June 2015 Supplement to Pattern Jury Instructions for Civil Cases

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

Interim Instructions. As the Pattern Jury Instructions Committee considers new or updated instructions, it posts Interim Instructions that are too important to wait until June to distribute as part of the annual hard copy supplements to the School of Government website at www.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. Go to the following link to join the Listserv: http://lists.unc.edu/read/all_forums/subscribe?name=ncpjii.

This supplement contains no new instructions. All are replacements for existing instructions.

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Conference of Superior Court Judges
Committee on Pattern Jury Instructions

North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

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Volume I

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

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

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1. The doctrine of sudden emergency is not applicable to one who by his own negligence has brought about or contributed to the emergency.

As to the situation of one who attempts to rescue a person placed in peril by another's negligence, see *Bumgarner v. Southern R.R.*, 247 N.C. 374, 100 S.E.2d 830 (1957).

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

N.C.P.I.—Civil 640.40
EMPLOYMENT RELATIONSHIP—VICARIOUS LIABILITY OF EMPLOYER FOR CO-WORKER TORTS.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

640.40 EMPLOYMENT RELATIONSHIP—VICARIOUS LIABILITY OF EMPLOYER FOR CO-WORKER TORTS.[1]

This issue reads:

"[Was] [Were] the act(s) of (*name co-worker(s)*) [expressly authorized by the defendant employer] [committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business] [ratified by the defendant employer]?"[2]

You are to answer this issue only if you answer the (*state number*) issue in favor of the plaintiff.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, [the following] [one of the following]

[That the act(s) of (*name co-worker(s)*) [was] [were] expressly authorized by the defendant employer. (An act is expressly authorized when it has been approved orally or in writing.)]

[That the act(s) of (*name co-worker(s)*) [was] [were] committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business. (An employer is not responsible for the acts of an employee who departs from *his* duties to accomplish a purpose of *his* own which is not incidental to the work *he* is employed to do.)[3]]

[That the act(s) of (*name co-worker(s)*) [was] [were] ratified by the defendant employer. (An employer ratifies an act when all material facts and circumstances concerning the act become known to a [manager] [person with authority to act on behalf of the employer] who, by words or conduct, indicates approval of or acquiescence in such act.)[4]]

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 act(s) of (*name co-worker(s)*) [was] [were] expressly authorized by the defendant employer] [the act(s) of (*name co-worker(s)*) [was] [were] committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business] [the act(s) of (*name co-worker(s)*) [was] [were] ratified by the defendant employer], 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 This instruction is intended to cover an employer's respondeat superior liability for a non-physical tort (most often intentional infliction of emotional distress) committed by one co-worker against another. The essence of a non-physical tort is that the injury caused is non-physical in nature. *See Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 489, 340 S.E.2d 116, 120, *cert. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986); *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987) and *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989).

2 *Hogan*, *supra*, 79 N.C. App. at 491, 340 S.E.2d at 122.

3 *Wegner v. Delicatessen*, 270 N.C. 62, 66-67, 153 S.E.2d 804, 808 (1967).

4 *Hogan*, *supra*, 79 N.C. App. at 491, 340 S.E.2d at 122.

N.C.P.I.—Civil 645.20
COVENANTS NOT TO COMPETE—ISSUE OF THE EXISTENCE OF THE COVENANT.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

645.20 COVENANTS NOT TO COMPETE—ISSUE OF THE EXISTENCE OF THE COVENANT.

NOTE WELL: The existence of the covenant is a question for the jury but the court must decide whether or not the terms of the covenant are reasonable, valid and not against public policy.[1]

This issue reads:

"Did (*name plaintiff*) and (*name defendant*) enter into a written contract that (*here state alleged covenant*)?"

The burden of proof on this issue is on (*name party seeking to enforce covenant*) to satisfy you by the greater weight of the evidence that *he* and (*name other party*) entered into a written contract that (*here state alleged covenant*).

For a contract limiting the rights of a person to do business anywhere in North Carolina to be enforceable: (*Here use one or more of the following statements as the evidence justifies*).[2]

[There must be at least two parties to the contract (there may be any greater number).]

[There must be mutual assent by the parties, that is, a meeting of the minds.]

[There must be sufficient consideration, that is, something of legal value must be furnished, [in return for the other party's promise] [to support the agreement], by the party seeking to enforce the contract.]

[The party against whom enforcement is sought must have had legal capacity to make the promise.]

The contract must be in writing and signed by (*name defendant*).[3]

Finally, as to this issue, if you find, by the greater weight of the evidence, that (*name plaintiff*) and (*name defendant*) entered into a written contract that (*here state alleged covenant*), then you will answer this issue "Yes."

On the other hand, if you fail to so find, then you will answer this issue "No."

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1. *See Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944) (holding the reasonableness and validity of a restrictive covenant not to compete is a question for the court); *see also Calhoun v. WHA Medical Clinic, PLLC*, 178 N.C. App. 585, 632 S.E.2d 563 (2006). Restrictive covenants not to compete in employment contracts are scrutinized more vigorously than similar covenants incident to the sale of a business and the burden is on the plaintiff to establish the reasonableness of the contract. *Harwell Enterprises, Inc. v. Heim*, 6 N.C. App. 548, 552, 170 S.E.2d 540, 543 (1969), *aff'd in part, rev'd in part on other grounds*, 276 N.C. 475, 173 S.E.2d. 316 (1970). The restriction must be reasonable in time and in area in light of the protection needed by the employer. *Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 661, 9 S.E.2d 473, 475 (1940). In *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E.2d 139 (1962) the court stated that in cases in which the employees have acquired knowledge which would give them an advantage over their employer equity will enforce a covenant not to compete if it is: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." 258 N.C. at 181, 128 S.E.2d at 140-41. *Cf. Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, __ N.C. App. __, __, 747 S.E.2d 256, 263 (2013) (concluding that non-compete covenants in the franchisor-franchisee context are a hybrid situation and the court should use elements of the tests used in both the employer-employee context and the business sale context to evaluate the reasonableness and validity of the covenant); *Horner Int'l Co. v. McKoy*, __ N.C. App. __, 754 S.E.2d 852 (2014) (discussing the factors the court considers in determining whether a covenant not to compete is valid and enforceable and whether it may be properly enforced by means of a preliminary injunction).

2. This portion of this instruction contains all of the tests of enforceability of a contract. In any case, one or more of the issues may not be present and a judge may either omit entirely those sentences dealing with the tests not in issue (capacity, for instance) or he might read the paragraph in its entirety and then comment that "in this particular litigation, no question has been raised as to the capacity of the parties; both are capable of entering into a contract," or some like statement. On the other hand insert instructions from N.C.P.I.-Civil 501.01 to 503.54 on tests that are in issue.

3. Required by N.C. Gen. Stat. § 75-4.

N.C.P.I.—Civil 736.00
QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

736.00 *QUANTUM MERUIT*—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.

> *NOTE WELL: An express contract precludes an implied contract with reference to the same matter.*[1] *Therefore, quantum meruit is not an appropriate remedy when there is an actual agreement between the parties unless there is evidence to support a jury finding that the parties have abandoned some or all of the provisions of their express contract.*[2]

This issue reads:

"Did the plaintiff [(*describe service rendered*)] [deliver (*describe goods*)] to the defendant under such circumstances that the defendant should be required to pay for [it] [them]?"

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the following six things:

First, that the plaintiff did [render a service by (*describe act*)] [deliver goods by (*describe act*)].[3]

Second, that this [(*describe service*)] [(*describe goods*)] had some value to the defendant.

Third, that at the time the [(*describe service*) was rendered] [(*describe goods*) was delivered], the plaintiff expected payment. The law presumes that a person expects to be paid whenever *he* [renders a service] [delivers goods] unless *he* does so as a gift, or in repayment or satisfaction of a debt or obligation.[4] All of the circumstances existing at the time, including the relationship between the plaintiff and defendant, and their present or previous dealings, should be considered. Furthermore, the plaintiff's expectation to be paid must arise at the time the [service was rendered] [goods were delivered], and not thereafter.[5]

Fourth, that the plaintiff's expectation of payment was reasonable. A person's expectation of payment is reasonable when, under all the facts and circumstances existing at the time, a person of ordinary prudence and intelligence would have expected to be paid.[6]

Fifth, that the defendant received the [(*describe service*)] [(*describe goods*)] with the knowledge or reason to know that the plaintiff expected to be paid.[7] To "know" something requires actual knowledge of it.[8] A person "has reason to know" something when the circumstances existing at the time are such that a reasonable person at the time would have acquired knowledge of it.

And Sixth, the defendant voluntarily accepted the [(*describe service*)] [(*describe goods*)], that is, that *he* kept [it] [them] after having a realistic opportunity to refuse [it] [them] or to return [it] [them] to the plaintiff.[9]

So I instruct you that if the plaintiff has proved, by the greater weight of the evidence, that *he* [rendered a service by (*describe act*)] [delivered a good by (*describe act*)], and that this [(*describe service*)] [(*describe goods*)] had some value to the defendant, and that the plaintiff expected to be paid at the time the [(*describe service*) was rendered] [(*describe goods*) were delivered], and that the plaintiff's expectation of payment was reasonable, and that the defendant received the [(*describe service*)] [(*describe goods*)] with knowledge or reason to know that the plaintiff expected to be paid, and

that the defendant voluntarily accepted the [(*describe service*)] [(*describe goods*)], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

On the other hand, if after considering all the evidence, you are not so persuaded, then it would be your duty to answer this issue "No" in favor of the defendant.

1. *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 489 (2010) (quoting *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998), *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962)).

2. *Geoscience Grp., Inc. v. Waters Constr. Co., Inc.*,__ N.C. App. __, 759 S.E.2d 696 (2014).

3. Actions for recovery based on *quantum meruit* need not be limited to "goods" and "services" situations. For example, an action to recover the value of a patent or trademark would not be one to recover the value of a "good" or "service". Under North Carolina law, patents and trademarks are intangible property rights. This charge uses "goods" and "services" because practically all North Carolina cases on the subject of *quantum meruit* involve these two categories. However, any type of property can be the subject of a *quantum meruit* action.

4. The law will not imply a promise to pay fair compensation when property and services are rendered gratuitously or in discharge of an obligation. *Atl. Coast Line R.R Co. v. State Highway Comm'n.*, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966). Payment must be expected, and this is a question of fact for the jury. *Johnson v. Sanders*, 260 N.C. 291, 293, 132 S.E.2d 582, 584 (1963).

Two legal presumptions have developed pertaining to a plaintiff's *prima facie* case.

Generally, the law presumes that a person who delivers property or renders services of value expects to be compensated. *Id.*; *Burns v. Burns*, 4 N.C. App. 426, 429, 167 S.E.2d 82, 83–84 (1969). This presumption may be overcome by evidence that the property or service was rendered gratuitously or in discharge of some obligation. *Atl. Coast Line*, 268 N.C. at 95–96, 150 S.E.2d at 73. When certain family relationships exist, services performed by one family member for another or property delivered from one family member to another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation. *Allen v. Seay*, 248 N.C. 321, 323, 103 S.E.2d 332, 333 (1958). A relationship does not give rise to this presumption unless it is within the unity of the family. A relationship is not within the unity of the family simply because persons live in the same house or take meals together. There must be a mutual and cooperative interchange of property and services like that which might be expected of a typical unbroken family. *Landreth v. Morris*, 214 N.C. 619, 619, 200 S.E. 378, 381 (1939). Some relationships have been determined not to give rise to such a presumption. *Brown v. Hatcher*, 268 N.C. 57, 59, 149 S.E.2d 586, 588–89 (1966) (mother-in-law/daughter-in-law); *Johnson*, 260 N.C. at 293, 132 S.E.2d at 584 (father/emancipated daughter); *Landreth*, 214 N.C. at 619, 200 S.E. at 381–82 (father-in-law/daughter-in-law). This presumption may be overcome by proof of an agreement to pay or of facts or circumstances permitting the inference that payment was expected on the one hand and intended on the other. *Francis v. Francis*, 223 N.C. 401, 402, 26 S.E.2d 907, 908 (1943).

5. *Twiford v. Waterfield*, 240 N.C. 582, 585, 83 S.E.2d 548, 551 (1954); *Everitt v. Walker*, 109 N.C. 129, 129, 13 S.E. 860, 861 (1891).

6. *Johnson*, 260 N.C. at 293, 132 S.E.2d at 584 (finding that plaintiff bears the burden of showing "circumstances from which it might be inferred that services were rendered and received with the mutual understanding that they were to be paid for, or, as it is sometimes put, 'under circumstances calculated to put a reasonable person on notice that the services are not gratuitous.'") (citations omitted).

7. *McEachern v. Rockwell International Corp.*, 41 N.C. App. 73, 78, 254 S.E.2d 263, 267 (1979); *Johnson*, 260 N.C. at 293, 132 S.E.2d at 584.

8. *Brown*, 268 N.C. at 61–62, 149 S.E.2d 586, 589–90.

9. *See McCoy v. Peach*, 40 N.C. App. 6, 9, 251 S.E.2d 881, 883 (1979); *See Everitt v. Walker*, 109 N.C. 129, 129, 13 S.E. 860, 861 (1891).

N.C.P.I.—Civil 736.01
QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW: MEASURE OF RECOVERY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

736.01 *QUANTUM MERUIT*—QUASI CONTRACT—CONTRACT IMPLIED AT LAW: MEASURE OF RECOVERY.[1]

This issue reads:

"What amount is (*name plaintiff*) entitled to recover from (*name defendant*)?"

You will answer this issue only if you have answered the first issue in favor of the plaintiff.

If you have answered this first issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage resulting from the breach. [2]

To recover more than a nominal amount, however, the burden of proof is on the plaintiff to prove, by the greater weight of the evidence, the reasonable value of the [(*describe services rendered*)] [(*describe goods delivered*)] to the defendant.[3]

In deciding the reasonable value of the plaintiff's [(*describe services rendered*)] [(*describe goods delivered*)], you may not consider the defendant's financial condition. Nor may you speculate as to the value of the [(*describe services*)] [(*describe goods*)] based upon your own experience.[4] You must consider only that evidence presented to you which bears on the reasonable value of the [(*describe services*)] [(*describe goods*)] actually realized and retained by the defendant.[5]

So I instruct you that if the plaintiff has proved, by the greater weight of the evidence, the reasonable value of the [(*describe services rendered*)] [(*describe goods delivered*)], then you will answer this issue by writing the

amount in the blank space provided.

On the other hand, if after considering all the evidence, you are not so persuaded 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. The jury should be instructed that it should consider this issue only if it answers N.C.P.I.-Civil 736.00 in the affirmative.

Quantum meruit is based upon a contract implied at law. *Burns v. Burns*, 4 N.C. App. 426, 167 S.E.2d 82 (1969).

If the issue is one of contract implied in fact, a contract instruction must be given. Perhaps the most litigated situation where the lines between contracts implied at law and contracts implied in fact are blurred is where an action is brought for services rendered to a decedent. To avoid confusion, the jury should be charged separately on contracts implied in fact where the plaintiff attempts to prove their existence. *See* N.C.P.I.-Civil 735.00 *et seq*.

While there is a difference between contracts implied at law and implied in fact for purposes of instructing the jury, the same statute of limitations applies. An action based on an implied contract must be commenced within 3 years of the date on which the action accrues. N.C. Gen. Stat. § 1-52. Absent a special agreement, prevalent custom or other circumstance indicating that compensation will become due at a later date, the implied promise is to pay for the property or services as rendered, and thus, the statute precludes recovery for whatever services and property were rendered beyond the prescribed limitation. *Doub v. Hauser*, 256 N.C. 331, 123 S.E.2d 821 (1961) *Hodge v. Perry*, 255 N.C. 697, 122 S.E.2d 677, 678 (1961). The jury should be instructed to limit its verdict accordingly. *See* N.C.P.I.-Civil 735.40.

It may be contended that the parties implicitly intended compensation to be provided at some later point, such as in the will of the recipient, rather than the time at which the services or property was rendered.

If this contention is made and is supported by evidence, the jury should be instructed that it must determine whether or not such was the case and how its determination will affect the verdict. *See Doub*, 256 N.C. at 337, 123 S.E.2d at 825.

2. Nominal damages consist of some trifling amount and are recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation. *Hairston v. Atlantic Greyhound Corporation*, 220 N.C. 642, 644, 18 S.E.2d 166, 168 (1942) (*quoting Hutton & Bourbonnais v. Cook*, 173 N.C. 496, 92 S.E. 355 (1917)).

3. *McEachern v. Rockwell Int'l. Corp.*, 41 N.C. App. 73, 254 S.E.2d 263 (1979);

Johnson, 260 N.C. at 291, 132 S.E.2d at 582.

If the defendant contends that the plaintiff has received total or partial compensation, the jury should be charged on this question as well and instructed that the amount to be paid should be reduced by an amount equal to the benefit previously conferred on the plaintiff by the defendant.

4. *Johnson* 260 N.C. at 291, 132 S.E.2d at 582; *Cline v. Cline*, 258 N.C. 295, 128 S.E.2d 401 (1962).

5. The cases tend to treat services and goods differently from improvements to realty. Where compensation for services rendered is sought, the measure of recovery is limited by the value of the benefit actually realized and retained by the recipient. *Forbes v. Pillmon*, 22 N.C. App. 69, 205 S.E.2d 600, 601 (1974); *Stout v. Smith*, 4 N.C. App. 81, 165 S.E.2d 789, 791-792 (1969). Where compensation for improvements to land is sought, the measure of recovery is limited to the amount by which the value of the property has been enhanced by reason of the improvements. *Wright v. Wright*, 305 N.C. 345, 289 S.E.2d 347, 350 n. 4 (1982); *Jones, Inc. v. Western Waterproofing*, 66 N.C. App. 641, 312 S.E.2d 215, 217-218 (1984); *Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075, 1076 (1912); *Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434, 440 (1966); *McCoy v. Peach*, 40 N.C. App. 6, 251 S.E.2d 881, 883 (1979). "Reasonable value" is a flexible concept. What constitutes competent evidence of reasonable value depends on the facts and circumstances of each case. In many instances, for example, "reasonable value" might be equivalent to "fair market value." However, there are many cases where there is no "market" for the service rendered or good delivered, such as where the service is one not normally performed for pay, or the good is custom crafted and unique. In such circumstances, the proof of "reasonable value" will depend upon evidence other than that of the usual "fair market value."

North Carolina case law has not developed any definitive guidelines for ascertainment of "reasonable value." Two cases do illustrate, however, the flexible approach that has been taken in dealing with "reasonable value." *In Cline v. Cline*, 258 N.C. 295, 128 S.E.2d 295 (1962), a personal services case, the Supreme Court took the "fair market value" approach and stated that "[m]any factors serve to fix the market value of an article offered for sale. Supply, demand and quality (which is synonymous with skill when the thing sold is personal services) are prime factors. The jury, when called upon to fix the value, must base its evidence upon the value of the thing sold." *Id*. at 300. *Turner v. Marsh Furniture Company*, 217 N.C. 695, 9 S.E.2d 379 (1940), was also a personal services case but, by contrast, did not employ a "fair market value" approach: "The general rule is that when there is no agreement as to the amount to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based upon the time and labor expended, skill, knowledge and experience involved, and other attendant circumstance. . . ." *Id*. at 697. Both *Cline and Turner* were recently endorsed by the Court of Appeals in *Harrell v. Construction Company*, 41 N.C. App. 593, 255 S.E.2d 280 (1979).

It should be noted that "price" will be equivalent to "reasonable value" only in the rarest of circumstances. "Price" is a contractual measure, while *quantum meruit* is a restitutionary measure. In proving the reasonable value of goods delivered, for example, N.C. Gen. Stat. § 25-2-305 should never be used.

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

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Volume II

N.C.P.I.—Civil 745.07
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A PURCHASER.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(a)

745.07 NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A PURCHASER.

NOTE WELL: Appendices contain worksheets that the Court may want to provide to the jury, but it is not mandatory to do so.

The (*state number*) issue reads:

"What amount of damages is the plaintiff entitled to recover from the defendant?"[1]

You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff[2] and the (*state number*) issue "Yes" in favor of the plaintiff[3] [and the (*state number*) issue "No" 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, the amount of damages which the law permits the plaintiff to recover.[5] The following items may be recovered by the plaintiff:[6] (1) the full contract price including, but not limited to, charges for undercoating, dealer preparation and transport, installed options and nonrefundable portions of extended warranty and service contracts;[7] (2) all collateral charges including, but not limited to, sales tax, license and registration fees, and similar government charges;[8] (3) all finance charges incurred by the plaintiff after *he* first reported the nonconformity to the defendant;[9] and (4) any incidental and monetary consequential damages.[10] Incidental damages include any reasonable expenses incurred by the plaintiff incident to the defendant's [failure] [inability] to conform the (*name vehicle*) to the express warranty covering that vehicle.[11] Monetary consequential damages include monetary losses proximately resulting from the breach of warranty, but do not include non-monetary damages to the plaintiff for such things as embarrassment, emotional distress or pain and suffering.[12] A

monetary loss proximately results from a breach of warranty if it would not have occurred without the breach of warranty and if such loss was reasonably foreseeable to a person in the same or similar position as the defendant.

Any award to the plaintiff must be reduced by a reasonable allowance for the plaintiff's use of the (*name vehicle)*. A reasonable allowance for use is calculated from the number of miles used by the plaintiff up to the date of the third attempt to repair the same nonconformity which is the subject of the claim, or the twentieth cumulative business day when the vehicle is out of service by reason of repair of one or more nonconformities, whichever occurs first. The number of miles used by the plaintiff is multiplied by the purchase price of the vehicle and divided by 120,000.[13]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages the plaintiff is entitled to recover from the defendant, then it would be your duty to write that amount in the blank space provided.

