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).