

June 2016 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 summer 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=ncpji.

Instructions with asterisk (*) are new instructions. All others replace existing instructions.

The following instructions are included in this supplement:

- .010 Introduction
- 102.12 Negligence Issue—Definition Of Negligence In And Of Itself (Negligence *Per Se*)
- 102.65 Insulating/Intervening Negligence
- *102.87 Willful and Malicious Conduct Issue—Used To Defeat Parent-Child Immunity
- 736.00 *Quantum Meruit*—Quasi Contract—Contract Implied at Law
- *800.00A Fraud—Statute of Limitations
- 800.51 Battery
- *804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery
- *804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest
- *804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used
- *804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages
- *804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Sample Verdict Sheet. (Note: Remove and discard existing 804.05 (5/2004), which is unchanged but has been renumbered as new 804.50).
- *804.06 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Color of State Law
- *804.07 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Use of Force
- *804.08 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Lawfulness of Arrest

- *804.09 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Reasonableness of Force Used
- *804.10 Excessive Force in Making Arrest—Section 1983 Claim—Damages
- *804.11 Excessive Force in Making Arrest—Section 1983 Claim—Punitive Damages
- *804.12 Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet
- *804.50 Section 1983—Unreasonable Search of Home
- 807.50 Breach of Duty—Corporate Director
- 810.96 Punitive Damages—Liability of Defendant
- *814.40 Civil RICO—Introduction to RICO Instructions
- *814.41 Civil RICO—Engaging in A Pattern of Racketeering Activity
- *814.42 Civil RICO—Enterprise Activity
- *814.43 Civil RICO—Conspiracy
- *814.44 Civil RICO—Attempt
- 814.95 Budget Dispute Between Board of Education and Board of County Commissioners
- *814.95A Budget Dispute Between Board of Education and Board of County Commissioners—Verdict Sheet
- 820.16 Adverse Possession by a Cotenant Claiming Constructive Ouster
- *835.05 Eminent Domain—Introductory Instruction
- 835.05i Eminent Domain—Introductory Instruction [May 2006] (delete sheet).
- 855.10 Foreclosure—Action for Deficiency Judgment—Amount of Debt Owed
- 855.12 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Property Fairly Worth Amount Owed
- 855.14 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Bid Substantially Less Than True Value of Property on Date of Foreclosure
- 855.16 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—True Value of Property on Date of Foreclosure Sale

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

June 1975
Reprinted June 2016

Volume I

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES: *Dates the instructions were adopted are found in parentheses after the title of the instruction.

PART I. GENERAL

Chapter 1. Preliminary Instructions.

- 100.10 Opening Statement. (12/2004)
- 100.15 Cameras and Microphones in Courtroom. (5/2004)
- 100.20 Recesses. (6/2010)
- 100.21 Recesses. (6/2010)
- 100.40 Deposition Testimony. (5/2004)
- 100.44 Interrogatories. (12/2004)
- 100.70 Taking of Notes by Jurors. (5/2004)
- 101.00 Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
- 101.05 Function of the Jury. (3/1994)
- 101.10 Burden of Proof and Greater Weight of the Evidence. (3/1994)
- 101.11 Clear, Strong, and Convincing Evidence. (11/2004)
- 101.14 Judicial Notice. (10/1983)
- 101.15 Credibility of Witness. (3/1994)
- 101.20 Weight of the Evidence. (3/1994)
- 101.25 Testimony of Expert Witness. (2/1994)
- 101.30 Testimony of Interested Witness. (3/1994)
- 101.32 Evidence—Limitation as to Parties. (10/1983)
- 101.33 Evidence—Limitation as to Purpose. (10/1983)
- 101.35 Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
- 101.36 Impeachment of Witness or Party by Proof of Crime. (4/1986)
- 101.37 Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
- 101.38 Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
- 101.39 Evidence—Spoliation by a Party. (6/2010)
- 101.40 Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
- 101.41 Stipulations. (1/1988)
- 101.42 Requests for Admissions. (1/1988)
- 101.43 Deposition Evidence. (4/1988)
- 101.45 Circumstantial Evidence. (10/1985)
- 101.46 Definition of [Intent] [Intentionally]. (5/2004)
- 101.50 Duty to Recall Evidence. (3/1994)
- 101.60 Issues. (3/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 101.62 Presumptions. (4/1984)
- 101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

- 102.10 Negligence Issue—Burden of Proof. (5/1994)
- 102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
- 102.11 Negligence Issue—Definition of Common Law Negligence. (3/1994)
- 102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
- 102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
- 102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
- 102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
- 102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
- 102.20 Proximate Cause—Peculiar Susceptibility. (4/1998)
- 102.26 Proximate Cause—Act of God. (5/1994)
- 102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
- 102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
- 102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
- 102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
- 102.35 Contentions of Negligence. (3/1994)
- 102.50 Final Mandate—Negligence Issue. (3/1994)
- 102.60 Concurring Negligence. (3/2005)
- 102.65 Insulating/Intervening Negligence. (6/2016)
- 102.84 Negligence—Infliction of Severe Emotional Distress. (4/1998)
- 102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
- 102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
- 102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
- 102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
- 102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

- 103.10 Agency Issue—Burden of Proof—When Principal Is Liable. (5/2009)
- 103.15 Independent Contractor. (5/1992)
- 103.30 Agency Issue—Civil Conspiracy (One Defendant). (5/2004)
- 103.31 Agency Issue—Civil Conspiracy (Multiple Defendants). (5/2004)
- 103.40 Disregard of Corporate Entity of Affiliated Company—Instrumentality Rule (“Piercing the Corporate Veil”). (6/2014)
- 103.50 Agency—Departure from Employment. (10/1985)
- 103.55 Agency—Willful and Intentional Injury Inflicted by an Agent. (10/1985)
- 103.70 Agency Issue—Final Mandate. (10/1985)

Chapter 3a. Contributory Negligence Instructions.

- 104.10 Contributory Negligence Issue—Burden of Proof—Definition. (3/1994)
- 104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 104.35 Contentions of Contributory Negligence. (3/1994)
- 104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

- 108.75 Negligence of Third Party Tort-Feasor—Contribution. (10/1985)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 5. Summary Instructions.

- 150.10 Jury Should Consider All Contentions. (3/1994)
- 150.12 Jury Should Render Verdict Based on Fact, Not Consequences. (3/1994)
- 150.20 The Court Has No Opinion. (3/1994)
- 150.30 Verdict Must Be Unanimous. (3/1994)
- 150.40 Selection of Foreperson. (3/1994)
- 150.45 Concluding Instructions—When To Begin Deliberations, Charge Conference. (3/1994)
- 150.50 Failure of Jury to Reach a Verdict. (10/1980)
- 150.60 Discharging the Jury. (5/1988)

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

- 501.00 Introduction to Contract Series. (5/2003)

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation. (5/2003)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (5/2003)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (5/2003)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

502.05	Contracts—Issue of Breach By Repudiation. (6/2013)
502.10	Contracts—Issue of Breach By Prevention. (5/2003)
502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (5/2003)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)
	Chapter 4. Issue of Common Law Remedy.
503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)
503.45	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.48	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.51	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
503.54	Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
503.70	Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
503.73	Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
503.75	Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
503.76	Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
503.79	Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
503.90	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
503.91	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
503.94	Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
503.97	Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)
	Chapter 5. Issue of UCC Remedy.
504.00	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
504.03	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
504.06	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
504.09	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
504.12	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
504.15	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
504.18	Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
504.21	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
504.24	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
504.27	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
504.30	Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
504.33	Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 504.36 Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
- 504.39 Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
- 504.42 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)
- 504.45 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Undelivered Goods. (5/2003)
- 504.48 Contracts—Issue of UCC Remedy—Defense (Offset) of Failure to Mitigate. (5/2003)
- 504.51 Contracts—Issue of UCC Remedy—Validity of Liquidated Damages Provision. (5/2003)
- 504.54 Contracts—Issue of UCC Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 6. Minor’s Claims Where Contract Disavowed.

- 505.20 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed. (5/2003)
- 505.25 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed—Measure of Recovery. (5/2003)

Chapter 7. Agency.

- 516.05 Agency—Actual and Apparent Authority of General Agent. (6/2013)
- 516.15 Agency—Ratification. (6/2011)
- 516.30 Agency—Issue of Undisclosed Principal—Liability of Agent. (4/2005)
- 517.20 Breach of Contract—Special Damages—Loss of Profits. (6/2013)

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

- 635.20 Action on Unverified Account—Issue of Liability. (5/1991)
- 635.25 Action on Unverified Account—Issue of Amount Owed. (5/1991)
- 635.30 Action on Verified Itemized Account. (5/1991)
- 635.35 Action on Account Stated. (6/2014)
- 635.40 Action on Account—Defense of Payment. (5/1991)

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2010)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (6/2014)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (5/2004)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (5/2009)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

640.29C	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Pretext Case</i> . (6/2010)
640.29D	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Plaintiff). (6/2010)
640.29E	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Defendant). (5/2009)
640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (4/1998)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (6/2014)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

645.20	Covenants Not to Compete—Issue of the Existence of the Covenant. (6/2015)
645.30	Covenants Not to Compete—Issue of Whether Covenant was Breached. (5/1976)
645.50	Covenants not to Compete—Issue of Damages. (5/2006)

Chapter 12. Actions for Services Rendered a Decedent.

714.18	Products Liability—Military Contractor Defense. (6/2007)
735.00	Action for Services Rendered a Decedent—Issue of Existence of Contract. (11/2/2004)
735.05	Action for Services Rendered a Decedent—Evidence of Promise to Compensate by Will. (12/1977)
735.10	Action for Services Rendered a Decedent—Presumption that Compensation Is Intended. (5/1978)
735.15	Action for Services Rendered a Decedent—Presumption of Gratuities by Family Member. (12/1977)
735.20	Action for Services Rendered a Decedent—Issue of Breach of Contract. (12/1977)
735.25	Action for Services Rendered a Decedent—Issue of Recovery. (12/1977)
735.30	Action for Services Rendered a Decedent—Issue of Recovery—Benefits or Offsets. (10/1977)
735.35	Action for Services Rendered a Decedent—Issue of Recovery—Evidence of Value of Specific Property. (10/1977)
735.40	Action for Services Rendered a Decedent—Issue of Recovery—Statute of Limitations. (5/1978)

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
--------	---

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 736.01 Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

- 741.00 Warranties in Sales of Goods. (5/1999)
 741.05 Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
 741.10 Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
 741.15 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
 741.16 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
 741.17 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
 741.18 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
 741.20 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
 741.25 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.26 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.27 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.28 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.30 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.31 Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.32 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.33 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.34 Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.35 Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
 741.40 Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
 741.45 Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
 741.50 Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
 741.60 Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
 741.65 Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 741.66 Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
- 741.67 Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
- 741.70 Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)
- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

- 743.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 743.06 Products Liability—Exception To Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 743.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 743.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (5/1999)
- 743.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use In Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 743.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 744.06 Products Liability—Exception to Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 744.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 744.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (6/2010)
- 744.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use in Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 744.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.12 Products Liability—Seller’s and Manufacturer’s Defense of Open and Obvious Risk. (5/1999)
- 744.13 Products Liability—Prescription Drugs—Seller’s and Manufacturer’s Defense of Delivery of Adequate Warning or Instruction to Prescribers or Dispensers. (5/1999)
- 744.16 Products Liability—Manufacturer’s Defense of Inherent Characteristic. (5/1999)
- 744.17 Products Liability—Prescription Drugs—Manufacturer’s Defense of Unavoidably Unsafe Aspect. (5/1999)
- 744.18 Products Liability—Statute of Limitations. (6/2010)

Chapter 3. New Motor Vehicle Warranties (“Lemon Law”).

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 745.07 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessor. (6/2015)
- 745.13 New Motor Vehicles Warranties Act ("Lemon Law")—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder's Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2010)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2014)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (5/2002)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2010)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)

- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (6/2010)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)

- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)

Chapter 3A. Infliction of Emotional Distress.

- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)

Chapter 3B. Loss of Consortium.

- 800.65 Action for Loss of Consortium. (12/1999)

Chapter 4. Invasion of Privacy.

- 800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)
- 800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)
- 800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use. (5/2001)
- 800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—Damages. (5/2001)

Chapter 5. Malicious Prosecution, False Imprisonment, and Abuse of Process.

- 801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)
- 801.01 Malicious Prosecution—Civil Proceeding. (1/1995)
- 801.05 Malicious Prosecution—Damages. (10/1994)
- 801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice. (5/2001)
- 802.00 False Imprisonment. (6/2014)
- 802.01 False Imprisonment—Merchant’s Defenses. (5/2004)
- 803.00 Abuse of Process. (6/2012)
- 804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)
- 804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery. (3/2016)
- 804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest. (3/2016)
- 804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used. (3/2016)
- 804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages. (3/2016)
- 804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Sample Verdict Sheet. (3/2016)
- 804.06 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Color of State Law. (3/2016)
- 804.07 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Use of Force. (3/2016)
- 804.08 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Lawfulness of Arrest. (3/2016)
- 804.09 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Reasonableness of Force Used. (3/2016)
- 804.10 Excessive Force in Making Arrest—Section 1983 Claim—Damages. (3/2016)
- 804.11 Excessive Force in Making Arrest—Section 1983 Claim—Punitive Damages. (3/2016)
- 804.12 Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet. (3/2016)
- 804.50 Section 1983—Unreasonable Search of Home. (6/2016)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 6. Nuisances and Trespass.

- 805.00 Trespass to Real Property. (6/2015)
- 805.05 Trespass to Real Property—Damages. (5/2001)
- 805.10 Trespass to Personal Property. (5/2001)
- 805.15 Trespass to Personal Property—Damages. (5/2001)
- 805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

- 805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)
- 805.55 Duty of Owner to Lawful Visitor. (6/2011)
- 805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (5/2001)
- 805.60 Duty of Owner to Licensee. (Delete Sheet). (5/1999)
- 805.61 Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
- 805.64 Duty Of Owner to Trespasser—Intentional Harms (6/2013)
- 805.64A Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
- 805.64B Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
- 805.64C Duty of Owner to Trespasser: Position of Peril (6/2013)
- 805.65 Duty of Owner to Trespasser. (6/2013)
- 805.65A Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
- 805.66 Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
- 805.67 Duty of Municipality or County to Users of Public Ways. (5/1990)
- 805.68 Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
- 805.69 Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
- 805.70 Duty of Adjoining Landowners—Negligence. (5/1990)
- 805.71 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
- 805.72 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.73 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
- 805.74 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.80 Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

- 806.00 Conversion. (5/1996)
- 806.01 Conversion—Defense of Abandonment. (5/1996)
- 806.02 Conversion—Defense of Sale (or Exchange). (5/1996)
- 806.03 Conversion—Defense of Gift. (4/2004)
- 806.05 Conversion—Damages. (5/1996)

Chapter 9. Defamation.

- 806.40 Defamation—Preface. (5/2008)
- 806.50 Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (6/2013)
- 806.51 Defamation—Libel Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.53 Defamation—Libel Actionable *Per Se*—Public Figure or Official. (5/2008)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 806.60 Defamation—Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.61 Defamation—Libel Actionable *Per Quod*—Private Figure—Matter of Public Concern. (6/2011)
- 806.62 Defamation—Libel Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.65 Defamation—Slander Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.66 Defamation—Slander Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.67 Defamation—Slander Actionable *Per Se*—Public Figure or Official. (5/2008)
- 806.70 Defamation—Slander Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.71 Defamation—Slander Actionable *Per Quod*—Matter of Public Concern. (5/2008)
- 806.72 Defamation—Slander Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.79 Defamation—Libel Actionable *Per Se*, Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
- 806.81 Defamation Actionable *Per Se*—Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
- 806.82 Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
- 806.83 Defamation Actionable *Per Se*—Public Figure or Official—Presumed Damages. (5/2008)
- 806.84 Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
- 806.85 Defamation—Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

- 807.00 Wrongful Interference with Contract Right. (6/2013)
- 807.10 Wrongful Interference with Prospective Contract. (12/1994)
- 807.20 Slander of Title. (11/2004)
- 807.50 Breach of Duty—Corporate Director. (3/2016)
- 807.52 Breach of Duty—Corporate Officer. (5/2002)
- 807.54 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Closely Held Corporation. (5/2002)
- 807.56 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power. (5/2002)
- 807.58 "Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power—Defense of Good Faith, Care and Diligence." (5/2002)

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

- 809.00 Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
- 809.00A Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
- 809.03 Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
- 809.03A Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
- 809.05 Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.05A Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.06 Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.65A	Medical Malpractice—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider's Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider's Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

VOLUME II

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2014)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)
810.41	Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (1/2000)
810.42	Wrongful Death Damages—In General. (6/2012)
810.44	Wrongful Death Damages—Medical Expenses. (6/2013)
810.44A	Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
810.44B	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.44C	Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.44D	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.46	Wrongful Death Damages—Pain and Suffering. (1/2000)
810.48	Wrongful Death Damages—Funeral Expenses. (6/2013)
810.48A	Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
810.48B	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.48C	Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.48D	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.49	Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
810.50	Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
810.54	Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
810.56	Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
810.60	Property Damages—Issue and Burden of Proof. (2/2000)
810.62	Property Damages—Diminution in Market Value. (2/2000)
810.64	Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
810.66	Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
810.68	Property Damages—Final Mandate. (2/2000)
810.90	Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 810.91 Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
- 810.92 Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
- 810.93 Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
- 810.94 Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
- 810.96 Punitive Damages—Liability of Defendant. (3/2016)
- 810.98 Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

- 811.00 Legal Negligence—Duty to Client (Formerly 809.90) [as represented from Civil Committee] (6/2013)

Chapter 14. Animals.

- 812.00 (Preface) Animals—Liability of Owners and Keepers. (5/1996)
- 812.00 Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)
- 812.01 Animals—Liability of Owner Who Allows Dog to Run at Large at Night. (8/2004)
- 812.02 Animals—Common Law Liability of Owner Whose Domestic Livestock Run at Large with Owner’s Knowledge and Consent. (5/1996)
- 812.03 Miscellaneous Torts—Animals—Common Law Liability of Owner of Domestic Animals. (6/2011)
- 812.04 Animals—Owner’s Negligence In Violation of Animal Control Ordinance. (5/1996)
- 812.05 Animals—Liability of Owner of Dog Which Injures, Kills, or Maims Livestock or Fowl. (5/1996)
- 812.06 Animals—Liability of Owner Who Fails to Destroy Dog Bitten by Mad Dog. (5/1996)
- 812.07 Animals—Statutory (Strict) Liability of Owner of a Dangerous Dog. (5/1996)

Chapter 15. Trade Regulation.

- 813.00 Trade Regulation—Preface. (6/2013)
- 813.05 Model Unfair or Deceptive Trade Practice Charge. (6/2014)
- 813.20 Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
- 813.21 Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
- 813.22 Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
- 813.23 Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
- 813.24 Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
- 813.25 Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
- 813.26 Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
- 813.27 Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
- 813.28 Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
- 813.29 Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
- 813.30 Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
- 813.31 Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
- 813.33 Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
- 813.34 Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
- 813.35 Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 813.36 Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
- 813.37 Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
- 813.38 Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
- 813.39 Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
- 813.40 Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
- 813.41 Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
- 813.60 Trade Regulation—Commerce—Introduction. (6/2015)
- 813.62 Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
- 813.63 Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
- 813.70 Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
- 813.80 Trade Regulation—Damages—Issue of Damages. (5/2006)
- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

- 814.00 Bailments—Issue of Bailment. (5/1996)
- 814.02 Bailments—Bailee’s Negligence—Prima Facie Case. (5/1996)
- 814.03 Bailments—Bailee’s Negligence. (5/1996)
- 814.04 Bailments—Bailor’s Negligence. (5/1996)

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction to RICO Instructions (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2015)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (6/2015)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2015)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2015)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (6/2015)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Good Faith Effort to Rehabilitate. (6/2015)

**Chapter 18. Budget Dispute Between Board of Education and Board of
 County Commissioners.**

- 814.95 Budget Dispute Between Board of Education and Board of County Commissioners
 (5/2015)
- 814.95A Budget Dispute Between Board of Education and Board of County Commissioners—
 Sample Verdict Sheet (3/2016)

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)
- 815.08 Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
- 815.10 Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
- 815.20 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.22 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of
 Pregnancy or Living Children. (1/1999)
- 815.23 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.24 Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
- 815.26 Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge.
 (1/1999)
- 815.27 Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
- 815.28 Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity.
 (1/1999)
- 815.29 Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
- 815.30 Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of
 Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of
 Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth
 of Issue. (1/1999)
- 815.32 Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage
 of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity
 and Understanding—Defense of Ratification. (1/1999)
- 815.40 Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
- 815.42 Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental
 Impairment. (1/1999)
- 815.44 Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
- 815.46 Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct
 of Sane Spouse. (1/1999)
- 815.50 Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
- 815.52 Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
- 815.54 Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
- 815.56 Divorce—From Bed and Board—Issue of Indignities. (8/2004)
- 815.58 Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs.
 (1/1999)
- 815.60 Divorce—From Bed and Board—Issue of Adultery. (1/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (6/2014)
820.10	Adverse Possession—Color of Title. (3/1997)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (5/2016)

Chapter 2. Proof of Title.

820.40	Proof of Title—Marketable Title Act. (5/2001)
820.50	Proof of Title—Connected Chain of Title from the State. (5/2001)
820.60	Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
820.61	Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

825.00	Processioning Action. (N.C.G.S. Ch. 38). (5/2000)
--------	---

Chapter 4. Eminent Domain—Initiated Before January 1, 1982. Deleted. (2/1999)

830.00	Eminent Domain—Procedures. (Delete Sheet). (2/1999)
830.05	Eminent Domain—Total Taking. (Delete Sheet). (2/1999)
830.10	Eminent Domain—Partial Taking—Fee. (Delete Sheet). (2/1999)
830.15	Eminent Domain—Partial Taking—Easement. (Delete Sheet). (2/1999)
830.20	Eminent Domain—General and Special Benefits. (Delete Sheet). (2/1999)
830.30	Eminent Domain—Comparables. (Delete Sheet). (2/1999)

Chapter 5. Eminent Domain—Initiated on or After January 1, 1982.

835.00	Eminent Domain—Series Preface. (4/1999)
835.05	Eminent Domain—Introductory Instruction. (8/2015)
835.05i	Eminent Domain—Introductory Instruction. (Delete Sheet) (8/2015)
835.10	Eminent Domain—Issue of Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12	Eminent Domain—Issue of Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12A	Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.15	Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
835.20	Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.24 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.24A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.30 Eminent Domain—Comparables. (Delete Sheet). (5/1999)

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (6/2015)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (2/1993)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

- 847.00 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Violation of Act—Violation of Ordinance, Rule or Order of Secretary of Environment and Natural Resources or of Local Government. (5/2008)
- 847.01 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Damages. (5/2008)

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

- 855.10 Foreclosure—Action for Deficiency Judgment—Amount of Debt Owed (4/2016)
- 855.12 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Property Fairly Worth Amount Owed (4/2016)
- 855.14 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Bid Substantially Less than True Value of Property on Date of Foreclosure (4/2016)
- 855.16 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—True Value of Property on Date of Foreclosure Sale (3/2016)
- 855.18 Foreclosure—Action for Deficiency Judgment—Sample Verdict Form & Judge's Worksheet (6/2014)

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (6/2014)
- 860.10 Wills—Holographic Wills—Requirements. (8/2004)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (5/2002)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2006)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

- 865.50 Parol Trusts—Express Trust in Purchased Real or Personal Property. (5/2001)
- 865.55 Parol Trusts—Express Trust in Transferred Real or Personal Property. (8/2004)
- 865.60 Parol Trusts—Express Declaration of Trust in Personal Property. (5/2001)
- 865.65 Trusts by Operation of Law—Purchase Money Resulting Trust (Real and Personal Property). (6/2014)
- 865.70 Trusts by Operation of Law—Purchase Money Resulting Trust (Real or Personal Property). (6/2014)
- 865.75 Trusts by Operation of Law—Constructive Trust. (6/2015)

PART VIII. INSURANCE

Chapter 1. Liability for Agent for Failure to Procure Insurance.

- 870.00 Failure to Procure Insurance—Negligence Issue. (6/2013)
- 870.10 Failure to Procure Insurance—Breach of Contract Issue. (2/2005)

Chapter 2. Accident, Accidental Means, and Suicide.

- 870.20 Accidental Means Definition. (5/2005)

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

- 870.21 "Accident" or "Accidental Means" Issue—Effect of Diseased Condition. (5/2005)
- 870.25 Accident Issue. (2/2005)
- 870.30 General Risk Life Insurance Policy—Suicide as a Defense. (3/2005)
- 870.72 Identity Theft—Identifying Information. (6/2010)
- 870.73 Identity Theft—Identifying/Personal Information. (6/2010)

Chapter 3. Disability.

- 880.00 Disability—Continuous and Total Disability Issue. (3/2005)
- 880.01 Disability—Continuous Confinement Within Doors Issue. (3/2005)
- 880.02 Disability—Constant Care of a Licensed Physician Issue. (3/2005)

Chapter 4. Material Misrepresentations.