N.C.P.I.—Civil 745.07
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A PURCHASER.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(a)

Formula for Calculating "Reasonable Allowance" for the Plaintiff's Use of the Vehicle When the Plaintiff is a Purchaser

A "Reasonable Allowance" is determined by:

1. Calculating the number of miles used by the plaintiff up to: (a) the date of the third attempt to repair the same nonconformity which is the subject of the claim, or (b) the twentieth cumulative business day when the vehicle is out of service by reason of repair of one or more nonconformities; whichever occurs first;
2. Multiplying the number of miles in (1) by the purchase price of the vehicle; and
3. Dividing such amount by 120,000.

Number of Miles as of: (a) the date of the 3rd repair attempt of the same nonconformity which is the subject of the claim; or (b) the twentieth cumulative business day when the vehicle is out of service for repair of one or more nonconformities; Whichever occurs first.	_____
Multiplied by the Purchase Price of the Vehicle	**X** _____
= Subtotal	= _____
Divided by 120,000:	**÷ 120,000**
= Reasonable Allowance [Deduct this amount from the plaintiff's damages award]	= _____

N.C.P.I.—Civil 745.07
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A PURCHASER.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(a)

Formula for Calculating the Plaintiff's Damages When the Plaintiff is a Purchaser (N.C. Gen. Stat. § 20-351.3(a))

(1) Full Contract Price (including, but not limited to, charges for undercoating, dealer preparation and transport, installed options and nonrefundable portions of extended warranty and service contracts)	
Plus	+
(2) All Collateral Charges (including, but not limited to, sales tax, license and registration fees, and similar government charges)	
Plus	+
(3) All Finance Charges (incurred by the plaintiff after he/she first reported the nonconformity to the defendant)	
Plus	+
(4) Any Incidental and Monetary Consequential Damages	
= Subtotal of 1 + 2 + 3 + 4:	
Minus	**-**
Reasonable Allowance for the Plaintiff's Use (insert number from Appendix A)	
Equals	=
= Total Damages Awarded to the Plaintiff-Purchaser	

N.C.P.I.—Civil 745.07
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A PURCHASER.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(a)
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1. *See* N.C. Gen. Stat. § 20-351.3(a).

2. *See* N.C.P.I.-Civil 745.01.

3. *See* N.C.P.I.-Civil 745.03.

4. *See* N.C.P.I.-Civil 745.05.

5. A prerequisite to the plaintiff bringing an action for damages under the authority of this section is that the vehicle be returned to the defendant. Alternatively, in an action under N.C. Gen. Stat. § 20-351.3, the plaintiff may seek specific performance of the manufacturer's obligation to "replace the vehicle with a comparable new motor vehicle." *Id*.

6. This remedy is also available to a plaintiff bringing an action under N.C. Gen. Stat. § 20-351.2 by virtue of the language of N.C. Gen. Stat. § 20-351.8(2). *See Buford v. General Motors Corp.*, 339 N.C. 396, 408, 451 S.E.2d 293, 299-300 (1994).

7. N.C. Gen. Stat. § 20-351.3(a)(1).

8. N.C. Gen. Stat. § 20-351.3(a)(2).

9. N.C. Gen. Stat. § 20-351.3(a)(3).

10. N.C. Gen. Stat. § 20-351.3(a)(4).

11. N.C.P.I.-Civil 569.30; see also Heather Newton, Note, *When Life Gives You Lemons, Make A Lemon Law: North Carolina Adopts Automobile Warranty Legislation*, 66 N.C.L.Rev. 1080, 1091 n. 108 (1988) ("The lemon law does not define incidental damages although the UCC in its definition includes 'expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods,' expenses of covering, and other reasonable expenses incident to breach.") (citing N.C. Gen. Stat. § 25-2-715(1).

12. N.C.P.I.-Civil 569.40; N.C. Gen. Stat. § 20-351.3(b)(1). *See also* Newton, *supra* at 1091 n. 109 ("[C]onsequential damages would presumably include out-of-pocket expenses such as towing fees, car rental, and hotel expenses" (citations omitted)). In addition, liquidated and uncontested monetary liabilities of the plaintiff to third parties arising as a consequence of the breach of warranty would qualify as a "monetary loss." An example would be money owed to a hospital or other medical provider. The plaintiff's personal injuries (*e.g.*, loss of a limb, pain and suffering, loss of earning capacity, *etc*.) do not constitute monetary loss. Recovery of damages for these injuries may be sought in conjunction with other claims for relief.

13. N.C. Gen. Stat. § 20-351.3(c).

N.C.P.I.—Civil 745.09
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSEE.
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(b)(1)

745.09 NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSEE.

NOTE WELL: Appendices contain worksheets that the Court may want to provide to the jury, but it is not mandatory to do so.

The (*state number*) issue reads:

"What amount of damages is the plaintiff entitled to recover from the defendant?"[1]

You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff[2] and the (*state number*) issue "Yes" in favor of the plaintiff[3] [and the (*state number*) issue "No" 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, the amount of damages which the law permits the plaintiff to recover.[5] The following items may be recovered by the plaintiff:[6] (1) all sums previously paid by the plaintiff under the terms of the lease; (2) all sums previously paid by the plaintiff in connection with entering into the lease agreement including, but not limited to, any capitalized cost reduction, sales tax, license and registration fees, and similar government charges; and (3) any incidental and monetary consequential damages.[7] Incidental damages include any reasonable expenses incurred by the plaintiff incident to the defendant's [failure] [inability] to conform the (*name vehicle*) to the express warranty covering that vehicle.[8] Monetary consequential damages include monetary losses proximately resulting from the breach of warranty, but do not include non-monetary damages to the plaintiff for such things as embarrassment, emotional distress or pain and suffering.[9] A monetary loss proximately results from a breach of warranty if it would not have occurred without the breach of warranty and if such loss was reasonably foreseeable to a person in

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the same or similar position as the defendant.

Any award to the plaintiff must be reduced by a reasonable allowance for the plaintiff's use of the (*name vehicle*). A reasonable allowance for use is calculated from the number of miles used by the plaintiff up to the date of the third attempt to repair the same nonconformity which is the subject of the claim, or the twentieth cumulative business day when the vehicle is out of service by reason of repair of one or more nonconformities, whichever occurs first. The number of miles used by the plaintiff is multiplied by the lessor's actual lease price and divided by 120,000.[10] The "lessor's actual lease price" is the actual purchase cost of the vehicle to (*name lessor*).

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages the plaintiff is entitled to recover from the defendant, then it would be your duty to write that amount in the blank space provided.

N.C.P.I.—Civil 745.09
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSEE.
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(b)(1)

Formula for Calculating "Reasonable Allowance" for the Plaintiff's Use of the Vehicle When the Plaintiff is a Lessee

A "Reasonable Allowance" is determined by:

1. Calculating the number of miles used by the plaintiff-lessee up to: (a) the date of the third attempt to repair the same nonconformity which is the subject of the claim, or (b) the twentieth cumulative business day when the vehicle is out of service by reason of repair of one or more nonconformities; whichever occurs first;
2. Multiplying the number of miles by the lessor's actual lease price (which means the actual purchase cost of the vehicle to the lessor);
3. Dividing such amount by 120,000.

Number of Miles as of: (a) the date of the 3rd repair attempt of the same nonconformity which is the subject of the claim; or (b) the twentieth cumulative business day when the vehicle is out of service for repair of one or more nonconformities; Whichever occurs first.	_____
Multiplied by Lessor's Actual Lease Price (Which is the Actual Purchase Cost of the Vehicle to the Lessor)	**X** _____
= Subtotal	= _____
Divided by 120,000:	**÷ 120,000**
= Reasonable Allowance [Deduct this amount from the plaintiff's damages award]	= _____

N.C.P.I.—Civil 745.09
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSEE.
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(b)(1)

Formula for Calculating the Plaintiff's Damages
When the Plaintiff is a Lessee
(N.C. Gen. Stat. § 20-351.3(b)(1))

(1) All Sums Previously Paid by the Plaintiff-Lessee Under the Terms of the Lease	
Plus	+
(2) All sums previously paid by the Plaintiff-Lessee in Connection with Entering into the Lease (including, but not limited to, any capitalized cost reduction, sales tax, license and registration fees, and similar government charges)	
Plus	+
(3) Any Incidental and Monetary Consequential Damages	
= Subtotal of 1 + 2 + 3:	
Minus	**-**
Reasonable Allowance for the Plaintiff's Use (insert number from Appendix A)	
Equals	=
= Total Damages Awarded to the Plaintiff-Lessee	

N.C.P.I.—Civil 745.09
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSEE.
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(b)(1)
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1. *See* N.C. Gen. Stat. § 20-351.3(b).

2. *See* N.C.P.I.-Civil 745.01.

3. *See* N.C.P.I.-Civil 745.03.

4. *See* N.C.P.I.-Civil 745.05.

5. A prerequisite to the plaintiff bringing an action for damages under the authority of this section is that the vehicle be returned to the defendant. Alternatively, in an action under N.C. Gen. Stat. § 20-351.3, the plaintiff may seek specific performance of the manufacturer's obligation to "replace the vehicle with a comparable new motor vehicle." *Id*.

6. This remedy would appear to be available to a plaintiff bringing an action under N.C. Gen. Stat. § 20-351.2 by virtue of the language of N.C. Gen. Stat. § 20-351.8(2). *See Buford v. General Motors Corp.*, 339 N.C. 396, 408, 451 S.E.2d 293, 299-300 (1994).

7. N.C. Gen. Stat. § 20-351.3(b)(1).

8. N.C.P.I.-Civil 569.30; see also Heather Newton, Note, *When Life Gives You Lemons, Make A Lemon Law: North Carolina Adopts Automobile Warranty Legislation*, 66 N.C.L.Rev. 1080, 1091 n. 108 (1988) ("The lemon law does not define incidental damages although the UCC in its definition includes 'expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods,' expenses of covering, and other reasonable expenses incident to breach." (citing N.C. Gen. Stat. § 25-2-715(1)).

9. N.C.P.I.-Civil 569.40; N.C. Gen. Stat. § 20-351.3(b)(1). See also Newton, *supra* at 1091 n. 109 ("[C]onsequential damages would presumably include out-of-pocket expenses such as towing fees, car rental, and hotel expenses." (citations omitted)). In addition, liquidated and uncontested monetary liabilities of the plaintiff to third parties arising as a consequence of the breach of warranty would qualify as a "monetary loss." An example would be money owed to a hospital or other medical provider. The plaintiff's personal injuries (*e.g.*, loss of a limb, pain and suffering, loss of earning capacity, *etc*.) do not constitute monetary loss. Recovery of damages for these injuries may be sought in conjunction with other claims for relief.

10. N.C. Gen.Stat. § 20-351.3(c).

N.C.P.I.—Civil 745.11
NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSOR.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 20-351.3(B)(2)

745.11 NEW MOTOR VEHICLES WARRANTIES ACT ("LEMON LAW")—DAMAGES WHEN PLAINTIFF IS A LESSOR.

NOTE WELL: The Appendix contains a worksheet that the Court may want to provide to the jury, but it is not mandatory to do so.

The (*state number*) issue reads:

"What amount of damages is the plaintiff entitled to recover from the defendant?"[1]

You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff[2] and the (*state number*) issue "Yes" in favor of the plaintiff[3] [and the (*state number*) issue "No" 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, the amount of damages which the law permits the plaintiff to recover.[5] The law provides that the plaintiff[6] may recover an amount equal to one hundred five percent (105%) of the actual purchase cost of the vehicle to the plaintiff less eighty-five percent (85%) of the amount actually paid by the consumer to the plaintiff pursuant to the lease.[7]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of damages the plaintiff is entitled to recover from the defendant, then it would be your duty to write that amount in the blank space provided.

Civil 745.11
Formula for Calculating the Plaintiff's Damages
When the Plaintiff is a Lessor
(N.C. Gen. Stat. § 20-351.3(b)(2))

(1) Lease Price (which is the Actual Purchase Cost of Vehicle to the Plaintiff-Lessor) **_____ x 105%**	
Minus	**-**
(2) Actual amount Paid by the Consumer to the Plaintiff-Lessor Pursuant to the Lease **_____ x 85%**	
Equals	**=**
Total Damages Awarded to the Plaintiff-Lessor	

1. *See* N.C. Gen. Stat. § 20-351.3(b).

2. *See* N.C.P.I.-Civil 745.01.

3. *See* N.C.P.I.-Civil 745.03.

4. *See* N.C.P.I.-Civil 745.05.

5. A prerequisite to the plaintiff-lessor bringing an action for damages under this section is that the consumer-lessee return the vehicle to the defendant. In an action under N.C. Gen. Stat. § 20-351.3, this remedy would not be applicable at all if the consumer-lessee elects to have the vehicle replaced "with a comparable new motor vehicle." *Id*.

6. This remedy also is available to a plaintiff bringing an action under N.C. Gen. Stat. §

20-351.2 by virtue of the language of N.C. Gen. Stat. § 20-351.8(2). *See Buford v. General Motors Corp.*, 339 N.C. 396, 408, 451 S.E.2d 293, 299-300 (1994).

7. N.C. Gen. Stat. § 20-351.3(b)(2).

N.C.P.I.—Civil 800.27
CRIMINAL CONVERSATION—STATUTE OF LIMITATIONS.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

800.27 CRIMINAL CONVERSATION—STATUTE OF LIMITATIONS.

NOTE WELL: For actions arising from acts occurring prior to October 1, 2009, use this instruction. For actions arising from acts occurring on or after October 1, 2009, see N.C.P.I-Civil 800.27A ("Criminal Conversation – Statute of Limitations").

The (*state number*) issue reads:

"Did the plaintiff file this action within three years of the date it became apparent or ought reasonably to have become apparent to the plaintiff that the defendant had committed criminal conversation with the plaintiff's spouse?"[1]

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff's claim may nonetheless be legally barred by what is called the statute of limitations.[2] The law provides that a lawsuit claiming criminal conversation must be filed within three years after the date the plaintiff discovered or ought reasonably to have discovered, whichever event first occurred, that the defendant committed criminal conversation with the plaintiff's spouse.[3] The plaintiff filed the present lawsuit on (*state date of filing of criminal conversation action*).

On this issue, the burden of proof is on the plaintiff.[4] This means that the plaintiff must prove, by the greater weight of the evidence, that the plaintiff filed this action within three years after the date it became apparent or ought reasonably to have become apparent to the plaintiff, whichever event first occurred, that the defendant had committed criminal conversation with the plaintiff's spouse. An event would have been or would have become reasonably apparent to the plaintiff when it would have been or would have become apparent to a reasonable and prudent person in the same or similar circumstances as the plaintiff.

Finally, as to this issue on which the plaintiff has the burden of proof, if

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you find by the greater weight of the evidence, that the plaintiff filed this action within three years after the date it became apparent or ought reasonably to have become apparent to the plaintiff, whichever event first occurred, that the defendant had committed criminal conversation with the plaintiff's spouse, 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 N.C. Gen. Stat. § 1-52(16) provides that a cause of action "for personal injury . . . shall not accrue until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."

In *Misenheimer v. Burrus*, 360 N.C. 620, 623-24, 637 S.E.2d 173, 175-76, the North Carolina Supreme Court ruled that "an action for criminal conversation falls under the . . . definition of personal injury as it concerns an invasion of a [sic] individual's personal right" and "the discovery rule" in N.C. Gen. Stat. § 1-52(16) "tolls the statute of limitations" set out in § 1-52(5) "in cases of criminal conversation," although "such actions remain subject to the [ten year] statute of repose provision in § 1-52(16), which states that 'no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.'"

2 N.C. Gen. Stat. § 1-52(5) (2009) provides that a plaintiff must file an action within three years "[f]or criminal conversation." A "statute of limitations" is "the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable." *South Dakota v. North Carolina*, 192 U.S. 286, 346 (1904). "Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984).

3 *See* *Misenheimer*, 360 N.C. at 624-25, 637 S.E.2d at 176 ("[W]e interpret N.C. Gen. Stat. § 1-52(5) and § 1-52(16) together to mean that . . . the statute of limitations for criminal conversation begins to run when the tort is discovered or should have been discovered, not upon completion of the last act constituting the offense.") Whether a plaintiff exercised due diligence in discovering the criminal conversation

> is ordinarily an issue of fact for the jury absent dispositive or conclusive evidence indicating neglect by the plaintiff as a matter of law. In other words, when there is a dispute as to a material fact regarding when the plaintiff should have discovered the [criminal conversation], summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the [criminal conversation]. Failure to exercise due diligence may be determined as a matter of law, however, where it is clear that there was both capacity and opportunity to discover the [criminal conversation].

Ward v. Fogel, _____ N.C. App. ___, 768 S.E.2d 292, 299 (2014) (quoting *Spears v. Moore*, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (internal citation omitted)). Unless the circumstances are such that any reasonable party would have acted upon the opportunity, determination as a matter of law is inappropriate. *See Wells Fargo Bank, N.A. v. Coleman,* ___ N.C. App. ___, 768 S.E.2d 604 (2015).

4 *See Hudson v. Game World, Inc.*, 126 N.C. App. 139, 145, 484 S.E.2d 435, 439 (1997):

> While the plea of the statute of limitations is a positive defense and must be pleaded, . . . when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. (quoting *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957)).

See also White v. Consolidated Planning, Inc., 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (stating that the burden rests on plaintiff to prove claims were timely filed when defendant asserts statute of limitations as an affirmative defense).

N.C.P.I.—Civil 800.27A
CRIMINAL CONVERSATION—STATUTE OF LIMITATIONS.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

800.27A CRIMINAL CONVERSATION—STATUTE OF LIMITATIONS.

NOTE WELL: For actions arising from acts occurring on or after October 1, 2009, use this instruction. For actions arising from acts occurring prior to October 1, 2009, see N.C.P.I.-Civil 800.27 ("Criminal Conversation – Statute of Limitations").

The (*state number*) issue reads:

"Did the plaintiff file this action within three years of the date of the last act of the defendant giving rise to the plaintiff's claim?"[1]

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff's claim may nonetheless be legally barred by what is called the statute of limitations.[2] The law provides that a lawsuit claiming criminal conversation must be filed within three years of the date of the last act of the defendant which gave rise to the plaintiff's claim. [The law further provides that if the plaintiff and the plaintiff's spouse have physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent, then no act of the defendant which occurs following such physical separation may give rise to the plaintiff's criminal conversation claim.[3]] The plaintiff filed the present lawsuit on (*state date of filing of criminal conversation action*).

By answering issue (*state number*) "Yes" in favor of the plaintiff, you found that the defendant had sexual intercourse with the spouse of the plaintiff prior to the physical separation of the plaintiff and *his* spouse with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent.

On this (*state number*) issue, the burden of proof is on the plaintiff.[4] This means that the plaintiff must now prove, by the greater weight of the evidence, that the last act of sexual intercourse between the defendant and the

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plaintiff's spouse occurred less than three years before the date of the filing of this lawsuit by the plaintiff. [(*In cases where there is physical separation*) Furthermore, because the plaintiff and *his* spouse have physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent, the plaintiff must also prove that the act occurred prior to the physical separation.]

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 plaintiff filed this action within three years of the date of the last act of the defendant giving rise to the plaintiff's claim, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1 The statute of limitations for "criminal conversation" is three years. N.C. Gen. Stat. § 1-52(5). N.C. Gen. Stat. § 52-13(b), effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date, establishes the statute of repose for such actions. It provides as follows: An action for . . . criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action. This specific statute of repose is an exception to the general statute of repose for causes of actions for personal injury found in N.C. Gen. Stat. § 1-52(16). Thus, for actions for criminal conversation arising from acts occurring on or after October 1, 2009, the statute of repose and the statute of limitations are the same: three years.

2 A "statute of limitations" is "the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable." *South Dakota v. North Carolina*, 192 U.S. 286, 346 (1904). "Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984).

3 *See* N.C. Gen. Stat. § 52-13(a).

4 *See Hudson v. Game World, Inc.*, 126 N.C. App. 139, 145, 484 S.E.2d 435, 439 (1997):

> While the plea of the statute of limitations is a positive defense and must be pleaded, . . . when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. (quoting *Solon Lodge v.*

Ionic Lodge, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957)).

See also White v. Consolidated Planning, Inc., 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (stating that the burden rests on plaintiff to prove claims were timely filed when defendant asserts statute of limitations as an affirmative defense).

N.C.P.I.—Civil 805.00
TRESPASS TO REAL PROPERTY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

805.00 TRESPASS TO REAL PROPERTY.

NOTE WELL: A subsequent landowner who purchases a subject property after the encroaching structure has already been built may still meet the first element of a trespass claim, requiring possession of the property when the alleged trespass was committed, because the maintenance of the encroaching structure is itself a trespass that continues each day the encroachment exists.[1]

The (*state number*) issue reads:

"Did the defendant trespass on the property of the plaintiff?"

