New and updated instructions in this 2023 edition of
North Carolina Pattern Jury Instructions for Civil Cases

This edition contains a new table of contents for the civil instructions, a number of replacement instructions for civil cases, and a new civil index. To update your printed edition, print and place the instructions listed below in the proper numerical sequence of your previous edition. 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.

The following instructions are included in this supplement:

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APPENDICES.

103.10 AGENCY ISSUE—BURDEN OF PROOF—WHEN PRINCIPAL IS LIABLE.

This issue reads:

"Was (*state name of agent*) the agent of the defendant (*state name of defendant*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)]?"[1]

> *NOTE WELL: If the testimony presented at trial is in terms of employment rather than agency, the Court may choose to replace references to "principal" with "employer" and references to "agent" with "employee."*

You will answer this issue only if you have answered Issue (*state number of issue addressing agent's act*) "Yes" in favor of the plaintiff.

Agency is the relationship which results when one person, called the principal, authorizes another person, called the agent, to act for the principal. This relationship may be created by word of mouth, or by writing, or may be implied from conduct amounting to consent or acquiescence. A principal is liable to third persons for the [acts] [negligence] of [his] [her] [its] agent in the transaction of the principal's business if the agent [himself] [herself] is liable.[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, the following three things:

First, that there was a principal-agent relationship between (*state name of principal*) and (*state name of agent*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)].

Second, that (*state name of agent*) was engaged in the work, and was about the business of (*state name of principal*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)].

Third, that the business in which (*state name of agent*) was engaged at the time was within the course and scope of [his] [her] authority or employment. It would be within the course and scope of (*state name of agent*)'s authority or employment if it was done in furtherance of the business of (*state name of principal*), or was incident to the performance of duties entrusted to (*state name of agent*), or was done in carrying out a direction or order of (*state name of principal*)[3], and was intended to accomplish the purposes of the agency.

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 there was a principal-agent relationship between (*state name of principal*) and (*state name of agent*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)], that (*state name of agent*) was engaged in the work, and was about the business of (*state name of principal*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)], and that the business in which (*state name of agent*) was engaged at the time was within the course and scope of [his] [her] authority or employment, 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. "Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court." *Hylton v. Koontz*, 138 N.C. App. 629, 635-36, 532 S.E.2d 252, 257 (2000) (citation omitted), *disc. review denied and dismissed*, 353 N.C. 373, 546 S.E.2d 603-04 (2001).

2. *See Egen v. Excalibur Resort Professional & Travelers Insurance Co.,* 191 N.C. App. 724, 729, 663 S.E.2d 914, 918 (2008) (noting that "[t]he general agency doctrine holds the principal responsible for the acts of his agent"); *see also Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 271 N.C. App. 618, 629, 845 S.E.2d 156, 164 (2020) ("Where the agent has no liability, there is nothing from which to derive the principal's liability.").

3. *Hendrix v. Town of West Jefferson*, 273 N.C. App. 27, 33, 847 S.E.2d. 903, 908 (2020) ("To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing

the duties of his employment. If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable.") (quoting *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988)).

640.42 EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR NEGLIGENCE IN HIRING, SUPERVISION OR RETENTION[1] OF AN EMPLOYEE.

The (*state issue number*) reads: "Was the plaintiff [injured] [damaged] by the negligence[2] of the defendant in [hiring] [supervising] [retaining] (state name of employee) as an employee?[3]

[You will answer this issue only if you have answered issue (*state issue number*) "Yes" in favor of the plaintiff].[4] 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 employer was negligent in [hiring] [supervising] [retaining] (*state name of employee*) as an employee. Negligence refers to a party's failure to follow a duty of conduct imposed by law. Negligence is not to be presumed from the mere fact of [injury] [damage].

To establish negligence on the part of the employer in [hiring] [supervising] [retaining] (*state name of employee*), the plaintiff must prove, by the greater weight of the evidence, the following:[5] 1) that (*state name of employee*) committed a [negligent] [wrongful][6] act; 2) that the employer owed the plaintiff a legal duty of care; 3) that (*state name of employee*) was incompetent; 4) that, prior[7] to the act of (*state name of employee*) resulting in [injury] [damage] to the plaintiff, the employer had either actual or constructive notice[8] of this incompetence; and 5) that this incompetence was a proximate cause of the plaintiff's [injury] [damage].[9]

I will now discuss these things one at a time and explain the terms used.

First, the plaintiff must prove that the employee committed a [negligent] [wrongful] act by (*describe act*).

NOTE WELL: In most cases, this element will have been met by an affirmative answer to the issue addressing the named defendant-employee's negligent or wrongful act and need not be resubmitted here. If for some reason the issue of the individual employee's negligent or wrongful act has not been submitted to the jury, it may be addressed in two different ways. If the employee's act has been established by stipulation or admission, state the nature of the stipulation here. To craft an instruction based upon the parties' stipulation, see N.C.P.I.—Civil 101.41—Stipulations. In the absence of a stipulation or admission, define the negligent or wrongful act alleged and enumerate its elements, using the Pattern Jury Instruction for that act. If the issue of an individual employee's negligent or wrongful act is submitted, consider offering a limiting instruction as to what evidence may be considered by the jury in answering that issue. While evidence tending to show that the individual employee may have been careless or negligent in the past may be considered by the jury in determining whether the employer had knowledge of the employee's alleged incompetence, see *element three,* infra*, such evidence may not be considered by the jury on the question of whether the individual employee acted negligently or wrongfully on the occasion in question.*

Second, the plaintiff must prove that the employer owed the plaintiff a legal duty of care.[10] Every employer is under a duty to use ordinary care in the hiring, supervision, or retention of [his] [her] [its] employees in order to protect others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent employer would use under the same or similar circumstances to protect others from [injury] [damage].

No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care. An injury to the plaintiff is foreseeable if the employer could have foreseen that some injury would result from the employer's conduct in hiring, supervising, or retaining [his] [her] [its] employees or that consequences of a generally injurious nature might be expected if the employer failed to exercise ordinary care under the circumstances.[11]

NOTE WELL: A negligent hiring, supervision, or retention claim can be brought against an employer based on its employee's negligence[12] or based on its employee's intentional tortious or criminal act.[13] Where the plaintiff contends that the employee was negligent, no further instruction on the second element is required. Where the plaintiff contends that the employee committed an intentional tort or criminal act, use the following bracketed language:

[In this case, the plaintiff must also prove that there is a nexus between the employment relationship and the injury.[14] In determining whether there is a nexus between the employment relationship and the injury, you should consider the circumstances as you find them to have existed from the evidence, which may[15] include [whether the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred] [whether the plaintiff met the employee, when the wrongful act occurred, as a direct result of the employment] [whether the employer received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury] [and such other circumstances that are supported by the evidence.]]

Third, the plaintiff must prove that (*state name of employee*) was incompetent. This means that (*state name of employee*) was not fit for the work in which (*state name of employee*) was engaged.[16] Incompetence may be shown by inherent unfitness, such as [the lack of physical capacity or natural mental gifts] [the absence of [skill] [training] [experience]] [the employee's disposition] [such other characteristics that are supported by the evidence].[17]

[Incompetence may also be inferred [from previous specific acts of careless, negligent, or wrongful conduct by (*state name of employee*)][18] [or] [from prior habits of carelessness or inattention on the part of (*state name of employee*) in a kind of work where careless or inattentive conduct is likely to result in injury].[19] However, evidence, if any, tending to show that (*state name of employee*) may have been careless, negligent, or wrongful in the past may

not be considered by you in any way on the question of whether (*state name of employee*) acted [negligently] [wrongfully] on the occasion in question, but may only be considered by you in your determination of whether (*state name of employee*) was incompetent, and whether such incompetence was known or should have been known to the employer.[20]]

Fourth, the plaintiff must prove that the employer had either actual or constructive notice of (*state name of employee*)'s incompetence.[21] Actual notice means that prior[22] to the alleged act of (*state name of employee*) resulting in [injury] [damage] to the plaintiff, the employer actually knew of (*state name of employee*)'s incompetence.

Constructive notice means that the employer, in the exercise of reasonable care, should have known of (*state name of employee*)'s incompetence prior to the alleged act of (*state name of employee*) resulting in [injury] [damage] to the plaintiff.[23] Reasonable care is that degree of care in the [hiring] [supervision] [retention] of (*state name of employee*) that a reasonably careful and prudent employer would have exercised in the same or similar circumstances.[24]

Fifth, the plaintiff must prove that (*state name of employee*)'s incompetence was a proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause without which the [injury] [damage] would not have occurred, and one which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.[25]

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that (*state name of employee*)'s incompetence was the sole proximate cause of the plaintiff's [injury]

[damage]. The plaintiff must prove only that (*state name of employee*)'s incompetence was a proximate cause.