- 880.14 Misrepresentation in Application for Insurance—Factual Dispute. (5/2005)
- 880.15 Misrepresentation in Application for Insurance—Issue of Falsity of Representation. (5/2005)
- 880.20 Materiality of Misrepresentation in Application for Insurance. (5/2006)
- 880.25 Fire Insurance Policy—Willful Misrepresentation in Application. (5/2005)
- 880.26 Concealment in Application for Non-Marine Insurance. (5/2005)
- 880.30 Misrepresentation in Application—False Answer(s) Inserted by Agent. (Estoppel). (5/2006)

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2015)

Chapter 6. Fire Insurance.

- 910.20 Fire Insurance—Hazard Increased by Insured. (5/2006)
- 910.25 Fire Insurance—Intentional Burning by Insured. (5/2006)
- 910.26 Fire Insurance—Willful Misrepresentation in Application. (5/2006)
- 910.27 Fire Insurance—Defense of Fraudulent Proof of Loss. (5/2006)

Chapter 7. Damages.

- 910.80 Insurance—Damages for Personal Property—Actual Cash Value. (6/1983)
- 910.90 Insurance—Damages for Real Property—Actual Cash Value. (6/1983)

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2016)

NORTH CAROLINA PATTERN JURY INSTRUCTIONS

INTRODUCTION

I.	PREFACE	Page 1
II.	HISTORY	Page 3
III.	USER’S GUIDE	Page 6
IV.	CONCLUSION	Page 10

I. PREFACE

Instructions give guidance to the jury, thereby serving a most important function in the trial process. The Pattern Jury Instructions Committee has attempted in writing these charges to use language that can be readily understood by the jury and at the same time conform to the technicalities of the law. These instructions are intended to provide a useful starting point for lawyers and judges in developing jury instructions for a specific case.

The pattern jury instructions are divided into three large groups: criminal, civil, and motor vehicle negligence. The civil instructions cover the diverse subject areas of contracts, professional liability, miscellaneous torts, family matters, land actions, deeds, wills and trusts, and insurance. The criminal instructions cover various substantive offenses, including most felonies and misdemeanors, as well as various defenses. The motor vehicle instructions cover various forms of negligence in the operation of a motor vehicle.

Preparation of North Carolina Pattern Jury Instructions for trial judges and members of the North Carolina State Bar is an ongoing project which encompasses two basic functions. One function is to prepare new instructions

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

for which there is a demonstrated need based upon new statutes, case decisions or court rules, or for which requests have been received from members of the Bench and Bar. The other function is to revise existing instructions when necessary due to changes in law or policy. While an excellent resource, these instructions do not eliminate the need to individually tailor each charge to the given factual situation and to comply with Rule 51(a) of the North Carolina Rules of Civil Procedure.

The project is carried on by a committee of trial judges chaired by the Honorable Robert H. Hobgood, Senior Resident Judge of the 9th Judicial District. The committee is divided into two subcommittees: one for civil law and one for criminal law matters. Judge Hobgood chairs the Civil Law Subcommittee, while the Criminal Law Subcommittee is chaired by the Honorable Richard L. Doughton, Special Superior Court Judge.

Members and chairpersons are appointed by the President of the Conference of Superior Court Judges of North Carolina. Expenses incident to the Committee's operations are financed by appropriations by the North Carolina legislature.

The two subcommittees are each assisted by a reporter. In turn, the reporters are supported by student research assistants from the state's law schools.

The Committee acknowledges with particular gratitude the assistance and support of Professor Ann Anderson and the School of Government staff who perform the vital functions of printing, storing and distributing these instructions to the North Carolina trial judges. It also handles the administrative chores of scheduling, coordinating and fiscal accounting for the Committee.

N.C.P.I.—Civil .010
 INTRODUCTION.
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

The members and staff of the present Committee wish to express their deepest appreciation to all the former members, advisors and staff who have assisted in the continuing effort to maintain and improve these instructions. We hope it is and will continue to be a valuable service to the Bench, the Bar and the People of North Carolina.

2016-2017 PATTERN JURY INSTRUCTIONS COMMITTEE

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Research Assistant

II. HISTORY

Years ago, judges had to fashion jury instructions for each new case. Jury instructions that were effective or whose use was affirmed on appeal were used again in later cases. Over time, individual judges developed their own notebooks of instructions, and judges often shared instructions among themselves. In essence, a judge's instructions became a "pattern" for that judge and other judges in later cases. However, these individual judges' sets

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

of instructions were less than comprehensive, and there was no system for distributing them among all the judges.

Apparently, Illinois was the first state to have a pattern jury instruction committee, when the Illinois Supreme Court appointed the Supreme Court Committee on Jury Instructions in 1955. Other states soon began to examine the possibility of compiling sets of pattern jury instructions. In 1961, the North Carolina Conference of Superior Court Judges embarked on this process, when Judge J. Will Pless (later Justice of the Supreme Court) appointed a committee composed of Judges Francis O. Clarkson, Chairman, Hugh B. Campbell, and Henry A. McKinnon, Jr., to solicit the state's trial judges for copies of their charges. The committee solicited other judges for copies of their charges and then compiled them in a loose-leaf binder. These instructions consisted primarily of definitions and excerpts from North Carolina Supreme Court decisions. The first set of North Carolina Pattern Jury Instructions was published by the Institute of Government in 1963.

The North Carolina judges were spurred to further action when Judge Robert L. McBride, an Ohio judge, made a presentation to the judges in 1964. Judge McBride authored several books on instructing juries and was largely responsible for the production and publication of the Ohio Jury Instructions. Inspired by Judge McBride's presentation, the Judges Conference of 1965 instructed the committee to proceed with the drafting and publication of pattern instructions that would be understandable to the jury and that would be used by North Carolina judges in instructing the jury. This committee was composed of Judges Henry A. McKinnon, Jr., Hugh B. Campbell, E. Maurice Braswell and Howard H. Hubbard.

The project was promptly endorsed by the North Carolina Bar Association, with Mr. Norwood W. Robinson, chairman of its committee,

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

appointed to work with the judges' committee. It also was endorsed by and received grants from the American Bar Association, the Z. Smith Reynolds Foundation, and the Federal Law Enforcement Assistance Administration. The Institute of Government also participated in the project, assisting with staffing, coordinating the project, and providing the use of its facilities.

Over the next eight years, the committee worked on drafting a new set of pattern jury instructions. In the spring of 1973, the first volume of instructions, which dealt with criminal law, was made available to the Bench and Bar. The second volume, which dealt with motor vehicle negligence, was published in the fall of 1974. Finally, in the summer of 1975, the third volume of civil instructions was made available. In every year since 1973, the committee has drafted new instructions and has revised existing instructions as warranted by statutory and case law developments, as well as suggestions from other judges and attorneys.

In its early years, the committee was fortunate to have as its advisor Henry Brandis, Jr., former Dean of the University of North Carolina School of Law. Over the years, the committee has also benefited from the service of several reporters who assisted with the crafting of the jury instructions. This staff has included: Professor James E. Sizemore of the Wake Forest School of Law; Professor Walter Navin (deceased); Professor Arnold Loewy, Professor Kenneth S. Broun, and Professor Walker Blakey of UNC Law School; Gordon Brown, Attorney; Professor Don Beci of the Campbell University School of Law; the Honorable Joe John; the Honorable Gordon Battle, retired Superior Court Judge, and the Honorable John (Jack) Lewis, retired Court of Appeals and Superior Court Judge, and Mary M. Dillon, Attorney. Currently, the reporters are Robert E. Desmond, Attorney, and Alan Woodlief, Associate Dean and Professor at Elon University School of Law.

The committee is grateful to the School of Government, which has assisted in staffing and coordinating the project, and which has provided us the use of its facilities. It is especially grateful to Professor James Drennan, Mr. L. Poindexter Watts, Mr. Michael Crowell, Mrs. Joan Brannon and Professors Tom Thornburg and Ann Anderson who have devoted a substantial amount of time to the project as coordinators for the committee.

III. USER'S GUIDE

To fully realize the benefits of the pattern jury instructions, the instructions should be carefully selected and amended as dictated by the evidence and applicable law. The following are pointers on using the instructions and tailoring them to a particular case.

ORGANIZATION OF INSTRUCTIONS, TABLE OF CONTENTS, INDEX

As noted in the Preface, the pattern jury instructions are divided into three large groups: criminal, civil, and motor vehicle negligence. Some of the major parts of the pattern jury instructions are the table of contents and the index. The table of contents serves as the outline of the book, showing the grouping of individual instructions within chapters and parts. For each instruction, the date of publication for the instruction is provided. For the criminal instructions, the table of contents indicates the statutory source for the instruction and the structured sentencing offense classification for each substantive offense. The system also contains a descriptive-word index. In this index, instructions are grouped under words describing their subject matter.

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

Instructions numbers are assigned with the intent that instructions dealing with similar subject matters will be grouped together, where practicable. In all chapters, gaps are left for chapter and instruction numbers to be assigned in the future.

STRUCTURE OF INDIVIDUAL INSTRUCTIONS

Most instructions can be broken into several basic parts. In the upper left-hand corner each instruction has the following information that is not read to the jury: the instruction number; the title of the instruction; where applicable, a statutory reference; and the month and year of the most recent edition of the instruction. For criminal instructions, the level of offense (felony, misdemeanor, or infraction) is provided. The introductory paragraph, the body of the instruction, and the mandate are all read by the judge to the jury. Most instructions can be broken into several basic parts. Each instruction has the instruction number in the upper left-hand corner of the first page. A title is also is provided and, where applicable, a statutory reference is listed. The introductory paragraph, the body of the instruction, and the mandate are all read by the judge to the jury. The body of the instruction sets out the elements of the applicable crime, tort, or other matter that must be found by the jury. The mandate restates the matter that must be found by the jury, informing the jury of the burden of proof and its duty to reach a finding on the questions presented to it.

NOTE WELLS AND ENDNOTES

Instructions often contain “note wells” and endnotes. “Note wells” are not read to the jury; rather, they are intended as cautionary instructions or suggestions for the judge. Often, note wells explain possible edits that might be necessary, or they alert the judge to potential pitfalls to avoid. Endnotes are usually not read to the jury, but may be used by the judge to craft

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

additional instructions if the judge or parties believe they are necessary, or if the jury requests additional instructions. Endnotes often provide citations to relevant statutes and appellate cases, as well as definitions and explanations of the elements or terms used. In some cases, they may contain instructions to the judge much like the “note wells.”

NEED FOR ADAPTATION IN INDIVIDUAL CASES

The pattern jury instructions are intended to state the law applicable in typical fact situations. In some instances the facts may call into play alternative rules of law or special rules, exceptions, or defenses and make the pattern instruction partially or totally inapplicable. The forms contain additional or substitute language at certain places in an attempt to suggest adjustment for frequently encountered factual variations. It would be impossible, however, to suggest all possible variations and changes to the instructions. Hence, all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to jury.

One modification that may be consistently necessary is one with regard to the number and gender of persons treated in the instructions. More recently-drafted instructions use gender neutral terms, but earlier instructions often used male pronouns with the idea that the female pronoun would be substituted where appropriate. The third person singular form is often utilized and can also be adjusted as necessary.

USE OF BRACKETS, PARENTHESES, AND TYPE STYLES

For purposes of clarity and consistency, the committee has used the following rules in editing its instructions:

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

(1) The words to be spoken by the judge to the jury are in regular type. For example: “The motor vehicle law provides that a special speed limitation”

(2) Directions as to facts information that the judge must insert or add to the instruction are set out in parentheses and are italicized. For example: “. . . the maximum safe speed was (*state maximum speed limit*)” .

(3) Alternative words or phrases are indicated in brackets. The judge must choose the bracketed terms that are appropriate under the facts of the particular case. For example, in the phrase “the defendant [used] [displayed] a firearm,” the judge should choose which of the two bracketed terms is appropriate given the evidence presented. It is possible that the evidence could support the use of both terms.

(4) Optional language is contained in parentheses. The optional parenthetical phrases should be given only when warranted by the evidence. For example, in the phrase “the State must prove that the defendant acted intentionally (and without justification or excuse),” the judge should only use the parenthetical phrase when there is some evidence that the defendant’s actions were justified or might be excused.

N.C.P.I.—Civil .010
INTRODUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

IV. CONCLUSION

The Committee welcomes all suggestions and observations for the improvement of the instructions. Please send messages to the following addresses:

For civil instructions:

Hon. Robert H. Hobgood
PO Box 704
Louisburg, NC 27549

Mr. Robert E. Desmond
PO Box 2611
Raleigh, NC 27602.2611

For criminal instructions:

Hon. Richard L. Doughton
PO Box 458
Sparta, NC 28675

Alan Woodlief
201 N. Greene Street
Greensboro, NC 27455

N.C.P.I.—Civil 102.12
NEGLIGENCE ISSUE—DEFINITION OF NEGLIGENCE IN AND OF ITSELF
(NEGLIGENCE *PER SE*)
GENERAL CIVIL VOLUME
REPLACEMENT AUGUST 2015

102.12 NEGLIGENCE ISSUE—DEFINITION OF NEGLIGENCE IN AND OF ITSELF (NEGLIGENCE *PER SE*).

Every person is (also) under a duty to follow standards of conduct enacted as laws for the safety of the public. A standard of conduct established by a safety statute must be followed.¹ A person's failure to do so is negligence in and of itself.²

¹ *Aldridge v. Hasty*, 240 N.C. 353, 360, 82 S.E.2d 331, 338 (1954). "A public safety statute is one impos[ing] upon [the defendant] a specific duty for the protection of others." *Pope v. Bridge Broom, Inc.*, ___ N.C. App. ___, ___, 770 S.E.2d 702, 715 (2015) (citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (internal citations omitted)). Recommendations, guidance and options that do not impose a specific duty are insufficient to establish negligence *per se*. *Id.* at 717.

² *Hinnant v. Holland*, 92 N.C. App. 142, 147, 374 S.E.2d 152, 155 (1988), appeal denied, 324 N.C. 335, 378 S.E.2d 792 (1989). If a safety statute provides to the contrary, the jury should be instructed that a violation of this statute does not constitute negligence in and of itself. See *Mintz v. Foster*, 35 N.C. App. 638, 641-42, 242 S.E.2d 181, 183-84 (1978).

N.C.P.I.—Civil 102.65
INSULATING/INTERVENING NEGLIGENCE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

102.65 INSULATING/INTERVENING NEGLIGENCE.¹

A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person and causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first person's negligence. Under such circumstances, the negligence of the second person, not reasonably foreseeable by the first person, insulates the negligence of the first person and would be the sole proximate cause of the [injury] [damage].²

In this case, the defendant, (*state name of defendant*),³ contends that if *he* was negligent, which *he* denies, such negligence was not a proximate cause of the plaintiff's [injury] [damage] because it was insulated by the negligence of (*state name of other person who defendant alleges was negligent*).

You will consider this matter only if you find that the defendant was negligent. If you do so find, the defendant's negligence would be insulated- and the defendant would not be liable to the plaintiff- if the negligence of (*state name of other person*) was such as to have broken the causal connection or sequence between the defendant's negligence and the plaintiff's [injury] [damage], thereby excluding the defendant's negligence as a proximate cause. The negligence of (*state name of other person*) would thus become as between the negligence of the defendant and (*state name of other person*), the sole proximate cause of the plaintiff's [injury] [damage].⁴

On the other hand, if the causal connection between the negligence of the defendant and the plaintiff's [injury] [damage] was not broken, and the

N.C.P.I.—Civil 102.65
 INSULATING/INTERVENING NEGLIGENCE.
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

defendant's negligence continued to be a proximate cause of the plaintiff's [injury] [damage] up to the moment of [the collision] [(describe other occurrence)],⁵ then the defendant would be liable to the plaintiff.⁶

If, at the time of the defendant's negligent act, the defendant reasonably could have foreseen⁷ negligent conduct which was likely to produce [injury] [damage] on the part of one in the position of (*state name of other person*),⁸ the causal connection would not be broken, and the negligence of the defendant would not be prevented from being a proximate cause of the plaintiff's [injury] [damage].

However, if the negligence of the defendant would not have resulted in the plaintiff's [injury] [damage] except for the negligence of (*state name of other person*), and if negligence and resulting injury on the part of one in the position of (*state name of other person*) was not reasonably foreseeable to the defendant, then the causal connection would be broken and the negligence of the defendant (*state name of defendant*) would not be a proximate cause of the plaintiff's [injury] [damage].⁹

The burden is not on the defendant to prove that *his* negligence, if any, was insulated by the negligence of (*state name of other person*). Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury] [damage].

1 NOTE WELL: Insulating negligence, also referred to in North Carolina case law as *intervening or superseding negligence*, Barber v. Constien, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998), is not a separate issue.

"The law of intervening negligence provides that under certain circumstances another sufficiently independent act, unassociated with defendant's initial negligence, may insulate

N.C.P.I.—Civil 102.65
 INSULATING/INTERVENING NEGLIGENCE.
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

defendant from liability.” David A. Logan & Wayne A. Logan, *North Carolina Torts* § 7.30, 166 (1996). See also *Strong’s North Carolina Index* 4th § 20 (2010):

In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party as one of the proximate causes of the injury. (citation omitted).

“[T]he question of whether the intervening negligence of another tort-feasor will operate to insulate the negligence of the original tort-feasor is ordinarily a question for the jury.” *Tabor v. Kaufman*, 196 N.C. App. 745, 748, 675 S.E.2d 701, 703 (2009) (citation omitted). This is “[b]ecause ‘[p]roximate cause is an inference of fact [and] [i]t is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not.’” *Id.* (citation and emphasis omitted).

“The doctrine of insulating negligence is an elaboration of a phase of proximate cause. Where proper instructions on proximate cause are given, the court is under no duty to instruct the jury specifically with respect to insulating negligence in the absence of proper request[.]” *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967). But even when the instruction is requested, the burden of proof does not shift to the defendant to prove that *his* negligence, if any, was insulated by the negligence of another party. The burden remains with the plaintiff, because “[s]uperseding or insulating negligence is an extension of plaintiff’s burden of proof on proximate cause.” *Clarke v. Mikhail*, ___ N.C. App. ___, 779 S.E.2d 150, 158 (2015).

The instruction, when given, will often follow the instruction on joint and concurring negligence. See N.C.P.I.—Civil 102.60 (“Concurring Negligence”).

2 See *Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906):

“An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. . . . If . . . the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening cause may be culpable, intentional, or merely negligent.” (citation omitted).

3 Should it be the plaintiff who claims insulating negligence, this instruction must be adapted accordingly.

4 See *Strong’s*, *supra* note 1 (“Intervening negligence of an outside agency or responsible third person will insulate prior negligence only if the intervening negligence is the sole proximate cause of the injury.”(footnote omitted)); *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 44, 493 S.E.2d 460, 465 (1997) (“Insulating negligence ‘is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.’” (citation omitted)).

N.C.P.I.—Civil 102.65
 INSULATING/INTERVENING NEGLIGENCE.
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

5 See *Strong's*, *supra* note 1 ("If the negligence of the first party continues to be a proximate cause up to the moment of injury, it cannot be insulated by the negligence of a second party." (footnote omitted)).

6 See *Batts v. Faggart*, 260 N.C. 641, 645, 133 S.E.2d 504, 507 (1963):

"The question always is, [w]as there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application." (quoting *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U.S. 469, 475 (1876)).

7 See *Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) ("The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur."); *cf. Barber*, 130 N.C. App. at 385–89, 502 S.E. 2d at 915–19 (rejecting an earlier version of this pattern instruction for its failure to include a charge on "reasonable foreseeability").

8 See *Tabor*, 196 N.C. App. at 748, 675 S.E.2d at 703 ("The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." (citation and internal quotations omitted)); *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) ("[I]n order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.").

9 For illustrative cases, see *Tabor*, 196 N.C. App. at 749–750, 675 S.E.2d at 704:

Defendant [Kaufman] was traveling on the highway in front of Plaintiff when Defendant came to a sudden stop and turned left without using his turn signal. As a result, Plaintiff and the driver of a vehicle behind her (vehicle two) slammed on their brakes and were able to come to a complete stop on the highway. However, a third vehicle driven by [2nd Defendant] Thibodeaux was unable to stop and collided with the rear of vehicle two, causing vehicle two to collide with Plaintiff's vehicle [T]here [is] a genuine issue of material fact as to whether the collision caused by Thibodeaux's negligence was a foreseeable result of Defendant's negligent actions.

See also *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 151–52, 296 S.E.2d 302, 307 (1982), where the defendant braked suddenly and was struck from the rear by the plaintiff who was unable to stop and slid into the defendant. A third vehicle behind the plaintiff came to a complete stop, but a fourth vehicle was unable to stop and collided with the third vehicle pushing it into the rear of the plaintiff's vehicle. See *id.* at 152, 296 S.E.2d at 307:

In terms of proximate causation[,] it is not unforeseeable that one or more, if not all, of the following cars will not be able to stop in time to avoid a "chain reaction" collision. The probable consequences reasonably to be anticipated

N.C.P.I.—Civil 102.65
INSULATING/INTERVENING NEGLIGENCE.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

from suddenly stopping on a highway are exactly those outlined here, a line of cars undergoing a series of impacts in an unbroken sequence.

See also Hester, 41 N.C. App. at 510-14, 255 S.E.2d at 320-21, where the defendant abruptly slowed and turned off the road without using a turn signal. The plaintiff braked and came to a complete stop, but a third vehicle traveling behind the plaintiff failed to stop and crashed into the rear of the plaintiff's vehicle. The Court held that the facts did "not establish intervening negligence as a matter of law and that the negligence of the defendant[] might have set in motion a chain of circumstances leading up to plaintiff's injuries."

N.C.P.I.—Civil 102.87

WILLFUL AND MALICIOUS CONDUCT ISSUE—USED TO DEFEAT PARENT-CHILD IMMUNITY.

GENERAL CIVIL VOLUME

MARCH 2016

102.87 WILLFUL AND MALICIOUS CONDUCT ISSUE—USED TO DEFEAT PARENT-CHILD IMMUNITY.

(NOTE WELL: Use this instruction only where the plaintiff-child seeks to overcome the defendant-parent's immunity by proving defendant's conduct was willful and malicious.)

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged] by the willful and malicious conduct of the defendant?"

An unemancipated child may not recover in an action against *his* parent for ordinary negligence.¹ However, the plaintiff-child may recover when the defendant's conduct is willful and malicious.²

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 the defendant engaged in willful and malicious conduct and that such conduct caused [injury] [damage] to the plaintiff.

Willful conduct is conduct done purposely and deliberately in violation of law, or done knowingly and of a set purpose, or done without regard for reason.³

An act is malicious if it is deliberately done, without just cause, excuse or justification, and it is reasonably calculated to injure another [others].⁴

The plaintiff not only has the burden of proving willful and malicious conduct, but also that such willful and malicious conduct caused [injury] [damage] to the plaintiff.

N.C.P.I.—Civil 102.87

WILLFUL AND MALICIOUS CONDUCT ISSUE—USED TO DEFEAT PARENT-CHILD IMMUNITY.

GENERAL CIVIL VOLUME

MARCH 2016

In this case, the plaintiff contends, and the defendant denies, that the defendant engaged in willful and malicious conduct in one or more of the following respects:

(Read all contentions of willful and malicious conduct supported by the evidence.)

You must decide whether such conduct occurred and, if it did occur, whether such conduct was willful and malicious.

The plaintiff further contends, and the defendant denies, that such alleged willful and malicious conduct caused [injury] [damage] to the plaintiff.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant's conduct was willful and malicious, and that such conduct caused [injury][damage] to 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.

1 *Doe By & Through Connolly v. Holt*, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992).

2 *Id.* at 96, 418 S.E.2d at 514. See also *Needham v. Price*, ___ N.C. ___, 780 S.E.2d 549 (2015), *rev'g in part* ___ N.C. App. ___, 768 S.E.2d 160 (reversing the Court of Appeals' conclusion that allegations of gross negligence or willful and wanton conduct were sufficient to overcome parent-child immunity and holding that "anything short of willful and malicious conduct does not support a valid claim against the parent").

3 *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001).

4 *Doe*, 332 N.C. at 96, 418 S.E.2d at 514.

N.C.P.I.—Civil 736.00

QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2016

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,

N.C.P.I.—Civil 736.00

QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2016

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.

N.C.P.I.—Civil 736.00

QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2016

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.*, 234 N.C. App. 680, 690, 759 S.E.2d 696, 702 (2014). But an implied contract cannot be substituted for an express contract rendered unenforceable by public policy. See *Johnson v. Starboard Ass'n*, ___ N.C. App. ___, ___, 781 S.E.2d 813, 821 (2016) (citing *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) for the proposition that "if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*").

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

N.C.P.I.—Civil 736.00

QUANTUM MERUIT—QUASI CONTRACT—CONTRACT IMPLIED AT LAW.

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2016

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 v. Sanders*, 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 *Johnson v. Starboard Ass'n*, __ N.C. App. __, __, 781 S.E.2d 813, 821 (2016) (evidence that individual unit owners voted against renovations and paid first assessment to condominium association under protest found sufficient to submit issue of voluntary acceptance to the jury); *McCoy v. Peach*, 40 N.C. App. 6, 9, 251 S.E.2d 881, 883 (1979); *Everitt v. Walker*, 109 N.C. 129, 129, 13 S.E. 860, 861 (1891).