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

First, that the plaintiff was in possession of the property at the time of the alleged trespass.[3] A person is in possession of the property when he [physically occupies it] [exercises acts of dominion over it] [has title to it with the right to immediate actual possession].[4]

Second, that the defendant intentionally[5] [entered][6] [caused entry][7] [remained present][8] upon the plaintiff's property. [Entry] [Continued presence] is intentional when it is [made] [continued] purposefully or with the intent to do so, even if mistaken or unaccompanied by bad or wrongful intent.[9]

And third, that the defendant's [entry] [continued presence] was unauthorized. [Entry upon the property of another is unauthorized when it occurs without the consent of the owner or possessor, whether express or implied.[10]] [A person's continued presence is unauthorized when *he* refuses to leave after being asked to do so,[11] or when *his* conduct exceeds that which has been authorized.[12]]

Finally, as to the (*state number*) issue on which the plaintiff has the

burden of proof, if you find, by the greater weight of the evidence, that the defendant trespassed on the property 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 *Graham v. Deutsche Bank Nat. Trust Co*., ___ N.C. App. ___, ___, 768 S.E.2d 614, 616–17 (2015) (*citing Caveness v. Charlotte, Raleigh & S. R.R. Co.,* 172 N.C. 305, 309, 90 S.E. 244, 246 (1916) (internal quotations omitted): "A subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case for a continuing trespass, and in the latter for a fresh injury.")

2 *See* C. E. Daye & M. W. Morris, *North Carolina Law of Torts* § 6.20, 49–50 (1999) ("Trespass to land is any unauthorized entry onto land in the actual or constructive possession of the plaintiff." (citations omitted)); *Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 355 (1996) ("To prove trespass, a plaintiff must show that the defendants intentionally, . . . and without authorization entered real property actually or constructively possessed by him at the time of the entry." (citations omitted)); *but cf. Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005), *aff'd per curiam*, 360 N.C. 397, 627 S.E.2d 462 (2006) ("The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." (citations and internal quotations omitted)).

> *NOTE WELL*: *The Conference of Superior Court Judges Pattern Jury Instruction Civil Subcommittee, after careful consideration, has concluded that "damage" to the plaintiff does not constitute an element of the tort of trespass to real property. It is, therefore, not included in N.C.P.I.- Civil 805.00 ("Trespass to Real Property").*

In 1983, the North Carolina Court of Appeals first appears to have set out the elements of a trespass to real property claim as "1. Possession by the plaintiff [of the property] when the [alleged] trespass was committed, 2. An unauthorized entry by the defendant, and 3. Damage to the plaintiff from the trespass." *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983) (citation omitted). This formulation, specifically including the third element, has been reiterated without discussion in several cases. *See*, *e.g., Keyzer,* 173 N.C. App. at 289, 618 S.E.2d at 772; *Woodring v. Swieter*, 180 N.C. App. 362, 376, 637 S.E.2d 269, 280 (2006); *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 32, 588 S.E.2d 20, 29 (2003).

In *Kuykendall*, the Court cites *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) as authority for the formulation. *Matthews* states that the allegation "[t]hat the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of

possession" constitutes an "ingredient" of "[a] complaint stat[ing] a good cause of action for trespass to specific realty[,]" *Id*. at 283, 69 S.E.2d at 555 (citation omitted). Nonetheless, the *Matthews* Court continues,

> "[A] complaint states a cause of action for the recovery of nominal damages for a properly pleaded trespass to realty even if it contains no allegations setting forth the character and amount of damages. This is true because an unauthorized entry upon the possession of another entitles him to nominal damages at least. It is otherwise, however, with respect to compensatory and punitive damages. If a plaintiff would recover compensatory damages . . . , he must allege facts showing actual damage; and if he would recover punitive damages for such a trespass, he must allege circumstances of aggravation authorizing punitive damages.

Matthews, 235 N.C. at 283, 69 S.E.2d at 555 (citations omitted).

The foregoing language from *Matthews* certainly indicates that the trial judge must carefully consider both the pleadings and the evidence so as to instruct the jury properly regarding damages in a trespass to real property claim. *See*, *e.g., Hutton & Bourbonnais, Inc. v. Cook*, 173 N.C. 496, 499, 92 S.E. 355, 356 (1917) ("As upon all the uncontradicted evidence there had been a trespass on the land, the recovery of nominal damages followed as a matter of course. There was evidence here of substantial damages, but plaintiffs have not claimed them."). However, the Civil Subcommittee does not believe that *Matthews* holds that a trespass to land claim includes the element of damage to the plaintiff, but rather that at least nominal damages to the plaintiff, even without evidence of actual damage, are inherent in proof of a trespass upon the land claim.

The only appellate decision that references the issue, *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), notes in dicta that "trespass to land" is one of the torts which "do[es] not include actual damage as an essential element" (citation omitted). *See also Keziah v. Seaboard A.L.R. Co.*, 272 N.C. 299, 311, 158 S.E.2d 539, 548 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done."); Daye & Morris, *supra*, at 49-50 ("Trespass to land can be found regardless of whether the entrant used force, regardless of the instrumentality employed in making the entry, and regardless of the amount of actual damage, if any, inflicted by the entrant." (citations omitted)); D. Dobbs, *The Law of Torts* § 50, 95-96 (2001) ("The gist of the tort is intentional interference with rights of exclusive possession; no other harm is required."); *id.* at 97 ("The modern tort claim originated in [the old writ of Trespass used in the earlier common law.] Under its rules the plaintiff is not required to prove actual harm to the land or to the persons or things on it; interference with possession is itself an injury for which the plaintiff can recover at least nominal damages. These rules still hold." (citations omitted)).

3 *Keyzer*, 173 N.C. App. at 289, 618 S.E.2d at 772.

4 "Actual possession of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. Constructive possession is that theoretical possession which exists in contemplation of law in instances where there is no possession in fact. When land is not in the actual enjoyment or occupation of anybody, the law declares it to be in the constructive possession of the person whose title gives him the right to assume its immediate actual possession."

Matthews, 235 N.C. at 284, 69 S.E.2d at 556 (citation omitted).

5 *See York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967) ("[T]respass to land requires an intentional entry thereon." (citing *Schloss v. Hallman,* 255 N.C. 686, 122 S.E.2d 513 (1961))). *See Dobbs*, *supra* note 1, § 50, at 98–99 ("The intent required to show a trespass to land is the intent to enter or to commit the equivalent of an entry. . . . Since intent to enter is sufficient the plaintiff need not show an intent to cause harm or even to invade the plaintiff's possessory rights."). For an instruction on intent, *see* N.C.P.I.-Civil 101.46 ("Definition of [Intent] [Intentionally]").

6 "At common law, every man's land was deemed to be inclosed. . . . Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used, and . . . the form of the instrumentality by which the close is broken . . . is [im]material . . . . [W]hether the defendant acted intentionally is immaterial; trespass lies whether the injury to the plaintiff's possession is willful or not."

Letterman v. English Mica Co., 249 N.C. 769, 771, 107 S.E.2d 753, 755 (1959) (citation omitted).

7 Our appellate courts have repeatedly held defendants liable in trespass for entry through objects, substances or forces. *See, e.g., Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991) (gasoline seeping from underground storage tanks); *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963) (blasting); *Hall v. DeWeld Mica Corp.*, 244 N.C. 182, 93 S.E.2d 56 (1956) (dust); *Pegg v. Gray*, 240 N.C. 548, 82 S.E.2d 757 (1954) (foxhounds); *Forrest City Cotton Co. v. Mills*, 218 N.C. 294, 10 S.E.2d 806 (1940) (ponding of water); *McGhee v. Norfolk & Southern Railway Co.*, 147 N.C. 142, 60 S.E. 912 (1908) (bullets); *Frisbee v. Town of Marshall*, 122 N.C. 760, 30 S.E. 21 (1898) (flooding by water); *Academy of Dance Arts, Inc. v. Bates*, 1 N.C. App. 333, 161 S.E.2d 762 (1968) (construction rubble and debris). *See also The Shadow Group, LLC v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 201, 579 S.E.2d 285, 287–88 (2003) ("[E}very subsequent incidence[] of water flowing onto the property . . . could constitute a trespass in and of itself.").

8 [E]ven if the entry is peaceable, or by the express or implied invitation of the occupant, still if after coming upon the premises the defendant uses violent and abusive language and does acts which are calculated to produce a breach of the peace . . . , he is guilty of forceable [*sic*] trespass, because although not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises.

Suggs v. Carroll, 76 N.C. App. 420, 424, 333 S.E.2d 510, 513 (1985) (quoting *Anthony v. Protective Union*, 206 N.C. 7, 11, 173 S.E. 6, 8 (1934)).

9 *See York*, 271 N.C. at 163, 155 S.E.2d at 506 (holding that "an action for trespass lies even though the entry was made under a bona fide belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property"). *See also Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 614-615, 621 S.E.2d 217, 220 (2005) ("[T]hough the defendant's entry must be intentional, the defendant need not have contemplated any damage to the plaintiff to incur liability." (citing *Lee v. Stewart*, 218 N.C. 287, 289, 10 S.E.2d 804, 805 (1940))).

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

10 "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." . . . The consent of the person in possession of the land to such entry may be implied. An apparent consent is sufficient if brought about by acts of the possessor. It need not be an invitation to enter, which carries with it the idea of a desire on the part of the one in possession that such entry be made. It is sufficient that his conduct be such as to indicate that he consents to the entry, if the other person desires to come upon the land. . . . In determining whether one who enters upon the land of another could reasonably have concluded from the conduct of the landowner that he had permission to do so, regard is to be had to customs prevailing in the community." *Smith v. Von Cannon*, 283 N.C. 656, 660–62, 197 S.E.2d 524, 528-29 (1973) (citations omitted).

11 *See Suggs*, 76 N.C. App. at 424, 333 S.E.2d at 513 ("Although defendants' initial entry was peaceful, they became trespassers when they refused to leave after plaintiff specifically requested they do so."); *Von Cannon*, 283 N.C. at 661, 197 S.E.2d at 528 ("We perceive no basis for a distinction between an involuntary intrusion upon the land of another and an involuntary exceeding of the landowner's assent to the original entry.").

12 *See supra* note 7; *Miller*, 123 N.C. App. at 27–28, 472 S.E.2d at 355 ("Even an authorized entry can be a trespass if a wrongful act is done in excess of and in abuse of authorized entry." (citation omitted)).

N.C.P.I.—Civil 807.50
BREACH OF DUTY—CORPORATE DIRECTOR
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

807.50 BREACH OF DUTY—CORPORATE DIRECTOR.[1]

The (*state number*) issue reads:

"Was the plaintiff[2] damaged by the failure of the defendant to discharge *his* duties as a corporate director?"[3]

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, four things:[4]

First, that the defendant failed to act in good faith.[5] Good faith requires a director to discharge *his* duties honestly, conscientiously, fairly and with undivided loyalty to the corporation.[6] A director acts in good faith so long as *he* acts with reasonable care in the honest belief that *his* action is in the best interests of the corporation.[7]

Second, that the defendant failed to act as an ordinarily prudent person in a like position would have acted under similar circumstances.[8] (Unless *he* has actual knowledge to the contrary,[9] a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by

[one or more employees of the corporation who the director reasonably believes to be reliable and competent in the matter(s) presented]

[[a lawyer] [a public accountant] [*name other outside advisor*] as to the matter(s) the director reasonably believes are within such [professional's] [advisor's] competence]

[a committee of the board of directors of which the director is not a member if *he* reasonably believes the committee merits confidence][10].)

Third, that the defendant failed to act in a manner *he* reasonably believed to be in the best interests of the corporation.[11]

And Fourth, that the defendant's [acts] [omissions] proximately caused damage to the plaintiff. Proximate cause is a cause which in a natural and continuous sequence produces a person's damage and is a cause which a reasonable and prudent person could have foreseen 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 acts were the sole proximate cause of the damage. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's acts were a proximate cause.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was damaged by the failure of the defendant to discharge *his* duties as a corporate director, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1 The statutes no longer use the word "fiduciary" to describe the duty owed by a director to a corporation in order to avoid confusion between corporate and trust fiduciary duties. The substantive law regarding the duty owed by a director, however, has not been modified. *See* N.C. Gen. Stat. § 55-8-30 (1990) (amended 1993).

2 In *Green v. Freeman*, 367 N.C. 136, 749 S.E.2d 262 (2013), the Supreme Court noted the general rule that "shareholders, creditors or guarantors of corporations generally may not bring individual actions [against a director for breach of his fiduciary duties] to recover what they consider their share of the damages suffered by the corporation." 367 N.C. at 152, 749 S.E.2d at 268 (quoting *Barger v. McCoy Hillard & Parks,* 346 N.C. 650, 660, 488 S.E.2d 215, 220–21 (1997)). Rather, shareholders, creditors or guarantors may bring derivative actions against a director on behalf of the corporation and any damages recovered flow back to the corporation, not to the shareholder, creditor or guarantor individually. *Id.* The Court then discussed two exceptions to this general rule: (1) when the wrongdoer owed the shareholder, creditor or guarantor "a special duty" or (2) when the shareholder, creditor or guarantor suffered a personal injury "distinct from the injury sustained by ... the corporation itself." 367 N.C. at 142, 749 S.E.2d at 268 (quoting *Barger*,

346 N.C. at 659, 488 S.E.2d at 221). The Supreme Court has recognized the creation of a special duty in circumstances "when the wrongful actions of a [director] induced an individual to become a shareholder; . . . when the [director] performed individualized services directly for the shareholder; and when a [director] undertook to advise shareholders independently of the corporation." 367 N.C. at 143, 749 S.E.2d at 269 (quoting *Barger*, 346 N.C. at 659, 488 S.E.2d at 220). This list, however, is not exhaustive. *See id.*

3 Note that the "business judgment rule protects corporate directors from being judicially second-guessed when [directors] exercise reasonable care and business judgment." *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *modified, aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991).

4 N.C. Gen. Stat. § 55-8-30; *see also Green*, 367 N.C. at 141, 749 S.E.2d at 268 (citing N.C. Gen. Stat. § 55-8-30 (2011)). The Supreme Court has interpreted this Section "as codifying the common law theory of the business judgment rule." *Jackson v. Marshall*, 140 N.C. App. 504, 510, 537 S.E.2d 232, 236 (2000). Either N.C. Gen. Stat. § 55-8-30 or the common law business judgment rule "could potentially insulate him [a director] from liability." *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 513 S.E.2d 812 (1999).

5 N.C. Gen. Stat. § 55-8-30(a)(1).

6 *Anthony v. Jeffress*, 172 N.C. 378, 380, 90 S.E. 414, 415 (1916); *McIver v. Young Hardware Co.*, 144 N.C. 478, 57 S.E. 169 (1907) (discussing in detail the principles of good faith).

7 *See* Russell M. Robinson*, Robinson on North Carolina Corporation Law* §§ 14.02 and 14.06 (7th Ed. 2014).

8 N.C. Gen. Stat. § 55-8-30(a)(2); *Anthony v. Jeffress*, 172 N.C. 378, 380, 90 S.E. 414, 415 (1916) ("While the directors are not liable for losses resulting from mistakes of judgment such as are excused in law, they are liable for losses resulting from gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees."). For an explanation of the meaning of the phases "in a like position" and "under similar circumstances", *see* the Official Comment to this section.

Note that directors of banks and other financial institutions may be held to a higher standard than a director of a typical private corporation. *Lillian Knitting Mills Co. v. Earle*, 237 N.C. 97, 103, 74 S.E.2d 351, 355 (1953) ("The general rule with respect to the liability of bank directors is not altogether applicable to officers and directors of a private corporation.").

9 N.C. Gen. Stat. § 55-8-30(c).

10 N.C. Gen. Stat. § 55-8-30(b). This language may be used when the defendant director presents evidence that he relied on business data even though the plaintiff may have been damaged. The director's reliance must be in good faith and reasonable. He

cannot ignore the corporate information and expert advice and then expect to be protected by N.C. Gen. Stat. § 55-8-30(b). *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 603, 513 S.E.2d 812, 822 (1999).

11 N.C. Gen. Stat. § 55-8-30(a)(3). A director fails to act in the best interests of the corporation if he uses his position for his own personal gain to the detriment of the corporation (or its shareholders), or uses his position to benefit others to the detriment of the corporation. An officer fails to act in the best interests of the corporation if he uses his position for his own personal gain to the detriment of the corporation (or its shareholders), or uses his position to benefit others to the detriment of the corporation.

N.C.P.I.—Civil 809.100
MEDICAL MALPRACTICE—DAMAGES-PERSONAL INJURY GENERALLY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.100 MEDICAL MALPRACTICE—DAMAGES—PERSONAL INJURY GENERALLY.[1]

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.00 et seq.*)*

The *(state number)* issue reads:

"What amount is the plaintiff entitled to recover for personal injury?"

If you have answered the (*state number*) issue "Yes" (and the (*state number*) issue "No") in favor of the plaintiff, then the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff.

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately caused by the negligence of the defendant.

Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury proximately caused by the negligence of another.

In determining the amount of actual damages you award the plaintiff, if any, you will consider the evidence you have heard as to economic and non-economic damages. You have heard evidence of the following type(s) of economic damages:

[medical expenses]

[loss of earnings] [and]

[permanent injury for *(medical expenses) (loss of earnings)*][2]

[state any other type of economic damage supported by the evidence][3].

You also have heard evidence as to the following type(s) of non-economic damages:

[pain and suffering]

[scars or disfigurement] [4]

[*(partial)* loss *(of use)* of part of the body]

[loss of consortium][5] [and]

[permanent injury for *(pain and suffering) (scars or disfigurement) (loss (of use) of part of the body) (loss of consortium)*]

[*state any other type of non-economic damage supported by the evidence*].

Your award of damages will be entered on your verdict sheet in two lump sums, by grouping economic damages (such as [medical expenses] (and) [lost earnings]) on one line on your verdict sheet, and grouping non-economic damages on a separate line on your verdict sheet. Non-economic damages are damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience and any other nonpecuniary compensatory damage (, but not punitive damages).[6]

[NOTE WELL: Refer to punitive damages only if the issue of punitive damages has not been bifurcated pursuant to N.C. Gen. Stat. § 1D-30.]

In this case, you may consider only the following categories of non-economic damages: (*specify applicable types*).

I now will explain the law of damages as it relates to the types of Economic Damages about which you have heard evidence.

[Personal Injury Damages- Medical Expenses- N.C.P.I.-Civil 810.04A-D]

[Personal Injury Damages- Loss of Earnings- N.C.P.I.-Civil 810.06]

[Medical Malpractice- Permanent Injury- Economic Damages- N.C.P.I.-Civil 809.114]

[*Any other type of economic damage supported by the evidence*]

So, if you find by the greater weight of the evidence the amount of actual economic damages proximately caused by the negligence of the defendant, then you will enter that amount as one lump sum on the line on your verdict sheet under issue (*state number*) that reads "Economic Damages."

I now will explain the law of damages as it relates to the types of Non-economic Damages about which you have heard evidence.

[Personal Injury Damages- Pain and Suffering- N.C.P.I.-Civil 810.08]

[Personal Injury Damages-Scars or Disfigurement- N.C.P.I.-Civil 810.10]

[Personal Injury Damages- Loss (of Use) of Part of the Body- N.C.P.I.-Civil 810.12]

[Personal Injury Damages- Loss of Consortium- N.C.P.I.-Civil 810.30]

[Medical Malpractice-Permanent Injury- Non-Economic Damages-Civil 809.115]

[*Any other type of non-economic damage supported by the evidence*].

So, if you find by the greater weight of the evidence the amount of actual non-economic damages proximately caused by the negligence of the defendant, then you will enter that amount as one lump sum on the line on your verdict sheet under issue (*state number*) that reads "Non-Economic

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Damages."

NOTE WELL: At this point, conclude the personal injury damages instructions by giving one of the following mandates.

[Medical Malpractice- Personal Injury Damages- Final Mandate. (Regular) N.C.P.I.-Civil 809.120]

[Medical Malpractice- Personal Injury Damages- Final Mandate. (*Per Diem* Argument) N.C.P.I.-Civil 809.122]

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1 *Bifurcation Note*: N.C. R. Civ. P. 42(b)(3) specifies: "Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars *($150,000)*, the court shall order *separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable.* The same trier of fact that tries the issues relating to liability shall try the issues relating to damages." N.C. R. Civ. P. 42(b)(3) (2011) (emphasis added).

2 *NOTE WELL: Permanent injury can be for either economic injury (medical expenses, earnings) or non-economic injury (pain, disfigurement, loss of use of part of the body). Be mindful of which category of permanent injury damages the plaintiff seeks for the purpose of having the verdict specify "what amount, if any, is awarded for noneconomic damages," as required by N.C. Gen. Stat. § 90-21.19B. To achieve this end, giving versions of the permanent injury instruction twice may be necessary: i.e., once for alleged permanent medical expenses and then again for alleged permanent pain and suffering. See N.C.P.I.-Civil 809.114 (permanent injury/economic) and N.C.P.I.-Civil 809.115 (permanent injury/non-economic).*

3 Consider whether any other category included is economic or non-economic for the purpose of having the verdict specify "what amount, if any, is awarded for noneconomic damages," as required by N.C. Gen. Stat. § 90-21.19B.

4 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). Non-economic damages are defined as: "Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage*," but not punitive damages. N.C. Gen. Stat. § 90-21.19(c)(2) (emphasis added). Although not expressly listed as such in the statute, scarring and loss of use of part of the body are likely "non-economic damages" that are subject to the limit on non-economic damages, and have been treated that way in these instructions. The jury must not be instructed or told as to the existence of any limit. N.C. Gen. Stat. § 90-21.19(d). There is no limit, however, if BOTH: (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death; and (2) the defendant's acts or failures which

proximately caused the injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice. N.C. Gen. Stat. § 90-21.19(b)(1-2). This issue is submitted separately. *See* N.C.P.I.-Civil 809.160. If the jury verdict exceeds the $515,000 limit on non-economic damages and the plaintiff does not meet the requirements for exemption from the limit, then the judgment entered should modify the verdict to comply with the $515,000 limit. N.C. Gen. Stat. § 90-21.19(a).