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 employee committed a [negligent] [wrongful] act by (*describe act*); that the employer owed the plaintiff a duty of care [and that there was a nexus between employment relationship and the plaintiff's injury]; that (*state name of employee*) was incompetent; that, prior to the (*state name of employee*)'s act resulting in [injury] [damage] to the plaintiff, the employer had either actual or constructive notice of this incompetence; and that this incompetence 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. Case law appears to use the terms "hiring," "supervision," and "retention" interchangeably.

2. In addition to the general rule that employers or agents of an employer may "both be held liable for the agent's torts committed in the course and scope of the agency relationship under the doctrine of *respondeat superior*," *Woodson v. Rowland*, 329 N.C. 330, 348, 407 S.E.2d 222, 233 (1991), "North Carolina recognizes a cause of action against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 123 (1986). A claim may be brought "as an independent tort based on the employer's liability to third parties." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998). This instruction is for the independent tort of negligent hiring, supervision, or retention. For purposes of this claim, "the theory of liability is that the employer's negligence is a wrong to third persons, entirely independent of the employer's liability under the doctrine of respondeat superior." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 182–83, 352 S.E.2d 267, 270–71 (1987).

"[T]he theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment. In these cases, such application allows the injured person to establish liability on the part of the [employer] where no liability would otherwise exist." *Hogan*, 79 N.C. App. at 495–96, 340 S.E.2d at 116; *see, e.g., White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004) ("In North Carolina, intentional torts have rarely been considered within the scope of an employee's employment . . . Nevertheless, 'rarely' does not mean 'never.'" (internal quotations omitted)).

3. If there is a factual dispute as to the named individual defendant-employee's status, then N.C.P.I.-Civil 640.00 – Employment Relationship – Status of Person as Employee should be submitted first. A "No" answer to that issue would preclude submission of this issue; however, N.C.P.I.—Civil 640.43—Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor or N.C.P.I.—Civil 640.44—Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor may then be appropriate.

4. *See* first Note Well on page 2.

5. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022) (recognizing the elements for a negligent hiring, supervision, or retention claim and noting that, in addition to those elements, a plaintiff must establish that the employer owed a legal duty to the plaintiff); *see also Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (noting that in a claim for negligent employment or retention, a plaintiff must prove: "(1) the specific negligent act on which the action is founded . . . ; (2) incompetency, by inherent unfitness or previous acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the [employer] of such unfitness or bad habits, or constructive notice . . . by showing that the [employer] could have known the facts had he used ordinary care in 'oversight and supervision,' . . . ; and (4) that the injury complained of resulted from the incompetency proved" (citations omitted) (emphasis in original omitted)); *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.'"); *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986) (stating that "the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency").

6. For purposes of this instruction, "wrongful" refers to an intentionally tortious or criminal act. *See* Note Well on page 3.

7. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff *and that prior to the act*, the employer knew or had reason to know of the employee's incompetency.'" (emphasis added)).

8. *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of a negligent hiring, supervision, or retention claim is that "the employer had notice, either actual or constructive, of [the employee's] incompetence.").

9. *NOTE WELL: Appellate case law is not definitive on the precise language which should be employed with respect to proximate cause. Compare* Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that the plaintiff's injury must be "the" proximate cause of the employee's incompetence);* Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (same); with* Deitz v. Jackson*, 57 N.C. App. 275, 278, 291 S.E.2d 282, 285 (1982) (noting that the plaintiff's injury must be "a" proximate cause of the employee's incompetence) and* Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990)* (speaking of proximate cause in less exclusive language *as "that the injury complained of resulted from the incompetency proved");* White v. Consolidated Planning*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004) (similar);* Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (similar).*

10. *Keith v. Health-Pro Home Care Servs., Inc*., 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022).

11. *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co*., 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010).

12. *See, e.g., Kinsey v. Spann,* 139 N. C. App. 370, 533 S.E.2d 487 (2000) (alleged negligent selection claim based on negligence of a person cutting down trees).

13. *See, e.g., Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022); *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

14. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that a negligent hiring, supervision, and retention claim when the injury causing acts were intentional torts or criminal requires "a nexus between the employment relationship and the injury."). In *Keith v. Health-Pro Home Care Servs., Inc*., 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022), the North Carolina Supreme Court reiterated that "[e]mployers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury."

15. The Court of Appeals in *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) delineated some factors that may be considered by the factfinder when deciding whether the "nexus between the employment relationship and the injury" exists: (1) whether the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred; (2) whether the plaintiff met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) whether the employer received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury. However, "[n]owhere in the *Little* opinion did it state that these factors must be alleged, proven, or shown . . . to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 454, 873 S.E.2d 567, 577 (2022). As a result, the *Little* factors are considerations, but in no way decisive or conclusive requirements for the jury when deciding whether a nexus between the employment relation and the plaintiff's injury exists.

16. *See Walters v. Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (an employer must exercise "reasonable care in selecting employees who are competent and fitted for the work in which they are engaged."); *see also Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd* 281 N.C. 697, 190 S.E.2d 189 (1971) (stating that "a condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if . . . the contractor was not properly qualified to undertake the work, [the employer] may be held liable for the negligent acts of the contractor.").

17. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 466, 873 S.E.2d 567, 584 (2022) (noting that incompetence and unfitness for employment can include lack of physical capacity, natural mental gifts, skill, training, or experience needed for the job but that also "incompetence and unfitness can exist on account of the employee's disposition"); *see also Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49, 52 (1913) (noting that incompetency "extends to any kind of unfitness which 'renders the employment or retention of the servant dangerous to his fellow-servant,'" (citation omitted)); *Lamb v. Littman*, 128 N.C. 361, 38 S.E. 911, 912 (1901) (noting that the evidence showed a defendant was unfit

and incompetent to perform the duties of supervising children by reason of his cruel nature and high temper, and thus his disposition, more than his lack of training and skillfulness, rendered him unfit and incompetent).

18. *See Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (the plaintiff must prove the agent "was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence"), *Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49 (the plaintiff must prove "incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred"); *B.B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 567, 424 S.E.2d 172, 175 (1993) (noting that a "plaintiff would have to prove . . . the incompetency of the [employees] to perform their duty, either by inherent unfitness for the job, or by showing such incompetence by previous conduct").

19. *See Walters v. Lumber Co.,* 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (noting that incompetency "would include habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury").

20. *See Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (stating that "specific acts of negligence or carelessness and inattention on the part of the [employee] should be received, not to show that there was negligence in the particular case . . . , but in so far as they may tend to establish the character of the incompetency and that the same was known to the [employer] or should have been in the exercise of the duties incumbent upon him as an employer of labor.").

21. *Kinsey v. Spann,* 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of a negligent hiring, supervision, or retention claim is that "the employer had notice, either actual or constructive, of [the employee's] incompetence.").

22. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff *and that prior to the act*, the employer knew or had reason to know of the employee's incompetency." (emphasis added)).

23. *See Hogan v. Forsyth Country Club Co*., 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986) (noting that "[t]he theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances."); *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971) (stating that "if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the [employee was incompetent], [the employer] may be held liable for the negligent acts of the [employee]").

24. *See Medlin v. Bass*, 327 N.C. 591, 591, 398 S.E.2d 460, 462 (1990) (The plaintiff must prove "either actual notice to the [employer] of such unfitness or bad habits, or constructive notice, by showing that the [employer] could have known the facts had he used ordinary care in 'oversight and supervision.'"); *Barker v. Kimberly-Clark Corp*., 136 N.C. App. 455, 464, 524 S.E.2d 821, 827-28 (2000) (summary judgment against plaintiff in a negligent supervision claim proper because "plaintiff's forecast of evidence was insufficient to show that [the] defendant . . . had actual or constructive knowledge of any tortious acts of [the employee] defendant").

25. The *Little* court noted that "'it is axiomatic that proximate cause requires foreseeability.'" *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 589–90, 615 S.E.2d 45, 50 (2005) (quoting *Johnson v. Skinner*, 99 N.C. 1, 7–8, 392 S.E.2d 634, 637 (1990)). The court further emphasized that "the foreseeability of a risk of harm is insufficient unless defendants'

negligent hiring or retention of [the independent contractor] in some manner *actually* caused the injury in question" *Id*. (emphasis in original).

640.43 EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR NEGLIGENCE IN HIRING OR SELECTING[1] AN INDEPENDENT CONTRACTOR.