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

June 1975
Reprinted June 2016

Volume II

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES: *Dates the instructions were adopted are found in parentheses after the title of the instruction.

PART I. GENERAL

Chapter 1. Preliminary Instructions.

100.10	Opening Statement. (12/2004)
100.15	Cameras and Microphones in Courtroom. (5/2004)
100.20	Recesses. (6/2010)
100.21	Recesses. (6/2010)
100.40	Deposition Testimony. (5/2004)
100.44	Interrogatories. (12/2004)
100.70	Taking of Notes by Jurors. (5/2004)
101.00	Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
101.05	Function of the Jury. (3/1994)
101.10	Burden of Proof and Greater Weight of the Evidence. (3/1994)
101.11	Clear, Strong, and Convincing Evidence. (11/2004)
101.14	Judicial Notice. (10/1983)
101.15	Credibility of Witness. (3/1994)
101.20	Weight of the Evidence. (3/1994)
101.25	Testimony of Expert Witness. (2/1994)
101.30	Testimony of Interested Witness. (3/1994)
101.32	Evidence—Limitation as to Parties. (10/1983)
101.33	Evidence—Limitation as to Purpose. (10/1983)
101.35	Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
101.36	Impeachment of Witness or Party by Proof of Crime. (4/1986)
101.37	Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
101.38	Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
101.39	Evidence—Spoliation by a Party. (6/2010)
101.40	Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
101.41	Stipulations. (1/1988)
101.42	Requests for Admissions. (1/1988)
101.43	Deposition Evidence. (4/1988)
101.45	Circumstantial Evidence. (10/1985)
101.46	Definition of [Intent] [Intentionally]. (5/2004)
101.50	Duty to Recall Evidence. (3/1994)
101.60	Issues. (3/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 101.62 Presumptions. (4/1984)
- 101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

- 102.10 Negligence Issue—Burden of Proof. (5/1994)
- 102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
- 102.11 Negligence Issue—Definition of Common Law Negligence. (3/1994)
- 102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
- 102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
- 102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
- 102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
- 102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
- 102.20 Proximate Cause—Peculiar Susceptibility. (4/1998)
- 102.26 Proximate Cause—Act of God. (5/1994)
- 102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
- 102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
- 102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
- 102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
- 102.35 Contentions of Negligence. (3/1994)
- 102.50 Final Mandate—Negligence Issue. (3/1994)
- 102.60 Concurring Negligence. (3/2005)
- 102.65 Insulating/Intervening Negligence. (6/2016)
- 102.84 Negligence—Infliction of Severe Emotional Distress. (4/1998)
- 102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
- 102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
- 102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
- 102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
- 102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

- 103.10 Agency Issue—Burden of Proof—When Principal Is Liable. (5/2009)
- 103.15 Independent Contractor. (5/1992)
- 103.30 Agency Issue—Civil Conspiracy (One Defendant). (5/2004)
- 103.31 Agency Issue—Civil Conspiracy (Multiple Defendants). (5/2004)
- 103.40 Disregard of Corporate Entity of Affiliated Company—Instrumentality Rule (“Piercing the Corporate Veil”). (6/2014)
- 103.50 Agency—Departure from Employment. (10/1985)
- 103.55 Agency—Willful and Intentional Injury Inflicted by an Agent. (10/1985)
- 103.70 Agency Issue—Final Mandate. (10/1985)

Chapter 3a. Contributory Negligence Instructions.

- 104.10 Contributory Negligence Issue—Burden of Proof—Definition. (3/1994)
- 104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 104.35 Contentions of Contributory Negligence. (3/1994)
- 104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

- 108.75 Negligence of Third Party Tort-Feasor—Contribution. (10/1985)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 5. Summary Instructions.

- 150.10 Jury Should Consider All Contentions. (3/1994)
- 150.12 Jury Should Render Verdict Based on Fact, Not Consequences. (3/1994)
- 150.20 The Court Has No Opinion. (3/1994)
- 150.30 Verdict Must Be Unanimous. (3/1994)
- 150.40 Selection of Foreperson. (3/1994)
- 150.45 Concluding Instructions—When To Begin Deliberations, Charge Conference. (3/1994)
- 150.50 Failure of Jury to Reach a Verdict. (10/1980)
- 150.60 Discharging the Jury. (5/1988)

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

- 501.00 Introduction to Contract Series. (5/2003)

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation. (5/2003)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (5/2003)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (5/2003)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

502.05	Contracts—Issue of Breach By Repudiation. (6/2013)
502.10	Contracts—Issue of Breach By Prevention. (5/2003)
502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (5/2003)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)
	Chapter 4. Issue of Common Law Remedy.
503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)
503.45	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.48	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.51	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
503.54	Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
503.70	Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
503.73	Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
503.75	Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
503.76	Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
503.79	Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
503.90	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
503.91	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
503.94	Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
503.97	Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)
	Chapter 5. Issue of UCC Remedy.
504.00	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
504.03	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
504.06	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
504.09	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
504.12	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
504.15	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
504.18	Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
504.21	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
504.24	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
504.27	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
504.30	Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
504.33	Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 504.36 Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
- 504.39 Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
- 504.42 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)
- 504.45 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Undelivered Goods. (5/2003)
- 504.48 Contracts—Issue of UCC Remedy—Defense (Offset) of Failure to Mitigate. (5/2003)
- 504.51 Contracts—Issue of UCC Remedy—Validity of Liquidated Damages Provision. (5/2003)
- 504.54 Contracts—Issue of UCC Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 6. Minor’s Claims Where Contract Disavowed.

- 505.20 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed. (5/2003)
- 505.25 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed—Measure of Recovery. (5/2003)

Chapter 7. Agency.

- 516.05 Agency—Actual and Apparent Authority of General Agent. (6/2013)
- 516.15 Agency—Ratification. (6/2011)
- 516.30 Agency—Issue of Undisclosed Principal—Liability of Agent. (4/2005)
- 517.20 Breach of Contract—Special Damages—Loss of Profits. (6/2013)

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

- 635.20 Action on Unverified Account—Issue of Liability. (5/1991)
- 635.25 Action on Unverified Account—Issue of Amount Owed. (5/1991)
- 635.30 Action on Verified Itemized Account. (5/1991)
- 635.35 Action on Account Stated. (6/2014)
- 635.40 Action on Account—Defense of Payment. (5/1991)

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2010)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (6/2014)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (5/2004)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (5/2009)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

640.29C	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Pretext Case</i> . (6/2010)
640.29D	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Plaintiff). (6/2010)
640.29E	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Defendant). (5/2009)
640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (4/1998)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (6/2014)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

645.20	Covenants Not to Compete—Issue of the Existence of the Covenant. (6/2015)
645.30	Covenants Not to Compete—Issue of Whether Covenant was Breached. (5/1976)
645.50	Covenants not to Compete—Issue of Damages. (5/2006)

Chapter 12. Actions for Services Rendered a Decedent.

714.18	Products Liability—Military Contractor Defense. (6/2007)
735.00	Action for Services Rendered a Decedent—Issue of Existence of Contract. (11/2/2004)
735.05	Action for Services Rendered a Decedent—Evidence of Promise to Compensate by Will. (12/1977)
735.10	Action for Services Rendered a Decedent—Presumption that Compensation Is Intended. (5/1978)
735.15	Action for Services Rendered a Decedent—Presumption of Gratuuity by Family Member. (12/1977)
735.20	Action for Services Rendered a Decedent—Issue of Breach of Contract. (12/1977)
735.25	Action for Services Rendered a Decedent—Issue of Recovery. (12/1977)
735.30	Action for Services Rendered a Decedent—Issue of Recovery—Benefits or Offsets. (10/1977)
735.35	Action for Services Rendered a Decedent—Issue of Recovery—Evidence of Value of Specific Property. (10/1977)
735.40	Action for Services Rendered a Decedent—Issue of Recovery—Statute of Limitations. (5/1978)

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
--------	---

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 736.01 Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

- 741.00 Warranties in Sales of Goods. (5/1999)
 741.05 Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
 741.10 Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
 741.15 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
 741.16 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
 741.17 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
 741.18 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
 741.20 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
 741.25 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.26 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.27 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.28 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.30 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.31 Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.32 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.33 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.34 Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.35 Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
 741.40 Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
 741.45 Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
 741.50 Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
 741.60 Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
 741.65 Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 741.66 Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
- 741.67 Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
- 741.70 Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)
- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

- 743.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 743.06 Products Liability—Exception To Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 743.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 743.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (5/1999)
- 743.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use In Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 743.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 744.06 Products Liability—Exception to Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 744.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 744.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (6/2010)
- 744.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use in Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 744.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.12 Products Liability—Seller’s and Manufacturer’s Defense of Open and Obvious Risk. (5/1999)
- 744.13 Products Liability—Prescription Drugs—Seller’s and Manufacturer’s Defense of Delivery of Adequate Warning or Instruction to Prescribers or Dispensers. (5/1999)
- 744.16 Products Liability—Manufacturer’s Defense of Inherent Characteristic. (5/1999)
- 744.17 Products Liability—Prescription Drugs—Manufacturer’s Defense of Unavoidably Unsafe Aspect. (5/1999)
- 744.18 Products Liability—Statute of Limitations. (6/2010)

Chapter 3. New Motor Vehicle Warranties (“Lemon Law”).

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 745.07 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessor. (6/2015)
- 745.13 New Motor Vehicles Warranties Act ("Lemon Law")—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder's Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2010)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2014)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (5/2002)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2010)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)

- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (6/2010)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)

- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)

Chapter 3A. Infliction of Emotional Distress.

- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)

Chapter 3B. Loss of Consortium.

- 800.65 Action for Loss of Consortium. (12/1999)

Chapter 4. Invasion of Privacy.

- 800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)
- 800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)
- 800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use. (5/2001)
- 800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—Damages. (5/2001)

Chapter 5. Malicious Prosecution, False Imprisonment, and Abuse of Process.

- 801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)
- 801.01 Malicious Prosecution—Civil Proceeding. (1/1995)
- 801.05 Malicious Prosecution—Damages. (10/1994)
- 801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice. (5/2001)
- 802.00 False Imprisonment. (6/2014)
- 802.01 False Imprisonment—Merchant’s Defenses. (5/2004)
- 803.00 Abuse of Process. (6/2012)
- 804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)
- 804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery. (3/2016)
- 804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest. (3/2016)
- 804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used. (3/2016)
- 804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages. (3/2016)
- 804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Sample Verdict Sheet. (3/2016)
- 804.06 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Color of State Law. (3/2016)
- 804.07 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Use of Force. (3/2016)
- 804.08 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Lawfulness of Arrest. (3/2016)
- 804.09 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Reasonableness of Force Used. (3/2016)
- 804.10 Excessive Force in Making Arrest—Section 1983 Claim—Damages. (3/2016)
- 804.11 Excessive Force in Making Arrest—Section 1983 Claim—Punitive Damages. (3/2016)
- 804.12 Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet. (3/2016)
- 804.50 Section 1983—Unreasonable Search of Home. (6/2016)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 6. Nuisances and Trespass.

- 805.00 Trespass to Real Property. (6/2015)
- 805.05 Trespass to Real Property—Damages. (5/2001)
- 805.10 Trespass to Personal Property. (5/2001)
- 805.15 Trespass to Personal Property—Damages. (5/2001)
- 805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

- 805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)
- 805.55 Duty of Owner to Lawful Visitor. (6/2011)
- 805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (5/2001)
- 805.60 Duty of Owner to Licensee. (Delete Sheet). (5/1999)
- 805.61 Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
- 805.64 Duty Of Owner to Trespasser—Intentional Harms (6/2013)
- 805.64A Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
- 805.64B Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
- 805.64C Duty of Owner to Trespasser: Position of Peril (6/2013)
- 805.65 Duty of Owner to Trespasser. (6/2013)
- 805.65A Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
- 805.66 Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
- 805.67 Duty of Municipality or County to Users of Public Ways. (5/1990)
- 805.68 Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
- 805.69 Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
- 805.70 Duty of Adjoining Landowners—Negligence. (5/1990)
- 805.71 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
- 805.72 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.73 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
- 805.74 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.80 Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

- 806.00 Conversion. (5/1996)
- 806.01 Conversion—Defense of Abandonment. (5/1996)
- 806.02 Conversion—Defense of Sale (or Exchange). (5/1996)
- 806.03 Conversion—Defense of Gift. (4/2004)
- 806.05 Conversion—Damages. (5/1996)

Chapter 9. Defamation.

- 806.40 Defamation—Preface. (5/2008)
- 806.50 Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (6/2013)
- 806.51 Defamation—Libel Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.53 Defamation—Libel Actionable *Per Se*—Public Figure or Official. (5/2008)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 806.60 Defamation—Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.61 Defamation—Libel Actionable *Per Quod*—Private Figure—Matter of Public Concern. (6/2011)
- 806.62 Defamation—Libel Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.65 Defamation—Slander Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.66 Defamation—Slander Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.67 Defamation—Slander Actionable *Per Se*—Public Figure or Official. (5/2008)
- 806.70 Defamation—Slander Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.71 Defamation—Slander Actionable *Per Quod*—Matter of Public Concern. (5/2008)
- 806.72 Defamation—Slander Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.79 Defamation—Libel Actionable *Per Se*, Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
- 806.81 Defamation Actionable *Per Se*—Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
- 806.82 Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
- 806.83 Defamation Actionable *Per Se*—Public Figure or Official—Presumed Damages. (5/2008)
- 806.84 Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
- 806.85 Defamation—Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

- 807.00 Wrongful Interference with Contract Right. (6/2013)
- 807.10 Wrongful Interference with Prospective Contract. (12/1994)
- 807.20 Slander of Title. (11/2004)
- 807.50 Breach of Duty—Corporate Director. (3/2016)
- 807.52 Breach of Duty—Corporate Officer. (5/2002)
- 807.54 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Closely Held Corporation. (5/2002)
- 807.56 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power. (5/2002)
- 807.58 "Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power—Defense of Good Faith, Care and Diligence." (5/2002)

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

- 809.00 Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
- 809.00A Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
- 809.03 Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
- 809.03A Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
- 809.05 Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.05A Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.06 Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.65A	Medical Malpractice—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider's Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider's Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

VOLUME II

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2014)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)
810.41	Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (1/2000)
810.42	Wrongful Death Damages—In General. (6/2012)
810.44	Wrongful Death Damages—Medical Expenses. (6/2013)
810.44A	Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
810.44B	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.44C	Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.44D	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.46	Wrongful Death Damages—Pain and Suffering. (1/2000)
810.48	Wrongful Death Damages—Funeral Expenses. (6/2013)
810.48A	Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
810.48B	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.48C	Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.48D	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.49	Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
810.50	Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
810.54	Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
810.56	Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
810.60	Property Damages—Issue and Burden of Proof. (2/2000)
810.62	Property Damages—Diminution in Market Value. (2/2000)
810.64	Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
810.66	Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
810.68	Property Damages—Final Mandate. (2/2000)
810.90	Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 810.91 Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
- 810.92 Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
- 810.93 Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
- 810.94 Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
- 810.96 Punitive Damages—Liability of Defendant. (3/2016)
- 810.98 Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

- 811.00 Legal Negligence—Duty to Client (Formerly 809.90) [as represented from Civil Committee] (6/2013)

Chapter 14. Animals.

- 812.00 (Preface) Animals—Liability of Owners and Keepers. (5/1996)
- 812.00 Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)
- 812.01 Animals—Liability of Owner Who Allows Dog to Run at Large at Night. (8/2004)
- 812.02 Animals—Common Law Liability of Owner Whose Domestic Livestock Run at Large with Owner’s Knowledge and Consent. (5/1996)
- 812.03 Miscellaneous Torts—Animals—Common Law Liability of Owner of Domestic Animals. (6/2011)
- 812.04 Animals—Owner’s Negligence In Violation of Animal Control Ordinance. (5/1996)
- 812.05 Animals—Liability of Owner of Dog Which Injures, Kills, or Maims Livestock or Fowl. (5/1996)
- 812.06 Animals—Liability of Owner Who Fails to Destroy Dog Bitten by Mad Dog. (5/1996)
- 812.07 Animals—Statutory (Strict) Liability of Owner of a Dangerous Dog. (5/1996)

Chapter 15. Trade Regulation.

- 813.00 Trade Regulation—Preface. (6/2013)
- 813.05 Model Unfair or Deceptive Trade Practice Charge. (6/2014)
- 813.20 Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
- 813.21 Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
- 813.22 Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
- 813.23 Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
- 813.24 Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
- 813.25 Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
- 813.26 Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
- 813.27 Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
- 813.28 Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
- 813.29 Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
- 813.30 Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
- 813.31 Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
- 813.33 Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
- 813.34 Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
- 813.35 Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 813.36 Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
- 813.37 Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
- 813.38 Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
- 813.39 Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
- 813.40 Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
- 813.41 Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
- 813.60 Trade Regulation—Commerce—Introduction. (6/2015)
- 813.62 Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
- 813.63 Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
- 813.70 Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
- 813.80 Trade Regulation—Damages—Issue of Damages. (5/2006)
- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

- 814.00 Bailments—Issue of Bailment. (5/1996)
- 814.02 Bailments—Bailee’s Negligence—Prima Facie Case. (5/1996)
- 814.03 Bailments—Bailee’s Negligence. (5/1996)
- 814.04 Bailments—Bailor’s Negligence. (5/1996)

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction to RICO Instructions (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2015)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (6/2015)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2015)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2015)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (6/2015)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Good Faith Effort to Rehabilitate. (6/2015)

**Chapter 18. Budget Dispute Between Board of Education and Board of
 County Commissioners.**

- 814.95 Budget Dispute Between Board of Education and Board of County Commissioners
 (5/2015)
- 814.95A Budget Dispute Between Board of Education and Board of County Commissioners—
 Sample Verdict Sheet (3/2016)

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)
- 815.08 Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
- 815.10 Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
- 815.20 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.22 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of
 Pregnancy or Living Children. (1/1999)
- 815.23 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.24 Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
- 815.26 Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge.
 (1/1999)
- 815.27 Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
- 815.28 Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity.
 (1/1999)
- 815.29 Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
- 815.30 Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of
 Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of
 Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth
 of Issue. (1/1999)
- 815.32 Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage
 of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity
 and Understanding—Defense of Ratification. (1/1999)
- 815.40 Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
- 815.42 Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental
 Impairment. (1/1999)
- 815.44 Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
- 815.46 Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct
 of Sane Spouse. (1/1999)
- 815.50 Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
- 815.52 Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
- 815.54 Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
- 815.56 Divorce—From Bed and Board—Issue of Indignities. (8/2004)
- 815.58 Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs.
 (1/1999)
- 815.60 Divorce—From Bed and Board—Issue of Adultery. (1/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (6/2014)
820.10	Adverse Possession—Color of Title. (3/1997)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (5/2016)

Chapter 2. Proof of Title.

820.40	Proof of Title—Marketable Title Act. (5/2001)
820.50	Proof of Title—Connected Chain of Title from the State. (5/2001)
820.60	Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
820.61	Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

825.00	Processioning Action. (N.C.G.S. Ch. 38). (5/2000)
--------	---

Chapter 4. Eminent Domain—Initiated Before January 1, 1982. Deleted. (2/1999)

830.00	Eminent Domain—Procedures. (Delete Sheet). (2/1999)
830.05	Eminent Domain—Total Taking. (Delete Sheet). (2/1999)
830.10	Eminent Domain—Partial Taking—Fee. (Delete Sheet). (2/1999)
830.15	Eminent Domain—Partial Taking—Easement. (Delete Sheet). (2/1999)
830.20	Eminent Domain—General and Special Benefits. (Delete Sheet). (2/1999)
830.30	Eminent Domain—Comparables. (Delete Sheet). (2/1999)

Chapter 5. Eminent Domain—Initiated on or After January 1, 1982.

835.00	Eminent Domain—Series Preface. (4/1999)
835.05	Eminent Domain—Introductory Instruction. (8/2015)
835.05i	Eminent Domain—Introductory Instruction. (Delete Sheet) (8/2015)
835.10	Eminent Domain—Issue of Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12	Eminent Domain—Issue of Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12A	Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.15	Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
835.20	Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.24 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.24A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.30 Eminent Domain—Comparables. (Delete Sheet). (5/1999)

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (6/2015)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (2/1993)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

- 847.00 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Violation of Act—Violation of Ordinance, Rule or Order of Secretary of Environment and Natural Resources or of Local Government. (5/2008)
- 847.01 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Damages. (5/2008)

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

- 855.10 Foreclosure—Action for Deficiency Judgment—Amount of Debt Owed (4/2016)
- 855.12 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Property Fairly Worth Amount Owed (4/2016)
- 855.14 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Bid Substantially Less than True Value of Property on Date of Foreclosure (4/2016)
- 855.16 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—True Value of Property on Date of Foreclosure Sale (3/2016)
- 855.18 Foreclosure—Action for Deficiency Judgment—Sample Verdict Form & Judge's Worksheet (6/2014)

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (6/2014)
- 860.10 Wills—Holographic Wills—Requirements. (8/2004)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (5/2002)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2006)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

- 865.50 Parol Trusts—Express Trust in Purchased Real or Personal Property. (5/2001)
- 865.55 Parol Trusts—Express Trust in Transferred Real or Personal Property. (8/2004)
- 865.60 Parol Trusts—Express Declaration of Trust in Personal Property. (5/2001)
- 865.65 Trusts by Operation of Law—Purchase Money Resulting Trust (Real and Personal Property). (6/2014)
- 865.70 Trusts by Operation of Law—Purchase Money Resulting Trust (Real or Personal Property). (6/2014)
- 865.75 Trusts by Operation of Law—Constructive Trust. (6/2015)

PART VIII. INSURANCE

Chapter 1. Liability for Agent for Failure to Procure Insurance.

- 870.00 Failure to Procure Insurance—Negligence Issue. (6/2013)
- 870.10 Failure to Procure Insurance—Breach of Contract Issue. (2/2005)

Chapter 2. Accident, Accidental Means, and Suicide.

- 870.20 Accidental Means Definition. (5/2005)

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

- 870.21 "Accident" or "Accidental Means" Issue—Effect of Diseased Condition. (5/2005)
- 870.25 Accident Issue. (2/2005)
- 870.30 General Risk Life Insurance Policy—Suicide as a Defense. (3/2005)
- 870.72 Identity Theft—Identifying Information. (6/2010)
- 870.73 Identity Theft—Identifying/Personal Information. (6/2010)

Chapter 3. Disability.

- 880.00 Disability—Continuous and Total Disability Issue. (3/2005)
- 880.01 Disability—Continuous Confinement Within Doors Issue. (3/2005)
- 880.02 Disability—Constant Care of a Licensed Physician Issue. (3/2005)

Chapter 4. Material Misrepresentations.

- 880.14 Misrepresentation in Application for Insurance—Factual Dispute. (5/2005)
- 880.15 Misrepresentation in Application for Insurance—Issue of Falsity of Representation. (5/2005)
- 880.20 Materiality of Misrepresentation in Application for Insurance. (5/2006)
- 880.25 Fire Insurance Policy—Willful Misrepresentation in Application. (5/2005)
- 880.26 Concealment in Application for Non-Marine Insurance. (5/2005)
- 880.30 Misrepresentation in Application—False Answer(s) Inserted by Agent. (Estoppel). (5/2006)

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2015)

Chapter 6. Fire Insurance.

- 910.20 Fire Insurance—Hazard Increased by Insured. (5/2006)
- 910.25 Fire Insurance—Intentional Burning by Insured. (5/2006)
- 910.26 Fire Insurance—Willful Misrepresentation in Application. (5/2006)
- 910.27 Fire Insurance—Defense of Fraudulent Proof of Loss. (5/2006)

Chapter 7. Damages.

- 910.80 Insurance—Damages for Personal Property—Actual Cash Value. (6/1983)
- 910.90 Insurance—Damages for Real Property—Actual Cash Value. (6/1983)

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2016)

N.C.P.I.—Civil 800.00A
FRAUD—STATUTE OF LIMITATIONS.
GENERAL CIVIL VOLUME
MAY 2016

800.00A FRAUD—STATUTE OF LIMITATIONS.

The (*state number*) issue reads:

“Did the plaintiff file this action within three years after discovery of the facts constituting the fraud?”

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.¹ The law provides that a lawsuit claiming fraud must be filed within three years after discovery of the facts constituting the fraud.² The plaintiff filed the present lawsuit on (*state date of filing of fraud action*).

On this issue, the burden of proof is on the plaintiff.³ This means that the plaintiff must prove, by the greater weight of the evidence, that the plaintiff filed this action within three years after discovery of the facts constituting the fraud. A person discovers facts constituting a fraud when *he* becomes aware of facts or circumstances which, in the exercise of reasonable diligence, would have enabled *him* to discover the defendant's [false representation] [concealment].⁴

The law imposes a duty on a plaintiff to exercise reasonable diligence to discover the [false representation] [concealment] that forms the basis for *his* claim.⁵ A plaintiff's obligation to investigate begins when an event occurs that raises *his* suspicion, or would have raised the suspicion of a reasonable and prudent person in the same or similar circumstances as the plaintiff.⁶

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 after discovery of the facts constituting the fraud, then it

N.C.P.I.—Civil 800.00A
FRAUD—STATUTE OF LIMITATIONS.
GENERAL CIVIL VOLUME
MAY 2016

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 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).