5 The plaintiff can claim damages for loss of consortium of *his* spouse-provided the plaintiff's spouse does not make that claim. *See Nicholson v. Chatham Hosp.*, 300 N.C. 295, 303–04, 266 S.E.2d 818, 823 (1980); N.C.P.I.-Civil 102.97. However, the amount of damages for loss of consortium in favor of any plaintiff against a defendant must be considered as part of the total amount of non-economic damages arising out of the same professional services, which is subject to the $515,000 limit on non-economic damages imposed by N.C. Gen. Stat. § 90-21.19(a), if applicable.

6 *See* N.C. Gen. Stat. § 90-21.19(c)(2) defines "noneconomic damages." N.C. Gen. Stat. § 90-21.19B states: "If applicable, the court shall instruct the jury on the definition of noneconomic damages under N.C. Gen. Stat. § 90-21.19(b)." In the rare case in which the plaintiff does not seek any non-economic damages, references to non-economic damages throughout this instruction may be deleted.

N.C.P.I.—Civil 809.114
MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.114 MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—ECONOMIC DAMAGES.

(Use for medical malpractice cases filed on or after 1 October 2011. For all other cases, use N.C.P.I.-Civil 810.14.)

> *NOTE WELL: Be mindful of which category of permanent injury the plaintiff seeks for the purpose of segregating non-economic damages (pain, disfigurement, loss of use of part of the body) from economic damages (medical expenses, earnings) in the issue sheet. Giving this instruction and N.C.P.I.-Civil 809.115 (permanent injury/non-economic) may be necessary.*
>
> *When this instruction is given, you also should give N.C.P.I.-Civil 810.16 ("Future Worth in Present Value").*

Economic damages for personal injury also include fair compensation for permanent injury[1] incurred by the plaintiff as a proximate result of the negligence of the defendant. An injury is permanent when any of its effects will continue throughout the plaintiff's life.[2] These effects may include [medical expenses] [loss of earnings] [*state any other element of economic damages supported by the evidence*] to be incurred or experienced by the plaintiff over *his* life expectancy. (*For purposes of this determination, you are not to consider [pain and suffering] [scarring and disfigurement] [(partial) loss (of use) of part of the body] [loss of consortium] [state any other element of non-economic damages supported by the evidence]. I will instruct you about those types of damages separately.*)

However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you already have allowed for [medical expenses] [loss of earnings] [*state any other element of economic damages supported by the evidence*] because of permanent injury.

Life expectancy is the period of time the plaintiff may reasonably be expected to live. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.][3] They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.

In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.[4]

N.C.P.I.—Civil 809.114
MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

N.C. Gen. Stat. § 8-46. Mortality tables as evidence.

NOTE WELL: Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age / Expectation

0 / 75.8	29 / 48.5	58 / 22.7
1 / 75.4	30 / 47.5	59 / 21.9
2 / 74.5	31 / 46.6	60 / 21.1
3 / 73.5	32 / 45.7	61 / 20.4
4 / 72.5	33 / 44.7	62 / 19.7
5 / 71.6	34 / 43.8	63 / 18.9
6 / 70.6	35 / 42.9	64 / 18.2
7 / 69.6	36 / 42.0	65 / 17.5
8 / 68.6	37 / 41.0	66 / 16.8
9 / 67.6	38 / 40.1	67 / 16.1
10 / 66.6	39 / 39.2	68 / 15.5
11 / 65.6	40 / 38.3	69 / 14.8
12 / 64.6	41 / 37.4	70 / 14.2
13 / 63.7	42 / 36.5	71 / 13.5
14 / 62.7	43 / 35.6	72 / 12.9
15 / 61.7	44 / 34.7	73 / 12.3
16 / 60.7	45 / 33.8	74 / 11.7
17 / 59.8	46 / 32.9	75 / 11.2
18 / 58.8	47 / 32.0	76 / 10.6
19 / 57.9	48 / 31.1	77 / 10.0
20 / 56.9	49 / 30.2	78 / 9.5
21 / 56.0	50 / 29.3	79 / 9.0
22 / 55.1	51 / 28.5	80 / 8.5
23 / 54.1	52 / 27.6	81 / 8.0
24 / 53.2	53 / 26.8	82 / 7.5
25 / 52.2	54 / 25.9	83 / 7.1
26 / 51.3	55 / 25.1	84 / 6.6
27 / 50.4	56 / 24.3	85 & over/ 6.6
28 / 49.4	57 / 23.5	

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1 A jury may consider permanent injury as an element of damages where there is sufficient evidence showing that the injury is permanent and that it proximately resulted from the wrongful act. *See Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46–47 (1964); *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 84, 539 S.E.2d 356, 358 (2000); *Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999).

2 "Where, however, the injury is subjective and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.'" *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760–61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231–32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff "did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'" as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

3 Ordinarily the "mortality tables" will be in evidence. However, since they are statutory (*see* N.C. Gen. Stat. § 8-46), "judicial notice" of them may be taken. *See Chandler v. Moreland Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967); *Rector v. James*, 41 N.C. App. 267, 272, 254 S.E.2d 633, 637 (1979). The annuity tables (*see* N.C. Gen. Stat. § 8-47) are different and should not be admitted in evidence. As pointed out in *Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953), the annuity tables have nothing to do with the establishment of life expectancy and it would be error to admit them for this purpose. Where the life expectancy to be determined is that of the plaintiff, *his* age is to be measured as of the date the jury charge is given.

4 A failure to include this sentence, or its equivalent, is reversible error. *See generally Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Atl. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

N.C.P.I.—Civil 809.115
MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—NON-ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.115 MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—NON-ECONOMIC DAMAGES.

(Use for medical malpractice cases filed on or after 1 October 2011. For all other cases, use N.C.P.I.-Civil 810.14.)

> *NOTE WELL: Be mindful of which category of permanent injury the plaintiff seeks for the purpose of segregating non-economic damages (pain, disfigurement, loss of use of part of the body) from economic damages (medical expenses, earnings) in the issue sheet. Giving this instruction and N.C.P.I.-Civil 809.114 (permanent injury/economic) may be necessary.*
>
> *When this instruction is given, you also should give N.C.P.I.-Civil 810.16 ("Future Worth in Present Value").*

Non-economic damages [1] for personal injury also include fair compensation for permanent injury[2] incurred by the plaintiff as a proximate result of the negligence of the defendant. An injury is permanent when any of its effects will continue throughout the plaintiff's life.[3] These effects may include [pain and suffering] [scarring and disfigurement] [(*partial*) loss (*of use*) of part of the body] [loss of consortium] [*state any other element of non-economic damages supported by the evidence*] to be incurred or experienced by the plaintiff over *his* life expectancy. (*For purposes of this instruction, you are not to consider [medical expenses] [loss of earnings] [state any other element of economic damages supported by the evidence]. I already have instructed you about those types of damages separately.*)

However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you already have allowed for [pain and suffering] [scarring and disfigurement] [(*partial*) loss (*of use*) of part of the body] [loss of consortium] [*state any other element of non-economic damage supported by the evidence*] because of permanent injury.

Life expectancy is the period of time the plaintiff may reasonably be expected to live. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.][4] They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.

In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.[5]

N.C.P.I.—Civil 809.115
MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES—PERMANENT INJURY—NON-ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

N.C. Gen. Stat. § 8-46. Mortality tables as evidence.

NOTE WELL: Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age / Expectation

0 / 75.8	29 / 48.5	58 / 22.7
1 / 75.4	30 / 47.5	59 / 21.9
2 / 74.5	31 / 46.6	60 / 21.1
3 / 73.5	32 / 45.7	61 / 20.4
4 / 72.5	33 / 44.7	62 / 19.7
5 / 71.6	34 / 43.8	63 / 18.9
6 / 70.6	35 / 42.9	64 / 18.2
7 / 69.6	36 / 42.0	65 / 17.5
8 / 68.6	37 / 41.0	66 / 16.8
9 / 67.6	38 / 40.1	67 / 16.1
10 / 66.6	39 / 39.2	68 / 15.5
11 / 65.6	40 / 38.3	69 / 14.8
12 / 64.6	41 / 37.4	70 / 14.2
13 / 63.7	42 / 36.5	71 / 13.5
14 / 62.7	43 / 35.6	72 / 12.9
15 / 61.7	44 / 34.7	73 / 12.3
16 / 60.7	45 / 33.8	74 / 11.7
17 / 59.8	46 / 32.9	75 / 11.2
18 / 58.8	47 / 32.0	76 / 10.6
19 / 57.9	48 / 31.1	77 / 10.0
20 / 56.9	49 / 30.2	78 / 9.5
21 / 56.0	50 / 29.3	79 / 9.0
22 / 55.1	51 / 28.5	80 / 8.5
23 / 54.1	52 / 27.6	81 / 8.0
24 / 53.2	53 / 26.8	82 / 7.5
25 / 52.2	54 / 25.9	83 / 7.1
26 / 51.3	55 / 25.1	84 / 6.6
27 / 50.4	56 / 24.3	85 & over / 6.6
28 / 49.4	57 / 23.5	

1 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). Non-economic damages are defined as "Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage*," but not punitive damages. N.C. Gen. Stat. § 90-21.19(c)(2) (emphasis added). Although not expressly listed as such, scarring and loss of use of part of the body are likely "nonpecuniary compensatory damages" that are subject to the limit on non-economic damages, and have been treated that way in this instruction.

2 A jury may consider permanent injury as an element of damages where there is sufficient evidence showing that the injury is permanent and that it proximately resulted from the wrongful act. *See Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46–47 (1964); *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 84, 539 S.E.2d 356, 358 (2000); *Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999).

3 "Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.'" *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760–61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231–32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff "did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'" as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

4 Ordinarily the "mortality tables" will be in evidence. However, since they are statutory (see N.C. Gen. § Stat. 8-46), "judicial notice" of them may be taken. *See Chandler v. Moreland Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967); *Rector v. James*, 41 N.C. App. 267, 272, 254 S.E.2d 633, 637 (1979). The annuity tables (*see* N.C. Gen. Stat. § 8-47) are different and should not be admitted in evidence. As pointed out in *Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953), the annuity tables have nothing to do with the establishment of life expectancy and it would be error to admit them for this purpose. Where the life expectancy to be determined is that of the plaintiff, *his* age is to be measured as of the date the jury charge is given.

5 A failure to include this sentence, or its equivalent, is reversible error. *See generally Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Atl. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

N.C.P.I.—Civil 809.142
MEDICAL MALPRACTICE—DAMAGES—WRONGFUL DEATH GENERALLY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.142 MEDICAL MALPRACTICE—DAMAGES—WRONGFUL DEATH GENERALLY.[1]

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.42 et seq.*)*

The (*state number*) issue reads:

"What amount is the estate of (*name deceased*) entitled to recover for wrongful death?"

If you have answered the (*state number*) issue "Yes" (and the (*state number*) issue "No") in favor of the estate, then the estate is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the estate.

The estate may also be entitled to recover actual damages. On this issue, the burden of proof is on the estate. This means the estate must prove, by the greater weight of the evidence, the amount of actual damages proximately caused by the negligence of the defendant.

Actual damages are the fair compensation to be awarded to the estate for the death of (*name deceased*) proximately caused by the negligence of the defendant. In determining the amount of actual damages[2], you will consider the evidence you have heard as to economic damages and non-economic damages. In this case, you have heard evidence of the following type(s) of economic damages:

[expenses for care, treatment and hospitalization incident to the injury resulting in death]

[reasonable funeral expenses] [and]

[the present monetary value of (*name deceased*) to *his* next-of-kin (from *his* net income) (from services that *he* provided for which you find a market value)][3].

You also have heard evidence as to the following type(s) of non-economic damages:

[pain and suffering][4] [and]

[the present monetary value of (*name deceased*) to *his* next-of-kin (from *his* society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance) (from services, that *he* provided to *his* next-of-kin for which you do not find a market value)].

Your award of damages will be entered on your verdict sheet in two lump sums, by grouping economic damages (such as [medical expenses] [funeral expenses] [lost income][5] [lost value of services for which you find a market value]) on one line on your verdict sheet, and grouping non-economic damages on a separate line on your verdict sheet. Non-economic damages are damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience and any other nonpecuniary compensatory damage (, but not punitive damages).[6]

[NOTE WELL: Refer to punitive damages <u>only</u> if the issue of punitive damages has not been bifurcated pursuant to N.C. Gen. Stat. § 1D-30.] In this case, you may consider only the following categories of non-economic damages: [pain and suffering] [the present monetary value of (*name deceased*) to *his* next-of-kin (from *his* society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance) [and] (from services that *he* provided for which you do not find a market value)].

I will now explain the law as it relates to the types of <u>Economic Damages</u> about which you have heard evidence.

[Wrongful Death Damages- Medical Expenses- N.C.P.I.-Civil 810.44A, 810.44B, 810.44C, 810.44D]

[Wrongful Death Damages- Funeral Expenses- N.C.P.I.-Civil 810.48A, 810.48B, 810.48C, 810.48D]

[Medical Malpractice- Wrongful Death Damages- Present Monetary Value Next-of-Kin- Economic Elements- N.C.P.I.-Civil 809.150]

If you find by the greater weight of the evidence the amount of actual economic damages proximately caused by the negligence of the defendant, then you will enter that amount as one lump sum on the line on your verdict sheet under issue (*state number*) that reads "Economic Damages."

I will now explain the law as it relates to the types of Non-Economic Damages about which you have heard evidence.

[Wrongful Death Damages- Pain and Suffering- N.C.P.I.-Civil 810.48]

[Medical Malpractice- Wrongful Death Damages- Present Monetary Value Next-of-Kin-Non-Economic Elements- N.C.P.I.-Civil 809.151]

If you find by the greater weight of the evidence the amount of actual non-economic damages proximately caused by the negligence of the defendant, then you will enter that amount as one lump sum on the line on your verdict sheet under issue (*state number*) that reads "Non-economic Damages."

NOTE WELL: At this point, conclude the wrongful death medical malpractice damages instructions by giving one of the following final mandates.

[Medical Malpractice- Wrongful Death Damages- Final Mandate. (Regular)- N.C.P.I.-Civil 809.154]

[Medical Malpractice- Wrongful Death Damages- Final Mandate. (*Per Diem*)- N.C.P.I.-Civil 809.156]

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1 *Bifurcation Note*: N.C. R. Civ. P. 42(b)(3) specifies: "Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000), the court shall order *separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable.* The same trier of fact that tries the issues relating to liability shall try the issues relating to damages." N.C. R. Civ. P. 42(b)(3) (2011) (emphasis added).

2 N.C. Gen. Stat. § 28A-18-2(b)(1)–(4) specifies the types of damages recoverable in wrongful death actions: a) medical expenses; b) funeral expenses; c) present monetary value of deceased to next-of-kin; and 4) pain and suffering.

3 *NOTE WELL: Damages for the present monetary value of the deceased comprises a hybrid of economic and non-economic damages. The verdict must specify "what amount, if any, is awarded for non-economic damages" as required by N.C. Gen. Stat. § 90-21.19B. Thus, the Court must instruct separately on those elements of damages that are economic (N.C.P.I.-Civil 809.150-Medical Malpractice Wrongful Death-Present Monetary Value of Deceased to Next-of-Kin-Economic) and those that are non-economic (N.C.P.I.-Civil 809.151-Medical Malpractice Wrongful Death-Present Monetary Value of Deceased to Next-of-Kin-Non-Economic). Whether any "services" by the deceased may be categorized as economic damages is an open question. See N.C.P.I.-Civil 809.150 (Note). If the Court is persuaded that the law and evidence warrant such a jury instruction, then the pattern jury instructions instructing the jury that some services provided by the deceased can be considered as "economic damages" provide a mechanism for doing so. See*, e.g., id.

4 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). Non-economic damages are defined as "Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage*," but not punitive damages. N.C. Gen. Stat. § 90-21.19(c)(2) (emphasis added). The jury must not be instructed or told as to the existence of any limit. N.C. Gen. Stat. § 90-21.19(d). There is no limit, however, if BOTH (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death and (2) the defendant's acts or failures which proximately caused the injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice. N.C. Gen. Stat. § 90-21.19(b)(1-2). These issues are to be submitted separately, as in N.C.P.I.-Civil 809.160. If the jury verdict exceeds the $515,000 limit on non-economic damages and the plaintiff does not meet the requirements for exemption from the limit, then the judgment entered should modify the verdict to comply with the $515,000 limit. N.C. Gen. Stat. § 90-21.19(a).

5 "Lost income" and "Lost value of services" are intended to capture portions of the Present Monetary Value of Deceased to Next-of-Kin where there is evidence of a market value.

6 *See* N.C. Gen. Stat. § 90-21.19(c)(2). N.C. Gen. Stat. § 90-21.19B states: "If applicable, the court shall instruct the jury on the definition of noneconomic damages under N.C. Gen. Stat. § 90-21.19(b)." In the rare case in which the plaintiff does not seek any non-economic damages, references to non-economic damages throughout this instruction may be deleted.

N.C.P.I.—Civil 809.150
MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN—ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.150 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN[1]—ECONOMIC DAMAGES.[2]

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.50.)

> *NOTE WELL: N.C. Gen. Stat. § 90-21.19B specifies that "any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount, if any, is awarded for noneconomic damages." Whether any "services" provided by the deceased may be categorized as economic damages is an open question.*
>
> *If the Court is persuaded that the law and evidence warrant such an instruction, then this instruction provides a mechanism for instructing the jury that some services provided by the deceased can be considered as "economic damages," along with such other damages as "net income." Which services, if any, may give rise to "economic damages" will likely be dependent on the type of service and whether there has been evidence of market value.*
>
> *If there has been no evidence of market value for a service provided by the deceased, or if the Court determines that the law does not warrant such an instruction, then be mindful to omit references to "services" when giving this instruction. Likewise, if there has been evidence of market value of only certain services performed by the deceased, then be careful to limit this instruction to those services for which there has been such evidence of market value.*

Damages for (*name deceased*)'s death also may include fair compensation for the present monetary value of (*name deceased*) to *his* next-of-kin.[3] (In this case, (*name deceased*)'s next-of-kin are (*name persons and specify relationships*).)

Economic damages for the present monetary value of (*name deceased*) to *his* next-of-kin can include (*name deceased*)'s [income] [services[4] (*name deceased*) provided to *his* next-of-kin for which you find there is market value].

For purposes of this instruction, you are not to consider the society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance that (*name deceased*) provided to *his* next-of-kin, or the services performed by (*name deceased*) for *his* next-of-kin about which there has been no evidence of market value. I will instruct you about those types of damages separately.

In determining the present monetary value of (*name deceased*) to *his* next-of-kin for (*name deceased*)'s [income] [services provided to *his* next-of-kin about which there has been evidence of market value such as (*specify services for which there has been evidence of economic value*)], you may consider:

[The net income (*name deceased*) would have earned during the remainder of *his* life. You must subtract from (*name deceased*)'s reasonably expected income the amount *he* would have spent on *himself* or for other purposes which would not have benefited *his* next-of-kin.[5] The amount *he* would have earned depends upon *his* prospects in life, health, character, ability, industry and [the means *he* had for making money] [the business in which *he* was employed]. It also depends upon *his* life expectancy- that is, the length of time *he* could reasonably have been expected to live but for the negligence of the defendant.]

[You also may consider the services that (*name deceased*) provided to *his* next-of-kin, whether voluntary or obligatory, about which there has been evidence of market value such as (*specify services for which there has been evidence of economic value*).[6] These words are to be given their ordinary meanings. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin, and what you find to be the reasonable

monetary or market value, if any, of the loss to them of these things over the life expectancy of (*name deceased*)[7] (or, as I will explain to you, over a shorter period).[8]]

As I have indicated, in determining (*name deceased*)'s [net income expectancy] [the value of *his* services of (*specify services for which there has been evidence of market value*)], you must consider *his* life expectancy.[9] Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the negligence of the defendant. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.][10] They show that for one of (*name deceased*)'s age at the time of *his* death, *his* life expectancy would have been (*state expectancy*) years. In determining (*name deceased*)'s life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.[11]

(The life expectancy tables show that, at the time of the death of (*name deceased*), the life expectancy for (*name next-of-kin*) was (*state expectancy*), which was shorter than the expectancy shown by the tables for (*name deceased*). Therefore, you must determine the expectancy of (*name next-of-kin*) as well as the expectancy of (*name deceased*). In determining the expectancy of (*name next-of-kin*), you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits. If you find that the expectancy of (*name next-of-kin*) is shorter than that of (*name deceased*), then you will determine the monetary value of (*name deceased*) to (*name next-of-kin*) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits *he* might have expected to receive during *his* own life.)[12]

In determining the amount of actual economic damages to be awarded to (*name deceased*)'s next-of-kin, you are not limited to the things which I have mentioned, but you may not consider any other element of damages for which there has not been evidence of market or monetary value. Thus, insofar as you have not already taken it into account, you may consider any other evidence which reasonably tends to establish the monetary or economic value of (*name deceased*) to *his* next-of-kin.

Any amount you allow as damages for the future monetary value of (*name deceased*) to *his* next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (*name deceased*)'s future monetary value to *his* next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (*name decedent*)'s monetary value to *his* next-of-kin already has been reduced to present value, then you must not reduce it again.)

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1 N.C. Gen. Stat. § 28A-18-2(b)(4).