The (*state issue number*) reads: "Was the plaintiff [injured] [damaged] by the negligence[2] of the defendant in [hiring] [selecting] (*state name of independent contractor*) as an independent contractor?[3]

[You will answer this issue only if you have answered issue (*state issue number*) "Yes" in favor of the plaintiff.][4] 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 employer was negligent in [hiring] [selecting] (*state name of independent contractor*) as an independent contractor. Negligence refers to a party's failure to follow a duty of conduct imposed by law. Negligence is not to be presumed from the mere fact of [injury] [damage].

To establish negligence on the part of the employer in [hiring] [selecting] (*state name of independent contractor*), the plaintiff must prove, by the greater weight of the evidence, the following:[5] 1) that (*state name of independent contractor*) committed a [negligent] [wrongful][6] act; 2) that the employer owed the plaintiff a legal duty of care; 3) that (*state name of independent contractor*) was incompetent at the time of the [hiring] [selection] of the (*state name of independent contractor*); 4) that prior[7] to the (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff, the employer had either actual or constructive notice[8] of this incompetence; and 5) that this incompetence was a proximate cause of the plaintiff's [injury] [damage].[9]

I will now discuss these things one at a time and explain the terms used.

First, the plaintiff must prove that the independent contractor committed a [negligent] [wrongful] act by (*describe act*).

NOTE WELL: In most cases, this element will have been met by an affirmative answer to the issue addressing the named defendant-independent contractor's negligent or wrongful act and need not be resubmitted here. If for some reason the issue of the independent contractor's negligent or wrongful act has not been submitted to the jury, it may be addressed in two different ways. If the independent contractor's act has been established by stipulation or admission, state the nature of the stipulation here. To craft an instruction based upon the parties' stipulation, see N.C.P.I.—Civil 101.41—Stipulations. In the absence of a stipulation or admission, define the negligent or wrongful act alleged and enumerate its elements, using the Pattern Jury Instruction for that act. If the issue of an individual employee's negligent or wrongful act is submitted, consider offering a limiting instruction as to what evidence may be considered by the jury in answering that issue. While evidence tending to show that the individual employee may have been careless or negligent in the past may be considered by the jury in determining whether the employer had knowledge of the employee's alleged incompetence, see *element three,* infra*, such evidence may not be considered by the jury on the question of whether the individual employee acted negligently or wrongfully on the occasion in question.*

Second, the plaintiff must prove that the employer owed the plaintiff a legal duty of care.[10] Every employer is under a duty to use ordinary care in the hiring or selecting of an independent contractor in order to protect others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent employer would use under the same or similar circumstances to protect others from [injury] [damage].

No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care. An injury to the plaintiff is foreseeable if the employer could have foreseen that some injury would result from the employer's conduct in hiring or selecting its independent contractor or that consequences of a generally injurious nature might be expected if the employer failed to exercise ordinary care under the circumstances.[11]

NOTE WELL: A negligent hiring or selecting claim can be brought against an employer based on its independent contractor's negligence[12] or based on its independent contractor's intentional tortious or criminal act.[13] Where the plaintiff contends that the independent contractor was negligent, no further instruction on the second element is required. Where the plaintiff contends that the independent contractor committed an intentional tort or criminal act, use the following bracketed language:

[In this case, the plaintiff must also prove that there is a nexus between the employment relationship and the injury.[14] In determining whether there is a nexus between the employment relationship and the injury, you should consider the circumstances as you find them to have existed from the evidence, which may[15] include [whether the independent contractor and the plaintiff were in places where each had a right to be when the wrongful act occurred] [whether the plaintiff met the independent contractor, when the wrongful act occurred, as a direct result of the independent contractor relationship] [whether the employer received some benefit, even if only potential or indirect, from the meeting of the independent contractor and the plaintiff that resulted in the plaintiff's injury] [and such other circumstances that are supported by the evidence.]]

Third, the plaintiff must prove that (*state name of independent contractor*) was incompetent at the time of (*state name of independent contractor*)'s [hiring] [selection]. This means that (*state name of independent contractor*) was not fit for the work in which (*state name of independent contractor*) was engaged.[16] Incompetence may be shown by inherent unfitness, such as [the lack of physical capacity or natural mental gifts] [the absence of [skill] [training] [experience]] [the independent contractor's disposition] [such other characteristics that are supported by the evidence].[17]

[Incompetence may also be inferred from [previous specific acts of careless, negligent, or wrongful conduct by (*state name of independent contractor*)][18] [or] [from prior habits of carelessness or inattention on the part of *(state name of independent contractor*) in a kind of work where careless or inattentive conduct is likely to result in injury].[19] However, any evidence

tending to show, if you find that it does so show, that (*state name of independent contractor*) may have been careless, negligent, or wrongful in the past may not be considered by you in any way on the question of whether (*state name of independent contractor*) acted [negligently] [wrongfully] on the occasion in question, but may only be considered by you in your determination of whether (*state name of independent contractor*) was incompetent and whether such incompetence was known or should have been known to the employer.[20]]

Fourth, the plaintiff must prove that the employer had either actual or constructive notice of (*state name of independent contractor*)'s incompetence.[21] Actual notice means that prior[22] to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff, the employer actually knew of (*state name of independent contractor*)'s incompetence.

Constructive notice means that the employer, in the exercise of reasonable care, should have known of (*state name of independent contractor*)'s incompetence prior to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff.[23] Reasonable care is that degree of care in the hiring or selection of an independent contractor that a reasonably careful and prudent employer would have exercised in the same or similar circumstances.[24]

Fifth, the plaintiff must prove that (*state name of independent contractor*)'s incompetence was a proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause without which the [injury] [damage] would not have occurred, and one which a reasonable and

prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.[25]

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that (*state name of independent contractor*)'s incompetence was the sole proximate cause of the plaintiff's [injury] [damage]. The plaintiff must prove only that (*state name of independent contractor*)'s incompetence was a proximate cause.

Finally, as to this (*state issue number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*state name of independent contractor*) committed a [negligent] [wrongful] act by (*describe act*); that the employer owed the plaintiff a duty of care; that (*state name of independent contractor*) was incompetent at the time of *(state name of independent contractor*)'s [hiring] [selection]; that the employer had either actual or constructive notice of this incompetence; and that this incompetence 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. *NOTE WELL: Case law appears to use the terms "hiring," "selecting" and "retaining" interchangeably, notwithstanding the implied chronological distinction between the first two terms on the one hand and the third term on the other.* See, e.g., Little v. Omega Meats I, Inc., *171 N.C. App. 583, 615 S.E.2d 45 (2005) (describing the action several times either as one for "negligent hiring," or as one for "negligent hiring and retention").*

However, because Woodson v. Rowland*, 329 N.C. 330, 358-60, 407 S.E.2d 222, 238-39 (1991) appears to treat claims of "negligent selection" and "negligent retention" of an independent contractor separately, the Pattern Jury Civil Subcommittee upon careful consideration and deliberation believes that negligent retention of an independent contractor should be the subject of a separate instruction.* Cf. *N.C.P.I.—Civil-640.44—Employment Relationship—Liability of Employer for Negligence in Retention of Independent Contractor.*

Whatever label may be placed upon an individual case by counsel, the burden rests upon the trial court, in selecting appropriate jury instructions, to consider the evidence presented carefully and determine whether the factual circumstances constitute a claim for negligent hiring or selection, negligent retention, or both.

2. The general rule is that "one who employs an independent contractor is not liable for the independent contractor's negligence." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991).

However, "[i]n limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability [derived from agency law], but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party." *Little v. Omega Meats I, Inc*., 171 N.C. App. 586, 615 S.E.2d 48 (2005). Thus, "[a] third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the theory that the selection was negligently made." *Woodson*, 329 N.C. at 358, 407 S.E.2d at 239. However, an employee of an independent contractor may not recover from the employer who hired the independent contractor whom he or she worked for. *Dunleavy v. Yates Const. Co., Inc.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197 (1992) (stating that North Carolina law "does not currently recognize claims of an injured employee of an incompetent or unqualified independent contractor against a party for its negligent selection or retention of the independent contractor."). Thus, after *Woodson* and *Dunleavy*, North Carolina law delineates the following:

(1) An employee injured by the negligence of an incompetent fellow employee may recover against the employer of both on the theory of negligent hiring, selection, or retention. *Woodson*, 329 N.C. at 358. *See* N.C.P.I.—Civil-640.42—Employment Relationship—Liability of Employer for Negligence in Hiring, Selecting, or Retaining Employee.

(2) A third party injured by an incompetent independent contractor may recover against the employer of that independent contractor on the theory of negligent hiring, selection, or retention. *Id*. *See* N.C.P.I.—Civil-640.43—Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting Independent Contractor *and* N.C.P.I.—Civil—640.44—Employment Relationship-Liability of Employer for Negligence in Retention of Independent Contractor.