2 N.C. Gen. Stat. § 1-52(9) provides that a plaintiff must file an action within three years “[f]or relief on the ground of fraud or mistake.” However, it is further provided that a cause of action “for relief on the ground of fraud . . . shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud . . .” *Id.*

3 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).

4 *Doe v. Roman Catholic Diocese* ___ N.C. App. ___, ___, 775 S.E.2d 918, 922 (2015) (citing *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005), for the proposition that the limitations period applicable to fraud and misrepresentation claims begins to run “when the plaintiff first becomes aware of facts and circumstances that would enable him to discover the defendant’s wrongdoing in the exercise of due diligence.”).

5 *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007).

6 *Id.*

N.C.P.I.—Civil 800.51
BATTERY.
GENERAL CIVIL VOLUME
REPLACEMENT FEBRUARY 2016

800.51 BATTERY.

The (*state number*) issue reads:

"Did the defendant commit a battery upon 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:¹

First, that the defendant intentionally² caused bodily contact with the plaintiff.

Second, that such bodily contact [actually offended a reasonable sense of personal dignity] [caused physical pain or injury].³

And Third, that such bodily contact occurred without the plaintiff's consent.

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 intentionally caused bodily contact with the plaintiff, that such bodily contact was offensive or harmful to the plaintiff, and that bodily contact occurred without the plaintiff's consent, 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 *Andrews v. Peters*, 75 N.C. App. 252, 256, 330 S.E.2d 638, 640-41, *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986).

² For an instruction on intent, see N.C.P.I.—Civil 101.46.

³ *Scott v. Kiker*, 59 N.C. App. 458, 463, 297 S.E.2d 142, 146 (1982).

N.C.P.I.—Civil 804.01

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF BATTERY.

GENERAL CIVIL VOLUME

MARCH 2016

804.01 EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF BATTERY.

*NOTE WELL: This series of instructions is designed to be used
with 804.05 ("Excessive Force in Making Arrest—Common Law
Claim for Battery—Sample Verdict Sheet").¹*

The (*state number*) issue reads:

"Did the defendant commit a battery upon the plaintiff during his
arrest 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, two things:²

First, that the defendant committed a battery³ upon the plaintiff.

The law defines a battery as intentional⁴ bodily contact that occurs
without the consent of the person being contacted and [actually offends a
reasonable sense of personal dignity] [causes physical pain or injury].

And, Second, that the battery occurred during an arrest.

An individual has been arrested when a law enforcement officer
interrupts the individual's activities and significantly restricts *his* freedom of
action.⁵

Finally, as to this (*state number*) issue on which the plaintiff has the
burden of proof, if you find, by the greater weight of the evidence, that the
defendant committed a battery upon the plaintiff and that such battery
occurred during defendant's arrest of plaintiff, then it would be your duty to
answer this issue "Yes" in favor of the plaintiff.

N.C.P.I.—Civil 804.01

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF BATTERY.

GENERAL CIVIL VOLUME

MARCH 2016

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 The use of excessive force to effect an arrest may give rise to either a common law claim for battery or a federal claim under 42 U.S.C.A. § 1983, or both. *Myrick v. Cooley*, 91 N.C. App. 209, 214, 371 S.E.2d 492, 496 (1988). The pattern instruction for a federal claim begins at 804.06.

2 See *Andrews v. Peters*, 75 N.C. App. 252, 256, 330 S.E.2d 638, 640-41, *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986); *Myrick v. Cooley*, 91 N.C. App. at 215, 371 S.E.2d at 496.

3 If the evidence supports a claim for assault during arrest rather than battery during arrest, it may be appropriate to replace the first element of this instruction with the elements of an assault. See *N.C.P.I.—Civil 800.50*.

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

5 See *State v. Morgan*, 299 N.C. 191, 200, 261 S.E.2d 827, 832-33 (1980). “An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). An arrest is a more significant restriction of an individual’s freedom than a seizure. See *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 614-15, 538 S.E.2d 601, 609 (2000) (“A seizure becomes an arrest when ‘a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.’ ” (quoting *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999) (subsequent citation omitted))).

A seizure occurs when a law enforcement officer, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *State v. Foreman*, 133 N.C. App. 292, 296, 515 S.E.2d 488, 492 (1999) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Circumstances that might indicate a seizure include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the . . . citizen, or the use of language or tone of voice” suggesting that compliance is mandatory. See *State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Circumstances that do not amount to a seizure include the following: an officer approaching an individual in a public place and asking questions, see *State v. Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492 (citing *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994)); an officer following an individual on foot, *State v. Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492; or an officer following an individual’s vehicle, *id.* (citing *State v. Cuevas*, 121 N.C. App. 553, 468 S.E.2d 425 (1996)). *But see State v. Hendrickson*, 124 N.C. App. 150, 154-155, 476 S.E.2d 389, 392 (1996) (even “investigatory stop” or traffic stop is a seizure).

N.C.P.I.—Civil 804.02

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF LAWFULNESS OF ARREST.

GENERAL CIVIL VOLUME

MARCH 2016

804.02 EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF LAWFULNESS OF ARREST.

*NOTE WELL: This series of instructions is designed to be used
with 804.05 ("Excessive Force in Making Arrest—Common Law
Claim for Battery—Sample Verdict Sheet").*

The (*state number*) issue reads:

"Was the defendant's arrest of the plaintiff unlawful?"¹

If you have answered the first issue "Yes," then you will consider the second issue. If, on the other hand, you have answered the first issue "No," then you will not consider the remaining issues.

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 lacked probable cause to arrest the plaintiff.² The law defines probable cause as the facts and circumstances that an officer knows, based upon reasonably trustworthy information, to be sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense.³

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant lacked probable cause to arrest 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.

N.C.P.I.—Civil 804.02

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF LAWFULNESS OF ARREST.

GENERAL CIVIL VOLUME

MARCH 2016

1 *NOTE WELL*: If an officer attempts an arrest without probable cause, it is unlawful, and any use of force by the officer is inappropriate. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 623, 538 S.E.2d 601, 614 (2000) (citing *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000)).

2 Under state law, a police officer may arrest a person without a warrant if the officer “has probable cause to believe [that person] has committed a criminal offense in the officer’s presence.” N.C.G.S. § 15A-401(b)(1) (“Offense in Presence of Officer”). For other circumstances in which an officer may arrest a person without a warrant, see N.C.G.S. § 15A-401(b)(2) (“Offense Out of Presence of Officer”).

3 See *Glenn-Robinson v. Acker*, 140 N.C. App. at 618, 538 S.E.2d at 611 (quoting *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 671-72, 449 S.E.2d 240, 245 (1995) (defining probable cause as “those facts and circumstances within an officer’s knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense”)) (internal citation omitted).

NOTE WELL: “The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.” *Glenn-Robinson v. Acker*, 140 N.C. App. at 619, 538 S.E.2d at 612 (citing *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)).

For additional discussion of the determination of probable cause, see N.C.P.I.—Crim. 208.81B.

N.C.P.I.—Civil 804.03

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF REASONABLENESS OF FORCE USED.

GENERAL CIVIL VOLUME

MARCH 2016

804.03 EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF REASONABLENESS OF FORCE USED.

*NOTE WELL: This series of instructions is designed to be used
with 804.05 ("Excessive Force in Making Arrest—Common Law
Claim for Battery—Sample Verdict Sheet").*

The (*state number*) issue reads:

"Was the amount of force used by the defendant to arrest the plaintiff
excessive?"

If you have answered the first issue "Yes," then you will consider the
third issue regardless of your answer to the second 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 used excessive force in *his* arrest of the plaintiff.

A law enforcement officer has the right to use such force and make
such contact as is reasonably necessary under the circumstances to make a
lawful arrest.¹ The reasonableness of a particular use of force or amount of
contact must be judged objectively,² in light of the facts and circumstances
viewed from the perspective of a reasonable officer on the scene at that time
[rather than with the 20/20 vision of hindsight].³

You may take into consideration all the facts and circumstances
surrounding the arrest, including the severity of the crime at issue, whether
the plaintiff posed an immediate threat to the safety of the officer or others,
and whether the plaintiff was actively resisting arrest or attempting to
escape.⁴

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

N.C.P.I.—Civil 804.03

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—ISSUE OF REASONABLENESS OF FORCE USED.

GENERAL CIVIL VOLUME

MARCH 2016

amount of force used by the defendant to arrest the plaintiff was excessive,
then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

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

1 *NOTE WELL:* If an officer attempts an arrest without probable cause, it is unlawful and any use of force by the officer is inappropriate. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 623, 538 S.E.2d 601, 614 (2000) (citing *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000)).

2 *Glenn-Robinson v. Acker*, 140 N.C. App. at 622, 538 S.E.2d at 613 (citing *Graham v. Connor*, 490 U.S. 386, 395-97 (1989)).

3 *See Graham v. Connor*, 490 U.S. at 396.

4 *Id.*

N.C.P.I.—Civil 804.04

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

804.04 EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—DAMAGES.

NOTE WELL: This series of instructions is designed to be used with 804.05 ("Excessive Force in Making Arrest—Common Law Claim for Battery—Sample Verdict Sheet").

NOTE WELL: If state law and federal law claims are submitted to the jury, and if damages are returned as to each, the plaintiff must elect between the awards.

The (state number) issue reads:

"What amount is the plaintiff entitled to recover as a result of the defendant's battery?"

If you have answered either the second issue or the third issue "Yes," then you will consider the remaining issue(s). If, on the other hand, you have answered the second issue and the third issue "No," then you will not consider the remaining issue(s).

If you have answered either the second issue (804.02—*Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest*) "Yes" or the third issue (804.03—*Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used*) "Yes" in favor of the plaintiff, then the plaintiff is entitled to recover nominal damages even without proof of actual damages.¹ 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 caused by the defendant's battery.²

N.C.P.I.—Civil 804.04

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

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

In determining the amount, if any, to award the plaintiff for actual damages, you will consider the evidence you have heard as to (each of the following types of damages):

[medical expenses]

[loss of earnings]

[pain and suffering]

[scars or disfigurement]

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

[permanent injury]

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

The total of all damages is to be awarded in one lump sum.³

I will now explain the law of damages as it relates to each of these types of damages.

NOTE WELL: Insert here the actual damages instructions found in Chapter 12 (810.04—810.22 et seq.) as supported by the evidence.

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 the amount of actual damages caused by the defendant's battery, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

N.C.P.I.—Civil 804.04

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

NOTE WELL: If instruction regarding punitive damages is supported by the evidence, this instruction should be followed by 810.96 ("Punitive Damages—Liability of Defendant") and 810.98 ("Issue of Whether to Make Award and Amount of Award"). Note, too, that under N.C. Gen. Stat. § 1D-30, the issues of liability for and amount of punitive damages may be tried separately from the issues of liability for and amount of compensatory damages upon the motion of a defendant.

1 See *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992) (where cause of action for battery is established, plaintiff is entitled to recover at least nominal damages).

2 Care should be exercised in choosing the appropriate standard. Negligence cases require proximate cause. Intentional torts generally do not require proximate cause.

3 *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966); see also *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963).

N.C.P.I.—Civil 804.05
EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—SAMPLE VERDICT SHEET.
GENERAL CIVIL VOLUME
MARCH 2016

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
xx CVS xxxx

PLAINTIFF	)	
	)	
vs.	)	VERDICT
	)	
DEFENDANT,	)	
	)	

We, the jury, unanimously answer the following issues:

Issue 1: Did the defendant commit a battery upon the plaintiff during his arrest of the plaintiff?

ANSWER: _____
(If you answer Issue 1 "Yes," then proceed to Issue 2. If you answer Issue 1 "No," then you will not consider the remaining issues.)

Issue 2: Was the defendant's arrest of the plaintiff unlawful?

ANSWER: _____
(Proceed to Issue 3.)

Issue 3: Was the amount of force used by the defendant to arrest the plaintiff excessive?

ANSWER: _____
(If you answer "Yes" to Issue 2 or Issue 3, or both, then proceed to Issue 4. If you answer Issue 2 and 3 "No," then you will not consider the remaining issue(s).)

Issue 4: What amount is the plaintiff entitled to recover as a result of the defendant's battery?

AMOUNT: \$_____.

N.C.P.I.—Civil 804.05

EXCESSIVE FORCE IN MAKING ARREST—COMMON LAW CLAIM FOR
BATTERY—SAMPLE VERDICT SHEET.

GENERAL CIVIL VOLUME

MARCH 2016

NOTE WELL: Issues 5 and 6 should be included on the Verdict Sheet only if the issue of punitive damages is submitted to the jury. If the issue of punitive damages is to be submitted, place this parenthetical guidance at the end of Issue 4:

(Proceed to Issue 5.)

Issue 5: Is the defendant liable to the plaintiff for punitive damages?

ANSWER: _____
(If you answer Issue 5 "Yes," then proceed to Issue 6. If you answer Issue 5 "No," then you will not consider the remaining issue.)

Issue 6: What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?

AMOUNT: \$_____.

This the _____ day of _____, _____.

Printed Name of Foreperson: _____.

Signature of Foreperson: _____.

N.C.P.I.—Civil 804.06

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
COLOR OF STATE LAW.

GENERAL CIVIL VOLUME

MARCH 2016

804.06 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—
ISSUE OF COLOR OF STATE LAW.

*NOTE WELL: This series of instructions is designed to be used
with 804.12 ("Excessive Force in Making Arrest—Section 1983
Claim—Sample Verdict Sheet").¹*

The (*state number*) issue reads:

"Was the defendant acting under color of state law when *he* arrested
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, that the
defendant was acting under color of state law. An official acts under color of
state law if *he* acts within the limits of lawful authority. An official also acts
under color of state law if, while purporting to act in performance of his
official duties, *he* exceeds lawful authority.² On the other hand, an official
who does not use state authority and acts for purely private purposes, does
not act under color of state law.³

As to this (*state number*) issue on which the plaintiff has the burden of
proof, if you find, by the greater weight of the evidence, that the defendant
was acting under color of state law when *he* arrested 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.

¹ The use of excessive force to effect an arrest may give rise to either a common
law claim for battery or a federal claim under 42 U.S.C.A. § 1983, or both. *Myrick v. Cooley*,
91 N.C. App. 209, 214, 371 S.E.2d 492, 496 (1988). The pattern instruction for a common
law claim begins at 804.01.

N.C.P.I.—Civil 804.06

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
COLOR OF STATE LAW.

GENERAL CIVIL VOLUME

MARCH 2016

2 See *West v. Atkins*, 487 U.S. 42, 49-50 (1998); *Mentavlos v. Anderson*, 249 F.3d 301, 321 (4th Cir. 2001); *Scott v. Vandiver*, 476 F.2d 238, 241 (4th Cir. 1973).

3 See *Mentavlos*, 249 F.3d at 321-22; see also *Hughes v. Halifax County School Board*, 855 F.2d 183, 186-87 (4th Cir. 1988) (county maintenance workers whose assault of coworker was neither an exercise of their state authority nor made possible because of the “privileges of their employment” did not act under color of state law for purposes of a § 1983 claim).

N.C.P.I.—Civil 804.07

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
USE OF FORCE.

GENERAL CIVIL VOLUME

MARCH 2016

804.07 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—
ISSUE OF USE OF FORCE.

*NOTE WELL: This series of instructions is designed to be used
with 804.12 ("Excessive Force in Making Arrest—Section 1983
Claim—Sample Verdict Sheet").*

The (*state number*) issue reads:

"Did the defendant use force to arrest the plaintiff?"

If you have answered the first issue "Yes," then you will consider the second issue. If, on the other hand, you have answered the first issue "No," then you will not consider the remaining issues.

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 used force to arrest the plaintiff. An arrest occurs when an individual submits to a law enforcement officer's assertion of authority and intent to arrest the individual, or when physical force is applied to an individual by an officer who is attempting to arrest the individual.¹ Any application of physical force by the defendant to arrest the plaintiff would be sufficient.²

As to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant used force to arrest 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.

¹ *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

N.C.P.I.—Civil 804.07

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
USE OF FORCE.

GENERAL CIVIL VOLUME

MARCH 2016

2 *Id.* at 624, 696 (cited with approval by *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 615, 538 S.E.2d 601, 609 (2000)).

N.C.P.I.—Civil 804.08

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
LAWFULNESS OF ARREST.

GENERAL CIVIL VOLUME

MARCH 2016

804.08 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—
ISSUE OF LAWFULNESS OF ARREST.

*NOTE WELL: This series of instructions is designed to be used
with 804.12 ("Excessive Force in Making Arrest—Section 1983
Claim—Sample Verdict Sheet").*

The (*state number*) issue reads:

"Was the defendant's arrest of the plaintiff unlawful?"¹

If you have answered the second issue "Yes," then you will consider the third issue. If, on the other hand, you have answered the second issue "No," then you will not consider the remaining issues.

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 lacked probable cause to arrest the plaintiff.² The law defines probable cause as the facts and circumstances that an officer knows, based upon reasonably trustworthy information, to be sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense.³

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant lacked probable cause to arrest 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.

1 *NOTE WELL:* "Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). If an officer attempts an arrest without probable cause, it is unlawful, and any use of force by the officer is inappropriate. *Glenn-Robinson v. Acker*, 140 N.C.

N.C.P.I.—Civil 804.08

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
LAWFULNESS OF ARREST.

GENERAL CIVIL VOLUME

MARCH 2016

App. 606, 623, 538 S.E.2d 601, 614 (2000) (citing *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000)).

2 Under state law, a police officer may arrest a person without a warrant if the officer “has probable cause to believe [that person] has committed a criminal offense in the officer’s presence.” N.C.G.S. § 15A-401(b)(1) (“Offense in Presence of Officer”). For other circumstances in which an officer may arrest a person without a warrant, see N.C.G.S. § 15A-401(b)(2) (“Offense Out of Presence of Officer”).

3 See *Glenn-Robinson v. Acker*, 140 N.C. App. at 618, 538 S.E.2d at 611 (quoting *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 671-72, 449 S.E.2d 240, 245 (1995) (defining probable cause as “those facts and circumstances within an officer’s knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense”)) (internal citation omitted).

NOTE WELL: “The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.” *Glenn-Robinson v. Acker*, 140 N.C. App. at 619, 538 S.E.2d at 612 (citing *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)).

For additional discussion of the determination of probable cause, see N.C.P.I. —Crim. 208.81B.

N.C.P.I.—Civil 804.09

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
REASONABLENESS OF FORCE USED.

GENERAL CIVIL VOLUME

MARCH 2016

804.09 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—
ISSUE OF REASONABLENESS OF FORCE USED.

*NOTE WELL: This series of instructions is designed to be used
with 804.12 ("Excessive Force in Making Arrest—Section 1983
Claim—Sample Verdict Sheet").*

The (*state number*) issue reads:

"Was the amount of force used by the defendant to arrest the plaintiff
excessive?"

If you have answered the second issue "Yes," you will consider the
fourth issue regardless of your answer to the third 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 used excessive force in *his* arrest of the plaintiff.

A law enforcement officer has the right to use such force and make
such contact as is reasonably necessary under the circumstances to make a
lawful arrest.¹ The reasonableness of a particular use of force or amount of
contact must be judged objectively,² in light of the facts and circumstances
viewed from the perspective of a reasonable officer on the scene at that time
[rather than with the 20/20 vision of hindsight].³

You may take into consideration all the facts and circumstances
surrounding the arrest, including the severity of the crime at issue, whether
the plaintiff posed an immediate threat to the safety of the officer or others,
and whether the plaintiff was actively resisting arrest or attempting to
escape.⁴

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

N.C.P.I.—Civil 804.09

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—ISSUE OF
REASONABLENESS OF FORCE USED.

GENERAL CIVIL VOLUME

MARCH 2016

amount of force used by the defendant to arrest the plaintiff was excessive,
then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

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

1 *NOTE WELL*: “Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law.” *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). If an officer attempts an arrest without probable cause, it is unlawful, and any use of force by the officer is inappropriate. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 623, 538 S.E.2d 601, 614 (2000) (citing *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000)).

2 *Glenn-Robinson v. Acker*, 140 N.C. App. at 622, 538 S.E.2d at 613 (citing *Graham v. Conner*, 490 U.S. 386, 395-97 (1989)).

3 *See Graham v. Conner*, 490 U.S. at 396.

4 *Id.*

N.C.P.I.—Civil 804.10

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—DAMAGES.
GENERAL CIVIL VOLUME
MARCH 2016

804.10 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—
DAMAGES.¹

NOTE WELL: This series of instructions is designed to be used with 804.12 ("Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet").

NOTE WELL: 804.10 is similar to the damages instruction for a state law claim, 804.04, with the primary difference being the inclusion of language in this instruction regarding the defendant's violation of plaintiff's constitutional rights. Because a jury may determine that the violation of plaintiff's constitutional rights enhances the ordinary elements of damage for which the jury may award damages under the state law claim, if state law and federal law claims are submitted to the jury, the court should instruct both as to the damages available for a state law claim and the damages available for a federal claim. If damages are returned as to each claim, the plaintiff must elect between the awards.

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover as a result of the defendant's use of excessive force in violation of the plaintiff's constitutional rights?"²

If you have answered either the third issue or the fourth issue "Yes," then you will consider the remaining issue(s). If, on the other hand, you have answered the third issue and fourth issue "No," then you will not consider the remaining issue(s).

If you have answered either the third issue (804.08) "Yes" or the fourth issue (804.09) "Yes" in favor of the plaintiff, then the plaintiff is entitled to recover nominal damages even without proof of actual damages.³ Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff. The mere fact that a constitutional deprivation has been shown to have occurred as a result of the

N.C.P.I.—Civil 804.10

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

defendant's use of excessive force is an injury to the plaintiff, even when no actual damages flow from the deprivation.

The plaintiff may also be entitled to recover actual damages. Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury caused by the wrongful conduct of another.

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 defendant's deprivation of plaintiff's constitutional rights.⁴

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

In determining the amount, if any, to award the plaintiff for actual damages, you will consider the evidence you have heard as to (each of the following types of damages):

[medical expenses]

[loss of earnings]

[pain and suffering]

[scars or disfigurement]

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

[permanent injury]

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

The total of all damages is to be awarded in one lump sum.

I will now explain the law of damages as it relates to each of these types of damages.

N.C.P.I.—Civil 804.10

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—DAMAGES.
 GENERAL CIVIL VOLUME
 MARCH 2016

NOTE WELL: Insert here the actual damages instructions found in Chapter 12 (810.04—810.22 et seq.) as supported by the evidence.

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 the amount of actual damages caused by the defendant's use of excessive force in violation of plaintiff's constitutional rights, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

NOTE WELL: If instruction regarding punitive damages is supported by the evidence, this instruction should be followed by 804.11 ("Excessive Force in Making Lawful Arrest—Section 1983—Punitive Damages").

1 Plaintiff's entitlement to relief in state court for a Section 1983 claim is the same that *he* "might have in federal court." *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 197, 371 S.E.2d 503, 510 (1988), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). The United States Court of Appeals for the Fourth Circuit does not publish model instructions, so the following instructions utilize the model from Federal Jury Practice and Instructions, 3B Fed. Jury Prac. & Instr. § 165:70-71 (6th ed. 2014).

2 The Federal Jury Practice and Instructions model includes as notes on compensatory and nominal damages available in a Section 1983 claim the following:

In a Section 1983 action, compensatory damages for actual injury are available upon proper proof. See *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (basic purpose of damages under Section 1983 should be to compensate persons for injuries caused by deprivation of constitutional rights and thus such awards should be governed by principles of compensation). *Accord Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Slicker v. Jackson*, 215 F.3d 1225, 1229 (11th Cir. 2000); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999); *Fontroy v. Owens*, 150 F.3d 239, 244 (3d Cir. 1998); *Price v. City of Charlotte*, 93 F.3d 1241, 1245 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Bushce v. Burkee*, 649 F.2d 509, 518 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Corriz v. Naranjo*, 667 F.2d 892, 896 (10th Cir. 1981); *cert. dismissed*, 458 U.S. 1123 (1982).

The principles governing the propriety of compensatory and punitive damages under Section 1983 are derived from the common law. *Cunningham v. City of Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986). Damages may not be based on the abstract "value" or "importance" of a constitutional right. *Memphis Community School Dist. v. Stachura*, 477

N.C.P.I.—Civil 804.10

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—DAMAGES.
 GENERAL CIVIL VOLUME
 MARCH 2016

U.S. 299, 308 (1986). Presumed damages (the type of damages awarded in some defamation actions to compensate for “presumed” harm to reputation from defamation even in the absence of proof of actual injury) are not recoverable in a Section 1983 action. *Carey v. Phipps*, 435 U.S. 247, 264 (1978).

Compensatory damages may be awarded for emotional and mental distress as well as for pecuniary loss. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (compensatory damages in Section 1983 action may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering). See also *Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997); *Walz v. Town of Smithtown*, 46 F.3d 162, 170 (2d Cir. 1995), cert. denied, 515 U.S. 1131 (1995); *Bolden v. Southeastern Penn. Transp. Auth.*, 21 F.3d 29, 35 (3d Cir. 1994); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir. 1980).

