EMPLOYMENT RELATIONSHIP—LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR (BREACH OF NON-DELEGABLE DUTY OF SAFETY)—INHERENTLY DANGEROUS ACTIVITY.

The (*state number*) issue reads:

"Was the [plaintiff] [decedent] [injured] [killed] as a proximate result of the negligence of the defendant?" [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, that the defendant was negligent and that such negligence was a proximate cause of the [plaintiff's] [decedent's] [injury] [death].

Negligence refers to a party's failure to follow a duty of conduct imposed by law. A person who employs another to do an inherently dangerous job or activity has a continuing duty to use ordinary care to ensure that reasonable safety precautions are taken to protect

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1. In certain instances, North Carolina imposes upon employers of independent contractors an exception to the general rule 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). This exception is described as a "nondelegable duty of care" for the safety of others. *Id.* However, the independent contractor is not absolved of responsibility for his *own* actions. *See generally,* Dan B. Dobbs, *The Law of Torts* § 337, p.920 (2001) (stating that a "nondelegable duty of care" does not mean "that the independent contractor himself escapes liability").

The *Woodson* court explained that the "[i]mposition of this nondelegable duty of safety reflects 'the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them'. . . . By holding both an employer and its independent contractor responsible for injuries that may result from inherently dangerous activities, there is a greater likelihood that the safety precaution necessary to substantially eliminate the danger will be followed." *Woodson*, 329 N.C. at 352-53, 407 S.E.2d at 235 (citations omitted).

"[T]he cases of non-delegable duty . . . hold the employer liable for the negligence of the [independent] contractor, although [the employer] has done everything that could reasonably be required of him. They are thus cases of vicarious liability." *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62, 159 S.E. 2d 362, 366 (1968); *but see Kinsey v. Spann,* 139 N.C. App. 370, 375, 533 S.E.2d 487, 491-92 (2000) (noting that "[i]n more recent decisions, . . . our courts have clarified that it is the negligence of the *employer*, not the independent contractor, that must be considered; liability is direct, not vicarious, in nature . . . . Thus, liability will attach only if *the employer* failed to take the necessary precautions to control the risks associated with the activity." (emphasis in original)).

Instances in which the "non-delegable duty" exception has been held to apply, include 1) "ultrahazardous activities", *Woodson*, at 350, 407 S.E.2d at 234, 2) those involving activities denominated "inherently dangerous," *id.* at 352, 407 S.E.2d at 235, or "peculiarly risky" or "intrinsically dangerous," *Deitz v. Jackson*, 57 N.C. App. 275, 279-80, 291 S.E.2d 282, 286 (1982), and 3) those concerning premises open to the public. *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E.2d 189, 192 (1972); *see also Hendricks v. Fay,* 273 N.C. 59, 65, 159 S.E.2d 362, 367 (1968) (contractual duties performed by a private detective firm hired to maintain security over the property and employees of a textile plant were "non-delegable," and "liability for tortious conduct," including false arrest and malicious prosecution, of the firm and its agents, was "imputable to [the plant] under the doctrine of *respondeat superior").*

"Even when the duty is nondelegable, the employer is not responsible for 'collateral negligence' of the independent contractor. Collateral negligence creates a risk that is not a usual or inherent part of the work or is outside the scope of the employer's enterprise." Dobbs, at 924.

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both the workers employed and the public generally.[2] I instruct you that negligence is not to be presumed from the mere fact of [injury] [death].

To establish negligence on the part of the defendant, the plaintiff must prove, by the greater weight of the evidence, four things:[3] 1) that the activity which resulted in the [plaintiff's] [decedent's] [injury] [death] was, at the time of that [injury] [death], an inherently dangerous activity,[4] 2) that the defendant knew or should have known that the activity was, at the time of the [plaintiff's] [decedent's] [injury] [death], an inherently dangerous activity, 3) that the defendant failed to use ordinary care to prevent that [injury] [death], either by taking reasonable safety precautions[5] or by ensuring that such precautions were taken, and 4) that this failure by the defendant to use ordinary care was a proximate cause of the [plaintiff's] [decedent's] [injury] [death]. I will now discuss these things one at a time and explain the terms used.

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2. *See Woodson*, 329 N.C. at 352, 407 S.E.2d at 235 (stating that "[t]he party that employs the independent contractor [to perform an inherently dangerous activity] has a continuing responsibility to ensure that adequate safety precautions are taken. The rule imposing liability on one who employs an independent contractor applies 'whether [the activity] involves an appreciable and foreseeable danger to the workers employed or to the public generally.'" (quoting *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 410, 142 S.E.2d 29, 32 (1965)).

3. *See Coastal Plains Util., Inc. v. New Hanover City*, 166 N.C. App. 333, 348, 601 S.E.2d 915, 926 (2004) ("To establish breach of the nondelegable duty [to provide for the safety of others], a plaintiff must show: (1) the activity causing the injury was, at the time of the injury, inherently dangerous, (2) the employer knew or should have known, at the time of the injury, of the inherent dangerousness of the activity, (3) the employer failed to take reasonable precautions or ensure that such precautions were taken to avoid the injury, and (4) this negligence was a proximate cause of the plaintiff's injuries.").