(3) An employee of an independent contractor may <u>not</u> recover against the employer of that independent contractor on the theory of negligent hiring, selection, or retention. *Dunleavy*, 106 N.C. App. at 153.

In order to establish a claim for negligent hiring or selection of an independent contractor, "there must be a legal duty owed by the employer to the injured party." *Little*, 171 N.C. App. at 586-87, 615 S.E.2d at 48. "Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring, selection, or retention case: '(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence.'" *Id.* at 587, 615 S.E.2d at 48 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000)). As noted in n.1, a negligent retention claim involving an independent contractor is treated differently than a negligent hiring or selection claim. A negligent retention claim has an additional element—that the employer had "a reasonable opportunity to discharge" the independent contractor. *See Woodson*, 329 N.C. at 359, 407 S.E.2d at 240.

3. If there is a factual dispute as to the named individual employer-independent contractor's status, then N.C.P.I.—Civil 640.00—Employment Relationship-Status of Person as Employee should be submitted first. A "Yes" answer to that issue would preclude submission of this issue; however, N.C.P.I.—Civil 640.42—Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision or Retention of an Employee might then be appropriate.

4. *See* first Note Well on page 2.

5. *See Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022) (recognizing the elements for a negligent hiring claim and noting that, in addition to those elements, a plaintiff must establish that the employer owed a legal duty to the plaintiff); *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.'"); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (noting same elements); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (the plaintiff must demonstrate that "the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.").

6. For purposes of this instruction, "wrongful" refers to an intentionally tortious or criminal act. *See* Note Well on page 3.

7. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) (noting that, in order to find an employer liable on a negligent hiring claim, the employer must have known or had reason to know of the employee's incompetence *prior to* the act that resulting in the plaintiff's injury). Though *Smith* is framed in terms of an *employee's* competence, subsequent cases concerning an employer's liability for the negligent hiring of its independent contractor have not distinguished this temporal requirement. *See, e.g., Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005).

8. *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of a "negligent hiring" claim is that "the employer had notice, either actual or constructive, of [the independent contractor's] incompetence").

9. *NOTE WELL: Appellate case law is not definitive on the precise language which should be employed with respect to proximate cause. Compare* Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that the plaintiff's injury must be "the" proximate cause of the employee's incompetence);* Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (same); with* Deitz v. Jackson*, 57 N.C. App. 275, 278, 291 S.E.2d 282, 285 (1982) (noting that the plaintiff's injury must be "a" proximate cause of the employee's incompetence) and* Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990)* (speaking of proximate cause in less exclusive language *as "that the injury complained of resulted from the incompetency proved");* White v. Consolidated Planning*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004) (similar);* Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (similar).*

10. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022) (recognizing the *Little* case as setting forth a duty owed by an employer with respect to the hiring or selecting of independent contractors); *see also Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005).

11. *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co*., 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010).

12. *See, e.g., Kinsey v. Spann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000) (alleged negligent selection claim based on negligence of a person cutting down trees).

13. *See, e.g., Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022); *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

14. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that a negligent hiring, supervision, and retention claim when the injury causing acts were intentional torts or criminal requires "a nexus between the employment relationship and the injury."). In *Keith v. Health-Pro Home Care Servs., Inc*., 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022), the North Carolina Supreme Court reiterated that "[e]mployers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury."

15. The Court of Appeals in *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) delineated some factors that may be considered by the factfinder when deciding whether the "nexus between the employment relationship and the injury" exists: (1) whether the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred; (2) whether the plaintiff met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) whether the employer received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury. However, "[n]owhere in the *Little* opinion did it state that these factors must be alleged, proven, or shown . . . to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 454, 873 S.E.2d 567, 577 (2022). As a result, the *Little* factors are considerations, but in no way decisive or conclusive requirements for the jury when deciding whether a nexus between the employment relation and the plaintiff's injury exists.

16. *See Walters v. Lumber Co*., 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (An employer must exercise "reasonable care in selecting employees who are competent and fitted for the work in which they are engaged."); *see also Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1971) ("[A] condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if . . . the contractor was not properly qualified to undertake the work, [the employer] may be held liable for the negligent acts of the contractor.").

17. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 466, 873 S.E.2d 567, 584 (2022) (noting that incompetence and unfitness for employment can include lack of physical capacity, natural mental gifts, skill, training, or experience needed for the job but that also "incompetence and unfitness can exist on account of the employee's disposition"); *see also Walters v. Lumber Co.*, 163 N.C. 536, 542, 80 S.E. 49, 52 (1913) (noting that incompetency "extends to any kind of unfitness which 'renders the employment or retention of the servant dangerous to his fellow-servant,'" (citation omitted)); *Lamb v. Littman*, 128 N.C. 361, 38 S.E. 911, 912 (1901) (noting that the evidence showed a defendant was unfit and incompetent to perform the duties of supervising children by reason of his cruel nature and high temper, and thus his disposition, more than his lack of training and skillfulness, rendered him unfit and incompetent).

18. *See Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (the plaintiff must prove the agent "was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence"), *Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49 (the plaintiff must prove "incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred"); *B.B. Walker*

Co. v. Burns International Security Services, 108 N.C. App. 562, 567, 424 S.E.2d 172, 175 (1993) (noting that a "plaintiff would have to prove . . . the incompetency of the [employees] to perform their duty, either by inherent unfitness for the job, or by showing such incompetence by previous conduct").

19. *See Walters v. Lumber Co.,* 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (noting that incompetency "would include habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury").

20. *See Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (stating that "specific acts of negligence or carelessness and inattention on the part of the [employee] should be received, not to show that there was negligence in the particular case . . . , but in so far as they may tend to establish the character of the incompetency and that the same was known to the [employer] or should have been in the exercise of the duties incumbent upon him as an employer of labor.").

21. *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of a negligent hiring, supervision, or retention claim is that "the employer had notice, either actual or constructive, of [the independent contractor's] incompetence.").

22. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff *and that prior to the act*, the employer knew or had reason to know of the employee's incompetency." (emphasis added)). Though *Smith* is framed in terms of an *employee's* competence, subsequent cases concerning an employer's liability for the negligent hiring of its independent contractor have not distinguished this temporal requirement. *See, e.g., Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005).

23. *See Hogan v. Forsyth Country Club Co*., 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986) (noting that "[t]he theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances."); *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971) (stating that "if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work, he may be held liable for the negligent acts of the contractor").

24. *See Medlin v. Bass*, 327 N.C. 591, 591, 398 S.E.2d 460, 462 (1990) (The plaintiff must prove "either actual notice to the [employer] of such unfitness or bad habits, or constructive notice, by showing that the [employer] could have known the facts had he used ordinary care in 'oversight and supervision.'"); *Barker v. Kimberly-Clark Corp*., 136 N.C. App. 455, 464, 524 S.E.2d 821, 827–28 (2000) (summary judgment against plaintiff in a negligent supervision claim proper because "plaintiff's forecast of evidence was insufficient to show that [the] defendant . . . had actual or constructive knowledge of any tortious acts of [the employee] defendant").

25. The *Little* court noted that "'it is axiomatic that proximate cause requires foreseeability.'" *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 589–90, 615 S.E.2d 45, 50 (2005) (quoting *Johnson v. Skinner*, 99 N.C. 1, 7–8, 392 S.E.2d 634, 637 (1990)). The court further emphasized that "the foreseeability of a risk of harm is insufficient unless defendants' negligent hiring or retention of [the independent contractor] in some manner *actually* caused the injury in question" *Id*. (emphasis in original).

640.44 EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR NEGLIGENCE IN RETAINING[1] AN INDEPENDENT CONTRACTOR.

The (*state issue number*) reads: "Was the plaintiff [injured] [damaged] by the negligence of the defendant[2] in retaining (*state name of independent contractor*) as an independent contractor?"[3]

[You will answer this issue only if you have answered issue (*state issue number*) "Yes" in favor of the plaintiff.[4]] 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 employer was negligent in retaining (*state name of independent contractor*) as an independent contractor. Negligence refers to a party's failure to follow a duty of conduct imposed by law. Negligence is not to be presumed from the mere fact of [injury] [damage].

To establish negligence on the part of the employer in retaining (*state name of independent contractor*), the plaintiff must prove, by the greater weight of the evidence, the following[5]: 1) that (*state name of independent contractor*) committed a [negligent] [wrongful][6] act; 2) that the employer owed the plaintiff a legal duty of care; 3) that (*state name of independent contractor*) was incompetent prior to the (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff;[7] 4) that the employer had either actual or constructive notice[8] of this incompetence prior[9] to (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff; 5) that the defendant, upon actual or constructive notice of this incompetence, had a reasonable opportunity to discharge (*state name of independent contractor*) prior to (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff, but failed to do so;[10] and 6) that this incompetence was a proximate cause of the plaintiff's [injury] [damage].[11]

I will now discuss these things one at a time and explain the terms used.