Nominal damages are permitted under Section 1983. See *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Nominal damages may be awarded when no actual injury of any consequence is established to make the symbolic point that the plaintiff was wronged and that society demands that constitutional rights be scrupulously observed. *Carey v. Phipps*, 435 U.S. 247, 266-67. See *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (even when plaintiff fails to prove actual compensable injury, plaintiff may be entitled to award of nominal damages upon proof of violation of substantive constitutional right); *Wescott v. Crinklaw*, 133 F.3d 658 (8th Cir. 1998) (giving of nominal damages instruction and award of only one dollar plain error where it was clear from undisputed evidence that plaintiff’s injuries were caused by defendant’s excessive use of force).

In *Lawson v. Trowbridge*, 153 F.3d 368, 370 (7th Cir. 1998), the plaintiff, who suffered from schizophrenia, was arrested for carrying a concealed weapon. Because he had no money and could not post a cash bond, he remained in custody for ten months. He brought suit under Section 1983, claiming there was no probable cause for his arrest and also alleging that while in custody, government officials provided him with no medical care for his disease. The jury awarded plaintiff only \$2 in damages. The plaintiff appealed the jury’s award, arguing that it was error for the district court to instruct the jury that he had a duty to mitigate his damages. At trial, the government aggressively pursued the theory that plaintiff failed to help himself by posting the \$500 bond, causing him to linger in jail for an extraordinary length of time (10 months). The Seventh Circuit agreed with plaintiff that it was error to instruct the jury that plaintiff had a duty to mitigate his damages by posting bond. The Seventh Circuit explained:

Even if we . . . generally saw a place for the avoidance of consequences doctrine in a failure-to-post bond case, we would be uncomfortable with the conclusion these facts present: that a mentally ill man, who [the jury found] was held unconstitutionally in solitary confinement for at least 65 days, and [the jury found] was not provided medical care for his disease, and spent three months of his confinement in a state mental hospital because he was adjudged to be incompetent to stand trial, acted unreasonably by not applying his VA check [use for rent money] toward his bond and not asking his family members to bail him out.

153 F.3d at 378.

In a detainee’s Section 1983 suit against a police officer for wrongful detention the Ninth Circuit held that the jury should not have been given the following indemnification instruction:

If an employee of a public entity requests the public entity to defend him against any claim arising out of an act made within the scope of his

N.C.P.I.—Civil 804.10

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—DAMAGES.
 GENERAL CIVIL VOLUME
 MARCH 2016

employment, and gives the entity sufficient notice, and reasonably cooperates in good faith in the defense of the claim, the public entity shall pay any compensatory damages awarded.

Larez v. Holcomb, 16 F.3d 1513, 1518 (9th Cir. 1994). The indemnification issue had no relevance to the proper calculation of compensatory damages. *Id.* at 1520. The Ninth Circuit also held that “the district court erred when it allowed the information on potential punitive damages indemnification to come before the jury.” *Id.* at 1520.

In *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996), the Seventh Circuit recognized three situations where nominal damages might be appropriate to remedy an excessive force violation: (1) where an arresting officer uses both justifiable and excessive force, but any injury results from the use of justifiable force; (2) where a jury reasonably concludes that evidence of plaintiff’s injury is not credible; or (3) where a plaintiff’s injuries are insufficient to justify with reasonable certainty a more substantial measure of damages. See *Frizzell v. Szabo*, 647 F.3d 698 (7th Cir. 2011) (nominal damages instruction was appropriate in arrestee’s excessive force case against arresting officer; given the lack of focus throughout the trial on anything other than the pain and negative after-effects caused by arresting officer’s tasing of arrestee, the jury might have believed that arresting officer’s use of pepper spray or jumping on arrestee’s chest, following the tasing, and after the arrestee was down was excessive, but that those applications of force caused little or no quantifiable injury or pain).

See *Guzman v. City of Chicago*, 689 F.3d 740 (7th Cir. 2012) (court should use caution in giving a nominal damages instruction for an unlawful search or seizure because an unlawful search or seizure will often produce, at a minimum, a compensable claim for loss of time).

3 Nominal damages are permitted under Section 1983. See endnote 2, *supra*.

4 “[A] Section 1983 plaintiff must demonstrate that the defendant’s actions were the proximate cause of the violation of his federally protected right.” *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004) (discussing defendants’ contentions that their conduct did not “proximately cause[] [the decedent’s] death”).

N.C.P.I.—Civil 804.11
EXCESSIVE FORCE IN MAKING LAWFUL ARREST—SECTION 1983 CLAIM—
PUNITIVE DAMAGES.
GENERAL CIVIL VOLUME
MARCH 2016

804.11 EXCESSIVE FORCE IN MAKING LAWFUL ARREST—SECTION 1983
CLAIM—PUNITIVE DAMAGES.^{1,2}

The (*state number*) issue reads:

NOTE WELL: This series of instructions is designed to be used with 804.12 ("Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet").

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"³

If you have answered either the third issue or the fourth issue "Yes," then you will consider this issue. If, on the other hand, you have answered the third issue and fourth issue "No," then you will not consider this issue.

If you have answered the third issue or the fourth issue "Yes" in favor of the plaintiff, then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages. The plaintiff has the burden of proving punitive damages by the greater weight of the evidence. Punitive damages are awarded to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Punitive damages may be awarded when the defendant's conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.⁴ Plaintiff's right to be free from the application of excessive force during an arrest is a federally protected right.

Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion. In exercising this discretion, you should consider [the following:]

N.C.P.I.—Civil 804.11

EXCESSIVE FORCE IN MAKING LAWFUL ARREST—SECTION 1983 CLAIM—
PUNITIVE DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

- (1) whether the defendant's conduct is made more reprehensible by factors such as vulnerability of the plaintiff, the degree of violence involved, or previous acts of similar misconduct;
- [(2) whether the punitive damages award would be excessive in comparison to the compensatory damages you award;][and]
- [(3) whether evidence has been presented of punitive damages awarded or civil penalties imposed in similar cases.]

NOTE WELL: The first factor—reprehensibility of the defendant(s)' conduct—should be included whenever the jury is instructed upon punitive damages. The second and third factors may be included, if the court determines either or both to be supported by the evidence and appropriate given the circumstances of the case.

While you may consider evidence of actual harm to nonparties as part of your determination of reprehensibility, you may not use it to punish a defendant for injury the defendant may have inflicted upon nonparties [or those whom they directly represent].

[(If there are multiple defendants)⁵ You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same or they may be different.]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if in your discretion you have awarded punitive damages in addition to the amount of plaintiff's actual or nominal damages, then it would be your duty to write that amount in the blank space provided for punitive damages.

N.C.P.I.—Civil 804.11

EXCESSIVE FORCE IN MAKING LAWFUL ARREST—SECTION 1983 CLAIM—
PUNITIVE DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

On the other hand, if you fail to so find, then it would be your duty to write the word “None” in the space provided on the verdict sheet.

1 Under N.C. Gen. Stat. § 1D-30, the issues of liability for and amount of punitive damages may be tried separately from the issues of liability for and amount of compensatory damages upon the motion of a defendant.

2 Plaintiff’s entitlement to relief in state court for a Section 1983 claim is the same that *he* “might have in federal court.” *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 197, 371 S.E.2d 503, 510 (1988), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). The United States Court of Appeals for the Fourth Circuit does not publish model instructions, so the following instructions utilize the model from Federal Jury Practice and Instructions, 3B Fed. Jury Prac. & Instr. § 165:70-71 (6th ed. 2014).

3 The Federal Jury Practice and Instructions model includes as notes on punitive damages available in a Section 1983 claim the following:

See Philip Morris USA v. Williams, 549 U.S. 346 (2007) (Due Process Clause forbids state from using punitive damages award to punish defendant for injury it inflicts upon nonparties or those whom they directly represent).

According to the Supreme Court, a jury should take into account the following considerations: (1) degree of reprehensibility of the defendant’s conduct, (2) the ratio between harm or potential harm to the plaintiff and the punitive damages award, and (3) the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). *Accord Williams v. Kaufmann County*, 352 F.3d 994, 1016 (5th Cir. 2003) (affirming award of \$100 in nominal damages and \$15,000 in punitive damages for each plaintiff).

Punitive damages in actions under Section 1983 were approved in *Smith v. Wade*, 461 U.S. 30, 35-36. The Court held that a jury “may be permitted to assess punitive damages . . . when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Id.* at 56, 1640. However, municipalities enjoy absolute immunity from punitive damages. *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

It has been held permissible to instruct the jury that it may award punitive damages even in the absence of awarding compensatory damages. *See McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997); *King v. Macri*, 993 F.2d 294, 297 (2d Cir. 1993). While evidence of actual harm to nonparties can help show conduct that harmed the plaintiff also posed a substantial risk of harm to the general public and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties. *Phillip Morris USA v. Williams*, 549 U.S. 346, 356 (2007).

Rejecting Model Instruction 7.5 from the Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, the Ninth Circuit held that the district court should

N.C.P.I.—Civil 804.11

EXCESSIVE FORCE IN MAKING LAWFUL ARREST—SECTION 1983 CLAIM—
PUNITIVE DAMAGES.

GENERAL CIVIL VOLUME

MARCH 2016

have separately stated the concept of oppressive conduct in the punitive damages instruction. *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005). *See also Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996); *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994); *Walker v. Norris*, 917 F.2d 1449, 1459 (6th Cir. 1990); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987); *Wren v. Spurlock*, 798 F.2d 1313, 1322 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *Abraham v. Pekarski*, 728 F.2d 167, 173 (3d Cir. 1984), *cert. denied*, 467 U.S. 1242 (1984); *McKinley v. Trattles*, 732 F.2d 1320 (7th Cir. 1984); *Stokes v. Delcambre*, 710 F.2d 1120, 1126 (5th Cir. 1983).

See Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010) (arrestees were entitled to punitive damages jury instruction, in § 1983 action alleging false arrest and malicious prosecution against city and arresting officers, where arrestees presented testimony and other evidence that the officers knew that they lacked probable cause to support arrests, and then provided false information to the prosecutors).

4 Plaintiff may meet this burden of proof by a preponderance of the evidence, rather than by clear and convincing evidence, the standard that applies to plaintiff's entitlement to punitive damages under state law. *See Dang v. Cross*, 422 F.3d 800, 808 (9th Cir. 2005); *see also Butler v. Windsor*, 2015 U.S. Dist. LEXIS 144061 (D. Md. 2015); *McCloud v. Hildebrand et al.*, 2010 U.S. Dist. LEXIS 121703 (W.D.N.C. 2010).

5 Adjust verdict sheet accordingly.

N.C.P.I.—Civil 804.12
 EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—SAMPLE
 VERDICT SHEET.
 GENERAL CIVIL VOLUME
 MARCH 2016

STATE OF NORTH CAROLINA
 COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 xx CVS xxxx

PLAINTIFF

vs.

DEFENDANT,

)
)
)
)
)
)
)

VERDICT

We, the jury, unanimously answer the following issues:

Issue 1: Was the defendant acting under color of state law when *he* arrested the plaintiff?

ANSWER: _____
 (If you answer Issue 1 "Yes," then proceed to Issue 2. If you answer Issue 1 "No," then you will not consider the remaining issues.)

Issue 2: Did the defendant use force to arrest the plaintiff?

ANSWER: _____
 (If you answer Issue 2 "Yes," then proceed to Issue 3. If you answer Issue 2 "No," then you will not consider the remaining issues.)

Issue 3: Was the defendant's arrest of the plaintiff unlawful?

ANSWER: _____
 (Proceed to Issue 4.)

Issue 4: Was the amount of force used by the defendant to arrest the plaintiff excessive?

ANSWER: _____

N.C.P.I.—Civil 804.12

EXCESSIVE FORCE IN MAKING ARREST—SECTION 1983 CLAIM—SAMPLE
VERDICT SHEET.

GENERAL CIVIL VOLUME

MARCH 2016

(If you answer "Yes" to Issue 3 or Issue 4, or both, then proceed to Issue
5. If you answer Issue 3 and 4 "No," then you will not consider the
remaining issue(s).)

Issue 5: What amount is the plaintiff entitled to recover as a result of the defendant's
use of excessive force in violation of the plaintiff's constitutional rights?

AMOUNT: \$_____.

*NOTE WELL: Issue 6 should be included on the Verdict
Sheet only if the issue of punitive damages is submitted to
the jury. If the issue of punitive damages is to be
submitted, place this parenthetical guidance at the end of
Issue 5:*

(Proceed to Issue 6.)

Issue 6: What amount of punitive damages, if any, does the jury in its discretion
award to the plaintiff?

AMOUNT: \$_____.

This the _____ day of _____, _____.

Printed Name of Foreperson: _____.

Signature of Foreperson: _____.

N.C.P.I.—Civil 804.50
SECTION 1983—UNREASONABLE SEARCH OF HOME.
GENERAL CIVIL VOLUME
JUNE 2016

804.50 SECTION 1983—UNREASONABLE SEARCH OF HOME.

NOTE WELL: This instruction was previously labeled "N.C.P.I.—Civil 804.05 SECTION 1983—UNREASONABLE SEARCH OF HOME" and published in May 2004. It has been renumbered as "N.C.P.I.—Civil 804.50" and the published date has been updated from "MAY 2004" to "JUNE 2016". No substantive changes have been made since the 2004 revision.

This (state number) issue reads:

Did the defendant violate the plaintiff's constitutional rights by conducting an unreasonable search of plaintiff's home?

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.

First, that the defendant acted under color of state law. An official acts under color of state law if *he* acts within the limits of lawful authority or if, while purporting to act in the performance of his official duties, he exceeds lawful authority. On the other hand, an official who does not use state authority and acts for purely private purposes does not act under color of state law.¹

Second, that the defendant deprived the plaintiff of *his* Fourth Amendment² constitutional right to be free from an unreasonable search.³

Ordinarily, a law enforcement officer must obtain a warrant before conducting a search of a home. However, there are certain exceptions to this requirement, including consent and exigent circumstances.⁴ When a person in lawful possession of a home freely and voluntarily consents to a search, law enforcement officers may reasonably and lawfully conduct a search consistent in scope with the consent given.⁵ Exigent circumstances exist when a law enforcement officer has a reasonable belief that there is an

N.C.P.I.—Civil 804.50
 SECTION 1983—UNREASONABLE SEARCH OF HOME.
 GENERAL CIVIL VOLUME
 JUNE 2016

imminent threat of danger to himself or others or that occupants will attempt to escape or destroy evidence.⁶

And Third, that the unreasonable search was a proximate cause of the [injury] [damage] sustained by the plaintiff.

A proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

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

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant, acting under color of state law, conducted an unreasonable search of the plaintiff's home, and that the unreasonable search was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

¹ See *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *Mentavlos v. Anderson*, 249 F.3d 301, 321 (4th Cir. 2001); *Scott v. Vandiver*, 476 F.2d 238, 241 (4th Cir. 1973).

² U.S.C.A. Const. Amend. IV.

³ See *Roberts v. Swain*, 126 N.C. App. 712, 719, 487 S.E. 2d 760, 765 (1997); *Barnett v. Karpinos*, 119 N.C. App. 719, 726, 460 S.E. 2d 208, 211 (1995). Section 1983 provides a civil action for deprivation of rights. 42 U.S.C.A. § 1983.

N.C.P.I.—Civil 804.50
SECTION 1983—UNREASONABLE SEARCH OF HOME.
GENERAL CIVIL VOLUME
JUNE 2016

4 See *Groh v. Ramirez*, 124 S.Ct. 1284, 1294 (2004) ("No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional."); *United States v. Reed*, 935 F.2d 641, 642 (4th Cir. 1991); *United States v. Miller*, 933 F. Supp. 501, 504 (M.D.N.C. 1996); *State v. Worsley*, 336 N.C. 268, 281, 443 S.E. 2d 68, 74 (1994).

5 See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (using the standard of objective reasonableness to measure the scope of a suspect's consent); *United States v. McFarley*, 935 F.2d 1188, 1191 (4th Cir. 1993) (noting that consent may be limited or withdrawn) ; *Trulock v. Freeh*, 275 F.3d 391, 503 (4th Cir. 2001) (explaining that authority to consent does not automatically extend to every discrete, enclosed space); see also *United States v. Boone*, 245 F.3d 352, 364 (4th Cir. 2001) (determining the officer did not exceed the scope of the consent); *Worsley*, 336 N.C. at 283, 443 S.E.2d at 75 (discussing consent searches under N.C. Gen. Stat. §§ 15A-221 to -222).

6 See *United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) (danger to police); *United States v. Jackson*, 585 F.2d 653, 662 (4th Cir. 1978) (occupants will escape, resist, or destroy evidence); see also *United States v. Reed*, 935 F.2d 641, 642 (4th Cir. 1991) (discussing factors relevant to a determination of the existence of exigent circumstances); *State v. Johnson*, 310 N.C. 581, 586, 313 S.E.2d 580, 583 (1984) (recognizing that the facts and circumstances sufficient to constitute exigent circumstances vary widely); *State v. Yananokwiak*, 65 N.C. App. 513, 517, 309 S.E.2d 560, 563 (1983) (using a totality of the circumstances test to determine whether there were exigent circumstances).

N.C.P.I.—Civil 807.50
BREACH OF DUTY—CORPORATE DIRECTOR.
GENERAL CIVIL VOLUME
REPLACEMENT MARCH 2016

807.50 BREACH OF DUTY—CORPORATE DIRECTOR.¹

The (*state number*) issue reads:

“Was the plaintiff² 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] were a proximate

N.C.P.I.—Civil 807.50
 BREACH OF DUTY—CORPORATE DIRECTOR.
 GENERAL CIVIL VOLUME
 REPLACEMENT MARCH 2016

 cause of 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.

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

N.C.P.I.—Civil 807.50
 BREACH OF DUTY—CORPORATE DIRECTOR.
 GENERAL CIVIL VOLUME
 REPLACEMENT MARCH 2016

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). A director’s failure to disclose material facts to the corporation may constitute a breach of the director’s undivided loyalty, and therefore, a failure to act in good faith. See *Harris v. Testar, Inc.*, ___ N.C. App. ___, ___, 777 S.E.2d 776, 780 (2015).

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 phrases “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.

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

June 1975
Reprinted June 2016

Volume III

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES: *Dates the instructions were adopted are found in parentheses after the title of the instruction.

PART I. GENERAL

Chapter 1. Preliminary Instructions.

100.10	Opening Statement. (12/2004)
100.15	Cameras and Microphones in Courtroom. (5/2004)
100.20	Recesses. (6/2010)
100.21	Recesses. (6/2010)
100.40	Deposition Testimony. (5/2004)
100.44	Interrogatories. (12/2004)
100.70	Taking of Notes by Jurors. (5/2004)
101.00	Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
101.05	Function of the Jury. (3/1994)
101.10	Burden of Proof and Greater Weight of the Evidence. (3/1994)
101.11	Clear, Strong, and Convincing Evidence. (11/2004)
101.14	Judicial Notice. (10/1983)
101.15	Credibility of Witness. (3/1994)
101.20	Weight of the Evidence. (3/1994)
101.25	Testimony of Expert Witness. (2/1994)
101.30	Testimony of Interested Witness. (3/1994)
101.32	Evidence—Limitation as to Parties. (10/1983)
101.33	Evidence—Limitation as to Purpose. (10/1983)
101.35	Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
101.36	Impeachment of Witness or Party by Proof of Crime. (4/1986)
101.37	Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
101.38	Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
101.39	Evidence—Spoliation by a Party. (6/2010)
101.40	Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
101.41	Stipulations. (1/1988)
101.42	Requests for Admissions. (1/1988)
101.43	Deposition Evidence. (4/1988)
101.45	Circumstantial Evidence. (10/1985)
101.46	Definition of [Intent] [Intentionally]. (5/2004)
101.50	Duty to Recall Evidence. (3/1994)
101.60	Issues. (3/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 101.62 Presumptions. (4/1984)
- 101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

- 102.10 Negligence Issue—Burden of Proof. (5/1994)
- 102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
- 102.11 Negligence Issue—Definition of Common Law Negligence. (3/1994)
- 102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
- 102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
- 102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
- 102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
- 102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
- 102.20 Proximate Cause—Peculiar Susceptibility. (4/1998)
- 102.26 Proximate Cause—Act of God. (5/1994)
- 102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
- 102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
- 102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
- 102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
- 102.35 Contentions of Negligence. (3/1994)
- 102.50 Final Mandate—Negligence Issue. (3/1994)
- 102.60 Concurring Negligence. (3/2005)
- 102.65 Insulating/Intervening Negligence. (6/2016)
- 102.84 Negligence—Infliction of Severe Emotional Distress. (4/1998)
- 102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
- 102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
- 102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
- 102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
- 102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

- 103.10 Agency Issue—Burden of Proof—When Principal Is Liable. (5/2009)
- 103.15 Independent Contractor. (5/1992)
- 103.30 Agency Issue—Civil Conspiracy (One Defendant). (5/2004)
- 103.31 Agency Issue—Civil Conspiracy (Multiple Defendants). (5/2004)
- 103.40 Disregard of Corporate Entity of Affiliated Company—Instrumentality Rule (“Piercing the Corporate Veil”). (6/2014)
- 103.50 Agency—Departure from Employment. (10/1985)
- 103.55 Agency—Willful and Intentional Injury Inflicted by an Agent. (10/1985)
- 103.70 Agency Issue—Final Mandate. (10/1985)

Chapter 3a. Contributory Negligence Instructions.

- 104.10 Contributory Negligence Issue—Burden of Proof—Definition. (3/1994)
- 104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (3/1994)
- 104.35 Contentions of Contributory Negligence. (3/1994)
- 104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

- 108.75 Negligence of Third Party Tort-Feasor—Contribution. (10/1985)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 5. Summary Instructions.

- 150.10 Jury Should Consider All Contentions. (3/1994)
- 150.12 Jury Should Render Verdict Based on Fact, Not Consequences. (3/1994)
- 150.20 The Court Has No Opinion. (3/1994)
- 150.30 Verdict Must Be Unanimous. (3/1994)
- 150.40 Selection of Foreperson. (3/1994)
- 150.45 Concluding Instructions—When To Begin Deliberations, Charge Conference. (3/1994)
- 150.50 Failure of Jury to Reach a Verdict. (10/1980)
- 150.60 Discharging the Jury. (5/1988)

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

- 501.00 Introduction to Contract Series. (5/2003)

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation. (5/2003)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (5/2003)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (5/2003)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

502.05	Contracts—Issue of Breach By Repudiation. (6/2013)
502.10	Contracts—Issue of Breach By Prevention. (5/2003)
502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (5/2003)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)
	Chapter 4. Issue of Common Law Remedy.
503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)
503.45	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.48	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.51	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
503.54	Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
503.70	Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
503.73	Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
503.75	Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
503.76	Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
503.79	Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
503.90	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
503.91	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
503.94	Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
503.97	Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)
	Chapter 5. Issue of UCC Remedy.
504.00	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
504.03	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
504.06	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
504.09	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
504.12	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
504.15	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
504.18	Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
504.21	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
504.24	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
504.27	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
504.30	Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
504.33	Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 504.36 Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
- 504.39 Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
- 504.42 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)
- 504.45 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Undelivered Goods. (5/2003)
- 504.48 Contracts—Issue of UCC Remedy—Defense (Offset) of Failure to Mitigate. (5/2003)
- 504.51 Contracts—Issue of UCC Remedy—Validity of Liquidated Damages Provision. (5/2003)
- 504.54 Contracts—Issue of UCC Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 6. Minor’s Claims Where Contract Disavowed.

- 505.20 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed. (5/2003)
- 505.25 Contracts—Issue of Remedy—Minor’s Claim for Restitution Where Contract Is Disavowed—Measure of Recovery. (5/2003)

Chapter 7. Agency.

- 516.05 Agency—Actual and Apparent Authority of General Agent. (6/2013)
- 516.15 Agency—Ratification. (6/2011)
- 516.30 Agency—Issue of Undisclosed Principal—Liability of Agent. (4/2005)
- 517.20 Breach of Contract—Special Damages—Loss of Profits. (6/2013)

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

- 635.20 Action on Unverified Account—Issue of Liability. (5/1991)
- 635.25 Action on Unverified Account—Issue of Amount Owed. (5/1991)
- 635.30 Action on Verified Itemized Account. (5/1991)
- 635.35 Action on Account Stated. (6/2014)
- 635.40 Action on Account—Defense of Payment. (5/1991)

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2010)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (6/2014)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (5/2004)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (5/2009)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

640.29C	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Pretext Case</i> . (6/2010)
640.29D	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Plaintiff). (6/2010)
640.29E	Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act— <i>Mixed Motive Case</i> (Defendant). (5/2009)
640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (4/1998)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (6/2014)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

645.20	Covenants Not to Compete—Issue of the Existence of the Covenant. (6/2015)
645.30	Covenants Not to Compete—Issue of Whether Covenant was Breached. (5/1976)
645.50	Covenants not to Compete—Issue of Damages. (5/2006)

Chapter 12. Actions for Services Rendered a Decedent.