2 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). Non-economic damages are defined as "Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage," but not punitive damages*. N.C. Gen. Stat. § 90-21.19(c)(2) (emphasis added). The jury must not be instructed or told as to the existence of any limit. N.C. Gen. Stat. § 90-21.19(d). There is no limit, however, if BOTH (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death and (2) the defendant's acts or failures which proximately caused the injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice. N.C. Gen. Stat. § 90-21.19(b)(1-2). That issue is to be submitted separately. *See* N.C.P.I.–Civil 809.160. If the jury verdict exceeds the $515,000 limit on non-economic damages and the plaintiff does not meet the requirements for exemption from the limit, then the judgment entered should modify the verdict to comply with the $515,000 limit. N.C. Gen. Stat. § 90-21.19(a).

3 If the decedent's next-of-kin has not been stipulated or determined as a matter of law, then a separate issue must be submitted.

4 *See NOTE WELL* at the beginning of this instruction. Whether "services" are economic or non-economic damages is an open question, legally and factually, and may vary with the type of evidence offered. For instance, if there has been evidence that the deceased mowed the lawn every week and evidence of the fair market value for lawn mowing, then there is an argument for categorizing such damages as economic.

5 N.C. Gen. Stat. § 28A-18-2(b)(4)a. Only the net income of the deceased can be considered. *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

6 N.C. Gen. Stat. § 28A-18-2(b)(4)b.

7. *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 74, 191 S.E.2d 419, 422 (1972), *aff'd*, 283 N.C. 395, 196 S.E.2d 789 (1973).

8 *Id*. 16 N.C. App. at 74–77, 191 S.E.2d at 422–24. This and other parenthetical statements in the instruction keyed to this footnote should be used when there is evidence tending to show that the expectancy of one or more next-of-kin is shorter than that of the deceased.

9 *Bowen*, 16 N.C. App. at 74, 191 S.E.2d at 422.

10 "The [mortality] table is statutory, [N.C. Gen. Stat.] § 8-46, and need not be introduced but may receive judicial notice when facts are in evidence requiring or permitting its application." *Chandler v. Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967).

11 A failure to include this sentence, or its equivalent, is reversible error. *See Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

12 *See supra* note 8. However, the above parenthetical paragraph will need revision if the contention of a shorter life expectancy for the next-of-kin is based upon health evidence (*e.g.*, terminal cancer) rather than age.

N.C.P.I.—Civil 809.151
MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES-PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN—NON-ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.151 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN [1] —NON-ECONOMIC DAMAGES.[2]

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.—Civil 810.50.)

> *NOTE WELL: N.C. Gen. Stat. § 90-21.19B specifies that "any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount, if any, is awarded for noneconomic damages." Whether any "services" provided by the deceased may be categorized as economic damages is an open question.*
>
> *If the Court is persuaded that the law and evidence warrant such an instruction, then use N.C.P.I.-Civil 809.150 to instruct the jury about those services provided by the deceased that could be considered as "economic damages." Which services, if any, may give rise to "economic damages" will likely be dependent on the type of service, and whether there has been evidence of market value.*
>
> *If there has been no evidence of market value for a service provided by the deceased, or if the Court determines that the law does not warrant such an instruction, then use this instruction to refer to all "services" provided by the deceased. Similarly, if there has been evidence of market value of only certain services provided by the deceased, then be careful to limit this instruction to those services for which there has been no such evidence of market value.*

(As I have instructed you already,) Damages for (*name deceased*)'s death also include fair compensation for the present monetary value of (*name deceased*) to *his* next-of-kin.[3] (In this case, (*name deceased*)'s next-of-kin are (*name persons and specify relationships*).)

Non-economic damages for the present monetary value of (*name deceased*) to *his* next-of-kin can include society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance and services

provided by (*name deceased*) to *his* next-of-kin (for which you do not find a market value. For purposes of this instruction, you are not to consider (*name deceased*)'s income (or services[4] (*name deceased*) provided to *his* next-of-kin for which you have found a market value and an economic loss), as I already have instructed you on those economic damages.)[5]

There is no fixed formula for determining the present monetary value of (*name deceased*) to *his* next-of-kin in connection with *his* society, companionship, comfort, guidance, kindly offices, advice, protection, care, or assistance or of the services (*name deceased*) provided to *his* next-of-kin (for which there is no evidence of market value).[6] You must determine what fair compensation is by applying logic and common sense to the evidence.[7] You may consider:

[You may consider the protection, care and assistance of (*name deceased*) to *his* next-of-kin and the services provided by (*name deceased*) to *his* next-of-kin (for which you have not found a market value),[8] whether voluntary or obligatory,[9] these words are to be given their ordinary meanings. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin, and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)[10] (or, as I will explain to you, over a shorter period).[11]]

[You may consider the society, companionship, comfort, guidance, kindly offices, or advice that (*name deceased*) provided to *his* next-of-kin.[12] These words are to be given their ordinary meaning. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)[13] (or, as I will explain to you, over a shorter period.)]

As I have indicated, in determining the value of [(*name deceased*)'s society, companionship, comfort, guidance, kindly offices and advice to *his* next-of-kin] [the protection, care and assistance and services (*name deceased*) provided to *his* next-of-kin (for which you have not found a market value)[14]], you must consider (*name deceased*)'s life expectancy.[15] Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the negligence of the defendant. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.][16] They show that for one of (*name deceased*)'s age at the time of *his* death, *his* life expectancy would have been (*state expectancy*) years. (As I have instructed you,) In determining (*name deceased*)'s life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.[17]

(Also as I have instructed you,) (The life expectancy tables show that, at the time of the death of (*name deceased*), the life expectancy for (*name next-of-kin*) was (*state expectancy*), which was shorter than the expectancy shown by the tables for (*name deceased*). Therefore, you must determine the expectancy of (*name next-of-kin*) as well as the expectancy of (*name deceased*). In determining the expectancy of (*name next-of-kin*), you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits. If you find that the expectancy of (*name next-of-kin*) is shorter than that of (*name deceased*), then you will determine the monetary value of the (*name deceased*) to (*name next-of-kin*) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits *he* might have expected to receive during *his* own life.)[18]

In determining the amount of actual non-economic damages to be awarded to (*name deceased*)'s next-of-kin, you are not limited to the things which I have mentioned, but you may not consider any other element of damages about which I already have instructed you. Insofar as you have not already taken it into account, you may consider any other evidence which reasonably tends to establish the value of (*name deceased*) to *his* next-of-kin.

(As I have instructed you,) any amount you allow as damages for the future value of (*name deceased*) to *his* next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (*name deceased*)'s future monetary value to *his* next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (*name decedent*)'s monetary value to *his* next-of-kin already has been reduced to present value, then you must not reduce it again.)

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1 N.C. Gen. Stat. § 28A-18-2(b)(4).

2 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). Non-economic damages are defined as: "Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and *any other nonpecuniary compensatory damage*," but not punitive damages. Although not expressly listed as such, "society, companionship, comfort, guidance, kindly offices, advice, protection, care and assistance" and any "services" for which there is no evidence of market value are likely "nonpecuniary compensatory damages" that are subject to the limit on non-economic damages, and have been treated that way in these instructions. The jury must not be instructed as to the existence of any limit. There is no limit, however, if BOTH (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death and (2) the defendant's acts or failures which proximately caused the injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice. That issue is submitted separately. *See* N.C.P.I.–Civil 809.160. If the jury verdict exceeds the $515,000 limit on non-economic damages and the plaintiff does not meet the requirements for exemption from the limit, then the judgment entered should modify the verdict to comply with the $515,000 limit. N.C. Gen. Stat. § 90-21.19(a).

3 If the decedent's next-of-kin has not been stipulated or determined as a matter of

law, then a separate issue must be submitted.

4 *See NOTE WELL* at the beginning of this instruction. Whether "services" are economic or non-economic damages is an open question and may vary with the type of evidence offered. Specifically, if there has been evidence that the deceased mowed the lawn every week and evidence of the fair market value for lawn mowing, then there is an argument for categorizing such damages as economic.

5 *NOTE WELL: If the jury was instructed about "services" pursuant to N.C.P.I.-Civil 809.150, use this parenthetical.*

6 *See supra* note 5.

7 The jury also may consider all negative factors that would tend to diminish the present value of the deceased to his or her next-of-kin. Thus, a young decedent's low level of educational achievement, lack of regular employment, dependency on parents for financial support and history of substance abuse was relevant. *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E.2d 889 (1985). *See also Hales v. Thompson*, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

8 *See supra* note 5.

9 N.C. Gen. Stat. § 28A-18-2(b)(4)b.

10 *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 74, 191 S.E.2d 419, 422 (1972), *aff'd*, 283 N.C. 395, 196 S.E.2d 789 (1973).

11 *Id*. 16 N.C. App. at 74–77, 191 S.E.2d at 422–24. This and other parenthetical statements in the instruction keyed to this footnote should be used when there is evidence tending to show that the expectancy of one or more next-of-kin is shorter than that of the deceased.

12 N.C. Gen. Stat. § 28A-18-2(b)(4)c.

13 These damages are not available where the deceased is a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

14 *See supra* note 5.

15 *Bowen*, 16 N.C. App. at 74, 191 S.E.2d at 422.

16 "The [mortality] table is statutory, [N.C. Gen. Stat.] § 8-46, and need not be introduced but may receive judicial notice when facts are in evidence requiring or permitting its application." *Chandler v. Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967).

17 A failure to include this sentence, or its equivalent, is reversible error. *See Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

18 *See supra* note 11. However, the above parenthetical paragraph will need revision if the contention of a shorter life expectancy for the next-of-kin is based upon health evidence (*e.g.*, terminal cancer) rather than age.

N.C.P.I.—Civil 809.160
MEDICAL MALPRACTICE—DAMAGES—NO LIMIT ON NON-ECONOMIC DAMAGES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

809.160 MEDICAL MALPRACTICE—DAMAGES—NO LIMIT ON NON-ECONOMIC DAMAGES.

(Use for medical malpractice claims filed on or after 1 October 2011.)

> *NOTE WELL: This instruction applies only if the plaintiff seeks entry of a judgment that includes non-economic damages greater than $515,000, and therefore seeks to overcome the limit on non-economic damages in N.C. Gen. Stat. § 90-21.19(a).*[1]

The (*state number*) issue reads:

"Did the plaintiff (*or name deceased*) suffer (disfigurement) (loss of use of part of the body) (permanent injury) (death) that [was] [were] proximately caused by conduct of the defendant that was (in reckless disregard of the rights of others) (grossly negligent) (fraudulent) (intentional) [or] (with malice)?"[2]

[You will answer this issue only if you have awarded actual damages in answering issue (*state number*).[3]]

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 acts or failures of the defendant for which you already have awarded relief caused as one of its consequences (disfigurement) (loss of use of part of the body) [or] (permanent injury) (or proximately caused the death of (*name deceased*)).

(If you answered issue (*state number*)[4] "Yes" in favor of the plaintiff, you already have found that the defendant's medical negligence proximately caused the death of (*name deceased*) and have found that the plaintiff has satisfied this element.)

(As I already have instructed you, an injury is permanent when any of its effects will continue throughout the plaintiff's life.[5] These effects may include [medical expenses], [loss of earnings], [pain and suffering], [scarring or disfigurement], [(partial) loss (of use) of part of the body], or [(*state any other element of damages supported by the evidence*)] to be incurred or experienced by the plaintiff over *his* life expectancy.) (Your consideration of this issue is the same as it was in connection with issue[6] (*state number*).)

Second, that the defendant's conduct that produced the injury was (grossly negligent) (committed in reckless disregard of the rights of others) (fraudulent) (intentional) (committed with malice).

[An act is grossly negligent when the defendant lacks even slight care, when *he* shows indifference to the rights and welfare of others or when *his* negligence is of an aggravated character.][7]

[To find that an act was committed in reckless disregard for the rights and safety of others, you must find more than mere failure to exercise ordinary care. You must find that the defendant acted needlessly, manifesting a reckless indifference to others.][8]

[Fraud means a false representation of material fact made by the defendant with intent to deceive which was reasonably calculated to deceive and which did, in fact, deceive and damage the plaintiff because of *his* reasonable reliance on it.][9]

[Conduct is intentional if the defendant intentionally fails to carry out some duty imposed by law which is necessary to protect the safety of the person or property to which it is owed.][10]

[Malice means a sense of personal ill will toward the plaintiff that

activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff.][11]

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 acts or failures proximately caused the plaintiff (disfigurement) (loss of use of part of the body) [or] (permanent injury) (or proximately caused the death of *name deceased*); and that the defendant's conduct that produced the (injury) (death) was (grossly negligent) (committed in reckless disregard of the rights of others) (fraudulent) (intentional) (committed with malice), 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 N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000. *See* N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). N.C. Gen. Stat. § 90-21.19(b) provides: "[T]here shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds both of the following: (1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death [and] (2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice."

2 N.C. R. Civ. P. Rule 42(b)(3) requires the court, upon motion of a party, to bifurcate issues of liability and damages when the plaintiff seeks damages greater than $150,000, unless the court for "good cause shown orders a single trial." N.C. R. Civ. P. 42(b)(3) (2011). In such a bifurcated case, "[e]vidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable." *Id*. Arguably, but not expressly, the issue of gross negligence/permanent injury is one of damages- that is, whether there is a statutory cap on non-economic damages- that would be tried in the second phase of the case.

3 If this issue is submitted to the jury along with all damages issues, use this sentence. *NOTE WELL: The jury must not be told or instructed in any way as to the existence of any limit on non-economic damages. N.C. Gen. Stat. § 90-21.19(d).* Alternatively, the issue may be submitted in a separate phase of the trial if the jury award of non-economic damages is in fact

greater than the statutory limit.

4 If the medical malpractice claim is for wrongful death, and that issue already has been decided by the jury by separate issue, you may include this sentence.

5 "Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.'" *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760–61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231–32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff "did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'" as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

6 Refer here to the personal injury damages issue that was submitted to the jury in connection with N.C.P.I.-Civil 809.100.

7 *Cowan v. Brian Ctr. Mgmt. Corp.*, 109 N.C. App. 443, 448–49, 428 S.E.2d 263, 266 (1993).

8 *See Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978) (*quoting Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953)); *Chewning v. Chewning*, 20 N.C. App. 283, 291, 201 S.E.2d 353, 358 (1973).

9 This definition is the same as that used in N.C.P.I.-Civil 810.96 for Punitive Damages Liability. *See* N.C.P.I.-Civil 800.90. Note that this summary definition must be adapted in "concealment" cases. In an appropriate case, the five elements of fraud set out in greater detail in N.C.P.I.-Civil 800.00 can be given. "Constructive fraud" also can qualify as "fraud" for the purposes of N.C. Gen. Stat. § 1D-15(a) if "an element of intent is present." N.C. Gen. Stat. § 1D-5(4). Thus, an intentional breach of fiduciary duty would be sufficient. In such instances, the jury could be instructed that, "Fraud occurs when a person who is a fiduciary for another intentionally fails to act in good faith and with due regard for such other person." *See* N.C.P.I.-Civil 800.96.

10 This definition is modeled on N.C.P.I.-Civil 102.86 (Gross Negligence Used to Defeat Contributory Negligence), *citing Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987).

11 This definition is the same as that used in N.C.P.I.-Civil 810.96 for Punitive Damages Liability, although there are multiple other definitions of malice.

N.C.P.I.—Civil 809.199
MEDICAL MALPRACTICE SAMPLE VERDICT FORM—DAMAGES ISSUES.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

your COUNTY — abc CVS defg

PLAINTIFF, Plaintiff, v. DEFENDANT, Defendant.	**SAMPLE VERDICT FORM** (for claims filed on or after 1 October 2011)

We, the jury, by our unanimous verdict, answer the following issues:

ISSUE (For use with N.C.P.I.-Civil 809.142 *et seq*.)

What amount is the estate of (*name deceased*) entitled to recover for wrongful death?

Economic damages: $_____

Non-economic damages: $_____

TOTAL DAMAGES: $_____

ISSUE (For use with N.C.P.I.-Civil 809.100 *et seq*.)

What amount is the plaintiff entitled to recover for personal injury?[1]

Economic damages: $_____

Non-economic damages: $_____

TOTAL DAMAGES: $_____

ISSUE (For use with N.C.P.I.-Civil 809.160)[2]

Did the plaintiff suffer (disfigurement) (loss of use of part of the body) (permanent injury) (death) that [was] [were] proximately caused by conduct of the defendant that was (in reckless disregard of the rights of others) (grossly negligent) (fraudulent) [or] (intentional) (with malice)?[3]

ANSWER: _____

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1 *NOTE WELL: If the plaintiff seeks damages for both wrongful death and personal injury, this issue and the liability issue can be modified to include at the end the phrase "other than injuries that resulted in the death of the deceased."*

2 *NOTE WELL: N.C. Gen. Stat. § 90-21.19(a) imposes a limit on "noneconomic damages." As of January, 1, 2014, that limit is $515,000.* See *N.C. Gen. Stat. § 90-21.19(a) (limit on damages for non-economic loss reset every three years to reflect change in Consumer Price Index). This issue is relevant only if the plaintiff seeks entry of judgment that includes non-economic damages greater than $515,000, and therefore would displace the current limit on non-economic damages.*

3 *NOTE WELL: N.C. R. Civ. P. 42(b)(3) requires the court, upon motion of a party, to bifurcate issues of liability and damages when the plaintiff seeks damages greater than $150,000, unless the court for "good cause shown orders a single trial." N.C. R. Civ. P. 42(b)(3) (2011). In such a bifurcated case, "[e]vidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable."* Id*. Arguably, but not expressly, the issue of gross negligence/permanent injury is one of damages- that is, whether there is a statutory cap on non-economic damages that would be tried in the second phase of the case.*

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Conference of Superior Court Judges
Committee on Pattern Jury Instructions

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for Civil Cases

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N.C.P.I.—Civil 810.14
PERSONAL INJURY DAMAGES—PERMANENT INJURY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

810.14 PERSONAL INJURY DAMAGES—PERMANENT INJURY.

(For medical malpractice cases filed on or after 1 October 2011, use N.C.P.I.-Civil 809.114 and 809.115.)

Damages for personal injury also include fair compensation for permanent injury[1] incurred by the plaintiff as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant. An injury is permanent when any of its effects will continue throughout the plaintiff's life.[2] These effects may include

[medical expenses]

[loss of earnings]

[pain and suffering]

[scarring or disfigurement]

[(partial) loss (of use) of part of the body]

[(*state any other element of damages supported by the evidence*)]

to be incurred or experienced by the plaintiff over *his* life expectancy. However, the plaintiff is not entitled to recover twice for the same element of damages. Therefore, you should not include any amount you have already allowed for [medical expenses] [loss of earnings] [pain and suffering] [scarring or disfigurement] [(partial) loss (of use) of part of the body] because of permanent injury.

Life expectancy is the period of time the plaintiff may reasonably be expected to live. [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.][3] They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.[4]

In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, constitution and habits.[5]

N.C. Gen. Stat. § 8-46. Mortality tables as evidence.

NOTE WELL: Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age / Expectation

0 / 75.8	29 / 48.5	58 / 22.7
1 / 75.4	30 / 47.5	59 / 21.9
2 / 74.5	31 / 46.6	60 / 21.1
3 / 73.5	32 / 45.7	61 / 20.4
4 / 72.5	33 / 44.7	62 / 19.7
5 / 71.6	34 / 43.8	63 / 18.9
6 / 70.6	35 / 42.9	64 / 18.2
7 / 69.6	36 / 42.0	65 / 17.5
8 / 68.6	37 / 41.0	66 / 16.8
9 / 67.6	38 / 40.1	67 / 16.1
10 / 66.6	39 / 39.2	68 / 15.5
11 / 65.6	40 / 38.3	69 / 14.8
12 / 64.6	41 / 37.4	70 / 14.2
13 / 63.7	42 / 36.5	71 / 13.5
14 / 62.7	43 / 35.6	72 / 12.9
15 / 61.7	44 / 34.7	73 / 12.3
16 / 60.7	45 / 33.8	74 / 11.7
17 / 59.8	46 / 32.9	75 / 11.2
18 / 58.8	47 / 32.0	76 / 10.6
19 / 57.9	48 / 31.1	77 / 10.0
20 / 56.9	49 / 30.2	78 / 9.5
21 / 56.0	50 / 29.3	79 / 9.0
22 / 55.1	51 / 28.5	80 / 8.5
23 / 54.1	52 / 27.6	81 / 8.0
24 / 53.2	53 / 26.8	82 / 7.5
25 / 52.2	54 / 25.9	83 / 7.1
26 / 51.3	55 / 25.1	84 / 6.6
27 / 50.4	56 / 24.3	85 & over / 6.6
28 / 49.4	57 / 23.5	

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1 A jury may consider permanent injury as an element of damages where there is sufficient evidence showing that the injury is permanent and that it proximately resulted from the wrongful act. *See Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46–47 (1964); *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 84, 539 S.E.2d 356, 358 (2000); *Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999).

2 "Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there 'be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.'" *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760–61 (1965) (internal citations and quotation marks omitted); *Littleton v. Willis*, 205 N.C. App. 224, 231–32, 695 S.E.2d 468, 473 (2010) (finding error in trial court's instruction to jury on permanent injury where the plaintiff "did not present any medical expert testimony that [p]laintiff, 'with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven,'" as an instruction on permanent injury would have required jurors to speculate on how long they believed plaintiff's pain would continue in the future) (citation omitted).

3 The terms "life expectancy tables" and "mortality tables" are used interchangeably. Ordinarily the "mortality tables" will be in evidence. However, since they are statutory (*see* N.C. Gen. § Stat. 8-46), "judicial notice" of them may be taken. *See Chandler v. Moreland Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967); *Rector v. James*, 41 N.C. App. 267, 272, 254 S.E.2d 633, 637 (1979). The annuity tables (*see* N.C. Gen. Stat. § 8-47) are different and should not be admitted in evidence. As pointed out in *Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953), the annuity tables have nothing to do with the establishment of life expectancy and it would be error to admit them for this purpose. Where the life expectancy to be determined is that of the plaintiff, his age is to be measured as of the date the jury charge is given.