First, the plaintiff must prove that the independent contractor committed a [negligent] [wrongful] act by (describe act).

> *NOTE WELL: In most cases, this element will have been met by an affirmative answer to the issue addressing the named defendant-independent contractor's negligent or wrongful act and need not be resubmitted here. If for some reason the issue of the independent contractor's negligent or wrongful act has not been submitted to the jury, it may be addressed in two different ways. If the independent contractor's act has been established by stipulation or admission, state the nature of the stipulation here. To craft an instruction based upon the parties' stipulation, see N.C.P.I.—Civil 101.41—Stipulations. In the absence of a stipulation or admission, define the negligent or wrongful act alleged and enumerate its elements, using the Pattern Jury Instruction for that act. If the issue of an individual employee's negligent or wrongful act is submitted, consider offering a limiting instruction as to what evidence may be considered by the jury in answering that issue. While evidence tending to show that the individual employee may have been careless or negligent in the past may be considered by the jury in determining whether the employer had knowledge of the employee's alleged incompetence,* see *element three,* infra*, such evidence may not be considered by the jury on the question of whether the individual employee acted negligently or wrongfully on the occasion in question.*

Second, the plaintiff must prove that the employer owed the plaintiff a legal duty of care[12]. Every employer is under a duty to use ordinary care in retaining an independent contractor in order to protect others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent employer would use under the same or similar circumstances to protect others from [injury] [damage].

No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care. An injury to the plaintiff is foreseeable if the employer could have foreseen that some injury would result from the employer's conduct in retaining its independent contractor or that

consequences of a generally injurious nature might be expected if the employer failed to exercise ordinary care under the circumstances.[13]

> *NOTE WELL: A negligent retention claim can be brought against an employer based on its independent contractor's negligence[14] or based on its independent contractor's intentional tortious or criminal act.[15] Where the plaintiff contends that the independent contractor was negligent, no further instruction on the second element is required. Where the plaintiff contends that the independent contractor committed an intentional tort or criminal act, use the following bracketed language:*
>
> [In this case, the plaintiff must also prove that there is a nexus between the employment relationship and the injury.[16] In determining whether there is a nexus between the employment relationship and the injury, you should consider the circumstances as you find them to have existed from the evidence, which may[17] include [whether the independent contractor and the plaintiff were in places where each had a right to be when the wrongful act occurred] [whether the plaintiff met the independent contractor, when the wrongful act occurred, as a direct result of the independent contractor relationship] [whether the employer received some benefit, even if only potential or indirect, from the meeting of the independent contractor and the plaintiff that resulted in the plaintiff's injury] [and such other circumstances that are supported by the evidence.]]

Third, the plaintiff must prove that (*state name of independent contractor*) was incompetent prior to (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff.[18] This means that (*state name of independent contractor*) was not fit for the work in which [he] [she] was engaged.[19] Incompetence may be shown by inherent unfitness, such as [the lack of physical capacity or natural mental gifts] [the absence of [skill] [training] [experience]] [the independent contractor's disposition] [such other characteristics that are supported by the evidence].[20]

[Incompetence may also be inferred [from previous specific acts of careless or negligent conduct by (*state name of independent contractor*)[21]]

[or] [from prior habits of carelessness or inattention on the part of (*state name of independent contractor*) in a kind of work where careless or inattentive conduct is likely to result in injury.][22] However, any evidence tending to show that (*state name of independent contractor*) may have been careless or negligent in the past may not be considered by you in any way on the question of whether (*state name of independent contractor*) acted [negligently] [wrongfully] on the occasion in question, but may only be considered by you in your determination of whether (*state name of independent contractor*) was incompetent and whether such incompetence was known or should have been known to the employer.[23]]

Fourth, the plaintiff must prove that the employer had either actual or constructive notice of (*state name of independent contractor*)'s incompetence.[24] Actual notice means that prior to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff,[25] the employer actually knew of (*state name of independent contractor*)'s incompetence.

Constructive notice means that the defendant, in the exercise of reasonable care, should have known of (*state name of independent contractor*)'s incompetence prior to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff.[26] Reasonable care is that degree of care in the supervision and oversight of an independent contractor that a reasonably careful and prudent employer would have exercised in the same or similar circumstances.[27]

Fifth, the plaintiff must prove that the employer, upon actual or constructive notice of (*state name of independent contractor*)'s incompetence, had a reasonable opportunity to discharge (*state name of independent contractor*) but failed to do so.[28] What constitutes a reasonable opportunity depends upon the circumstances. These circumstances may include the

gravity of the risk posed by (*state name of independent contractor*)'s incompetence; the employer's own ability to correct the situation; the difficulty, if any, of replacing (*state name of independent contractor*); the time needed to investigate the events in question; the employer's potential exposure to liability for breach of contract in the event the employer's discharge of (*state name of independent contractor*) was not justified; and the employer's reasonable reliance on (*state name of independent contractor*) ultimately fulfilling [his] [her] responsibilities.[29]

These factors are to be considered by you along with all of the other evidence in determining whether the employer had a reasonable opportunity to discharge (*state name of independent contractor*), but failed to do so. The existence or nonexistence of one or more of these factors is not necessarily controlling.

Sixth, the plaintiff must prove that (*state name of independent contractor*)'s incompetence was a proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause without which the [injury] [damage] would not have occurred, and one which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.[30]

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that (*state name of independent contractor*)'s incompetence was the sole proximate cause of the plaintiff's [injury] [damage]. The plaintiff must prove only that (*state name of independent contractor*)'s incompetence was a proximate cause.

Finally, as to this (*state issue number*) issue on which the plaintiff has the burden proof, if you find by the greater weight of the evidence that (state name of independent contractor) committed a [negligent] [wrongful] act by (*describe act*); that the employer owed the plaintiff a duty of care; that (*state name of independent contractor*) was incompetent prior to (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff; that the employer had either actual or constructive notice of this incompetence (prior to the (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff); that the employer, upon actual or constructive notice of this incompetence, had a reasonable opportunity to discharge (*state name of independent contractor*) and failed to do so; and that this incompetence 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. *NOTE WELL*: *Case law often appears to use the terms "hiring," "selecting" and "retaining" interchangeably, notwithstanding the implied chronological distinction between the first two terms on the one hand and the third term on the other. See, e.g.,* Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 585-89, 615 S.E.2d 45, 47-49 (2005) (describing the claim several times either as one for "negligent hiring" or as one for "negligent hiring and retention").*

However, because Woodson v. Rowland*, 329 N.C. 330, 358-60, 407 S.E.2d 222, 238-39 (1991), appears to treat claims of "negligent hiring or selection" and "negligent retention" of an independent contractor as separate and distinct, the Pattern Jury Civil Subcommittee upon careful consideration and deliberation, believes that each should be the subject of a separate instruction.* Cf*. N.C.P.I. Civil-640.43 Employment Relationship-Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor.*

In addition, despite the recitation of "incompetent at the time of hiring," Little v. Omega Meats I, Inc.*, 171 N.C. App. at 587, 615 S.E.2d at 48, as an element of "negligent hiring and retention claim," the Pattern Jury Instruction Civil Subcommittee, after careful consideration and deliberation, has concluded that inclusion of such an element would conflict with the "reasonable opportunity to discharge" element required by* Woodson*, 329 N.C. at 359, 407 S.E.2d at 240, and therefore, would be inappropriate in a negligent retention pattern instruction. The "incompetent at the time of hiring" language therefore has not been included in this instruction.* Cf*. N.C.P.I.—Civil 640.43 ("Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor").*

Whatever label may be placed upon an individual case by counsel, the burden rests upon the trial court, in selecting appropriate jury instructions, to consider carefully the evidence presented and to determine whether the factual circumstances constitute a claim for negligent hiring or selection, negligent retention, or both.

2. The general rule is that "one who employs an independent contractor is not liable for the independent contractor's negligence." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991).

However, "[i]n limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability [derived from agency law], but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party. *Little v. Omega Meats I, Inc*., 171 N.C. App. 586, 615 S.E.2d 48 (2005). Thus, "[a] third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the theory that the selection was negligently made." *Woodson*, 329 N.C. at 358, 407 S.E.2d at 239. However, an employee of an independent contractor may not recover from the employer who hired the independent contractor whom he or she worked for. *Dunleavy v. Yates Const. Co., Inc.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197 (1992) (stating that North Carolina law "does not currently recognize claims of an injured employee of an incompetent or unqualified independent contractor against a party for its negligent selection or retention of the independent contractor."). Thus, after *Woodson* and *Dunleavy*, North Carolina law delineates the following:

(1) An employee injured by the negligence of an incompetent fellow employee may recover against the employer of both on the theory of negligent hiring, selection, or retention. *Woodson*, 329 N.C. at 358. *See* N.C.P.I.—Civil-640.42—Employment Relationship—Liability of Employer for Negligence in Hiring, Selecting, or Retaining Employee.