714.18	Products Liability—Military Contractor Defense. (6/2007)
735.00	Action for Services Rendered a Decedent—Issue of Existence of Contract. (11/2/2004)
735.05	Action for Services Rendered a Decedent—Evidence of Promise to Compensate by Will. (12/1977)
735.10	Action for Services Rendered a Decedent—Presumption that Compensation Is Intended. (5/1978)
735.15	Action for Services Rendered a Decedent—Presumption of Gratitude by Family Member. (12/1977)
735.20	Action for Services Rendered a Decedent—Issue of Breach of Contract. (12/1977)
735.25	Action for Services Rendered a Decedent—Issue of Recovery. (12/1977)
735.30	Action for Services Rendered a Decedent—Issue of Recovery—Benefits or Offsets. (10/1977)
735.35	Action for Services Rendered a Decedent—Issue of Recovery—Evidence of Value of Specific Property. (10/1977)
735.40	Action for Services Rendered a Decedent—Issue of Recovery—Statute of Limitations. (5/1978)

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
--------	---

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 736.01 Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

- 741.00 Warranties in Sales of Goods. (5/1999)
 741.05 Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
 741.10 Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
 741.15 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
 741.16 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
 741.17 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
 741.18 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
 741.20 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
 741.25 Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.26 Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.27 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.28 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.30 Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
 741.31 Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.32 Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.33 Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.34 Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
 741.35 Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
 741.40 Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
 741.45 Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
 741.50 Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
 741.60 Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
 741.65 Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 741.66 Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
- 741.67 Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
- 741.70 Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)
- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

- 743.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 743.06 Products Liability—Exception To Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 743.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 743.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (5/1999)
- 743.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use In Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 743.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.05 Products Liability (Other than Express Warranty)—Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/1999)
- 744.06 Products Liability—Exception to Seller’s Defense of Sealed Container or Lack of Opportunity to Inspect Product. (5/2004)
- 744.07 Products Liability—Seller’s and Manufacturer’s Defense of Product Alteration or Modification. (5/1999)
- 744.08 Products Liability—Seller’s and Manufacturer’s Defense of Use Contrary to Instructions or Warnings. (6/2010)
- 744.09 Products Liability—Seller’s and Manufacturer’s Defense of Unreasonable Use in Light of Knowledge of Unreasonably Dangerous Condition of Product. (5/1999)
- 744.10 Products Liability—Seller’s and Manufacturer’s Defense of Claimant’s Failure to Exercise Reasonable Care as Proximate Cause of Damage. (5/1999)
- 744.12 Products Liability—Seller’s and Manufacturer’s Defense of Open and Obvious Risk. (5/1999)
- 744.13 Products Liability—Prescription Drugs—Seller’s and Manufacturer’s Defense of Delivery of Adequate Warning or Instruction to Prescribers or Dispensers. (5/1999)
- 744.16 Products Liability—Manufacturer’s Defense of Inherent Characteristic. (5/1999)
- 744.17 Products Liability—Prescription Drugs—Manufacturer’s Defense of Unavoidably Unsafe Aspect. (5/1999)
- 744.18 Products Liability—Statute of Limitations. (6/2010)

Chapter 3. New Motor Vehicle Warranties (“Lemon Law”).

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 745.07 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act ("Lemon Law")—Damages When Plaintiff is a Lessor. (6/2015)
- 745.13 New Motor Vehicles Warranties Act ("Lemon Law")—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder's Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2010)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2014)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (5/2002)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2010)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)

- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (6/2010)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)

- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)

Chapter 3A. Infliction of Emotional Distress.

- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)

Chapter 3B. Loss of Consortium.

- 800.65 Action for Loss of Consortium. (12/1999)

Chapter 4. Invasion of Privacy.

- 800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)
- 800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)
- 800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use. (5/2001)
- 800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—Damages. (5/2001)

Chapter 5. Malicious Prosecution, False Imprisonment, and Abuse of Process.

- 801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)
- 801.01 Malicious Prosecution—Civil Proceeding. (1/1995)
- 801.05 Malicious Prosecution—Damages. (10/1994)
- 801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice. (5/2001)
- 802.00 False Imprisonment. (6/2014)
- 802.01 False Imprisonment—Merchant’s Defenses. (5/2004)
- 803.00 Abuse of Process. (6/2012)
- 804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)
- 804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery. (3/2016)
- 804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest. (3/2016)
- 804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used. (3/2016)
- 804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages. (3/2016)
- 804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Sample Verdict Sheet. (3/2016)
- 804.06 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Color of State Law. (3/2016)
- 804.07 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Use of Force. (3/2016)
- 804.08 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Lawfulness of Arrest. (3/2016)
- 804.09 Excessive Force in Making Arrest—Section 1983 Claim—Issue of Reasonableness of Force Used. (3/2016)
- 804.10 Excessive Force in Making Arrest—Section 1983 Claim—Damages. (3/2016)
- 804.11 Excessive Force in Making Arrest—Section 1983 Claim—Punitive Damages. (3/2016)
- 804.12 Excessive Force in Making Arrest—Section 1983 Claim—Sample Verdict Sheet. (3/2016)
- 804.50 Section 1983—Unreasonable Search of Home. (6/2016)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

Chapter 6. Nuisances and Trespass.

- 805.00 Trespass to Real Property. (6/2015)
- 805.05 Trespass to Real Property—Damages. (5/2001)
- 805.10 Trespass to Personal Property. (5/2001)
- 805.15 Trespass to Personal Property—Damages. (5/2001)
- 805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

- 805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)
- 805.55 Duty of Owner to Lawful Visitor. (6/2011)
- 805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (5/2001)
- 805.60 Duty of Owner to Licensee. (Delete Sheet). (5/1999)
- 805.61 Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
- 805.64 Duty Of Owner to Trespasser—Intentional Harms (6/2013)
- 805.64A Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
- 805.64B Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
- 805.64C Duty of Owner to Trespasser: Position of Peril (6/2013)
- 805.65 Duty of Owner to Trespasser. (6/2013)
- 805.65A Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
- 805.66 Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
- 805.67 Duty of Municipality or County to Users of Public Ways. (5/1990)
- 805.68 Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
- 805.69 Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
- 805.70 Duty of Adjoining Landowners—Negligence. (5/1990)
- 805.71 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
- 805.72 Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.73 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
- 805.74 Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (5/1990)
- 805.80 Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

- 806.00 Conversion. (5/1996)
- 806.01 Conversion—Defense of Abandonment. (5/1996)
- 806.02 Conversion—Defense of Sale (or Exchange). (5/1996)
- 806.03 Conversion—Defense of Gift. (4/2004)
- 806.05 Conversion—Damages. (5/1996)

Chapter 9. Defamation.

- 806.40 Defamation—Preface. (5/2008)
- 806.50 Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (6/2013)
- 806.51 Defamation—Libel Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.53 Defamation—Libel Actionable *Per Se*—Public Figure or Official. (5/2008)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 806.60 Defamation—Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.61 Defamation—Libel Actionable *Per Quod*—Private Figure—Matter of Public Concern. (6/2011)
- 806.62 Defamation—Libel Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.65 Defamation—Slander Actionable *Per Se*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.66 Defamation—Slander Actionable *Per Se*—Private Figure—Matter of Public Concern. (6/2011)
- 806.67 Defamation—Slander Actionable *Per Se*—Public Figure or Official. (5/2008)
- 806.70 Defamation—Slander Actionable *Per Quod*—Private Figure—Not Matter of Public Concern. (5/2008)
- 806.71 Defamation—Slander Actionable *Per Quod*—Matter of Public Concern. (5/2008)
- 806.72 Defamation—Slander Actionable *Per Quod*—Public Figure or Official. (5/2008)
- 806.79 Defamation—Libel Actionable *Per Se*, Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
- 806.81 Defamation Actionable *Per Se*—Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
- 806.82 Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
- 806.83 Defamation Actionable *Per Se*—Public Figure or Official—Presumed Damages. (5/2008)
- 806.84 Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
- 806.85 Defamation—Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

- 807.00 Wrongful Interference with Contract Right. (6/2013)
- 807.10 Wrongful Interference with Prospective Contract. (12/1994)
- 807.20 Slander of Title. (11/2004)
- 807.50 Breach of Duty—Corporate Director. (3/2016)
- 807.52 Breach of Duty—Corporate Officer. (5/2002)
- 807.54 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Closely Held Corporation. (5/2002)
- 807.56 Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power. (5/2002)
- 807.58 "Breach of Duty—Controlling Shareholder of Closely Held Corporation—Issue of Taking Improper Advantage of Power—Defense of Good Faith, Care and Diligence." (5/2002)

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

- 809.00 Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
- 809.00A Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
- 809.03 Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
- 809.03A Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
- 809.05 Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.05A Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
- 809.06 Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.65A	Medical Malpractice—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider's Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider's Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

VOLUME II

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2014)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)
810.41	Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (1/2000)
810.42	Wrongful Death Damages—In General. (6/2012)
810.44	Wrongful Death Damages—Medical Expenses. (6/2013)
810.44A	Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
810.44B	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.44C	Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.44D	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.46	Wrongful Death Damages—Pain and Suffering. (1/2000)
810.48	Wrongful Death Damages—Funeral Expenses. (6/2013)
810.48A	Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
810.48B	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.48C	Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.48D	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.49	Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
810.50	Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
810.54	Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
810.56	Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
810.60	Property Damages—Issue and Burden of Proof. (2/2000)
810.62	Property Damages—Diminution in Market Value. (2/2000)
810.64	Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
810.66	Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
810.68	Property Damages—Final Mandate. (2/2000)
810.90	Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 810.91 Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
- 810.92 Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
- 810.93 Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
- 810.94 Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
- 810.96 Punitive Damages—Liability of Defendant. (3/2016)
- 810.98 Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

- 811.00 Legal Negligence—Duty to Client (Formerly 809.90) [as represented from Civil Committee] (6/2013)

Chapter 14. Animals.

- 812.00 (Preface) Animals—Liability of Owners and Keepers. (5/1996)
- 812.00 Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)
- 812.01 Animals—Liability of Owner Who Allows Dog to Run at Large at Night. (8/2004)
- 812.02 Animals—Common Law Liability of Owner Whose Domestic Livestock Run at Large with Owner’s Knowledge and Consent. (5/1996)
- 812.03 Miscellaneous Torts—Animals—Common Law Liability of Owner of Domestic Animals. (6/2011)
- 812.04 Animals—Owner’s Negligence In Violation of Animal Control Ordinance. (5/1996)
- 812.05 Animals—Liability of Owner of Dog Which Injures, Kills, or Maims Livestock or Fowl. (5/1996)
- 812.06 Animals—Liability of Owner Who Fails to Destroy Dog Bitten by Mad Dog. (5/1996)
- 812.07 Animals—Statutory (Strict) Liability of Owner of a Dangerous Dog. (5/1996)

Chapter 15. Trade Regulation.

- 813.00 Trade Regulation—Preface. (6/2013)
- 813.05 Model Unfair or Deceptive Trade Practice Charge. (6/2014)
- 813.20 Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
- 813.21 Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
- 813.22 Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
- 813.23 Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
- 813.24 Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
- 813.25 Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
- 813.26 Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
- 813.27 Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
- 813.28 Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
- 813.29 Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
- 813.30 Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
- 813.31 Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
- 813.33 Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
- 813.34 Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
- 813.35 Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 813.36 Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
- 813.37 Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
- 813.38 Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
- 813.39 Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
- 813.40 Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
- 813.41 Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
- 813.60 Trade Regulation—Commerce—Introduction. (6/2015)
- 813.62 Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
- 813.63 Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
- 813.70 Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
- 813.80 Trade Regulation—Damages—Issue of Damages. (5/2006)
- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

- 814.00 Bailments—Issue of Bailment. (5/1996)
- 814.02 Bailments—Bailee’s Negligence—Prima Facie Case. (5/1996)
- 814.03 Bailments—Bailee’s Negligence. (5/1996)
- 814.04 Bailments—Bailor’s Negligence. (5/1996)

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction to RICO Instructions (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2015)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (6/2015)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2015)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2015)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (6/2015)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—
 Defense of Good Faith Effort to Rehabilitate. (6/2015)

**Chapter 18. Budget Dispute Between Board of Education and Board of
 County Commissioners.**

- 814.95 Budget Dispute Between Board of Education and Board of County Commissioners
 (5/2015)
- 814.95A Budget Dispute Between Board of Education and Board of County Commissioners—
 Sample Verdict Sheet (3/2016)

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)
- 815.08 Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
- 815.10 Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
- 815.20 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.22 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of
 Pregnancy or Living Children. (1/1999)
- 815.23 Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
- 815.24 Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
- 815.26 Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge.
 (1/1999)
- 815.27 Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
- 815.28 Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity.
 (1/1999)
- 815.29 Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
- 815.30 Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of
 Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of
 Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth
 of Issue. (1/1999)
- 815.32 Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage
 of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity
 and Understanding—Defense of Ratification. (1/1999)
- 815.40 Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
- 815.42 Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental
 Impairment. (1/1999)
- 815.44 Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
- 815.46 Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct
 of Sane Spouse. (1/1999)
- 815.50 Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
- 815.52 Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
- 815.54 Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
- 815.56 Divorce—From Bed and Board—Issue of Indignities. (8/2004)
- 815.58 Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs.
 (1/1999)
- 815.60 Divorce—From Bed and Board—Issue of Adultery. (1/1999)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents' Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (6/2014)
820.10	Adverse Possession—Color of Title. (3/1997)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (5/2016)

Chapter 2. Proof of Title.

820.40	Proof of Title—Marketable Title Act. (5/2001)
820.50	Proof of Title—Connected Chain of Title from the State. (5/2001)
820.60	Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
820.61	Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

825.00	Processioning Action. (N.C.G.S. Ch. 38). (5/2000)
--------	---

Chapter 4. Eminent Domain—Initiated Before January 1, 1982. Deleted. (2/1999)

830.00	Eminent Domain—Procedures. (Delete Sheet). (2/1999)
830.05	Eminent Domain—Total Taking. (Delete Sheet). (2/1999)
830.10	Eminent Domain—Partial Taking—Fee. (Delete Sheet). (2/1999)
830.15	Eminent Domain—Partial Taking—Easement. (Delete Sheet). (2/1999)
830.20	Eminent Domain—General and Special Benefits. (Delete Sheet). (2/1999)
830.30	Eminent Domain—Comparables. (Delete Sheet). (2/1999)

Chapter 5. Eminent Domain—Initiated on or After January 1, 1982.

835.00	Eminent Domain—Series Preface. (4/1999)
835.05	Eminent Domain—Introductory Instruction. (8/2015)
835.05i	Eminent Domain—Introductory Instruction. (Delete Sheet) (8/2015)
835.10	Eminent Domain—Issue of Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12	Eminent Domain—Issue of Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.12A	Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2006)
835.15	Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
835.20	Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.24 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.24A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Greater of the Fair Market Value of Property Taken or the Difference in Fair Market Value of the Property Before and After the Taking. (5/2006)
- 835.30 Eminent Domain—Comparables. (Delete Sheet). (5/1999)

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (6/2015)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (2/1993)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

- 847.00 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Violation of Act—Violation of Ordinance, Rule or Order of Secretary of Environment and Natural Resources or of Local Government. (5/2008)
- 847.01 Land-Disturbing Activity—Sedimentation Pollution Control Act of 1973—Damages. (5/2008)

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)

N.C.P.I.—CIVIL TABLE OF CONTENTS
 GENERAL CIVIL VOLUME
 REPLACEMENT JUNE 2016

- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

- 855.10 Foreclosure—Action for Deficiency Judgment—Amount of Debt Owed (4/2016)
- 855.12 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Property Fairly Worth Amount Owed (4/2016)
- 855.14 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—Bid Substantially Less than True Value of Property on Date of Foreclosure (4/2016)
- 855.16 Foreclosure—Action for Deficiency Judgment—Defense of Mortgagor to Defeat and Offset Deficiency Judgment—True Value of Property on Date of Foreclosure Sale (3/2016)
- 855.18 Foreclosure—Action for Deficiency Judgment—Sample Verdict Form & Judge's Worksheet (6/2014)

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (6/2014)
- 860.10 Wills—Holographic Wills—Requirements. (8/2004)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (5/2002)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2006)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

- 865.50 Parol Trusts—Express Trust in Purchased Real or Personal Property. (5/2001)
- 865.55 Parol Trusts—Express Trust in Transferred Real or Personal Property. (8/2004)
- 865.60 Parol Trusts—Express Declaration of Trust in Personal Property. (5/2001)
- 865.65 Trusts by Operation of Law—Purchase Money Resulting Trust (Real and Personal Property). (6/2014)
- 865.70 Trusts by Operation of Law—Purchase Money Resulting Trust (Real or Personal Property). (6/2014)
- 865.75 Trusts by Operation of Law—Constructive Trust. (6/2015)

PART VIII. INSURANCE

Chapter 1. Liability for Agent for Failure to Procure Insurance.

- 870.00 Failure to Procure Insurance—Negligence Issue. (6/2013)
- 870.10 Failure to Procure Insurance—Breach of Contract Issue. (2/2005)

Chapter 2. Accident, Accidental Means, and Suicide.

- 870.20 Accidental Means Definition. (5/2005)

N.C.P.I.—CIVIL TABLE OF CONTENTS
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2016

- 870.21 "Accident" or "Accidental Means" Issue—Effect of Diseased Condition. (5/2005)
- 870.25 Accident Issue. (2/2005)
- 870.30 General Risk Life Insurance Policy—Suicide as a Defense. (3/2005)
- 870.72 Identity Theft—Identifying Information. (6/2010)
- 870.73 Identity Theft—Identifying/Personal Information. (6/2010)

Chapter 3. Disability.

- 880.00 Disability—Continuous and Total Disability Issue. (3/2005)
- 880.01 Disability—Continuous Confinement Within Doors Issue. (3/2005)
- 880.02 Disability—Constant Care of a Licensed Physician Issue. (3/2005)

Chapter 4. Material Misrepresentations.

- 880.14 Misrepresentation in Application for Insurance—Factual Dispute. (5/2005)
- 880.15 Misrepresentation in Application for Insurance—Issue of Falsity of Representation. (5/2005)
- 880.20 Materiality of Misrepresentation in Application for Insurance. (5/2006)
- 880.25 Fire Insurance Policy—Willful Misrepresentation in Application. (5/2005)
- 880.26 Concealment in Application for Non-Marine Insurance. (5/2005)
- 880.30 Misrepresentation in Application—False Answer(s) Inserted by Agent. (Estoppel). (5/2006)

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2015)

Chapter 6. Fire Insurance.

- 910.20 Fire Insurance—Hazard Increased by Insured. (5/2006)
- 910.25 Fire Insurance—Intentional Burning by Insured. (5/2006)
- 910.26 Fire Insurance—Willful Misrepresentation in Application. (5/2006)
- 910.27 Fire Insurance—Defense of Fraudulent Proof of Loss. (5/2006)

Chapter 7. Damages.

- 910.80 Insurance—Damages for Personal Property—Actual Cash Value. (6/1983)
- 910.90 Insurance—Damages for Real Property—Actual Cash Value. (6/1983)

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2016)

N.C.P.I.—Civil 810.96
PUNITIVE DAMAGES—LIABILITY OF DEFENDANT.
GENERAL CIVIL VOLUME
REPLACEMENT MARCH 2016

810.96 PUNITIVE DAMAGES—LIABILITY OF DEFENDANT.

NOTE WELL: Use this instruction in conjunction with claims for relief arising on or after January 1, 1996.¹ For claims for relief arising prior to January 1, 1996, use N.C.P.I. —Civil 810.90.

The (*state number*) issue reads:

"Is the defendant liable to the plaintiff for punitive damages?"

(You are to answer this issue only if you have awarded the plaintiff relief in conjunction with (*state number(s) of plaintiff's issue(s)*).)²

On this issue the burden of proof is on the plaintiff to prove three things. The plaintiff must prove the first thing by clear and convincing evidence.³ Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.

Thus, the first thing the plaintiff must prove, by clear and convincing evidence, is the existence of [fraud] [malice] [willful or wanton conduct].⁴

[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.]⁵

[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.]⁶

[Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage or other harm. Willful or wanton conduct means more than gross

N.C.P.I.—Civil 810.96
 PUNITIVE DAMAGES—LIABILITY OF DEFENDANT.
 GENERAL CIVIL VOLUME
 REPLACEMENT MARCH 2016

negligence.]]⁷

The plaintiff must prove the second and third things by the greater weight of the evidence. The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist. These second and third things are:

Second, that the [fraud] [malice] [willful or wanton conduct] was related to the injury to the plaintiff for which you have already awarded relief.⁸

And Third, that the [defendant participated in] [the defendant's officers, directors or managers participated in or condoned] the [fraud] [malice] [willful or wanton conduct].⁹

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the standards herein explained that the defendant is liable to the plaintiff for punitive damages, 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 "No" in favor of the defendant.

1 N.C. Gen. Stat. § 1D became effective January 1, 1996, displacing common law punitive damages. It applies to all "claims for relief arising on or after the date." 1995 N.C. Sess. Laws 514, § 5. Pursuant to N.C. Gen. Stat. § 1D-30, upon the motion of the defendant, the issues of liability for and amount of punitive damages shall be tried separately from the issues of liability for and amount of compensatory damages.

2 This admonition should be omitted in the event of a bifurcated procedure pursuant to N.C. Gen. Stat. § 1D-30. See *Watson v. Dixon*, 132 N.C. App. 329, 331-332, 511 S.E.2d 37, 38 (1999) cert. den. 351 N.C. 191, 541 S.E.2d 727(1999).

3 N.C. Gen. Stat. § 1D-15(b). Note that the statute omits any reference to "strong."

4 N.C. Gen. Stat. § 1D-15(a).

5 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" can also qualify as "fraud" for

N.C.P.I.—Civil 810.96
PUNITIVE DAMAGES—LIABILITY OF DEFENDANT.
GENERAL CIVIL VOLUME
REPLACEMENT MARCH 2016

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.

6 N.C. Gen. Stat. § 1D-5(5).

7 N.C. Gen. Stat. § 1D-5(7).

8 N.C. Gen. Stat. § 1D-15(a). Note, however, that *Mehovic v. Mehovic*, 133 N.C. App. 131, 136, 514 S.E.2d 730, 734 (1999) holds that punitive damages are appropriate where the plaintiff elects rescission rather than compensatory damages.

9 Punitive damages may not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. N.C. Gen. Stat. § 1D-15(c).

814.40 INTRODUCTION TO RICO INSTRUCTIONS

The North Carolina Racketeer Influenced and Corrupt Organizations Act (NC-RICO or the Act) was enacted in 1986. 2009 N.C. Sess. Laws 360, 361, ch. 999, §§ 1 *et seq.* and codified as Chapter 75D of the North Carolina General Statutes. The General Assembly found that “a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result of organized unlawful activity are being directed to and against the legitimate economy of the State.” N.C. Gen. Stat. § 75D-2(a). The express purpose of the legislation is:

to deter organized unlawful activity by imposing civil equitable sanctions against this subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; to restore [to] the general economy of the State all of the proceeds, money, profits, and property, both real and personal of every kind and description which is owned, used or acquired through organized unlawful activity by any person or association of persons whether natural, incorporated or unincorporated in this State; *and to provide compensation to private persons injured by organized unlawful activity.*

N.C. Gen. Stat. § 75D-2(b) (emphasis added).¹

Among the remedies provided by the Act is a private “cause of action” for an “innocent person who is injured or damaged in his business or property by reason of any violation” of the provisions of N.C. Gen. Stat. §

75D-4 “involving a pattern of racketeering activity.” N.C. Gen. Stat. § 75D-8(c). The claim is for “three times the actual damages sustained and reasonable attorneys fees.” *Id.*

N.C. Gen. Stat. § 75D-4 prohibits certain conduct, which can be conveniently divided into three basic categories. It is unlawful:

1. To *engage* in a “*pattern of racketeering activity*,” or to acquire or maintain an interest in any “*enterprise*” or property through racketeering activities. N.C. Gen. Stat. § 75D-4(a)(1).
2. To *conduct* or *participate in* an “*enterprise*” through a “*pattern of racketeering activity*.” N.C. Gen. Stat. § 75D-4(a)(2).
3. To *conspire* or *attempt* to engage in the conduct prohibited by the provisions applicable to (1) and (2), above. N.C. Gen. Stat. § 75D-4(a)(3).

The Act defines the key terms, “enterprise,” “racketeering activity” and “pattern of racketeering activity.” N.C. Gen. Stat. § 75D-3(a)-(c).

These instructions address liability issues only. An instruction for actual damages should be given, with the amount of the award, if any, trebled and reasonable attorneys fees added pursuant to N.C. Gen. Stat. § 75D-8(c).

¹ The legislation is not intended to interfere with “attorney-client relationship[s],” apply to “isolated and unrelated incidents of unlawful conduct,” or subject to suit under the provisions of this Chapter “legitimate business organizations doing business in this State, having no connection to, or any relationship or involvement with organized unlawful elements, groups or activities.” N.C. Gen. Stat. §§ 75D-2(b), (c).

N.C.P.I.—Civil 814.41

CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY.

GENERAL CIVIL VOLUME

MAY 2016

N.C. Gen. Stat. § 75D-4(a)(1).