4 The purpose of the permanent injury instruction "is to compensate the plaintiff for *additional* future harm that she is expected to experience because of a permanent injury that she suffered as a proximate result of the defendant's conduct." *Nicholson v. Thom*, ___N.C. App. __, __, 763 S.E.2d 772, __ (2014). In the event that the "decedent is not alive at the time of the trial and [if] Plaintiff did not bring suit for wrongful death," the trial court should not instruct on permanent injury. *Id*. In these circumstances [where the decedent is no longer living and there is no wrongful death claim], this instruction should not be used. *Id*.

5 A failure to include this sentence, or its equivalent, is reversible error. *See generally Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Atl. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

N.C.P.I.—Civil 810.50
WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

810.50 WRONGFUL DEATH DAMAGES—PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN.[1]

(For medical malpractice cases filed on or after 1 October 2011, use N.C.P.I.-Civil 809.150 and 809.151)

Damages for (*name deceased*)'s death also include fair compensation for the present monetary value of (*name deceased*) to *his* next-of-kin.[2] (In this case, (*name deceased*)'s next-of-kin are (*name persons and specify relationships*).)

There is no fixed formula for determining the present monetary value of (*name deceased*) to *his* next of kin. You must determine what is fair compensation by applying logic and common sense to the evidence.[3] You may consider:

[The net income (*name deceased*) would have earned during the remainder of *his* life. You must subtract from (*name deceased*)'s reasonably expected income the amount *he* would have spent on *himself* or for other purposes which would not have benefited *his* next of kin.[4] The amount *he* would have earned depends upon *his* prospects in life, health, character, ability, industry and [the means *he* had for making money] [the business in which *he* was employed]. It also depends upon *his* life expectancy- that is, the length of time *he* could reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant.]

[The services, protection, care and assistance of (*name deceased*), whether voluntary or obligatory, to *his* next-of-kin.[5] These words are to be given their ordinary meanings. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin, and what you find

to be the reasonable value of the loss to them of these things over the life

expectancy of (*name deceased*)[6] (or, as I will explain to you, over a shorter period).[7]]

[The society, companionship, comfort, guidance, kindly offices and advice of (*name deceased*) to *his* next-of-kin.[8] These words are to be given their ordinary meaning. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)[9] (or, as I will explain to you, over a shorter period.)]

As I have indicated, in determining [(*name deceased*)'s net income expectancy] [the value of (*name deceased*)'s (*his)* services, protection, care and assistance] [the value of (*name deceased*)'s (*his)* society, companionship, comfort, guidance, kindly offices and advice], you must consider *his* life expectancy.[10] Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant. The life expectancy tables are in evidence.[11] They show that for one of (*name deceased*)'s age at the time of *his* death, *his* life expectancy would have been (*state expectancy*) years. In determining (*name deceased*)'s life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.[12]

(The life expectancy tables show that, at the time of the death of (*name deceased*), the life expectancy for (*name next-of-kin*) was (*state expectancy*), which was shorter than the expectancy shown by the tables for (*name deceased*). Therefore, you must determine the expectancy of (*name next-of-kin*) as well as the expectancy of (*name deceased*). In determining the expectancy of (*name next-of-kin*), you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits. If you

find that the expectancy of (*name next-of-kin*) is shorter than that of (*name deceased*), you will determine the monetary value of the (*name deceased*) to (*name next-of-kin*) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits *he* might have expected to receive during *his* own life.)[13]

In determining the amount of actual damages to be awarded to (*name deceased*)'s next-of-kin, you are not limited to the things which I have mentioned. You may consider any other evidence which reasonably tends to establish the monetary value of (*name deceased*) to *his* next-of-kin.

Any amount you allow as damages for the future monetary value of (*name deceased*) to *his* next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (*name deceased*)'s future monetary value to *his* next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (*name decedent*)'s monetary value to *his* next-of-kin already has been reduced to present value, you must not reduce it again.)

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1 N.C. Gen. Stat. § 28A-18-2(b)(4).

2 If the decedent's next-of-kin has not been stipulated or determined by the Court as a matter of law, a separate issue must be submitted.

3 The jury also may consider all negative factors that would tend to diminish the present value of the deceased to his or her next-of-kin. Thus, a young decedent's low level of educational achievement, lack of regular employment, dependency on parents for financial support and history of substance abuse was relevant. *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E.2d 889 (1985). *See also Hales v. Thompson*, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

4 N.C. Gen. Stat. § 28A-18-2(b)(4)a. Only the net income of the deceased can be

considered. *State v. Smith*, 90 N.C. App. 161, 368 S. E. 2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

5 N.C. Gen. Stat. § 28A-18-2(b)(4)b.

6 *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 74, 191 S.E.2d 419, 422 (1972), *aff'd*, 283 N.C. 395, 196 S. E. 2d 789 (1973).

7 *Id*. at 74–77, 191 S. E. 2d at 422–24. This and other parenthetical statements in the instruction keyed to this footnote should be used when there is evidence tending to show that the expectancy of one or more next-of-kin is shorter than that of the deceased.

8 N.C. Gen. Stat. § 28A-18-2(b)(4)c.

9 These damages are not available where the deceased is a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

10 *Bowen*, 16 N.C. App. at 74, 191 S.E.2d at 422.

11 "The [mortality] table is statutory, [N.C. Gen. Stat.] § 8-46, and need not be introduced but may receive judicial notice when facts are in evidence requiring or permitting its application." *Chandler v. Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967).

12 A failure to include this sentence, or its equivalent, is reversible error. *See Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

13 *See* note 7. However, the above parenthetical paragraph will need revision if the contention of a shorter life expectancy for the next of kin is based upon health evidence (*e.g.*, terminal cancer) rather than age.

N.C.P.I.—Civil 813.60
TRADE REGULATION—COMMERCE—INTRODUCTION
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

813.60 TRADE REGULATION—COMMERCE—INTRODUCTION.

NOTE WELL: Some, but not all, of the statutory "violation" provisions of Chapter 75 require, as an element of proof, that some connection with commerce be proven. In most cases, commerce will not be a contested issue. Normally, the parties will stipulate that commerce has been affected or the court will give a peremptory instruction to that effect. Where commerce is contested, however, one of the following instructions should be given. Those violations and their commerce requirements are:

1. Contracts or Conspiracies in Restraint of Trade [1] (N.C.P.I.-Civil 813.20), which must restrain "trade or commerce."

2. Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices [2] (N.C.P.I.-Civil 813.21), which must involve methods or practices "in or affecting commerce."

3. Representation of Winning a Prize [3] (N.C.P.I.-Civil 813.35), Representation of Eligibility to Win a Prize [4] (N.C.P.I.-Civil 813.36), Representation of Being Specially Selected [5] (N.C.P.I.-Civil 813.37), and Simulation of Checks and Invoices [6] (N.C.P.I.-Civil 813.38), which all must involve an actor "engaged in commerce."

The commerce instruction for Contracts or Conspiracies in Restraint of Trade is already incorporated in N.C.P.I.-Civil 813.20 (Issue of Violation).

The commerce instructions for the other two categories of trade regulation violations are as follows:

N.C.P.I.-Civil 813.62 Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Trade Practices

N.C.P.I.-Civil 813.63 Trade Regulation—Commerce—Representation of

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Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices.

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1 N.C. Gen. Stat. § 75-1.

2 N.C. Gen. Stat. § 75-1.1.

3 N.C. Gen. Stat. § 75-32.

4 N.C. Gen. Stat. § 75-33.

5 N.C. Gen. Stat. § 75-34.

6 N.C. Gen. Stat. § 75-35.

N.C.P.I.—Civil 813.62
TRADE REGULATION—COMMERCE—UNFAIR AND DECEPTIVE METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

813.62 TRADE REGULATION—COMMERCE—UNFAIR AND DECEPTIVE METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES.

NOTE WELL: Use this instruction only in connection with N.C.P.I.-Civil 813.21, "Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices," which must be given prior to this issue on commerce.

The (*state number*) issue reads:

"Was the defendant's conduct in commerce or did it affect commerce?"[1]

You will answer this issue only if you have found in the plaintiff's favor on the preceding issue. 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's conduct was either "in commerce" or that it "affected commerce."[2]

Conduct is "in commerce" when it involves a business activity.[3]

Conduct "affects commerce" whenever a business activity is adversely and substantially affected.[4]

(A "business activity" is the way a business conducts its regular, day-to-day activities or affairs (such as the purchase or sale of goods), or whatever other activities the business regularly engages in and for which it is organized.)[5]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant's conduct was "in commerce" or that it "affected commerce," 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 If sufficient facts are admitted or stipulated to permit the court to find that the defendant's conduct was "in commerce" or "affected commerce," the court may find as a matter of law that this issue is proven as a matter of law. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). *See Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 56 n.4, 714 S.E.2d 162, 167 n.4 (2011) (noting that, although whether an act is an unfair or deceptive trade practice is a question of law for the court, it was not inappropriate to submit to the jury the issue of whether a defendant's acts were "in or affecting commerce"); *see also Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300 (1986) ("The only such 'issue' answered by the jury was whether defendant's misrepresentations to plaintiff were conduct in commerce or affecting commerce, which was appropriate.").

2 N.C. Gen. Stat. § 75-1.1(b) specifically excludes "professional services rendered by a member of a learned profession" from the definition of "commerce." The burden of establishing the applicability of this exclusion is upon the party seeking it. N.C. Gen. Stat. § 75-1.1(d). For the "learned profession" exclusion to apply, "a two-part inquiry must be conducted: '[f]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.'" *Wheeless v. Maria Parham Med. Ctr., Inc.*, ___ N.C. App. ___, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000)). Although the legislature has not defined what professions are "learned," *Reid,* 138 N.C. App. at 266, 531 S.E.2d at 235, the Supreme Court of North Carolina has recognized three learned professions: law, medicine and the clergy. *Patronelli v. Patronelli*, 360 N.C. 628, 630, 636 S.E.2d 559, 561 (2006). Furthermore, an opinion of the North Carolina Attorney General's Office that the exception applies to related professions "characterized by need of unusual learning, existence of confidential relations, [and] adherence to a standard of ethics higher than that of the marketplace," 47 N.C. Op. Att'y Gen. 118, 119-20, *citing Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939), has been cited as authority in North Carolina appellate decisions. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

Depending on the relationship between the parties, applicability of N.C. Gen. Stat. § 75-1.1 may be precluded. Because it has been determined that the General Assembly did not intend the Unfair and Deceptive Trade Practices statute to apply to a business' internal operations, the Supreme Court of North Carolina has held that N.C. Gen. Stat. § 75-1.1 does not apply to the conduct of a partner within a partnership. *See White v. Thompson*, 364 N.C. 47, 47-51, 691 S.E.2d 676, 676-680 (2010). Likewise, a defendant's status as an employee will normally preclude application of the act in a suit brought by the defendant's employer, but an employee may be held liable where the activity in question is better characterized as a business activity outside of the employer-employee relationship. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999). An independent contractor may be held liable as well. *Weaver Inv. Co. v. Pressly Dev. Assocs.,* ___ N.C. App. ___, ___, 760 S.E.2d 755, 762 (2014).

In addition, the courts have held that certain types of conduct are not business activities "in commerce" or do not "affect commerce" for Chapter 75 purposes. These

include the private sale of residential homes, *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989) *rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *c.f., Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994), certain charity fund raising activities, *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994), and the issuance and redemption of securities for the purpose of raising capital, *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).

3 N.C. Gen. Stat. § 75-1.1(b).

4 *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 743 (1976).

5 *HAJMM Co.*, 328 N.C. at 594, 403 S.E.2d at 493; *Malone*, 113 N.C. App. at 502, 439 S.E.2d at 194.

N.C.P.I—Civil 814.50
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.4(a)(1)

814.50 FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.[1]

The (*state number*) issue reads:

"Was (*name debtor's*) [transfer of the (*name asset*) a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?"

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that (*name debtor*) [transferred[2] the (*name asset*)[3]] [incurred the (*name obligation*)] with intent[4] to hinder, delay or defraud any[5] of *his* creditors.[6] [It is immaterial whether the plaintiff's claim arose before or after (*name debtor*) [made the transfer] [incurred the obligation].[7]] In determining whether (*name debtor*) had this intent, you may consider:[8]

[whether the [transfer] [obligation] was to an insider[9]]

[whether (*name debtor*) retained possession or control of the property after its transfer]

[whether the [transfer] [obligation] was disclosed or concealed]

[whether (*name debtor*) had been sued or threatened with suit before the [transfer was made] [obligation was incurred]]

[whether the transfer was of substantially all of (*name debtor's*) assets]

[whether (*name debtor*) absconded]

[whether (*name debtor*) removed or concealed assets]

[whether the value of the consideration received by (*name debtor*) was reasonably equivalent to the value of the [asset transferred] [amount of the obligation incurred]][10]

[whether (*name debtor*) was insolvent or became insolvent shortly after the [transfer was made] [obligation was incurred]]. For purposes of determining insolvency, [a person is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation[11]] [a partnership is insolvent if the sum of its debts is greater than the aggregate, at a fair valuation, of all its assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debt[12]].

[whether the transfer occurred shortly before or shortly after a substantial debt was incurred]

[whether (*name debtor*) transferred the essential assets of the business to a lien holder who transferred the assets to an insider[13] of (*name debtor*)]

[whether (*name debtor*) [made the transfer] [incurred the obligation] without receiving reasonably equivalent value in exchange for the [transfer] [obligation], and (*name debtor*) reasonably should have believed that *he* would incur debts beyond *his* ability to pay them as they would become due]

[whether (*name debtor*) transferred the assets in the course of legitimate [estate] [tax] planning]

[(*state such other factors as are relevant to the debtor's intent based upon the evidence*)].

N.C.P.I—Civil 814.50
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.4(a)(1)

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 (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], 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 North Carolina adopted the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 *et seq*. (1997).

2 A "transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance." N.C. Gen. Stat. § 39-23.1(12).

3 "Assets" do not include "property to the extent it is encumbered by a valid lien; property to the extent it is generally exempt under nonbankruptcy law; or an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." N.C. Gen. Stat. § 39-23.1(2).

4 For an instruction on intent, *see* N.C.P.I.-Civil 101.46.

5 "Value" is given "for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." N.C. Gen. Stat. § 39-23.3(a).

6 A "creditor" is someone who has "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3) and (4).

7 If a transfer made or obligation incurred by a debtor meets the requirements set forth in N.C. Gen. Stat. § 39-23.4, it is immaterial whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation. N.C. Gen. Stat. § 39-23.4(a).

8 N.C. Gen. Stat. § 39-23.4(b)(1)-(13). The factors enumerated in N.C. Gen. Stat. § 39-23.4(b) is a non-exhaustive list. *Estate of Hurst ex rel. Cherry v. Jones*, __N.C. App. __, __, 750 S.E.2d 14, 20 (2013).

9 *NOTE WELL: If an instruction as to the definition of an "insider" is requested, the following instruction (as applicable) may be given:*

(Use where the debtor is an individual: An "insider" is

[a relative of the debtor]

[a relative of a general partner of the debtor]

[a partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a corporation of which the debtor is a director, officer, or person in control].)

N.C. Gen. Stat. § 39-23.1(7)(a).

(Use where the debtor is a corporation: An "insider" is

[a director of the debtor]

[an officer of the debtor]

[a person in control of the debtor]

[a partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a relative of a general partner, director, officer, or person in control of the debtor].)

N.C. Gen. Stat. § 39-23.1(7)(b).

(Use where the debtor is a partnership: An "insider" is

[a general partner in the debtor]

[a relative of a general partner in, a general partner of, or a person in control of the debtor]

[another partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a person in control of the debtor].)

N.C. Gen. Stat. § 39-23.1(7)(c) (1997).

(Use where an affiliate is involved: An "insider" includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor.) N.C. Gen. Stat. § 39-23.1(7)(d) (1997).

(Use where there is a managing agent: An "insider" includes a managing agent of the debtor.) N.C. Gen. Stat. § 39-23.1(7)(e).

10 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, __N.C. App. __, __, 750 S.E.2d 14, 20 (2013) (citing N.C. Gen. Stat. § 39-23.5 (2011)).

11 N.C. Gen. Stat. § 39-23.2(a). *NOTE WELL: A debtor who is generally not paying his debts as they become due is presumed to be insolvent. N.C. Gen. Stat. § 39-23.2(b). For an instruction on presumptions, see N.C.P.I.—Civil 101.62.*

12 N.C. Gen. Stat. § 39-23.2(c).

13 See *supra* note 9 for language to use in instructing the jury as to the meaning of "insider."

N.C.P.I—Civil 814.55
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD—TRANSFEREE'S DEFENSE OF GOOD FAITH AND REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.8(a)

814.55 FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD—TRANSFEREE'S DEFENSE OF GOOD FAITH AND REASONABLY EQUIVALENT VALUE.

The (*state number*) issue reads:

"Did [defendant] [state name of defendant's predecessor in title][1] acquire the (*name asset*) in good faith and for a reasonably equivalent value?"

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

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, two things:[2]

First, [the defendant] [the defendant's predecessor in title (state name)] acquired the (*name asset*) in good faith.

And Second, [the defendant] [the defendant's predecessor in title] gave a reasonably equivalent value[3] for the (*name asset*).

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that [the defendant] [the defendant's predecessor in title] acquired the (*name asset*) in good faith and for a reasonably equivalent value, then it would be your duty to answer this issue "Yes" in favor of the defendant. If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

N.C.P.I—Civil 814.55
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD—TRANSFEREE'S DEFENSE OF GOOD FAITH AND REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.8(a)
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1 N.C. Gen. § 39-23.8(a) (a transfer or obligation is not voidable against any subsequent transferee or obligee of a person who took in good faith and for a reasonably equivalent value).

> *NOTE WELL:* If supported by the evidence, a separate issue should be submitted as to the defendant and each predecessor in title who the defendant contends took in good faith and for a reasonably equivalent value.

2 N.C. Gen. Stat. § 39-23.8(a). *See Estate of Hurst ex rel. Cherry v. Jones*, __N.C. App. __, __, 750 S.E.2d 14, 20 (2013) (discussing burden of proof on person who invokes defense under N.C. Gen. Stat. § 39-23.8(a)).

3 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst*, __N.C. App. at __, 750 S.E.2d at 20.

N.C.P.I—Civil 814.65
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.4(a)(2)

814.65 FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—LACK OF REASONABLY EQUIVALENT VALUE.

The (*state number*) issue reads:

"Was (*name debtor's*)[1] [transfer[2] of the (*name asset*)[3] a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?"

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:[4]

First, (*name debtor*) [transferred the (*name asset*)] [incurred the (*name obligation*)] without receiving a reasonably equivalent value in exchange for the [transfer] [obligation].[5]

And Second, at the time [of the transfer] [the obligation was incurred], (*name debtor*):

[was engaged or was about to engage in a business or a transaction for which *his* remaining assets were unreasonably small in relation to the business or transaction][6]

[intended to incur or believed *he* would incur debts beyond *his* ability to pay them as they would become due].[7]

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 (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], 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 A "debtor" is someone who is liable on a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3) and (6).

2 A "transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance." N.C. Gen. Stat. § 39-23.1(12).

3 "Assets" do not include "property to the extent it is encumbered by a valid lien; property to the extent it is generally exempt under nonbankruptcy law; or an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." N.C. Gen. Stat. § 39-23.1(2).

4 If a transfer made or obligation incurred by a debtor meets the requirements set forth below, it is immaterial whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation. N.C. Gen. Stat. § 39-23.4(a).

5 N.C. Gen. Stat. § 39-23.4(a)(2). "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, __N.C. App. __, __, 750 S.E.2d 14, 20 (2013).

6 N.C. Gen. Stat. § 39-23.4(a)(2)(a).

7 N.C. Gen. Stat. § 39-23.4(a)(2)(b).

N.C.P.I.—Civil 814.70
FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.5(a)

814.70 FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.

The (*state number*) issue reads:

"Was (*name debtor's*)[1] [transfer[2] of the (*name asset*)[3] a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?"

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:[4]

First, (*name debtor*) [transferred the (*name asset*)] [incurred the (*name obligation*)] without receiving a reasonably equivalent value[5] in exchange for the [transfer] [obligation].

Second, (*name debtor*)

[was insolvent at the time[6] *he* [transferred the (*name asset*)] [incurred the (*name obligation*)]]

[became insolvent as a result of the [transfer] [obligation]].

[A person is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.[7]] [A partnership is insolvent if the sum of its debts is greater than the aggregate, at a fair valuation, of all its assets and the

sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debt[8]].

And Third, before[9] the [transfer was made] [obligation was incurred], the plaintiff was a creditor[10] of the (*name debtor*).

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 (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], 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 A "debtor" is someone who is liable on a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3) and (6).

2 A "transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance." N.C. Gen. Stat. § 39-23.1(12).

3 "Assets" do not include "property to the extent it is encumbered by a valid lien; property to the extent it is generally exempt under nonbankruptcy law; or an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." N.C. Gen. Stat. § 39-23.1(2).

4 N.C. Gen. Stat. § 39-23.5(a).

5 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, __N.C. App. __, __, 750 S.E.2d 14, 20 (2013) (citing N.C. Gen. Stat. § 39-23.5 (2011)).