(2) A third party injured by an incompetent independent contractor may recover against the employer of that independent contractor on the theory of negligent hiring, selection, or retention. *Id*. *See* N.C.P.I.—Civil-640.43—Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting Independent Contractor *and* N.C.P.I.—Civil—640.44—Employment Relationship-Liability of Employer for Negligence in Retention of Independent Contractor.

(3) An employee of an independent contractor may <u>not</u> recover against the employer of that independent contractor on the theory of negligent hiring, selection, or retention. *Dunleavy*, 106 N.C. App. at 153.

In order to establish a claim for negligent retention of an independent contractor, "there must be a legal duty owed by the employer to the injured party." *Little*, 171 N.C. App. at 586-87, 615 S.E.2d at 48. "Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring, selection, or retention case: '(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence.'" *Id*. at 587, 615 S.E.2d at 48 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000)). As noted in n.1, a negligent retention claim involving an independent contractor is treated differently than a negligent hiring or selection claim. A negligent retention claim has an additional element—that the employer had "a reasonable opportunity to discharge" the independent contractor. *See Woodson*, 329 N.C. at 359, 407 S.E.2d at 240.

3. If there is a factual dispute as to the named individual defendant-independent contractor's status, then N.C.P.I.—Civil 640.00 ("Employment Relationship—Status of Person as Employee") should be submitted first. A "Yes" answer to that issue would preclude submission of this issue; however, N.C.P.I.—Civil 640.42 ("Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision or Retention of an Employee") might then be appropriate.

4. *See* first Note Well on page 2.

5. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.'"); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (noting same elements); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (the plaintiff must demonstrate that "the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.").

6. For purposes of this instruction, "wrongful" refers to an intentionally tortious or criminal act. *See* Note Well on page 3.

7. See n.1 *supra*.

8. *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of this claim is that "the employer had notice, either actual or constructive, of [the independent contractor's] incompetence").

9. See n.1 and n.5 *supra*.

10. *See* n.1 *supra*; *see also Woodson v. Rowland*, 329 N.C. 330, 359, 407 S.E.2d 222, 294 (1991) ("Once a contractee knows or should know that an independent contractor is incompetent or unqualified to do the work for which he was hired, the contractee, in order to be found liable on the theory that he negligently retained the independent contractor, must have had a reasonable opportunity to discharge the independent contractor.").

11. *NOTE WELL: Appellate case law is not definitive on the precise language which should be employed with respect to proximate cause. Compare* Little v. Omega Meats*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that the plaintiff's injury must be "the" proximate cause of the employee's incompetence);* Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (same); with* Deitz v. Jackson, *57 N.C. App. 275, 278, 291 S.E.2d 282, 285 (1982) (noting that the plaintiff's injury must be "a" proximate cause of the employee's incompetence) and* Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (speaking of proximate cause in less exclusive language as "that the injury complained of resulted from the incompetency proved");* White v. Consolidated Planning*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004) (similar);* Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (similar).*

12. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022) (recognizing the *Little* case as setting forth a duty owed by an employer with respect to the hiring or selecting of independent contractors); *see also Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005).

13. *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010).

14. *See, e.g., Kinsey v. Spann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000) (alleged negligent retention claim based on negligence of a person cutting down trees).

15. *See, e.g., Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022); *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

16. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) (noting that a negligent hiring, supervision, and retention claim when the injury causing acts were intentional torts or criminal requires "a nexus between the employment relationship and the injury."). In *Keith v. Health-Pro Home Care Servs., Inc*., 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022), the North Carolina Supreme Court reiterated that "[e]mployers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury."

17. The Court of Appeals in *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005) delineated some factors that may be considered by the factfinder when deciding whether the "nexus between the employment relationship and the injury" exists: (1) whether the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred; (2) whether the plaintiff met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) whether the employer received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury. However, "[n]owhere in the *Little* opinion did it state that these factors must be alleged, proven, or shown . . . to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 454, 873 S.E.2d 567, 577 (2022). As a result, the *Little* factors are considerations, but in no way decisive or conclusive requirements for the jury when deciding whether a nexus between the employment relation and the plaintiff's injury exists.

18. *See* n.1, n.5 *supra*.

19. *See Walters v. Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (An employer must exercise "reasonable care in selecting employees who are competent and fitted for the work in which they are engaged."); *see also Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1971) ("[A] condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if . . . the contractor was not properly qualified to undertake the work, [the employer] may be held liable for the negligent acts of the contractor.").

20. *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 466, 873 S.E.2d 567, 584 (2022) (noting that incompetence and unfitness for employment can include lack of physical capacity, natural mental gifts, skill, training, or experience needed for the job but that also "incompetence and unfitness can exist on account of the employee's disposition"); *see also Walters v. Lumber Co.*, 163 N.C. 536, 542, 80 S.E. 49, 52 (1913) (noting that incompetency "extends to any kind of unfitness which 'renders the employment or retention of the servant dangerous to his fellow-servant,'" (citation omitted)); *Lamb v. Littman*, 128 N.C. 361, 38 S.E. 911, 912 (1901) (noting that the evidence showed a defendant was unfit and incompetent to perform the duties of supervising children by reason of his cruel nature and high temper, and thus his disposition, more than his lack of training and skillfulness, rendered him unfit and incompetent).

21. *See Kinsey v. Spann*, 139 N.C. App. 375, 377, 533 S.E.2d 487, 493 (2000) (the plaintiff must prove the agent "was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence"), *Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49 (the plaintiff must prove "incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred"); *B.B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 567, 424 S.E.2d 172, 175 (1993) (noting that a "plaintiff would have to prove . . . the incompetency of the [employees] to perform their duty, either by inherent unfitness for the job, or by showing such incompetence by previous conduct").

22. *See Walters v. Lumber Co.,* 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (noting that incompetency "would include habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury").

23. *See Walters v. Lumber Co*., 163 N.C. 536, 542, 80 S.E. 49, 51 (1913) (stating that "specific acts of negligence or carelessness and inattention on the part of the [employee] should be received, not to show that there was negligence in the particular case . . . , but in so far as they may tend to establish the character of the incompetency and that the same was known to the [employer] or should have been in the exercise of the duties incumbent upon him as an employer of labor.").

24. *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (noting that the third element of a negligent hiring, supervision, or retention claim is that "the employer had notice, either actual or constructive, of [the independent contractor's] incompetence.").

25. *Smith v. Privette*, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff *and that prior to the act*, the employer knew or had reason to know of the employee's incompetency." (emphasis added)). Though *Smith* is framed in terms of an *employee's* competence, subsequent cases concerning an employer's liability for the negligent retention of its independent contractor have not distinguished this temporal requirement. *See, e.g., Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587, 615 S.E.2d 45, 48 (2005).

26. *See Hogan v. Forsyth Country Club Co*., 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986) (noting that "[t]he theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances."); *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971) (stating that "if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work, he may be held liable for the negligent acts of the contractor").

27. *See Medlin v. Bass*, 327 N.C. 591, 591, 398 S.E.2d 460, 462 (1990) (The plaintiff must prove "either actual notice to the [employer] of such unfitness or bad habits, or constructive notice, by showing that the [employer] could have known the facts had he used ordinary care in 'oversight and supervision.'"); *Barker v. Kimberly-Clark Corp*., 136 N.C. App. 455, 464, 524 S.E.2d 821, 827–28 (2000) (summary judgment against plaintiff in a negligent supervision claim proper because "plaintiff's forecast of evidence was insufficient to show that [the] defendant . . . had actual or constructive knowledge of any tortious acts of [the employee] defendant").

28. *Woodson v. Rowland*, 329 N.C. 330, 359, 407 S.E.2d 222, 240 (1991).

29. See Woodson v. Rowland, 329 N.C. 330, 359-60, 407 S.E.2d 222, 240 (1991) *(*stating that "[w]hat constitutes a reasonable opportunity depends upon the circumstances.

They include the gravity of the risk posed, the contractee's own ability to correct the situation, the difficulty, if any, of replacing the independent contractor, the time needed to investigate the events in question, the contractee's potential exposure to liability for breach of contract in the event the discharge is not justified, and the contractee's reasonable reliance on the independent contractor ultimately fulfilling his responsibilities.").