814.41 CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY.

The (*state number*) issue reads:

“Was the plaintiff [injured] [damaged] by the [defendant’s]
[defendants’]

[engaging in a pattern of racketeering activity].¹

[, [through a pattern of racketeering activities] [through proceeds
derived from a pattern of racketeering activities],

[acquiring] [maintaining], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of
any nature, including money]]?²”

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, five things³:

First, that the [defendant] [defendants]

[engaged in a pattern of racketeering activity]

[, [through a pattern of racketeering activities] [through proceeds
derived from a pattern of racketeering activities],

[acquired] [maintained], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of
any nature, including money]].

N.C.P.I.—Civil 814.41

CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY.

GENERAL CIVIL VOLUME

MAY 2016

N.C. Gen. Stat. § 75D-4(a)(1).

“Racketeering activity” means to [commit] [attempt to commit] [[solicit] [coerce] [intimidate] another person to commit] [an act] [acts] which would be chargeable by indictment for (*state crime(s)*).⁴

“Pattern of racketeering activity” means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided that at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.⁵

Second, that at least one of the incidents of racketeering activity involved something other than mail fraud, wire fraud or fraud in the sale of securities.⁶

Third, that as a result of such racketeering activity, the plaintiff suffered [injury] [damage] to *his* [business] [property].⁷

Fourth, that the [defendant] [defendants] obtained pecuniary gain as a result of the racketeering activity.

And Fifth, that the plaintiff is an innocent person.⁸

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] [defendants]

[engaged in a pattern of racketeering activity]

N.C.P.I.—Civil 814.41

CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY.

GENERAL CIVIL VOLUME

MAY 2016

N.C. Gen. Stat. § 75D-4(a)(1).

[,[through a pattern of racketeering activities] [through proceeds derived from a pattern of racketeering activities],

[acquired] [maintained], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of any nature, including money]],

that at least one of the incidents of racketeering activity involved something other than mail fraud, wire fraud or fraud in the sale of securities,

that as a result of such racketeering activity, the plaintiff suffered [injury] [damage] to *his* [business] [property],

that the [defendant] [defendants] obtained pecuniary gain as a result of the racketeering activity, and

that the plaintiff is an innocent person, then it would be your duty to answer this issue “Yes,” in favor of the plaintiff. If you do not so find, then it would be your duty to answer this issue “No,” in favor of the [defendant] [defendants].

1 N.C. Gen. Stat. § 75D-4(a)(1).

2 *Id.*

3 Because commission of an act prohibited by North Carolina RICO constitutes a civil offense only and not a crime, “a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section.” N.C. Gen. Stat. § 75D-4(b).

4 The crimes which may be considered are:

a. Article 5 of Chapter 90 of the North Carolina General Statutes;

b. Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59; and N.C. Gen. Stat. §§ 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313; and

N.C.P.I.—Civil 814.41

CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY.

GENERAL CIVIL VOLUME

MAY 2016

N.C. Gen. Stat. § 75D-4(a)(1).

c. Any conduct involved in a "money laundering" activity.

NOTE WELL: The meaning of "racketeering activity" also includes the description found in 18 U.S.C. § 1961(1). N.C. Gen. Stat. § 75D-3(c).

5 N.C. Gen. Stat. § 75D-3(b).

6 N.C. Gen. Stat. § 75D-8(c).

7 See *Gilmore v. Gilmore*, 229 N.C. App. 347, 357, 748 S.E.2d 42, 49 (2013), citing *In re Bostic Constr., Inc.*, 435 B.R. 46, 67 (M.D.N.C. 2010).

8 N.C. Gen. Stat. § 75D-8(c) ("Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. . . .")

[*NOTE WELL:* The statute does not define "innocent person." The counterpart federal statute, 18 U.S.C. § 1964(c), does not contain the word "innocent." Noting the difference, the North Carolina Court of Appeals has said that "no legally significant distinction between . . . these provisions" exists (albeit with respect to a different question). See *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, n.3, 475 S.E.2d 247, 254 (1996), *aff'd per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). This would seem to suggest that the term "innocent" has no substance. In *State ex rel. Thornburg v. Tavern*, 96 N.C. App. 84, 86, 384 S.E.2d 585, 587 (1989), a forfeiture proceeding pursuant to another provision of Chapter 75D, the Court of Appeals held that when a party resists forfeiture on grounds of ownership of the property as an "innocent party," the burden of proof on innocence lies with that party. *Id.* at 87, 384 S.E.2d at 587. The fifth element is included because of concern that the legislature probably does not intend for the term "innocent" to have no substance, and nothing in the statute suggests an intent that the defendant bear the burden of showing that the plaintiff is not an "innocent" person.]

N.C.P.I.—Civil 814.42
CIVIL RICO—ENTERPRISE ACTIVITY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(2).

814.42 CIVIL RICO—ENTERPRISE ACTIVITY. N.C. Gen. Stat. § 75D-4(a)(2).

The (*state number*) issue reads:

“Was the plaintiff [injured] [damaged] by the [defendant’s] [defendants’] [conduct of] [participation in] any enterprise through a pattern of racketeering activity?”¹

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, six things²:

First, that the [defendant] [defendants] directly or indirectly [conducted] [participated in] an enterprise.

“Enterprise” means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this State, or other legal entity; or any unchartered union, association or group of individuals associated in fact although not a legal entity. It includes a governmental entity, and an entity formed or operated for a legal purpose as well as an entity formed or operated for an illicit or illegal purpose.³

Second, that the enterprise engaged in a pattern of racketeering activity.

“Racketeering activity” means to [commit] [attempt to commit] [[solicit] [coerce] [intimidate] another person to commit] [an act] [acts] which would be chargeable by indictment for (*state crime(s)*).⁴

“Pattern of racketeering activity” means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are

N.C.P.I.—Civil 814.42
CIVIL RICO—ENTERPRISE ACTIVITY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(2).

interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

Third, that at least one of the incidents of racketeering activity involved something other than mail fraud, wire fraud or fraud in the sale of securities.⁵

Fourth, that as a result of such racketeering activity, the plaintiff suffered [injury] [damage] to *his* [business] [property].⁶

Fifth, that the [defendant] [defendants] obtained pecuniary gain as a result of the racketeering activity.

And Sixth, that the plaintiff is an innocent person.⁷

If you find, by the greater weight of the evidence, that the [defendant] [defendants] directly or indirectly [conducted] [participated in] an enterprise, that the enterprise engaged in a pattern of racketeering activity, that at least one of the incidents of racketeering activity involved something other than mail fraud, wire fraud or fraud in the sale of securities, that as a result of such racketeering activity, the plaintiff suffered [injury] [damage] to *his* [business] [property], that the [defendant] [defendants] obtained pecuniary gain as a result of the racketeering activity, and that the plaintiff is an innocent person, then it would be your duty to answer this issue “Yes,” in favor of the plaintiff. If you do not so find, then it would be your duty to answer this issue “No,” in favor of the defendant [defendants].

N.C.P.I.—Civil 814.42
CIVIL RICO—ENTERPRISE ACTIVITY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(2).

1 N.C. Gen. Stat. § 75D-4(a)(2).

2 Because commission of an act prohibited by North Carolina RICO constitutes a civil offense only and not a crime, “a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section.” N.C. Gen. Stat. § 75D-4(b).

3 N.C. Gen. Stat. § 75D-3(a).

4 The crimes which may be considered are:

a. Article 5 of Chapter 90 of the North Carolina General Statutes;

b. Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59; and N.C. Gen. Stat. §§ 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313; and

c. Any conduct involved in a “money laundering” activity.

NOTE WELL: The meaning of “*racketeering activity*” also includes the description found in 18 U.S.C. § 1961(1). N.C. Gen. Stat. § 75D-3(c).

5 N.C. Gen. Stat. § 75D-8(c).

6 See *Gilmore v. Gilmore*, 229 N.C. App. 347, 357, 748 S.E.2d 42, 49 (2013) (citing *In re Bostic Constr., Inc.*, 435 B.R. 46, 67 (M.D.N.C. 2010)).

7 N.C. Gen. Stat. § 75D-8(c) (“Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. . . .”)

[*NOTE WELL:* The statute does not define “innocent person.” The counterpart federal statute, 18 U.S.C. § 1964(c), does not contain the word “innocent.” Noting the difference, the North Carolina Court of Appeals has said that “no legally significant distinction between . . . these provisions” exists (albeit with respect to a different question). See *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, n.3, 475 S.E.2d 247, 254 (1996), *aff’d per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). For discussion of burden of proof, see endnote 8 to CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY. (814.41).]

N.C.P.I.—Civil 814.43
CIVIL RICO—CONSPIRACY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

814.43 CIVIL RICO—CONSPIRACY.

The (*state number*) issue reads:

“Did the

[defendant conspire with another [person] [entity]]

[defendants conspire with [each other] [one or more other [persons]
[entities]]]

[to engage in a pattern of racketeering activity]

[to, [through a pattern of racketeering activity] [through
proceeds derived from a pattern of racketeering activities],

[acquire] [maintain], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property
of any nature, including money]

[to, through a pattern of racketeering activity, [conduct]
[participate in], directly or indirectly, any enterprise]?¹

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, five things:

First, that the [defendant conspired with another] [defendants conspired with [each other] [another]] to

[engage in a pattern of racketeering activity]

[, [through a pattern of racketeering activities] [through proceeds derived from a pattern of racketeering activities],

N.C.P.I.—Civil 814.43
CIVIL RICO—CONSPIRACY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

[acquire] [maintain], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of
any nature, including money]]

[, through a pattern of racketeering activity, [conduct] [participate in],
directly or indirectly, any enterprise].

A conspiracy is an agreement of two or more persons to accomplish
some unlawful purpose, or some lawful purpose by unlawful means.²

“Racketeering activity” means to [commit] [attempt to commit]
[[solicit] [coerce] [intimidate] another person to commit] [an act] [acts]
which would be chargeable by indictment for (*state crime(s)*).³

“Pattern of racketeering activity” means engaging in at least two
incidents of racketeering activity that have the same or similar purposes,
results, accomplices, victims, or methods of commission or otherwise are
interrelated by distinguishing characteristics and are not isolated and
unrelated incidents, provided at least one of such incidents occurred after
October 1, 1986, and that at least one other of such incidents occurred
within a four-year period of time of the other, excluding any periods of
imprisonment, after the commission of a prior incident of racketeering
activity.

Second, that at least one of the incidents of racketeering activity
[involved] [would have involved] something other than mail fraud, wire
fraud or fraud in the sale of securities.⁴

N.C.P.I.—Civil 814.43
CIVIL RICO—CONSPIRACY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

Third, that as a result of such conspiracy, the plaintiff suffered [injury] [damage] to *his* [business] [property].⁵

Fourth, that the [defendant] [defendants] obtained pecuniary gain as a result of the conspiracy.

And Fifth, that the plaintiff is an innocent person.⁶

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 conspired with another]

[defendants conspired with [each other] [another]]

[to engage in a pattern of racketeering activity]

[to, [through a pattern of racketeering activity] [through proceeds derived from a pattern of racketeering activities],

[acquire] [maintain], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property
of any nature, including money]]

[to, through a pattern of racketeering activity, [conduct]
[participate in], directly or indirectly, any enterprise],

that at least one of the incidents of racketeering activity [involved]
[would have involved] an act other than mail fraud, wire fraud or fraud in
the sale of securities,

that as a result of such conspiracy, the plaintiff suffered [injury]
[damage] to *his* [business] [property],

N.C.P.I.—Civil 814.43
 CIVIL RICO—CONSPIRACY.
 GENERAL CIVIL VOLUME
 MAY 2016
 N.C. Gen. Stat. § 75D-4(a)(3).

 that the [defendant] [defendants] obtained pecuniary gain as a result of the conspiracy, and

that the plaintiff is an innocent person, then it would be your duty to answer this issue "Yes," in favor of the plaintiff. If you do not so find, then it would be your duty to answer this issue "No," in favor of the [defendant] [defendants].

1 N.C. Gen. Stat. § 75D-4(a) provides that a person shall not:

- (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
- (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
- (3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Because commission of an act prohibited by North Carolina RICO constitutes a civil offense only and not a crime, "a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section." N.C. Gen. Stat. § 75D-4(b).

2 See *State v. Brewer*, 258 N.C. 533, 538, 129 S.E.2d 262, 266 (1963); *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968).

3 The crimes which may be considered are:

- a. Article 5 of Chapter 90 of the North Carolina General Statutes;
- b. Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59; and N.C. Gen. Stat. §§ 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313; and
- c. Any conduct involved in a "money laundering" activity.

NOTE WELL: The meaning of "racketeering activity" also includes the description found in 18 U.S.C. § 1961(1). N.C. Gen. Stat. § 75D-3(c).

4. N.C. Gen. Stat. § 75D-8(c).

N.C.P.I.—Civil 814.43
CIVIL RICO—CONSPIRACY.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

5. See *Gilmore v. Gilmore*, 229 N.C. App. 347, 357, 748 S.E.2d 42, 49 (2013), citing *In re Bostic Constr., Inc.*, 435 B.R. 46, 67 (M.D.N.C. 2010).

6. N.C. Gen. Stat. § 75D-8(c) (“Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. . . .”)

[NOTE WELL: The statute does not define “innocent person.” The counterpart federal statute, 18 U.S.C. § 1964(c), does not contain the word “innocent.” Noting the difference, the North Carolina Court of Appeals has said that “no legally significant distinction between . . . these provisions” exists (albeit with respect to a different question). See *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, n.3, 475 S.E.2d 247, 254 (1996), *aff’d per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). For discussion of burden of proof, see endnote 8 to CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY. (814.41).]

N.C.P.I.—Civil 814.44
CIVIL RICO—ATTEMPT.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

814.44 CIVIL RICO—ATTEMPT.

The (*state number*) issue reads:

“Did the [defendant] [defendants] attempt
[to engage in a pattern of racketeering activity]
[to, [through a pattern of racketeering activity] [through proceeds
derived from a pattern of racketeering activities],
[acquire] [maintain], directly or indirectly, any
[interest in] [control of] any
[enterprise] [real property] [personal property of
any nature, including money]]
[to, through a pattern of racketeering activity, [conduct] [participate
in], directly or indirectly, any enterprise]?¹

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, five things:

First, that the [defendant] [defendants] attempted to
[engage in a pattern of racketeering activity]
[, [through a pattern of racketeering activities] [through proceeds
derived from a pattern of racketeering activities],
[acquire] [maintain], directly or indirectly, any
[interest in] [control of] any
[enterprise] [real property] [personal property of
any nature, including money]]

[, through a pattern of racketeering activity, [conduct] [participate in],
directly or indirectly, any enterprise].

N.C.P.I.—Civil 814.44
CIVIL RICO—ATTEMPT.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

An attempt is the performance of an act which was designed to bring about (*state crime*) [but which fell short of the completed offense] [and which in the ordinary and likely course of things the defendant would have completed the crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action].² (Mere preparation or mere planning is not enough to constitute such an attempt. But the act need not be the last act required to complete the crime.)

"Racketeering activity" means to [commit] [attempt to commit] [[solicit] [coerce] [intimidate] another person to commit] [an act] [acts] which would be chargeable by indictment for (*state crime(s)*).³

"Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

Second, that at least one of the incidents of racketeering activity [involved] [would have involved] an act other than mail fraud, wire fraud or fraud in the sale of securities.⁴

Third, that as a result of such attempt, the plaintiff suffered [injury] [damage] to *his* [business] [property].⁵

Fourth, that the [defendant] [defendants] attempted to obtain pecuniary gain.

N.C.P.I.—Civil 814.44
CIVIL RICO—ATTEMPT.
GENERAL CIVIL VOLUME
MAY 2016
N.C. Gen. Stat. § 75D-4(a)(3).

And Fifth, that the plaintiff is an innocent person.⁶

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] [defendants] attempted

[to engage in a pattern of racketeering activity]

[to, [through a pattern of racketeering activity] [through proceeds derived from a pattern of racketeering activities],

[acquire] [maintain], directly or indirectly, any

[interest in] [control of] any

[enterprise] [real property] [personal property of any nature, including money]

[to, through a pattern of racketeering activity, [conduct] [participate in], directly or indirectly, any enterprise],

that at least one of the incidents of racketeering activity [involved] [would have involved] something other than mail fraud, wire fraud, or fraud in the sale of securities,

that as a result of such attempt, the plaintiff suffered [injury] [damage] to *his* [business] [property],

that the [defendant] [defendants] attempted to obtain pecuniary gain, and

that the plaintiff is an innocent person, then it would be your duty to answer this issue “Yes,” in favor of the plaintiff. If you do not so find, then it would be your duty to answer this issue “No,” in favor of the [defendant] [defendants].

N.C.P.I.—Civil 814.44
 CIVIL RICO—ATTEMPT.
 GENERAL CIVIL VOLUME
 MAY 2016
 N.C. Gen. Stat. § 75D-4(a)(3).

1 N.C. Gen. Stat. § 75D-4(a) provides that a person shall not:

- (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
- (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
- (3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Because commission of an act prohibited by North Carolina RICO constitutes a civil offense only and not a crime, “a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section.” N.C. Gen. Stat. § 75D-4(b).

2 See *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996).

3 The crimes which may be considered are:

- a. Article 5 of Chapter 90 of the North Carolina General Statutes;
- b. Chapter 14 of the General Statutes except Articles 9, 22A, 38, 40, 43, 46, 47, 59; and N.C. Gen. Stat. §§ 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313; and
- c. Any conduct involved in a “money laundering” activity.

NOTE WELL: The meaning of “*racketeering activity*” also includes the description found in 18 U.S.C. § 1961(1). N.C. Gen. Stat. § 75D-3(c).

4 N.C. Gen. Stat. § 75D-8(c).

5 See *Gilmore v. Gilmore*, 229 N.C. App. 347, 357, 748 S.E.2d 42, 49 (2013), citing *In re Bostic Constr., Inc.*, 435 B.R. 46, 67 (M.D.N.C. 2010).

6 N.C. Gen. Stat. § 75D-8(c) (“Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. . . .”)

[*NOTE WELL:* The statute does not define “innocent person.” The counterpart federal statute, 18 U.S.C. § 1964(c), does not contain the word “innocent.” Noting the difference, the North Carolina Court of Appeals has said that “no legally significant distinction between . . . these provisions” exists (albeit with respect to a different question). See *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, n.3, 475 S.E.2d 247, 254 (1996), *aff’d per curiam*, 347 N.C. 342, 493 S.E.2d 416 (1997). For discussion of burden of proof, see endnote 8 to CIVIL RICO—ENGAGING IN A PATTERN OF RACKETEERING ACTIVITY (814.41).]

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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

(This document has an attachment: Verdict Sheet. Directions for accessing the attachment appear at the end of this document.)

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

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 of law and State Board of Education policy?
 - a) Current operating expenses: \$_____
 - b) Capital outlay: \$_____
2. 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?
 - a) Current operating expenses: \$_____
 - b) Capital outlay: \$_____
3. What amount of money has been appropriated by the (*name county*)

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

Board of County Commissioners to maintain the (name county) schools?

a) Current operating expenses: \$_____

b) Capital outlay: \$_____

4. 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?

a) Current operating expenses: \$_____

b) 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

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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)

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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.

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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

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]:

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

(a) Current operating expenses: \$_____

(b) Capital outlay: \$_____

Verdict Sheet found in attached PDF.

To access a print-only version of the attachment, do the following:

1. open the instruction from the electronic Table of Contents.
2. click on the Instruction References Tab at the top of the right border.
3. after the Instruction References menu opens to the left of the tab, double-click on the Verdict Sheet attachment.
4. print the attachment by clicking on the printer icon.

In order to access a version of the attachment that can be edited, do the following:

1. locate the instruction title number in the electronic Table of Contents.
2. double-click on the Verdict Sheet that appears below the instruction title number.
3. save as an .rtf document by clicking on the save icon.
4. edit the .rtf document as required by the circumstances of your case.
5. save your changes before exiting the document.

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).

N.C.P.I.—Civil 814.95

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

GENERAL CIVIL VOLUME

REPLACEMENT MAY 2015

N.C. Gen. Stat. § 115C-431(c)

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. See *Union County Bd. of Educ. v. Union Cnty. Bd. of Comm’rs*, ___ N.C. App. ___, ___, 771 S.E.2d 590, 601 (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 814.95A
 BUDGET DISPUTE BETWEEN BOARD OF EDUCATION AND BOARD OF
 COUNTY COMMISSIONERS—APPENDIX—SAMPLE VERDICT SHEET.
 GENERAL CIVIL VOLUME
 MARCH 2016

STATE OF NORTH CAROLINA
 COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 No. _____

PLAINTIFF	)	
	)	
vs.	)	VERDICT
	)	
DEFENDANT,	)	
	)	

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

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?

a) Current operating expenses: \$ _____
 b) Capital outlay: \$ _____

2. 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?

a) Current operating expenses: \$ _____
 b) Capital outlay: \$ _____

3. What amount of money has been appropriated by the (*name county*) Board of County Commissioners to maintain the (*name county*) schools?

a) Current operating expenses: \$ _____
 b) Capital outlay: \$ _____

N.C.P.I.—Civil 814.95A

BUDGET DISPUTE BETWEEN BOARD OF EDUCATION AND BOARD OF
COUNTY COMMISSIONERS—APPENDIX—SAMPLE VERDICT SHEET.

GENERAL CIVIL VOLUME

MARCH 2016

4. 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?

a) Current operating expenses: \$_____

b) Capital outlay: \$_____

This is the _____ day of _____, _____.

Foreperson of the Jury

N.C.P.I.—Civil 820.16

ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE OUSTER.
GENERAL CIVIL VOLUME
REPLACEMENT MAY 2016

820.16 ADVERSE POSSESSION BY A COTENANT¹ CLAIMING CONSTRUCTIVE² OUSTER.

The (*state number*) issue reads:

"Does the plaintiff hold exclusive title to the (*identify land*) by adverse possession?"³

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, four things:

First, that the plaintiff (or one through whom *he* claims) and the defendant (or one through whom *he* claims) were cotenants in the (*identify land*). A cotenant is a person who, by legal interest in or title to property, has the right to use and enjoy the entire property as if *he* were the sole owner, limited only by the other cotenants having the same right.⁵

Second, that while the plaintiff (or one through whom *he* claims) was a cotenant, *he* (or one through whom *he* claims) began to possess the land exclusively and remained in exclusive possession of it for at least twenty consecutive years.⁶

Third, that at no time during the twenty consecutive years of exclusive possession did the plaintiff (or those through whom *he* claims) acknowledge the ownership of the defendant (or those through whom *he* claims). An acknowledgment is any expression or act which recognizes that ownership is shared with one or more other persons.⁷

Fourth, that at no time during twenty consecutive years of exclusive possession did the defendant (or those through whom *he* claims) or any other cotenant demand or request possession of the land, an accounting, or a share of any rents or profits from the land.⁸

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

N.C.P.I.—Civil 820.16

ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE OUSTER.
GENERAL CIVIL VOLUME
REPLACEMENT MAY 2016

you find by the greater weight of the evidence that the plaintiff acquired exclusive title to the (*identify land*) by adverse possession, 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 This instruction presumes there is no legal issue that the cotenants were tenants-in-common. If the cotenancy arises out of joint tenancy with rights of survivorship or a tenancy by the entirety, constructive ouster does not apply. *Young v. Young*, 43 N.C. App. 419, 426, 259 S.E.2d 348 (1979).

2 If an actual ouster is claimed, use N.C.P.I.-Civil 820.00.

3 See *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906); *Collier v. Welker*, 19 N.C. App. 617, 199 S.E.2d 691 (1973).

4 "The party attempting to establish title by adverse possession has the burden of proof." *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560, 564 (1986) (citing *Power v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953)).

5 7 Richard R. Powell, *Powell on Real Property* § 50.03[1], at 50-14 (M. Wolf gen. ed., 2005), cited with approval in *Georgia v. Randolph*, 547 U.S. 103, 113-114 (2006). See 20 Am. Jur. 2d Cotenancy and Joint Ownership § 1 ("A 'cotenancy' is a tenancy under more than one distinct title, but with unity of possession").

6 N.C. Gen. Stat. §§ 1-39, 1-40. See *Morehead v. Harris*, 262 N.C. 330, 1375 S.E.2d 174 (1964); *Ange v. Owens*, 224 N.C. 514, 31 S.E.2d 521 (1944).

7 *Atl. Coast Properties, Inc. v. Saunders*, ___ N.C. App. ___, ___, 777 S.E.2d 292, 297 (2015); *Hi-Fort v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979); *Mott v. Land Co.*, 146 N.C. 525, 60 S.E. 423 (1908); *Covington v. Stewart*, 77 N.C. 148 (1877).

In *Mott*, the Court indicated that the affirmative act constituting acknowledgment need not occur during the twenty year period in order to defeat the plaintiff's claim of adverse possession. Once an acknowledgment is made by a possessor, the period of adverse possession cannot begin until there has been a disavowal of the acknowledgment, that is, an expression or act inconsistent with a recognition that title is shared. Usually, the acknowledging party will also be the disavowing party since an attempt to transfer a fee simple to another is sufficient to constitute a disavowal. Conceivably, however, possession could pass from the acknowledging party to another in a manner which would not constitute a disavowal as by will or through intestacy. In such a case, the acknowledging possessor's successor would have to disavow the acknowledgment in order to trigger the running of the required period.