6 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made or an obligation is incurred for purposes of the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 et seq.

7 N.C. Gen. Stat. § 39-23.2(a). *NOTE WELL: A debtor who is generally not paying his debts as they become due is presumed to be insolvent. N.C. Gen. Stat. § 39-23.2(b). For an instruction on presumptions, see N.C.P.I.—Civil 101.62.*

8 N.C. Gen. Stat. § 39-23.2(c).

9 See Endnote 6.

10 A "creditor is a person who has a claim." N.C. Gen. Stat. § 39-23.1(4). A "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3).

N.C.P.I.—Civil 814.75
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.5(b)

814.75 FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.

The (*state number*) issue reads:

"Was (*name debtor's*) transfer of the (*name asset*) a voidable 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, five things:

First, (*name debtor*)[1] transferred[2] the (*name asset*)[3] to (*name transferee*) because of a previous debt owed to (*name transferee*).

Second, at the time[4] of the transfer, (*name debtor*) was insolvent. [A person is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.[5]] [A partnership is insolvent if the sum of its debts is greater than the aggregate, at a fair valuation, of all its assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debt[6].]

Third, (*name transferee*) had reasonable cause to believe that (*name debtor*) was insolvent.

Fourth, that (*name transferee*) was an insider.[7]

(*Use where the debtor is an individual*: An "insider" is

[a relative of the debtor]

[a relative of a general partner of the debtor]

[a partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a corporation of which the debtor is a director, officer, or person in control].)

(*Use where the debtor is a corporation*: An "insider" is

[a director of the debtor]

[an officer of the debtor]

[a person in control of the debtor]

[a partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a relative of a general partner, director, officer, or person in control of the debtor].)

(*Use where the debtor is a partnership*: An "insider" is

[a general partner in the debtor]

[a relative of a general partner in, a general partner of, or a person in control of the debtor]

[another partnership in which the debtor is a general partner]

[a general partner in a partnership in which the debtor is a general partner]

[a person in control of the debtor].)

(*Use where an affiliate[8] is involved*: An "insider" includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor.)

(*Use where there is a managing agent*: An "insider" includes a managing agent of the debtor.)[9]

And Fifth, before[10] the transfer was made, the plaintiff was a creditor[11] of the (*name debtor*).

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 (*name debtor's*) transfer of the (*name asset*) was a voidable transaction, 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 A "debtor" is someone who is liable on a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3) and (6).

2 A "transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance." N.C. Gen. Stat. § 39-23.1(12).

3 "Assets" do not include "property to the extent it is encumbered by a valid lien; property to the extent it is generally exempt under nonbankruptcy law; or an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." N.C. Gen. Stat. § 39-23.1(2)

4 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made or an obligation is incurred for purposes of the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 et seq.

5 N.C. Gen. Stat. § 39-23.2(a). *NOTE WELL: A debtor who is generally not paying his debts as they become due is presumed to be insolvent. N.C. Gen. Stat. § 39-23.2(b). For an instruction on presumptions, see N.C.P.I.—Civil 101.62.*

6 N.C. Gen. Stat. § 39-23.2(c).

7 N.C. Gen. Stat. § 39-23.1(7).

8 For a definition of "affiliate," *see* N.C. Gen. Stat. § 39-23.1(1).

9 N.C. Gen. Stat. § 39-23.1(7)(e).

10 See Endnote 4.

11 A "creditor is a person who has a claim." N.C. Gen. Stat. § 39-23.1(4). A "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3).

N.C.P.I.—Civil 814.80
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF NEW VALUE GIVEN.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.8(f)(1)

814.80 FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF NEW VALUE GIVEN.

The (*state number*) issue reads:

"Did the defendant give new value to or for the benefit of (*name debtor*) after the transfer was made?"

You will answer this issue[1] only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means the defendant must prove, by the greater weight of the evidence, that *he* gave new value[2] to or for the benefit of (*name debtor*) after the transfer was made.[3]

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant gave new value to or for the benefit of (*name debtor*) after the transfer was made, then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

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1 This defense is limited to "insiders" who have received transfers voidable under N.C. Gen. Stat. § 39-23.5(b). *See* N.C.P.I.-Civil 814.75.

2 "Value" is given "for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." N.C. Gen. Stat. § 39-23.3(a). Note that to the extent the new value was secured by a valid lien, this defense does not apply. N.C. Gen. Stat. § 39-23.8(f)(1).

3 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made or an obligation is incurred for purposes of the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. §§ 39-23.1—23.12.

N.C.P.I.—Civil 814.85
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF TRANSFER IN THE ORDINARY COURSE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.8(f)(2)

814.85 FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF TRANSFER IN THE ORDINARY COURSE.

The (*state number*) issue reads:

"Did the defendant acquire the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*)?"

You will answer this issue[1] only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means the defendant must prove, by the greater weight of the evidence, that the defendant acquired the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*).[2]

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acquired the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

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1 This defense is limited to "insiders" who have received transfers voidable under N.C. Gen. Stat. § 39-23.5(b). *See* N.C.P.I.-Civil 814.75.

2 The "ordinary course of business" includes "those matters that are incidental to the business in which the [entity] is engaged . . . ." *Burlington Industries Inc. v. Foil*, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974). "[W]hether a particular matter is within the ordinary course of business is not governed by any inflexible rule." Russell M. Robinson,

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Robinson on North Carolina Corporate Law § 16.04 (7th Ed. 2014) (citing *Brimmer v. M.H. Brimmer Co.*, 174 N.C. 435, 93 S.E.984 (1917)). "Whether a transfer was in the 'ordinary course' requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged…." UNIFORM FRAUDULENT TRANSFER ACT § 8(f)(2) cmt. (6) (1984).

N.C.P.I.—Civil 814.90
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF GOOD FAITH EFFORT TO REHABILITATE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 39-23.8(f)(3)

814.90 FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF GOOD FAITH EFFORT TO REHABILITATE.

The (*state number*) issue reads:

"Did the defendant acquire the (*name asset*) pursuant to a good faith effort to rehabilitate (*name debtor*)?"

You will answer this issue[1] only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, two things:

First, the defendant acquired the (*name asset*) pursuant to a good faith effort to rehabilitate[2] (*name debtor*).

And Second, the transfer was provided as security for the present value[3] given to rehabilitate (*name debtor*) as well as a previous debt of (*name debtor*).

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acquired the (*name asset*) pursuant to a good faith effort to rehabilitate (*name debtor*) and that the transfer was provided as security for the present value given to rehabilitate (*name debtor*) as well as a previous debt of (*name debtor*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

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1. This defense is limited to "insiders" who have received transfers voidable under N.C. Gen. Stat. § 39-23.5(b). *See* N.C.P.I.-Civil 814.75.

2 Rehabilitation means an effort "to save a debtor from a forced liquidation." UNIFORM FRAUDULENT TRANSFER ACT § 8(f)(2) cmt. (6) (1984). "[A]n insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation…." *Id*. When determining whether the challenged transfer was made in good faith, "[t]he amount of present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative efforts are relevant considerations." *Id*.

3 "Value" is given "for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." N.C. Gen. Stat. § 39-23.3(a).

N.C.P.I.—Civil 814.95
BUDGET DISPUTE BETWEEN BOARD OF EDUCATION AND BOARD OF COUNTY COMMISSIONERS.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 115C-431(c)

814.95 BUDGET DISPUTE BETWEEN BOARD OF EDUCATION AND BOARD OF COUNTY COMMISSIONERS.

The [*state* number] issue reads:

"What amount of money is legally necessary from all sources and what amount of money is legally necessary from the board of county commissioners in order to maintain a system of free public schools as defined by state law and State Board of Education policy?"

For your convenience in analyzing the evidence I have separated this one issue into subparts on the verdict sheet for your consideration, as follows:[1]

WHAT AMOUNT OF MONEY IS LEGALLY NECESSARY FROM ALL SOURCES IN ORDER TO MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS AS DEFINED BY STATE LAW AND STATE BOARD OF EDUCATION POLICY?

(1) CURRENT OPERATING EXPENSES: $_____

(2) CAPITAL OUTLAY: $_____

WHAT AMOUNT OF MONEY IS LEGALLY NECESSARY FROM THE (*NAME* COUNTY) BOARD OF COUNTY COMMISSIONERS IN ORDER TO MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS AS DEFINED BY STATE LAW AND STATE BOARD OF EDUCATION POLICY?

(3) CURRENT OPERATING EXPENSES: $_____

(4) CAPITAL OUTLAY: $_____

WHAT AMOUNT OF MONEY HAS BEEN APPROPRIATED BY THE (*NAME* COUNTY) BOARD OF COUNTY COMMISSIONERS TO MAINTAIN THE (*NAME* COUNTY) SCHOOLS?

(5) CURRENT OPERATING EXPENSES: $_____

(6) CAPITAL OUTLAY: $_____

WHAT ADDITIONAL AMOUNT OF MONEY, IF ANY, BEYOND THE AMOUNT ALREADY APPROPRIATED BY THE (*NAME* COUNTY) BOARD OF COUNTY COMMISSIONERS, IS LEGALLY NECESSARY FROM THE BOARD OF COUNTY COMMISSIONERS IN ORDER TO MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS AS DEFINED BY STATE LAW AND STATE BOARD OF EDUCATION POLICY?

(7) CURRENT OPERATING EXPENSES: $_____

(8) CAPITAL OUTLAY: $_____

Your answers to these subparts of the issue will constitute your verdict in this civil action.

I now will discuss the issue and explain the law which you should consider as you deliberate upon your verdict.

The issue to be decided by you, the jury, is as follows:

"What amount of money is legally necessary from all sources and what amount of money is legally necessary from the board of county commissioners in order to maintain a system of free public schools as defined by state law and State Board of Education policy?"

The burden of proof on this issue is on the plaintiff [*name local Board of Education*]. The plaintiff must prove by the greater weight of the evidence the amount of money necessary to maintain a system of free public schools for [*name* county] County. I instruct you that "maintain" means to keep in good condition or operation; to support or provide for.[2]

In this case the plaintiff [*name local Board of Education*] contends, and the defendant [*name Board of County Commissioners*] denies, that it needs additional money from the Board of County Commissioners in fiscal year

[*identify school year*] for its current operating expenses needs and also for its capital outlay needs. Capital outlay consists of funds for facilities and capital improvements.

> *NOTE WELL: The full definition of capital outlay is set forth in N.C. Gen. Stat. § 115C-426(f) and may be used as needed.*

Current operating expenses include funds other than those used for facilities and capital improvements.[3]

Therefore, you the jury will make separate determinations as to current operating expenses and as to capital outlay.

North Carolina law requires the Board of County Commissioners to provide that appropriation legally necessary to support a system of free public schools, as defined by state law and the policies of the North Carolina State Board of Education.[4] In determining the amount that is legally necessary, you must first consider the educational goals and policies of both the State and the [*name local Board of Education*],[5] the budgetary request of the [*name local Board of Education*], and the financial resources and the fiscal policies of the [*name county Board of Commissioners*] and the [*name local Board of Education*].[6]

It is the policy of the State of North Carolina to create a public school system that ensures a quality education for every child in North Carolina,[7] and that graduates good citizens with the skills demanded in the market-place and necessary to cope with contemporary society, using State, local and other funds in the most cost-effective manner.[8]

It is the law of the State of North Carolina that the facilities requirements

for a public school system shall be met by county governments.[9] North Carolina law imposes on local boards of education the statutory duty to provide an adequate school system,[10] with adequate school buildings equipped with suitable school furniture, apparatus and supplies, and it shall be the duty of boards of county commissioners to provide funds for the same.[11]

North Carolina law also explicitly contemplates the funding of current operating expenses by county commissions when state funding is insufficient.[12]

I instruct you that education is a governmental function so fundamental in this state that our North Carolina Constitution contains a separate article entitled "Education." The constitutional provisions were intended to establish a system of public education adequate to the needs of a great and progressive people, affording school facilities of recognized and ever-increasing merit to all the children of the state.[13]

The North Carolina Constitution provides every child the constitutional right to the opportunity for a sound basic education.[14] For purposes of our constitution, a sound basic education is one that will provide the student with at least: (1) sufficient ability to read, write and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history and basic economic and political systems to enable the student to make informed choices regarding issues that affect the student personally or affect the community, state and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational

training; and (4) sufficient academic and social skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[15]

> *NOTE WELL: The State Board of Education policy is constantly in flux. Reference will need to be made to the State Board of Education policy relevant at the time of the lawsuit. The parties may stipulate as to what the relevant State Board of Education policy is. If they do not, the court may need to conduct a pretrial hearing as to what is the State Board of Education policy.*

For purposes of this lawsuit, the State Board of Education policy provides (*insert State Board of Education policy relevant to the time of this lawsuit regarding the student performance levels necessary to obtain a sound basic education*).

The constitution mandates that the General Assembly "provide by taxation or otherwise for a general and uniform system of free public schools"[16] and provides that the General Assembly "may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate."[17] The constitution also provides that state revenues "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools."[18] The General Assembly then assigned to local school boards, "in order to safeguard the investment made in public schools," the duty to "keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use."[19] The General Assembly further legislated that "[a] local board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations or other sureties for the application of all money or property which may be due to or

should be applied to the support and maintenance of the schools."[20] I instruct you that the plaintiff [*name local Board of Education*] is acting as an arm of the State and is pursuing a governmental function in bringing this civil action, or suit, to obtain funds to operate the public schools of [*name County*].[21]

Finally, as to this issue on which the plaintiff has the burden of proof, you must find, by the greater weight of the evidence, the amount of money legally necessary from all sources to maintain a system of free public schools for [*name County*]. You will make these findings both as to current operating expenses and as to capital outlay. When you have determined those amounts, you will write those amounts on the verdict sheet in the appropriate space provided.

You will then determine what additional amounts of money, if any, beyond the amount already appropriated by the Board of County Commissioners is legally necessary from the Board of County Commissioners in order to maintain a system of free public schools in [*name County*] as defined by State law and State Board of Education Policy. You will make this finding both as to current operating expenses and as to capital outlay. When you have determined those amounts, you will write those amounts on the verdict sheet in the appropriate space provided.

NOTE WELL: The trial court also may consider giving the jury a calculation worksheet, similar to the below, along with the verdict sheet.

N.C.P.I.—Civil 814.95
BUDGET DISPUTE BETWEEN BOARD OF EDUCATION AND BOARD OF COUNTY COMMISSIONERS.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 115C-431(c)

SAMPLE CALCULATION WORKSHEET

(1) Amount of money legally necessary from all sources: $_____. *[This total amount then should be broken down into the following categories]:*

(a) current operating expenses: $ _____

(b) capital outlay: $ _____

(2) amount of money legally necessary from the board of county commissioners: _____. *[This total amount then should be broken down into the following categories]:*

(a) current operating expenses: $ _____

(b) capital outlay: $ _____

(3) amount of money has been appropriated by the board of county commissioners for (*name county*) public schools:$ _____. *[This total amount then should be broken down into the following categories]:*

(a) current operating expenses: $ _____

(b) capital outlay: $ _____

(4) additional amount of money beyond the amount already appropriated by the board of county commissioners that is legally necessary from the board of county commissioners, subtract the total in (3) from the total in (2) = $_____. *[This total amount then should be broken down into the following categories]:*

(1) current operating expenses: $ _____

(2) capital outlay: $ _____

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1 There also is a sample calculation worksheet at the end of this Instruction that may

be used if the trial judge believes it will assist the jury.

2 Merriam-Webster Dictionary; *See also* N.C. Gen. Stat. § 115C-431(c).

3 *See* N.C. Gen. Stat. § 115C-426(f). *See generally Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 510, 681 S.E.2d 278, 285 (2009) (Newby, J. concurring) (describing generally capital outlay fund and current operating expenses).

4 *See* http://sbepolicy.dpi.state.nc.us/MasterList.asp (link to State Board of Education Policy Manual).

5 *NOTE WELL: The parties will need to submit evidence establishing what are the educational goals and policies of the local Board of Education.*

6 *Beaufort*, 363 N.C. at 507, 681 S.E.2d at 283; N.C. Gen. Stat. § 115C-431(c) (S.L. 2013-141).

7 N.C. Gen. Stat. §115C-408(b).

8 N.C. Gen. Stat. § 115C-408(a).

9 N.C. Gen. Stat. § 115C-408(b).

10 N.C. Gen. Stat. § 115C-47(1).

11 N.C. Gen. Stat. § 115C-521(b), § 115C-522(c).

12 *Beaufort*, 363 N.C. at 507, 681 S.E.2d at 283 (citing N.C. Gen. Stat. §115C-426(e)).

13 *Leandro v. State*, 346 N.C. 336, 346, 488 S.E.2d 249, 254 (1997) (quoting *Board of Educ. v. Board of Comm'rs of Granville Cnty.*, 174 N.C. 469, 472, 93 S.E. 1001, 1002 (1917)).

14 *Id*. at 347, 488 S.E.2d at 254-55. S*ee Union County Bd. of Educ. v. Union County Bd. of Comm'rs*, ___ N.C. App. ___, ___, ___ S.E.2d ___ (2015).

15 *Id.* at 247, 488 S.E.2d at 255.

16 N.C. Const. art. IX, § 2(1)

17 *Id.* at § 2(2).

18 *Id*. at § 6.

19 N.C. Gen. Stat. § 115C-524(b).

20 *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum*, 332 N.C. 1, 11, 418 S.E.2d 648, 655 (1992) (quoting N.C. Gen. Stat. § 115C-44(a).

21 *Id.*

N.C.P.I.—Civil 840.10
EASEMENT BY PRESCRIPTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

840.10 EASEMENT BY PRESCRIPTION.[1]

NOTE WELL: The party claiming the easement bears the burden of proving the elements essential to the acquisition of a prescriptive easement.[2] In most cases, the party claiming the easement will be the plaintiff, but in some cases the easement will be claimed by the defendant. The names of the parties should be modified to fit the situation presented by each case.

The plaintiff may rely upon one of three methods of satisfying the twenty-year time requirement of the prescriptive easement:

1. The Plaintiff's Use: the plaintiff has exercised the adverse use for the requisite twenty years.

2. Tacking: the plaintiff's adverse possession, added to the adverse possession of previous owners in the plaintiff's chain of title, equals the requisite twenty years.[3]

3. Succession: the twenty-year period of adverse possession was established by one or more previous owners in the plaintiff's chain of title before the plaintiff became owner of the dominant tract.[4]

The pattern instruction provides for the alternatives that may be used.

The (*state number*) issue reads:

"Has the plaintiff acquired an easement [on] [over] [across] [under] the land of the defendant by adverse use for a period of twenty years?"

(An easement is a right to make a specific use (or uses) of land owned by another person.[5] A person who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[6] The owner of the land which is burdened by the easement continues to have all of the rights of a landowner which are not inconsistent with the easement.[7])

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, four things:[8]

First, that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] actually used (*a portion of*) the land of [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] for (*describe the uses of the land claimed as easement*). A mere intention to claim a right to use the land is not sufficient. Moreover, the actual use must be substantially within a definite and specific (*identify type of easement claimed, e.g., roadway, drainageway or other type of easement appropriate to the facts of the case*), although there may be slight deviations over the course of time.[9]

Second, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title].[10] Mere use of the land is not sufficient. Every use of land is presumed to be by permission of the owner until it is proved that the user intended to claim the use of the land as a matter of right.[11] To establish that the use is adverse or hostile rather than permissive, it is not necessary to show that there was a heated controversy, or ill will or that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [was] [were] in any sense the enemy of [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title]. An adverse use is a use of such nature as to put others on notice that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous

owners in the plaintiff's chain of title] claim(s) the right to use the land.

(If [the plaintiff] [the plaintiff or one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] originally began using the land with the express permission of [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], the use would not become adverse unless and until [the plaintiff] [the plaintiff or one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] rejects the permission and made [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] aware either by words or conduct that he rejected the permission and was claiming the use as a matter of right.)[12]

Third, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious. This means either that the owner of the land must actually know of the adverse use or that the use must have been so open, visible and well known that a landowner would know of the use if he had the familiarity with *his* land that an ordinary owner would have. The use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] must be of such a nature that anyone in the community, including the owner, knows, or by observing could know, that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was using the land as if he had a right to do so and was not merely a temporary or occasional trespasser.

Fourth, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years. To be continuous it is not necessary that the use be constant or unceasing. It is sufficient that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [use] [used] the (*identify type of easement claimed, e.g., roadway, drainageway or other type of easement appropriate to the facts of the case*) consistently and with sufficient regularity under all the circumstances to constitute notice to the owner that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [was] [were] [has been] [had been] asserting a right. The regularity required is that the use be as frequent as would be consistent with the purpose and the nature of the use claimed by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title]. To be uninterrupted means that [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] [has] [have] not prevented the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [physically] [by strong threats] [by a lawsuit] [(*state other interruptions shown by the evidence*)].

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] actually used (*a portion of*) the land of [the defendant] [the defendant and *his*

predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] for (*describe the uses of the land claimed as easement*), that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious, and that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years, 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 This instruction is written in general language which is intended to be modified in each case to fit the exact nature of the easement claimed. While the most common claim will be for a right of ingress and egress, some cases will involve claims for easements for drainage, *e.g., Lamb v. Lamb*, 177 N.C. 150, 150, 98 S.E. 307, 308 (1919), for the maintenance of a pond, *e.g., Thomas v. Morris*, 190 N.C. 244, 244, 129 S.E. 623, 623–24 (1925) or for other particular uses, *e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 432, 20 S.E.2d 329, 330 (1942) (use of party wall). The general language of the instruction- particularly the mandate- should be tailored in each case to the nature of the easement claimed.