30. The *Little* court noted that "'it is axiomatic that proximate cause requires foreseeability.'" *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 589–90, 615 S.E.2d 45, 50 (2005) (quoting *Johnson v. Skinner*, 99 N.C. 1, 7–8, 392 S.E.2d 634, 637 (1990)). The court further emphasized that "the foreseeability of a risk of harm is insufficient unless defendants' negligent hiring or retention of [the independent contractor] in some manner *actually* caused the injury in question" *Id*. (emphasis in original).

800.03 DEFINITION OF FIDUCIARY[1]; EXPLANATION OF FIDUCIARY RELATIONSHIP.

A fiduciary is a person who is required to act honestly, in good faith and in the best interests of another person because a fiduciary relationship exists between them.[2]

NOTE WELL: Where the relationship is such that a fiduciary duty arises as a matter of law, use the following bracketed paragraph.

[By law, a fiduciary relationship exists between

[attorneys and their clients][3]

[principal and agent, including, e.g., principal operating under power of attorney][4]

[trustee and beneficiary][5]

[Less frequently encountered fiduciary relationships are listed in end note 6.]][6]

NOTE WELL: For other relationships where it is alleged that a fiduciary relationship exists, use the following bracketed paragraphs.

[A fiduciary relationship may exist in a variety of circumstances.[7] It is not necessary that a fiduciary relationship be a technical or legal relationship,[8] and even where a fiduciary relationship does not normally exist, one may be created by conduct.[9]

A fiduciary relationship exists when a person undertakes to act for the benefit of another, thus causing the other to place special faith, confidence, and trust in the person undertaking to act in the other's best interest.[10]]

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1. May be of particular use with instructions on Fraud, Breach of Fiduciary Duty, Constructive Fraud, and Negligent Misrepresentation (N.C.P.I.—Civil 800.00 *et seq*.) and Parol Trusts (N.C.P.I.—Civil 850.00 *et seq*.).

2. *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971); *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931).

3. "A fiduciary relationship can exist as a matter of fact in those circumstances 'in which there is confidence reposed on one side, and resulting domination and influence on the other.'" *Hewitt v. Hewitt*, 252 N.C. App. 437, 442, 798 S.E.2d 796, 800 (2017) (citing *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)).

4. *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

5. N.C.G.S. §§ 36C-8-801–818 (2021); *see also Fox v. Fox*, 283 N.C. App. 336, 873 S.E.2d 653, 660 (2022).

6. A fiduciary relationship exists as a matter of law between

- executor or administrator and heir, legatee or devisee, *Abbitt*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931);
- guardians and their wards, *id.*;
- broker and principal, *id.*;
- physician and patient, *Hewitt v. Hewitt*, 252 N.C. App. 437, 442, 798 S.E.2d 796, 800 (2017) (citing *King v. Bryant*, 369 N.C. 451, 464, 795 S.E.2d 340, 349 (2017));
- partners to a partnership, *id.*;
- spouses, *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968); and
- officers and board members of condominium associations and condominium unit owners, *Ironman Medical Properties, LLC v. Chodri*, 268 N.C. App. 502, 510, 836 S.E.2d 682, 690 (2019).

7. Where the existence of a fiduciary relationship is not established by the evidence as a matter of law, it is proper for the trial court to define "fiduciary relationship" but leave to the jury to determine as a matter of fact whether such a relationship has arisen. *Will of Baitschora*, 207 N.C. App. 174, 189-91, 700 S.E. 2d 50, 60-62 (2010); *see also Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

8. *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971).

9. *See Dallaire v. Bank of Am.*, 376 N.C. 363, 368, 760 S.E.2d 263, 267 (2014) (citing *Branch Bank & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992), for the principle that "given the proper circumstances" even a bank-customer transaction could give rise to fiduciary relationship); *see also Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971).

10. *See Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971) (tenant occupied a fiduciary relationship with his co-tenants where he "undertook to manage" land for their benefit, "causing them to repose special faith, confidence and trust in him to represent their best interest . . .").

800.04 BREACH OF FIDUCIARY DUTY.

The (*state number*) issue reads:

"Did the defendant take advantage of a position of trust and confidence to bring about (*identify transaction*)?"

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]

First, that a relationship of trust and confidence existed between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff's interests.

[(*Use where a fiduciary relationship exists as a matter of law; for a list of such relationships, see N.C.P.I.—Civil 800.03—Definition of Fiduciary; Explanation of Fiduciary Relationship*.) In this case, members of the jury, the plaintiff and the defendant had a relationship of (*name fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc*.). You are instructed that, under such circumstances, (*name fiduciary relationship*) is a relationship of trust and confidence.]

[(*Use for other relationships where it is alleged that a fiduciary relationship*[2] *exists.*) Such a relationship may exist in a variety of circumstances. It is not necessary that this relationship be a technical or legal relationship and it may be created by the parties' conduct. Such a relationship exists between the plaintiff and the defendant when the defendant undertakes to act for the benefit of the plaintiff, thus causing the plaintiff to place special faith, confidence, and trust in the defendant undertaking to act in the plaintiff's best interest.]

Second, that the defendant breached this duty to act in good faith and with due regard for the plaintiff's interests by using this position of trust and confidence to bring about (*identify transaction*) to the detriment of the plaintiff.[3]

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 there was a relationship of trust and confidence between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff's interests and that the defendant breached this duty by bringing about (*identify transaction*) to the detriment 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.

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1. *White v. Consol. Plan., Inc*., 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004). A breach of fiduciary duty claim does not require a finding that the defendant sought to benefit wrongfully from the transaction. Indeed, that is the key distinction between a claim for breach of fiduciary duty and a claim for constructive fraud. *Id.* ("The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.").

2. Some appellate decisions have phrased this first element as requiring the defendant to owe the plaintiff a fiduciary duty*, see, e.g., Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 274 (2022), while other appellate decisions have phrased this element as requiring that there be a confidential or fiduciary relationship between the parties, *see, e.g., Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018). Regardless of how it is phrased, this first element generally has been "described as arising when 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. A fiduciary relationship may exist in law or in fact. For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the legal relations between two parties, it may yet exist as a matter of fact in such instances when there is confidence reposed on one side, and the resulting superiority and influence on the other." *Fox v. Fox*, 283 N.C. App. 336, 873 S.E.2d 653, 661 (2022).

3. *White v. Consol. Plan., Inc*., 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004).

800.05 CONSTRUCTIVE FRAUD.

The (*state number*) issue reads:

"Did the defendant engage in constructive fraud to bring about (*identify transaction*)?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:[1]

First, that a relationship of trust and confidence existed between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff's interests.

[(*Use where a fiduciary relationship exists as a matter of law; for a list of such relationships, see N.C.P.I.—Civil 800.03—Definition of Fiduciary Duty; Explanation of Fiduciary*.) In this case, members of the jury, the plaintiff and the defendant had a relationship of (*name fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc*.). You are instructed that, under such circumstances, (*name fiduciary relationship*) is a relationship of trust and confidence.]

[(*Use for other relationships where it is alleged that a fiduciary relationship*[2] *exists.*) Such a relationship may exist in a variety of circumstances. It is not necessary that this relationship be a technical or legal relationship and it may be created by the parties' conduct. Such a relationship exists between the plaintiff and the defendant when the defendant undertakes to act for the benefit of the plaintiff, thus causing the plaintiff to place special faith, confidence, and trust in the defendant undertaking to act in the plaintiff's best interest.]

Second, that the defendant breached this duty by using this position of trust and confidence to bring about (*identify transaction*) to the detriment of the plaintiff.[3]

And Third, that the defendant sought to benefit [himself] [herself] [itself] in (*identify transaction*).[4]

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 there was a relationship of trust and confidence between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff's interests, that the defendant breached this duty by bringing about (*identify transaction*) to the detriment of the plaintiff, and that the defendant sought to benefit [himself] [herself] [itself], 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. *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 274 (2022) ("In order to prove constructive fraud, Plaintiff must allege and prove: '(1) that the defendant owes the plaintiff a fiduciary duty; (2) that the defendant breached that duty; and (3) that the defendant sought to benefit himself in the transaction.'" (quoting *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019)).

2. Some appellate decisions have phrased this first element as requiring the defendant to owe the plaintiff a fiduciary duty*, see, e.g., Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 274 (2022), while other appellate decisions have phrased this element as requiring that there be a confidential or fiduciary relationship between the parties, *see, e.g., Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018). Regardless of how it is phrased, this first element has been generally "described as arising when 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. A fiduciary relationship may exist in law or in fact. For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the legal relations between two parties, it may yet exist as a matter of fact in such instances when there is confidence reposed on one side, and the resulting superiority and influence on the other." *Fox v. Fox*, 283 N.C. App. 336, 345, 873 S.E.2d 653, 661 (2022).

3. *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 275 (2022).

