
811.00 LEGAL NEGLIGENCE—DUTY TO CLIENT.

The (*state number*) issue reads:

"Was the plaintiff damaged by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's damage.[1]

Negligence refers to a person's failure to follow a duty of care imposed by law. The law imposes [a duty] [certain duties] of care[2] upon every attorney who renders legal services to a client:[3]

[An attorney must possess the requisite degree of learning, skill and ability necessary to the practice of the legal profession which other attorneys similarly situated ordinarily possess.]

[An attorney must use [his] [her] best judgment in the handling of matters entrusted to the attorney.]

[An attorney must exercise such reasonable and ordinary care and diligence in the use of skill and in the application of knowledge to the client's matter as would other attorneys in the same or similar localities and under similar circumstances.][4]

[*Give the following where there is evidence the attorney is a certified specialist or has otherwise professed to have special education or experience in one or more areas of practice:* If an attorney professes special knowledge and skill in the type of legal services rendered by virtue of special [certification] [education] [experience], and if a client employs the attorney

to handle a matter for that reason, the attorney must perform the [duty] [duties] of care in accordance with the standard of practice exercised by attorneys with similar [certification] [education] [experience] who are situated in the same or similar localities at the time the legal service is rendered.]

A violation of [this duty] [any one of these duties] of care by an attorney is negligence.[5]

[Mere error of judgment] [A mistake as to a disputed point of law] is not negligence if an attorney otherwise acts with a reasonable and honest belief[6] that the advice given and the acts done are well founded and in the best interest of the client. The law does not require an attorney to be infallible, either in practice or in judgment. Nor does the law require the utmost degree of skill and learning known only to a few in the legal profession. An attorney is only required to render legal services in conformity with the [duty] [duties] I have just described for you.[7]

The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the damage.[8]

Proximate cause is a cause which in a natural and continuous sequence produces a person's damage, and one which a reasonably careful and prudent attorney similarly situated in the same or a similar locality could foresee would probably produce such damage or some similar injurious result.

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

(Furthermore, because the plaintiff in this case contends that a claim was lost because of the defendant's negligence, which the defendant denies, the plaintiff must also prove by the greater weight of the evidence that (1) the original claim was valid, (2) it would have resulted in a judgment in favor of this plaintiff and (3) the judgment would have been collectible).[9]

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

Read all contentions of negligence supported by the evidence.

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

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

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent (in any one or more of the ways contended by the plaintiff) and that such negligence was a proximate cause of the plaintiff's 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.

---

1. *NOTE WELL: If the claim is based on a breach of fiduciary duty, see N.C.P.I.—Civil 800.05.*

2. *See Rorrer v. Cooke*, 313 N.C. 338, 341, 329 S.E.2d 355, 358 (1985); *Hodges v. Carter*, 239 N.C. 517, 519-20, 80 S.E.2d 144, 145-46 (1954).

3. In some cases, the attorney-client relationship may have to be proven. "[A]n express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties even in the absence of the payment of

fees or the lack of a formal contract." *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 390, 402 S.E.2d 167, 172, *disc. rev. denied*, 329 N.C. 266, 407 S.E.2d 831, *aff'd*, 330 N.C. 438, 410 S.E.2d 392 (1991). There may be other instances where, absent an attorney-client relationship, an attorney may be held liable for negligence which causes injury to a non-client third party. *See United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980); *see also* N.C.P.I.—Civil 800.10 ("Negligent Misrepresentation").

4. *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. *See also Cheek v. Poole*, 98 N.C. App. 158, 166, 390 S.E.2d 455, 460, *disc. rev. denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). To satisfy the "same or similar" requirement, a plaintiff must produce evidence of what an attorney in the same or similar community *should do*, not merely what attorneys in fact do. *Haas v. Warren*, 112 N.C. App. 574, 579, 436 S.E.2d 259, 262 (1993). This may require expert testimony, although *Rorrer* did not mandate the use of an expert. *See Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987); *see also Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994) (determining on the facts of that case that expert testimony was unnecessary where jury could determine that failure to comply with applicable statute of limitations was a departure from the standard of care).

In a case in which the presiding judge determines that expert testimony is required, the following paragraph should be added after the instruction that "negligence is not to be presumed from the mere fact of damage."

> [With respect to the plaintiff's *(state number)* contention, that the attorney violated the duty to exercise reasonable care and diligence in the use of skill and in the application of knowledge as would other attorneys in the same or similar place and circumstances, you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.]

5. *Rorrer*, 313 N.C. at 341, 329 S.E.2d at 358; *Hodges*, 239 N.C. at 519-20, 80 S.E.2d at 145-46.

6. *Hodges* uses the term "good faith." 239 N.C. at 520, 80 S.E.2d at 146. *Rorrer* interpreted "good faith" to be "an objective, not subjective, standard." 313 N.C. at 358, 329 S.E.2d at 368.

7. "[A] mistake in a point of law which has not been settled by the court of last resort . . . and on which reasonable doubt may be entertained by well-informed lawyers" is not negligence. *Hodges*, 239 N.C. at 520, 80 S.E.2d at 146.

8. *NOTE WELL: In a legal negligence action, the attorney-defendant is entitled to argue the defense of contributory negligence.* See Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 359, 716 S.E. 2d. 29, 31 (2011) ("[C]ontributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action.") (quoting* Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, 211 N.C. App. 343, 351, 712 S.E.2d 328, 334 (2011)). For pattern instructions on contributory negligence, see N.C.P.I.-Civil 104.10 and 104.35.*

9. *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. *See also Bamberger v. Bernholz*, 326 N.C. 589, 589, 391 S.E.2d 192, 193 (1990); *Young v. Gum*, 185 N.C. App. 642, 647, 649

S.E.2d 469, 473-74 (because a plaintiff must forecast success on the underlying claim to support the legal malpractice claim, a court trying a legal malpractice claim must look to the substantive law of the underlying claim to determine the elements of the "case within a case"); *Patrick v. Ronald Williams, P.A.*, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991); *Summer v. Allran*, 100 N.C. App. 182, 184, 394 S.E.2d 689, 690 (1990), *disc. rev. denied*, 328 N.C. 97, 402 S.E.2d 428 (1991).