4. *See O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 313, 511 S.E.2d 313, 318 (1999) ("Although the determination of whether an activity is inherently dangerous is often a question of law, whether a particular . . . situation constitutes an inherently dangerous activity *usually* presents a question of fact and should be addressed on a case by case basis." (emphasis in original)); *see also Lilley v. Blue Ridge Electric Membership Corp.*, 133 N.C. App. 256, 261, 515 S.E.2d 483, 486 (1999) (stating that "there is a spectrum of activities, some of which are never inherently dangerous, as a matter of law, and some of which are always inherently dangerous, as a matter of law . . . . [Other] circumstances [do not] fall squarely at either end of the spectrum." (citations omitted)); *but see Simmons v. N.C. Dept. of Transport.*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998) ("Whether an activity is inherently or intrinsically dangerous is a question of law . . . . [I]t is generally understood that an activity will be characterized as [inherently dangerous] if it can be performed safely provided certain precautions are taken, but will, in the ordinary course of events, cause injury to others if these precautions are omitted." (citations omitted)).

5. *See Woodson,* 329 N.C. at 351, 407 S.E.2d at 234 (stating that "inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions.").

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First, the plaintiff must prove that the activity which resulted in [*his*] [the decedent's] [injury] [death] was, at the time of that [injury] [death], an inherently dangerous activity. An activity is inherently dangerous if it carries with it some substantial danger inherent in the work itself.[6] In other words, a job or activity is inherently dangerous when injury or death to those who perform it are recognizable and substantial risks of the work.[7]

In determining whether the activity which resulted in the [plaintiff's] [decedent's] [injury] [death] was, at the time of that [injury] [death], inherently dangerous, your focus must be upon the particular activity which was conducted and the pertinent circumstances surrounding that activity.[8] Therefore, you may consider the nature of the activity itself as well as the area in which it was performed.[9] However, any dangers created by how the activity was actually performed may not be considered in your determination of whether that activity was inherently dangerous.[10]

Second, the plaintiff must prove the defendant either knew or should have known that the activity was inherently dangerous at the time of the [plaintiff's] [decedent's] [injury] [death]. This means that the defendant either actually knew the activity was, at the

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6. *See Kinsey v. Spann*, 139 N.C. App. 370, 375, 533 S.E.2d 487, 493 (2000).

7. *See Woodson*, 329 N.C. at 356, 407 S.E.2d at 237 (explaining that "[i]t must be shown that because of [the circumstances surrounding the activity], the [activity] itself presents a 'a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor.'" (citation omitted)).

8. *See, e.g.*, *Woodson*, 329 N.C. at 356, 407 S.E.2d at 237 (noting that "[t]he focus is on the particular trench being dug and the pertinent circumstances surrounding the digging.").

9. *See Kinsey* at 376, 533 S.E.2d at 492 (activity, such as trenching or tree-cutting, conducted in a heavily populated area may be inherently dangerous, but may not be so if conducted in a rural, unpopulated area), and *Woodson,* 329 N.C. at 355, 407 S.E.2d at 237 (regarding trenching, "[n]umerous factors, including soil characteristics, vibrations, surface encumbrances, water conditions, and depth, contribute to how dangerous a trench is.").

10. *See* n.7 *supra*.

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time of the [plaintiff's] [decedent's] [injury] [death], inherently dangerous, or should have known it was inherently dangerous in the exercise of the same degree of care as would have been exercised by a reasonably careful and prudent employer in the same or similar circumstances as the defendant.

Third, the plaintiff must prove that the defendant failed to use ordinary care to prevent [injury] [death] either by taking reasonable safety precautions or by ensuring that such precautions were taken. Reasonable safety precautions are those which a reasonable and prudent person would have taken under the same or similar circumstances to protect himself and others from [injury] [death] in the performance of the inherently dangerous activity.

Fourth, the plaintiff must prove that such failure by the defendant to use ordinary care was a proximate cause of the [plaintiff's] [decedent's] [injury] [death]. Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [death], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [death] or some similar injurious result.

There may be more than one proximate cause of [an injury] [death]. Therefore, the plaintiff need not prove that the defendant's failure to use ordinary care was the sole proximate cause of the [plaintiff's] [decedent's] [injury] [death]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's failure to use ordinary care 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 activity which resulted in the [plaintiff's] [decedent's] [injury] [death] was, at the time of the [plaintiff's] [decedent's]

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[injury] [death], an inherently dangerous activity, that the defendant knew or should have known that the activity, at the time of the [plaintiff's] [decedent's] [injury] [death], was an inherently dangerous activity, that the defendant failed to use ordinary care to prevent [injury] [death] either by taking reasonable safety precautions or by ensuring that such precautions were taken, and that this failure by the defendant was a proximate cause of the [plaintiff's] [decedent's] [injury] [death], 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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