2 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, ___ N.C. App. ___, 768 S.E.2d 15 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)).

3 *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974). *See also Enzor v. Minton*, 123 N.C. App. 268, 271, 472 S.E.2d 376, 378 (1996).

4 *Deans v. Mansfield*, 210 N.C. App. 222, 228–29, 707 S.E.2d 658, 664 (2011). *See also* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 14.09 (Matthew Bender, 6th Ed. 2011) (describing the requisite privity as a connection made

out where an "initial adverse possessor transfers his possession to a successor adverse possessor by some recognized connection," such as a "deed, will, or even by a parol transfer").

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

6 *Thomas*, 190 N.C. at 244, 129 S.E. at 626. *See also Brown v. Weaver-Rogers Assocs.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998).

7 *North Asheboro-Central Falls Sanitary District v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960); *Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 57, 16 S.E.2d 453, 454 (1941). *See also Duke Power Co. v. Rogers*, 271 N.C. 318, 320, 156 S.E.2d 244, 246 (1967).

8 In *West v. Slick,* 313 N.C. 33, 326 S.E.2d 601 (1985), the Supreme Court of North Carolina described six criteria for the establishment of an easement by prescription. The first criterion serves as a reminder that the law places the burden of proof on the party seeking the easement. *Id.* The second criterion restates the presumption in North Carolina law that "the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Dickinson,* 284 N.C. at 580, 201 S.E.2d at 900 (internal quotations omitted).

The remaining four criteria from *West v. Slick* are more traditional "elements" and are presented as such in this endnote and in the body of the instruction. They are: "(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period." *Deans*, 210 N.C. App. at 226, 707 S.E.2d at 662 (citing *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)).

Regarding the second element, "[t]he term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim[.]" *Id*. (quoting *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912)); *Dickinson*, 284 N.C. at 580–81, 201 S.E.2d at 900–01; *see also West v. Slick*, 313 N.C. 33, 49-50, 326 S.E.2d 601, 610-11 (1985).

Regarding the fourth element on substantial identity, "the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Hemphill v. Board of Aldermen*, 212 N. C. 185, 193 S.E., 153 (1937). "One who uses one path or track for a portion of the prescriptive period and thereafter abandons all or nearly all of such path or track and uses another cannot tack the period of the use of the new way onto that of the use of the old way in order to acquire a way by prescription." *Speight v. Anderson*, 226 N.C. 492, 498, 39 S.E.2d 371, 375 (1946).

9 *See Dickinson*, 284 N.C. at 581, 201 S.E.2d at 901. *Speight*, 226 N.C. at 496–97, 39 S.E.2d at 374 (1946).

10 If there has been more than one owner during the twenty-year period, where appropriate, the instruction should refer to "the defendant and his predecessors in title" or "the defendant or any of the previous owners in the defendant's chain of title" as well.

11 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, ___ N.C. App. ___, 768

S.E.2d 15 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)); *Coggins v. Fox*, 34 N.C. App. 138, 140, 237 S.E.2d 332, 333 (1977).

12 This portion of the instruction is intended for use in cases where evidence tends to show that the use was begun with the express permission of the landowner.

N.C.P.I.—Civil 840.20
IMPLIED EASEMENT—USE OF PREDECESSOR COMMON OWNER.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

840.20 IMPLIED EASEMENT—USE OF PREDECESSOR COMMON OWNER.

The (*state number*) issue reads:

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

(An easement is a right to make [a specific use] [specific uses] of land owned by another.[3] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[4] The owner of land burdened by an easement continues to have all of the rights of a landowner which are not inconsistent with the easement.)[5]

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,[6] four things:

First, that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant were at one time owned by the same[7] [person] [entity], that is, that both parcels of land had a common owner.[8] (It is not necessary for either the plaintiff or the defendant to have been the earlier common owner.[9])

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

Third, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent.[10] That is, the conduct of the common owner must have been such as to create a reasonable belief that the use of the land

was intended to continue permanently and that when the land now owned by the plaintiff was separated from the land now owned by the defendant, the common owner intended to [grant] [retain][11] the continued right to use the land as it had been used.

And Fourth, that the existence of the easement claimed by the plaintiff is[12] [reasonably][13] [strictly][14] necessary to *his* beneficial enjoyment of the land owned by the plaintiff.

[A use is "reasonably necessary" when the plaintiff's full and comfortable enjoyment[15] of *his* land depends on it.][16]

[A use is "strictly necessary" when it is absolutely necessary to the plaintiff's full enjoyment[17] of *his* land.]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant had an earlier common owner, that the common owner of the two parcels of land used (*describe the easement claimed*) [on] [over] [across] [under] the land which is now owned by the defendant for the benefit of the land now owned by the plaintiff, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent, and that the existence of the easement claimed by the plaintiff is [reasonably] [strictly] necessary to the plaintiff’s beneficial enjoyment of the land owned by *him*, 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 While the most common claim will be for a right of ingress and egress, some cases will involve claims for easements for drainage, *see, e.g., Lamb v. Lamb*, 177 N.C. 150, 152, 98 S.E. 307, 309 (1919), for the maintenance of a pond, *see, e.g., Thomas v. Morris*, 190 N.C. 244, 248, 129 S.E. 623, 625 (1925), or for other particular uses, *see e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 436, 20 S.E.2d 329, 332 (1942) (use of party wall).

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

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

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

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

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

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

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

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

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

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

10 *Ferrell*, 160 N.C. App. at 377, 585 S.E.2d at 459-60; *Curd ex rel. Curd v. Winecoff*, 88 N.C. App. 720, 723, 364 S.E.2d 730, 732 (1988); *Bradley*, 245 N.C. at 486, 96 S.E.2d at 420; *Dorman*, 6 N.C. App. at 502, 170 S.E.2d at 512. *See also Tedder v. Alford*, 128 N.C.

App. 27, 32-33, 493 S.E.2d 487, 490 (1997). *See also Barbour v. Pate*, __ N.C. App. __, __, 748 S.E.2d 14, 17-18 (2013) (finding the proper scope of an easement implied by prior use to be the use of the land involved which gave rise to the quasi-easement at the time the land was divided given the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer).

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

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

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

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

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

16 In cases involving claimed rights of ingress and egress the existence of an alternative route does not preclude a jury determination of reasonable necessity. *See McGee*, 32 N.C. App. at 728, 233 S.E.2d at 676; *Dorman*, 6 N.C. App. at 501, 170 S.E.2d at 512.

17 *See Bowman*, 229 N.C. at 687-88, 51 S.E.2d at 195.

N.C.P.I.—Civil 840.25
IMPLIED EASEMENT-WAY OF NECESSITY.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

840.25 IMPLIED EASEMENT—WAY OF NECESSITY.

The (*state number*) issue reads:

"Is the plaintiff entitled to an easement across the land of the defendant because of necessity?"

(An easement is a right to make [a specific use] [specific uses] of land owned by another.[1] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[2] The owner of land burdened by an easement continues to have all the rights of a landowner which are not inconsistent with the reasonable use and enjoyment of the easement.)[3]

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:[4]

First, that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant were owned at one time by the same [person] [entity], that is, that both parcels had an earlier common owner.[5] (It is not necessary that the parcels of land now owned by the plaintiff and the defendant were part of a single larger tract. It is sufficient that both parcels were previously owned by the same person.)[6] (It is not necessary for either the plaintiff or the defendant to have been the earlier common owner.)[7]

And Second, when the common owner sold or transferred the parcel of land now owned by the plaintiff, it then became necessary for the [plaintiff] [plaintiff's predecessor-in-title] to be able to cross other land owned by the common owner in order to have beneficial use of the land purchased or acquired. Absolute necessity is not required.[8] It is sufficient that the physical conditions and uses at the time of the sale or transfer by the common owner were such that a reasonable person under the same or similar

circumstances would believe that the common owner intended for the [plaintiff] [plaintiff's predecessor-in-title] to have a right of access over the other land.[9]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant had an earlier common owner, and that at the time the common owner sold or transferred the parcel of land now owned by the plaintiff, it became necessary for the [plaintiff] [plaintiff's predecessor-in-title] to be able to cross other land owned by the common owner in order to have beneficial use of the land the [plaintiff] [plaintiff's predecessor-in-title] purchased or acquired, 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.[10]

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

2 *Thomas v. Morris*, 190 N.C. 244, 248, 129 S.E. 623, 625 (1925); *Brown v. Weaver-Rogers Assocs.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998).

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

4 *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974).

5 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, ___ N.C. App. ___, 768 S.E.2d 15 (2014) (quoting *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996)).

6 *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986).

7 It is possible that the "defendant" and the "common owner" will be the same person. In all cases the general language of this instruction will require modification to fit the evidence.

A way of necessity cannot be established over the land of a party not in privity of estate with the common owner. *Roper Lumber Co. v. Richmond Cedar Works*, 158 N.C. 161, 168, 73

S.E. 902, 905 (1912).

8 "It is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the [land] in the same manner and to the same extent which his grantor had used it. . . ." *Barbour v. Pate,* ___ N.C. App. ___, ___, 748 S.E.2d 14, 18 (2013) (quoting *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961)).

9 *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971); *Tedder v. Alford*, 128 N.C. App. 27, 33-34, 493 S.E.2d 487, 491 (1997); *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996). Note that *Cieszko v. Clark*, 92 N.C. App. 290, 295, 374 S.E.2d 456, 459 (1988) recognizes a "reverse" easement by necessity where the reservation of an easement by the common owner over the land he conveys away is implied. In such circumstances, this instruction will need to be modified.

10 In some cases it may be advisable to instruct the jury that if the plaintiff establishes the way of necessity, the defendant will have the right to select the location of the way, provided that he does so in a reasonable manner with due regard for the interests of plaintiff. *See Pritchard v. Scott*, 254 N.C. 277, 283, 118 S.E.2d 890, 895 (1961); *Joines v. Herman*, 89 N.C. App. 507, 509, 366 S.E.2d 606, 608 (1991); *Oliver*, 277 N.C. at 600, 178 S.E.2d at 397-98 (quoting 25 Am. Jur. 2d, *Easements and Licenses* § 64 (1971))(when two land-locked tracts were conveyed, a way of necessity across the lands retained was impliedly granted to the grantees– "a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances").

N.C.P.I.—Civil 840.30
CARTWAY PROCEEDING.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 136-69

840.30 CARTWAY PROCEEDING. N.C. Gen. Stat. § 136-69.[1]

This issue reads:

"Is the petitioner entitled to the establishment of a means of entry to and exit from *his* land over the land of the respondent?"

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

First, that there is no public road[2] or other adequate means of transportation affording necessary and proper entry to and exit from the petitioner's land. (A private right-of-way or permission to use the land of another person for entry and exit constitutes an adequate means of entry and exit,[3] unless the physical condition of such right-of-way is such that it is not practicable[4] to use that route for entry or exit. In determining what is practicable you may consider the physical nature and condition of the property and the petitioner's use (or proposed use).)

Second, that the petitioner is engaged in (or is preparing to engage in) one or more of the activities for which the law provides a right to claim a means of entry to and exit from *his* land. These activities include [cultivation of land] [cutting or removal of standing timber][5] [working a mine or quarry] [operating an industrial or manufacturing plant] [operating a cemetery]. The petitioner is not required to prove that *his* land will be used only for (*here state the one or more permissible activities claimed by the petitioner*) and for no other purpose. It is sufficient that (*here state the petitioner's claimed use*) is one of the uses to which *his* land is (or will be) put.[6]

[*Use the following sentence if the petitioner's claimed use of the land is "cultivation":* In this case the petitioner claims to be [engaged in cultivation]

[preparing for cultivation] of *his* land. To be engaged in cultivation means to use the land for raising crops or livestock for either commercial purposes or personal use.][7]

[*Use the following paragraph if the petitioner's claim is that* he *is "taking action preparatory to" one of the statutorily prescribed activities:* To be preparing for (*state the petitioner's proposed activity*) means that the petitioner is ready to begin (*state the petitioner's proposed activity*) once *he* has a means of entry to and exit from *his* land. The petitioner need not have taken action on the land itself to prove that *he* is preparing to begin (*state the petitioner's proposed activity*). Other activities by the petitioner relating to the proposed use of the land would constitute some evidence that the petitioner is preparing for (*state the petitioner's proposed activity*).][8]

Third, that the granting of a means of entry to and exit from the petitioner's land over the respondent's land is necessary, reasonable and just.[9]

Finally, as to the (*state number*) issue on which the petitioner has the burden of proof, if you find by the greater weight of the evidence that there is no public road or other adequate means of transportation affording necessary and proper entry to and exit from the petitioner's land, that the petitioner is engaged in (or is preparing to engage in) one or more of the activities for which the law provides a right to claim a means of entry to and exit from *his* land, and that the granting of a means of entry to and exit from the petitioner's land over the respondent's land is necessary, reasonable and just, then it would be your duty to answer this issue "Yes" in favor of the petitioner.

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 respondent.

N.C.P.I.—Civil 840.30
CARTWAY PROCEEDING.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 136-69
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1 Though commonly referred to as a "cartway" proceeding, this statute authorizes the establishment of a quasi-public route of access and is in the nature of eminent domain. *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964); *Cook v. Vickers*, 141 N.C. 101, 53 S.E. 740 (1906). The access route may be used for several types of conduit, including cartway, tramway, railway, cableway, chutes and flumes. *See* N.C. Gen. Stat. § 136-69.

2 Other than a navigable waterway. N.C. Gen. Stat. § 136-69.

3 *Taylor* held that an "adequate" means of access could be found where the defendant had offered petitioner a permissible right of way across respondent's land. 262 N.C. at 457, 137 S.E.2d at 836. *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973) held that there was an "adequate" means where the evidence showed that petitioner could acquire a permissive right of way across an easement owned by the county drainage district. *Id*. at 624, 195 S.E.2d at 319.

4 The word "practicable" was approved in *Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 1052 (1890). In that case petitioner might have had access to a public road across a strip of his land subject to regular flooding that connected two parcels of his own land, one of which abutted on a public road. The court held that a jury could consider the connecting strip not to be a practicable means of access. *Id*. at 65-66, 11 S.E. at 1052. *See also Candler v. Sluder*, 259 N.C. 62, 69, 130 S.E.2d 1, 6 (1963).

5 The term "standing timber" as used in the cartway statute encompasses all growing trees, including trees suitable only for firewood. *Turlington v. McLeod*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988).

6 *Candler* held that petitioner would be entitled to a cartway even if one of the principal uses of his land was not a use prescribed in N.C. Gen. Stat. § 136-69: "The rule of strict construction does not limit the uses to those specified in the statute if in fact that there are uses which do meet statutory requirements." 259 N.C. at 65, 130 S.E.2d at 4.

7 *Candler* held that an apple orchard of forty trees was "cultivation" despite the fact that the apples weren't sold commercially and also held that grazing cattle was an act of cultivation. 259 N.C. at 65-66, 130 S.E.2d at 4.

8 In *Candler* the court said: "To make preparations to cut timber, under the situation here presented, it is not necessary that petitioner take his implements to a gate he is forbidden to enter and wait there until he has established his right to enter by court action. Petitioner testified he was ready to cut the timber as soon as he has a way over which to transport it." 259 N.C. at 66, 130 S.E.2d at 4.

9 *Candler* interprets the criteria "adequate means of transportation affording necessary and proper means of ingress and egress" and "necessary, reasonable, and just" as meaning, for all practical purposes, the same thing. The only material difference between the two, notes the Court, is that the former is stated in the negative and the latter is stated in the positive. 259 N.C. at 68-69, 130 S.E.2d at 6. Thus, the issue arises as to whether both criteria should be used in this instruction. The Committee has decided to adopt both. Its rationale is as follows: First, the statute appears to embrace these phrases as separate standards. Second, *Candler* does not suggest that an instruction based on both criteria would be erroneous. Third, there are a number of circumstances where facts not germane to the "necessary and proper means of ingress and egress" criterion may be probative of the

"necessary, reasonable and just" criterion (*e.g.*, where the proposed route of the cartway would desecrate burial grounds, damage a historic landmark or create environmental issues. There may also be estoppel issues between the petitioner and defendant). In any event, two subsequent cases decided by the Court of Appeals embrace this approach. *See Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E.2d 44, *disc. rev*. *denied*, 316 N.C. 557, 344 S.E.2d 18 (1986) and *Campbell v. Conner*, 77 N.C. App. 627, 335 S.E.2d 788 (1986). *See also Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964).

N.C.P.I.—Civil 865.75
TRUSTS BY OPERATION OF LAW—CONSTRUCTIVE TRUST.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

865.75 TRUSTS BY OPERATION OF LAW[1]—CONSTRUCTIVE TRUST.

The (*state number*) issue reads:

"Is (*identify property*) subject to a constructive trust in favor of the plaintiff?"

You will note that in this issue I have used the word "trust." A trust is a legal relationship between persons. A trust exists when one person acquires or holds property under circumstances where *he* ought not retain it. A "constructive trust" is a legal relationship which arises when, under all the circumstances, it would be inequitable for the person holding the property to retain it as against the interests of the other.

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

First, that the defendant came into possession or control of (*identify property*) under circumstances where in good conscience *he* should not retain it. In determining whether the defendant should relinquish possession or control of (*identify property*) to the plaintiff, you may consider:

[the nature of the defendant's relationship with the plaintiff,[3]]

[whether the defendant came into possession or control of (*identify property*) as a result of a breach of some legal duty owed to the plaintiff,[4]]

[whether the defendant came into possession or control of (*identify property*) as a the result of wrongful conduct by the defendant,[5]]

[the plaintiff's [interest in] [contribution to] the [acquisition] [creation] [value] of (*identify property*),[6]]

[whether the defendant's retention of (*identify property*) will unjustly

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enrich *him*,[7]]

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

And Second, that the conduct of the defendant has deprived the plaintiff of a beneficial interest in (*identify property*) to which the plaintiff is entitled.[8]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by clear, strong and convincing evidence that (*identify property*) is subject to a constructive trust in favor 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 Trusts created by operation of law are classified into resulting trusts and constructive trusts. "[T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; whereas a constructive trust ordinarily arises out of the existence of fraud, actual or presumptive - usually involving the violation of a confidential or fiduciary relation - in view of which equity transfers the beneficial title to some person other than the holder of the legal title. Also, a resulting trust involves a presumption or supposition of law of an intention to create a trust, where as a constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee." *Bowen v. Darden*, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954).

2 *Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740, *review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998).

3 Constructive trusts are typically imposed in fiduciary relationships. *In re Gertzman*, 115 N.C. App. 634, 446 S.E.2d 130, *review denied*, 337 N.C. 801, 449 S.E.2d 571 (1994). However, other "close" relationships also support their imposition. *See, e.g., Upchurch*, 128 N.C. App. at 464, 495 S.E.2d at 740; (husband and wife); *Guy v. Guy*, 104 N.C. App. 753, 411 S.E.2d 403 (1991) (parent and child).

4 *Colwell Elec. Co. v. Kale-Barnwell Realty & Constr. Co.*, 267 N.C. 714, 148 S.E.2d 856 (1966); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

5 *E.g.*, coming into possession by fraud or deception, *Guy*, or by homicide, *Bryant v. Bryan*t, 193 N.C. 372, 137 S.E. 188 (1927).

6 *E.g.*, some of the present value of the property derives from the plaintiff's original contributions of money or property. *Upchurch*, 128 N.C. App. at 464, 495 S.E.2d at 740.

7 *Roper v. Edwards*, 323 N.C. 461, 373 S.E.2d 423 (1988); *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970); *Weatherford v. Keenan*, 128 N.C. App. 178,

493 S.E.2d 812, *review denied*, 348 N.C. 78, 505 S.E.2d 887 (1997).

8 *Leatherman v. Leatherman*, 297 N.C. 618, 622, 256 S.E.2d 793, 796 (1979).

N.C.P.I.—Civil 900.10
DEFINITION OF FIDUCIARY; EXPLANATION OF FIDUCIARY RELATIONSHIP.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

900.10 DEFINITION OF FIDUCIARY; EXPLANATION OF FIDUCIARY RELATIONSHIP.

A fiduciary[1] 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]]

[executor or administrator and heir, legatee or devisee[4]]

[guardians and their wards[5]]

[broker and principal[6]]

[principal and agent[7]]

[partners to a partnership[8]]

[spouses[9]].]

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.[10,11] It is not necessary that a fiduciary relationship be a technical or legal relationship,[12] and even where a fiduciary relationship does not normally exist, one may be created by conduct.[13]

A fiduciary relationship exists anytime 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.[14]]

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1 May be of particular use with charges on fraud (N.C.P.I.-Civil 800.00 *et seq*.) and parol trusts (N.C.P.I.-Civil 850.00 *et seq*.). *Compare* N.C.P.I.-Civil 800.15.

2 *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971); *Vail v. Vail*, 233 N.C. 109, 25 S.E.2d 407 (1950); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931).

3 *Abbitt,* 201 N.C. at 598, 160 S.E. at 906.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968).

10 Where the existence of a fiduciary relationship is not established by the evidence, 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, 700 S.E. 2d 50, 188-92 (2010).

11 *Abbitt,* 201 N.C. at 598, 160 S.E. at 906.

12 *Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116.

13 *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*, 11 N.C. App. at 265, 181 S.E.2d at 116 (citing 86 C.J.S., Tenancy in Common, § 17, p. 377 for the same regarding the duty of a tenant who undertakes to manage property on behalf of a tenancy in common).

14 *See Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (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…").

GENERAL CIVIL VOLUME

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.—Civil Instruction numbers)