4. "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty. This element requires a plaintiff to allege and prove that the defendant took advantage of his position of trust to the hurt of plaintiff and sought his own advantage in the transaction." *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019). In *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997), the Supreme Court wrote that "implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must

seek his own advantage in the transaction." Since *Barger*, North Carolina appellate courts have "continued to require a showing of benefit for constructive fraud." *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 638, 870 S.E.2d 269, 275 (2022).

In establishing this third element, a plaintiff must show "that the benefit sought was 'more than a continued relationship with the plaintiff' or 'payment of a fee to a defendant for work' it actually performed." *Ironman Med. Properties, LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019) (quoting *Sterner v. Penn*, 159 N.C. App. 626, 631-32, 583 S.E.2d 670, 674 (2003)).

805.26 PRIVATE NUISANCE—NUISANCE BY WATERFLOW.

The (state number) issue reads:

"Did the defendant cause substantial damage to or interference with the plaintiff's use and enjoyment of the plaintiff's property by unreasonably altering the flow of surface water on the defendant's property?"

North Carolina law allows every landowner to make a reasonable use of the owner's land, even if that reasonable use alters the flow of surface water and causes harm to others. A landowner incurs liability under the law only when the owner's harmful interference with the flow of surface water is unreasonable and causes substantial damage to another.[1]

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's action(s) in altering the flow of surface water [was] [were] unreasonable.[2] The reasonableness of the defendant's action(s) should be determined by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. A defendant's action(s) [is] [are] unreasonable if a person of ordinary prudence and discretion would consider those actions excessive or inappropriate after giving due consideration to the interests of the plaintiff, the interests of the defendant, and the interests of the community.

In evaluating the gravity of the harm to the plaintiff, you may consider:

[the extent and character of the harm to the plaintiff]

[the social value which the law attaches to the type of use which is invaded]

[the suitability of the locality to that use]

[the burden on the plaintiff to minimize the harm] [and]

[state any other factor arising from the evidence]

In evaluating the utility of the conduct of the defendant, you may consider:

[the purpose of the defendant's conduct]

[the social value which the law attaches to that purpose]

[the suitability of the locality for the use the defendant makes of the property] [and]

[state any other factor arising from the evidence].[3]

Even when the alteration of the flow of surface water is reasonable in the sense that the social utility arising from the change outweighs the harm to the plaintiff, you may still find that the defendant's action(s) [is] [were] unreasonable if the resulting interference to the plaintiff's use and enjoyment of [his] [her] property is greater than it is reasonable to require the plaintiff to bear under these circumstances.

Second, that the defendant's alteration of the flow of surface water caused substantial damage to the plaintiff's property or substantially interfered with the plaintiff's use and enjoyment of the plaintiff's property.[4] Such damage or interference is substantial when it results in significant annoyance, material physical discomfort, or injury to a person's health or property. Minor harms, slight inconveniences, or petty annoyances are not substantial damage or interference.[5]

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's action(s) in altering the flow of surface water [is] [was] unreasonable and the

defendant's alteration of the flow of surface water caused damage to the plaintiff's property or substantially 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. *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977); *see also Brown v. Lattimore Living Tr.*, 264 N.C. App. 682, 689, 826 S.E.2d 827, 831 (2019) (summarizing *Pendergrast*); *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980) (same).

2. *Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 613, 621 S.E.2d 217, 220 (2005); *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977).

As stated in *Pendergrast*, "most nuisances of this kind are intentional, usually in the sense that 'the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.'" *Pendergrast*, 293 N.C. at 216, 236 S.E.2d at 796. However, a nuisance by water flow may also exist where the defendant acts negligently or recklessly or in the course of an abnormally dangerous activity. *Id.* at 217, 236 S.E.2d at 796. "Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable. This is the essential inquiry in any nuisance action." *Pendergrast*, 293 N.C. at 217, 236 S.E.2d at 797.

3. *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977).

4. *Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977) ("The jury could not find that a nuisance existed at all without a finding of substantial damage to plaintiffs.").

5. *Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977).

810.62 PROPERTY DAMAGES—DIMINUTION IN MARKET VALUE.

The plaintiff's actual property damages are equal to the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged. 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.

(*If evidence is introduced regarding the actual or estimated cost of repair, the following paragraph should be used:* Evidence of [estimates of the cost to repair] [the actual cost of repairing] the damage to the plaintiff's property may be considered by you in determining the difference in fair market value[1] immediately before and immediately after the damage occurred.)[2]

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1. If no evidence of fair market value of the damaged property is introduced, then plaintiff may recover only nominal damages. *Heaton-Sides v. Snipes*, 233 N.C. App. 1, 6, 755 S.E.2d 648, 652 (2014); *Cockman v. White*, 76 N.C. App. 387, 391, 333 S.E.2d 54, 56 (1985).

2. *Smith v. White*, 213 N.C. App. 189, 192, 712 S.E.2d 717, 719 (2011) (citing *U.S. Fidelity & Guaranty Co. v. P. & F. Motor Express, Inc.*, 220 N.C. 721, 18 S.E.2d 116 (1942)). Both evidence of actual costs to repair and estimates of the cost to repair are competent evidence. As the Court notes in *Smith*, whether evidence of an estimate of the cost of repairs is as persuasive as evidence of the cost of the actual repairs is a question related to weight rather than its competency. *Id.* at 193, 712 S.E.2d 717.

845.20 SUMMARY EJECTMENT—DAMAGES.[1]

NOTE WELL: The issue of mitigation of damages may arise in a summary ejectment case. If so, give N.C.P.I.—Civil 503.90—Defense (Offset) For Failure to Mitigate.

This (*state number*) issue reads:

"What amount of damages, if any, is the landlord entitled to recover?"

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

On this issue the burden of proof is on the landlord. This means that the landlord must prove, by the greater weight of the evidence the amount of damages sustained as a result of [unpaid rent] [occupancy after the end of the term] [physical damage to the premises].

[Damages for unpaid rent may include the amount of rent which the tenant agreed to pay the landlord but did not.[2]]

[Damages for occupancy after the end of the term may include the fair rental value of the premises from the time the term ended until the tenant vacates the premises. Fair rental value is an amount which would be agreed upon as a fair rent by a landlord who wishes to rent, but is not compelled to do so, and a tenant who wishes to rent, but is not compelled to do so. (The contract rate of rent agreed upon by the landlord and tenant may be taken as some evidence of the fair rental value.)]

[Damages for physical injury to the premises may be recovered if the premises are not in substantially the same condition as originally delivered to the tenant, normal wear and tear excepted, because of the tenant's negligent or intentional conduct or the negligent or intentional conduct of the tenant's family or guest(s). (A tenant is not responsible for an act of God.) The landlord is entitled to recover the difference between the fair market value of the property immediately before it was damaged and its fair market value

immediately after it was damaged.[3] 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.

(*If evidence is introduced regarding the actual or estimated cost of repair, the following paragraph should be used*: Evidence of [estimates of the cost to repair] [the actual cost of repairing] the damage to the plaintiff's property may be considered by you in determining the difference in fair market value[4] immediately before and immediately after the damage occurred.[5])

Finally, as to this (*state number*) issue on which the landlord has the burden of proof, if you find, by the greater weight of the evidence, that the landlord was damaged, 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 amount such as "One Dollar" in the blank space provided.

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1. North Carolina General Statute § 42-46 authorizes certain fees, costs, and expenses with respect to residential rental agreements.

2. All party's damages resulting from a single wrong must be recovered in one action, including landlord's damages for future rents under contract. *Chrisalis Properties v. Separate Quarters, Inc.*, 101 N.C. App. 81, 88, 398 S.E.2d 628, 633 (1990).

3. *Paris v. Carolina Portable Aggregates*, 271 N.C. 471, 484, 157 S.E. 2d 131, 141 (1967) (damages by blasting).

4. If no evidence of fair market value of the damaged property is introduced, then plaintiff may recover only nominal damages. *Heaton-Sides v. Snipes*, 233 N.C. App. 1, 6, 755 S.E.2d 648, 652 (2014); *Cockman v. White*, 76 N.C. App. 387, 391, 333 S.E.2d 54, 56 (1985).

5. *Smith v. White*, 213 N.C. App. 189, 192, 712 S.E.2d 717, 719 (2011) (citing *U.S. Fidelity and Guaranty Co. v. P. and F. Motor Express, Inc*., 220 N.C. 721, 18 S.E.2d 116 (1942)). Both evidence of actual costs to repair and estimates of the cost to repair are competent evidence. As the Court notes in *Smith*, whether evidence of an estimate of the cost of repairs is as persuasive as evidence of the cost of the actual repairs is a question related to weight rather than its competency. *Id.* at 193, 712 S.E.2d 717.