Where there is evidence that an act constituting an acknowledgment occurred prior to the beginning of the alleged twenty-year period of exclusive possession, the jury should be instructed that such an acknowledgment continues in effect until disavowed. The following language is suggested as an addition to the second element in such a case:

"Once there is an act or expression of acknowledgment, the acknowledgment continues in effect, preventing adverse possession on the part of any possessor, until the acknowledgment is disclaimed. A disclaimer consists of an expression or act which is inconsistent with a recognition that title to the

N.C.P.I.—Civil 820.16

ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE OUSTER.
GENERAL CIVIL VOLUME
REPLACEMENT MAY 2016

land is shared. In other words, if any possessor has acknowledged title in the cotenants, either *he* or *his* successor must disclaim the acknowledgment before the required twenty-year period of adverse possession can begin."

8 *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986). See, e.g., *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964); *Sheets v. Sheets*, 57 N.C. App. 336, 291 S.E.2d 300 (1982); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1953).

N.C.P.I.—Civil 835.05
EMINENT DOMAIN—INTRODUCTORY INSTRUCTION.
GENERAL CIVIL VOLUME
AUGUST 2015

835.05 EMINENT DOMAIN—INTRODUCTORY INSTRUCTION.

NOTE WELL: This instruction may be given to the jury as an introduction of the case and in the final instruction as well.

Members of the jury, the [Department of Transportation] [*state other private or local public condemnor*], the [plaintiff] [defendant] in this case, has taken, for the public use or benefit, [property of the [*state name of* [plaintiff(s)] [defendant(s)]] [an easement on the property of the [*state name of* [plaintiff(s)] [defendant(s)]]]. The owner(s) of the [property] [easement] immediately before it was taken, [is] [are] the [plaintiff(s)] [defendant(s)] in this case. While the law permits the [Department of Transportation] [*state other private or local public condemnor*] to take private property without consent of the owner for the public use or benefit, the owner of the property taken must be paid just compensation for his loss. The amount of just compensation to which the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] is the sole issue before you in this case.

Here give such other preliminary instructions as are appropriate.

N.C.P.I.—Civil 835.05i
EMINENT DOMAIN—INTRODUCTORY INSTRUCTION.
GENERAL CIVIL VOLUME
REPLACEMENT AUGUST 2015

835.05i EMINENT DOMAIN—INTRODUCTORY INSTRUCTION (Delete Sheet).

*NOTE WELL: The Eminent Domain—Introductory Instruction
(May 2006) is deleted. See N.C.P.I.—Civil 835.05.*

N.C.P.I.—Civil 855.10
FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—
AMOUNT OF DEBT OWED.
GENERAL CIVIL VOLUME
REPLACEMENT APRIL 2016
N.C. Gen. Stat. § 45-21.36

855.10 FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—AMOUNT OF
DEBT OWED.

NOTE WELL: This issue is necessary only if the amount of the debt remains in dispute at the close of the evidence and has not been resolved by stipulation, summary judgment or directed verdict. It is anticipated in many cases that this will not be an issue. In the event that the defendant presents evidence that the debt has been paid in full, questions of issue preclusion may arise.

A sample verdict form and a judge's worksheet to use for deficiency judgment actions are available at N.C.P.I.—Civil 855.18.

The [first] [(state number)] issue reads:

"What amount did the defendant owe the plaintiff at the time and place of the foreclosure sale on (date)?"

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, what amount the defendant owed under the terms of the promissory note secured by the [mortgage] [deed of trust] [other obligation] at the time and place of the foreclosure sale on (date).

Once you have found by the greater weight of the evidence the amount that the defendant owed the plaintiff under the terms of the promissory note secured by the [mortgage] [deed of trust] [other obligation], you will write that amount in the blank space provided on the verdict form. You then should proceed to answer the next issue.

N.C.P.I.—Civil 855.12

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—PROPERTY
FAIRLY WORTH AMOUNT OWED.

GENERAL CIVIL VOLUME

REPLACEMENT APRIL 2016

N.C. Gen. Stat. § 45-21.36

855.12 FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—PROPERTY
FAIRLY WORTH AMOUNT OWED.

*NOTE WELL: A sample verdict form and a judge’s worksheet to use
for deficiency judgment actions are available at N.C.P.I.—Civil
855.18.*

The [second] [(state number)] issue reads:

“Was (*identify property*) fairly worth the amount owed to the plaintiff on
the debt secured by the [mortgage] [deed of trust] [*other obligation*] at the
time and place of the foreclosure sale on (*date*)?”

On this issue the burden of proof is on the defendant.¹ This means that
the defendant must prove, by the greater weight of the evidence, that (*identify
property*) was fairly worth the amount of the debt owed to the plaintiff on the
date of the foreclosure sale on (*date*).² For the purpose of this issue, the
amount of the debt owed to the plaintiff is [(*identify amount if stipulated or
judicially determined*)] [the amount you answered in response to Issue
[One]][(state number)].³

In determining whether the property was “fairly worth” the amount of
the debt owed to the plaintiff at the time and place of the foreclosure sale on
(*date*), you should give the words “fairly worth” their ordinary meanings.

If you find by the greater weight of the evidence that the (*identify
property*) was fairly worth the amount of the debt owed to the plaintiff at the
time and place of the foreclosure sale on (*date*), then it would be your duty to
answer this issue “Yes,” in favor of the defendant. If you do not so find, then it

N.C.P.I.—Civil 855.12

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—PROPERTY
FAIRLY WORTH AMOUNT OWED.

GENERAL CIVIL VOLUME

REPLACEMENT APRIL 2016

N.C. Gen. Stat. § 45-21.36

would be your duty to answer this issue “No,” in favor of the plaintiff.

If you have answered this issue “Yes,” then your deliberations are complete and you will not consider Issue(s) (*state number*). If you have answered this issue “No,” then proceed to answer the next issue.

1 *NOTE WELL: In United Cmty. Bank (Georgia) v. Wolfe*, __ N.C. __, __, 775 S.E.2d 677, 679 (2015), the Court held that, pursuant to N.C. Gen. Stat. § 45-21.36, there are “two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure” that can eliminate or reduce the liability of some obligors. For the first form of defensive relief, “the liability of certain obligors for the deficiency may be eliminated entirely where it is shown that the collateral was [actually] fairly worth the amount of the entire debt[,] notwithstanding that the creditor’s successful bid at foreclosure was less.” For the second form of defensive relief, “though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced by way of offset where it is shown that the creditor’s winning foreclosure bid was substantially less than the collateral’s true value” (internal citations omitted).

The forms of defensive relief are not defenses in the “usual” sense of the word, but “an equitable method of calculating the indebtedness” after the foreclosure purchase price is applied to the debt. *High Point Bank & Trust Co. v. Highmark Props, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 842 (2015). The Court also held that the “defense” is available to a guarantor, even if the debtor is not joined in the action. *Id.* at 307, 842. Finally, on public policy grounds, the Court held that, notwithstanding waiver language in loan or guaranty documents, the right to raise the “defense” and to enjoy its benefits is not subject to waiver. *Id.*

2 N.C. Gen. Stat. § 45-21.36. See *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 156, 530 S.E.2d 581, 583 (2000); *NCNB Nat’l Bank of N.C. v. O’Neill*, 102 N.C. App. 313, 317, 401 S.E.2d 858, 860 (1991) (noting that the defendants must produce evidence that the property sold was fairly worth the amount of the debt at the time and place of the sale).

3 See N.C.P.I.—Civil 855.10.

N.C.P.I.—Civil 855.14

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—BID SUBSTANTIALLY LESS THAN TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE.

GENERAL CIVIL VOLUME

REPLACEMENT APRIL 2016

N.C. Gen. Stat. § 45-21.36

855.14 FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—BID SUBSTANTIALLY LESS THAN TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE.

NOTE WELL: A sample verdict form and a judge’s worksheet to use for deficiency judgment actions are available at N.C.P.I.—Civil 855.18.

The [third] [(*state number*)] issue reads:

“Was the plaintiff’s bid of (*state bid amount*) at the foreclosure sale of (*identify property*) on (*date of foreclosure sale*) substantially less than the true value of that property on that date?”

On this issue the burden of proof is on the defendant.¹ This means that the defendant must prove, by the greater weight of the evidence, that the amount bid at the foreclosure sale on (*date*), (*state amount*), was substantially less than the true value of (*identify property*) on that date.²

The term “true value” means “market value,” which is defined as the amount that would be agreed upon as a fair price by a seller who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.³

If you find by the greater weight of the evidence that (*state bid amount*) is substantially less than the true value of (*identify property*) on (*date of foreclosure sale*), then it would be your duty to answer this issue “Yes,” in favor of the defendant. If you do not so find, then it would be your duty to answer this issue “No,” in favor of the plaintiff.

N.C.P.I.—Civil 855.14

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—BID SUBSTANTIALLY LESS THAN TRUE VALUE OF PROPERTY ON DATE OF FORECLOSURE.

GENERAL CIVIL VOLUME

REPLACEMENT APRIL 2016

N.C. Gen. Stat. § 45-21.36

If you have answered this issue “No,” then your deliberations are complete and you will not consider Issue(s) (*state number*). If you have answered this issue “Yes,” then proceed to answer the next issue.

1 *NOTE WELL: In United Cmty. Bank (Georgia) v. Wolfe*, __ N.C. __, __, 775 S.E.2d 677, 679 (2015), the Court held that, pursuant to N.C. Gen. Stat § 45-21.36, there are “two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure” that can eliminate or reduce the liability of some obligors. For the first form of defensive relief, “the liability of certain obligors for the deficiency may be eliminated entirely where it is shown that the collateral was [actually] fairly worth the amount of the entire debt[,] notwithstanding that the creditor’s successful bid at foreclosure was less.” For the second form of defensive relief, “though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced by way of offset where it is shown that the creditor’s winning foreclosure bid was substantially less than the collateral’s true value” (internal citations omitted).

The forms of defensive relief are not defenses in the “usual” sense of the word, but “an equitable method of calculating the indebtedness” after the foreclosure purchase price is applied to the debt. *High Point Bank & Trust Co. v. Highmark Props, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 842 (2015). The Court also held that the “defense” is available to a guarantor, even if the debtor is not joined in the action. *Id.* at 307, 842. Finally, on public policy grounds, the Court held that, notwithstanding waiver language in loan or guaranty documents, the right to raise the “defense” and to enjoy its benefits is not subject to waiver. *Id.*

2 N.C. Gen. Stat. § 45-21.36. See *Blue Ridge Sav. Bank, Inc. v. Mitchell*, 218 N.C. App. 410, 412, 721 S.E.2d 322, 324 (2012). There is no bright line rule as to what is “substantially less” than the property’s true value. The Court of Appeals has found twenty percent was “substantially less”, but ten percent was not. See *id.* 410 at 413, 721 S.E.2d at 325 (citing *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 154–56, 530 S.E.2d 581, 582–83 (2000)).

3 See *In re Ocean Isle Palms, LLC*, 366 N.C. 351, 353, 749 S.E.2d 439, 440 (2013); *Blue Ridge Sav. Bank*, 218 N.C. App. at 413, 721 S.E.2d at 324–25.

N.C.P.I.—Civil 855.16

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—TRUE
VALUE OF PROPERTY ON DATE OF FORECLOSURE SALE.

GENERAL CIVIL VOLUME

REPLACEMENT MARCH 2016

N.C. Gen. Stat. § 45-21.36

855.16 FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—TRUE
VALUE OF PROPERTY ON DATE OF FORECLOSURE SALE.

N.C. Gen. Stat. § 45-21.36¹

*NOTE WELL: A sample verdict form and a judge's worksheet to
use for deficiency judgment actions are available at N.C.P.I.—
Civil 855.18.*

The [fourth] [(state number)] issue reads:

"What was the true value of (*identify property*) on (*date of foreclosure
sale*)?"

You will answer this issue only if you have answered Issue [Three]
[(state number)] "Yes," in favor of the defendant.

On this issue the burden of proof is on the defendant.² This means that
the defendant must prove by the greater weight of the evidence the true
value of (*identify property*) on (*date of foreclosure sale*).³ As previously
instructed, the term "true value" means the amount that would be agreed
upon as a fair price by a seller who wishes to sell, but is not compelled to do
so, and a buyer who wishes to buy, but is not compelled to do so.⁴

Once you have found by the greater weight of the evidence the true
value of (*identify property*) on (*date of foreclosure sale*), you will write that
amount in the blank space on the verdict form.

¹ *NOTE WELL: N.C. Gen. Stat. § 45-21.36 provides:
When any sale of real estate has been made by a mortgagee, trustee, or
other person authorized to make the same, at which the mortgagee, payee,
or other holder of the obligation thereby secured becomes the purchaser and*

N.C.P.I.—Civil 855.16

FORECLOSURE—ACTION FOR DEFICIENCY JUDGMENT—DEFENSE OF
MORTGAGOR TO DEFEAT AND OFFSET DEFICIENCY JUDGMENT—TRUE
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GENERAL CIVIL VOLUME

REPLACEMENT MARCH 2016

N.C. Gen. Stat. § 45-21.36

takes title . . . and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor, or other maker of such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him[.]

2 See *United Cmty. Bank (Georgia) v. Wolfe*, __ N.C. __, __, 775 S.E.2d 677, 679 (2015) (holding that, pursuant to N.C. Gen. Stat § 45–21.36, there are “two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure” that can eliminate or reduce the liability of some obligors. For the first form of defensive relief, “the liability of certain obligors for the deficiency may be eliminated entirely where it is shown that the collateral was [actually] fairly worth the amount of the entire debt[,] notwithstanding that the creditor’s successful bid at foreclosure was less.” For the second form of defensive relief, “though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced by way of offset where it is shown that the creditor’s winning foreclosure bid was substantially less than the collateral’s true value”) (internal citations omitted).

The forms of defensive relief are not defenses in the “usual” sense of the word, but “an equitable method of calculating the indebtedness” after the foreclosure purchase price is applied to the debt. *High Point Bank & Trust Co. v. Highmark Props, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 842 (2015). The Court also held that the “defense” is available to a guarantor, even if the debtor is not joined in the action. *Id.* at 307, 842. Finally, the Court held that, notwithstanding waiver language in loan or guaranty documents, the right to raise the “defense” and to enjoy its benefits is not subject to waiver, on public policy grounds. *Id.*

3 See N.C. Gen. Stat. § 45-21.36.

4 See *In re Ocean Isle Palms, LLC*, 366 N.C. 351, 353, 749 S.E.2d 439, 440 (2013).

GENERAL CIVIL VOLUME

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.—Civil Instruction numbers)

ABANDONMENT.

See FAMILY MATTERS.

ABSOLUTE DIVORCE. See DIVORCE.

ABUSE OF PROCESS, 803.00.

ACCORD AND SATISFACTION, 515.45.

ACCOUNTS.

Accounts stated, 635.35.

Defense of payment, 635.40.

Unverified account

Amount owed, 635.25.

Liability, 635.20.

Verified itemized account, 635.30.

ACT OF GOD, 102.26.

ADMISSIONS, REQUESTS FOR, 101.42.

ADMONITION TO JUDGE ON STATING EVIDENCE AND RELATING THE LAW THERETO,
101.00.

ADVERSE POSSESSION.

Basic charge, 820.00.

By cotenant.

Actual ouster, 820.00.

Constructive ouster, 820.16.

Color of title, 820.10.

AGENCY.

Actual and apparent authority, 516.05.

Basic charge—issue; definition; burden of proof, 103.10.

Civil Conspiracy, Single defendant, 103.30.

Multiple defendants, 103.31.

Departure from employment, 103.50.

Final mandate, 103.70.

Independent contractor, 103.15.

Piercing corporate veil, 103.40.

Ratification, 516.15.

Undisclosed principal, 516.30.

Willful and intentional injury, 103.55.

ALIENATION OF AFFECTIONS.

By third person, 800.20.

Damages, compensatory and punitive, 800.22.

Statute of Limitations, 800.23, 800.23A.

ALIMONY, 815.70.

ALIMONY, CONDONATION, 815.71; 815.72.

ALLEN CHARGE, 150.50.

AMBIGUITIES, 502.30.

ANIMALS.

Animal control ordinance violation, 812.04.

Dog killing or injuring livestock or fowl, 812.05.

Failure to destroy dog bitten by mad dog, 812.06.

Keeping vicious domestic animals [common law (strict), liability], 812.00.

Liability of owners and keepers, 812.00 (Preface).

Running at large.

Dog at night, 812.01.

Dog that is vicious, 812.00.

Other than dogs, 812.03 (by owner's negligence); 812.02 (with owner's knowledge).

Statutory (strict) liability of owner of a dangerous dog, 812.07.

ANNULMENT.

Bigamy, 815.04, 815.37.

Birth of issue, 815.22; 815.36.

Cohabitation, 815.36.

Issue of Duress, 815.27

Issue of Impotence.

General charge, 815.24; 815.34.

Knowledge of, 815.20; 815.35.

Issue of Undue Influence, 815.29

Mental capacity, 815.28; 815.33.

Nonage.

Living children, 815.22; 815.31.

Pregnancy, 815.22A; 815.31.

Ratification, 815.32; 815.38.

ANTITRUST. See TRADE REGULATION.

ASSAULT AND BATTERY.

Basic charge, 800.50.

Battery, 800.51.

Defense of another, 800.54.

Defense of family member, 800.53A.

Defense of property, 800.56.

Defense of self, 800.52.

ASSENT.

Manner of, 502.20.

Mutual.

Meaning accorded offer and acceptance, 502.25.

Offer and acceptance, 502.10.

ATTRACTIVE NUISANCE, 805.65A.

BAILMENTS.

Issue of bailment, 814.00.

Negligence, 814.02; 814.03 (bailee's); 814.04 (bailor's).

BATTERY.

Basic charge on battery, 800.51.

Defense of property, 800.56.

Defense of self, 800.52.

Excessive force in making arrest

Battery, 804.01

Damages, 804.04

Lawfulness, 804.02

Reasonableness of force, 804.03

BLACKLISTING IN EMPLOYMENT, 640.25.

BOUNDARY, DETERMINATION OF (PROCESSIONING), 825.00.

BREACH OF CONTRACT. See CONTRACTS.

BUDGET DISPUTE; BOARD OF EDUCATION and COUNTY COMMISSIONERS, 814.95

BUILDER-VENDOR.

Breach of implied warranty, 747.20.

Damages for breach of implied warranty.

After rescission, 747.35.

Upon retention of dwelling, 747.40.

Defense to claim of breach, 747.10.

Implied warranty of habitability, 747.00.

Rescission for breach of implied warranty, 747.30.

Seller's recovery of rents, 747.36.

BURDEN OF PROOF.

By greater weight, 101.10.

Clear, strong, and convincing, 101.11.

CAMERAS IN COURTROOM, 100.15.

CAPACITY. See MENTAL CAPACITY and MENTAL INCAPACITY.

CARTWAY PROCEEDING.

Basic charge, 840.30.

Damages, 840.31.

CHARACTER EVIDENCE, 101.37.

CIRCUMSTANTIAL EVIDENCE, 101.45.

CITY NEGLIGENCE. See NEGLIGENCE.

COLOR OF TITLE—ADVERSE POSSESSION, 820.10.

COMMON LAW REMEDY FOR CONTRACT BREACH. See CONTRACTS.

CONCLUDING INSTRUCTIONS, 150.45.

CONDEMNATION. See EMINENT DOMAIN.

CONDITIONS PRECEDENT.

Liability on negotiable instrument dependent upon, 624.40.

Occurrence of, 624.41.

CONDONATION OF ALIMONY, 815.71; 815.72.

CONSEQUENTIAL DAMAGES.

Issue of common law remedy, 503.73.

CONSORTIUM.

Damages, 810.30.

Spouse's claim for loss of, 800.65.

CONSPIRACY—CIVIL (one defendant), 103.30.

(multiple defendants), 103.31.

CONSTRUCTION CONTRACT.

Common law remedy, 503.21 through 503.42.

CONTRACTS.

Employment—See EMPLOYMENT CONTRACTS.

Implied at law, 736.00 (basic charge); 736.01 (measure of recovery).

Infancy—See INFANTS.

Interference, wrongful, 807.00.

Interference with prospective contract, wrongful, 807.10.

Issue of formation, 501.01 through 501.80.

Peremptory instruction, 501.02.

Parties stipulate the contract, 501.03.

Defense of lack of mental capacity, 501.05.

Rebuttal by proof of fair dealing and lack of notice, 501.10.

by proof of necessities, 501.15.

by proof of ratification (incompetent regains mental capacity),
501.20.

by proof of ratification (by agent, personal representative or
successor), 501.25.

Defense of mutual mistake of fact, 501.30.

of undue influence, 501.35.

of duress, 501.40.

of fraud, 501.45.

of grossly inadequate consideration ("intrinsic fraud"), 501.50.

of fraud in the factum, 501.52.

of constructive fraud, 501.55.

Rebuttal by proof of openness, fairness and honesty, 501.60.

of infancy, 501.65.

Rebuttal by proof of emancipation, 501.67.

Rebuttal by proof of ratification after minor comes of age, 501.70.

Rebuttal by proof of ratification by guardian, personal
representative or agent, 501.75.

Rebuttal by proof of necessities, 501.80.

Issue of breach, 502.00 through 502.60.

- by non-performance, 502.00.

- by renunciation, 502.05.

- by prevention, 502.10.

- Defense of waiver, 502.15.

 - of prevention by plaintiff, 502.20.

 - of frustration of purpose, 502.25.

 - of impossibility (destruction of subject matter of contract), 502.30.

 - of impossibility (death, disability or illness of personal services provider), 502.35.

 - of illegality or unenforceability, 502.40.

 - of unconscionability, 502.45.

- Direct damages—defense of oral modification of written contract, 502.47.

 - of modification, 502.48.

- Defense of rescission, 502.50.

 - of novation, 502.55.

 - of accord and satisfaction, 502.60.

Issue of common law remedy, 503.00 through 503.97.

- Rescission, 503.00.

- Rescission—measure of restitution, 503.01.

- Specific performance, 503.03.

- Statement of damages issue, 503.06.

- Damages in general, 503.09.

- Direct damages—buyer's measure of recovery for a seller's breach of contract to convey real property, 503.12.

 - Seller's measure of recovery for a buyer's breach of executory contract to purchase real property, 503.15.

 - Broker's measure of recovery for a seller's breach of an exclusive listing contract, 503.18.

 - Owner's measure of recovery for a contractor's partial breach of a construction contract, 503.21.

 - Owner's measure of recovery for a contractor's partial breach of a construction contract where correcting the defect would cause economic waste, 503.24.

 - Owner's measure of recovery for a partial breach of a repair or services contract, 503.27.

 - Owner's measure of recovery for a contractor's failure to perform any work under a construction, repair, or services contract, 503.30.

 - Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where the contractor has fully performed, 503.33.

 - Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where the contractor has not begun performance, 503.36.

- Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract after the contractor delivers partial performance, 503.39.
- Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where contractor elects to recover preparation and performance expenditures, 503.42.
- Owner's measure of recovery for loss of rent due to a lessee's, occupier's, or possessor's breach of a lease of real estate or personal property, 503.45.
- Owner's measure of recovery for loss of use due to a lessee's, occupier's, or possessor's breach of a lease of real estate or personal property, 503.48.
- Owner's measure of recovery for real estate or personal property idled by breach of contract where proof of lost profits or rental value is speculative, 503.51.
- Employer's measure of recovery for employee's wrongful termination of an employment contract, 503.54.
- Incidental damages, 503.70.
- Consequential damages, 503.73.
- Future worth of damages in present value, 503.76.
- Damages mandate, 503.79.
- Defense (Offset) for failure to mitigate, 503.90.
- Amount of credit, 503.91.
- Validity of liquidated damages provision, 503.94.
- Amount of liquidated damages, 503.97.
- Issue of UCC remedy, 504.00 through 504.54.
 - Buyer's damages upon seller's repudiation, 504.00.
 - Buyer's damages upon seller's failure to make delivery or tender, 504.03.
 - Buyer's remedy of rightful rejection, 504.06.
 - Buyer's damages upon rightful rejection, 504.09.
 - Buyer's remedy of justifiable revocation of acceptance, 504.12.
 - Buyer's damages upon justifiable revocation of acceptance, 504.15.
 - Buyer's damages after acceptance and retention of goods, 504.18.
 - Buyer's remedy of specific performance, 504.21.
 - Seller's remedy (or defense) of stopping delivery of goods, 504.24.
 - Seller's remedy (or defense) of reclaiming goods already delivered, 504.27.
 - Seller's remedy of resale, 504.30.
 - Seller's resale damages, 504.33.
 - Seller's contract—market damages, 504.36.
 - Seller's lost profit damages, 504.39.
 - Seller's remedy of action for price (specific performance) for delivered goods, 504.42.
 - Seller's remedy of action for price (specific performance) for undelivered goods, 504.45.
 - Defense (offset) of failure to mitigate, 504.48.

Validity of liquidated damages provision, 504.51.

Amount of liquidated damages, 504.54.

Issue of remedy—minor's claim for restitution where contract is disavowed, 505.20.

Measure of recovery, 505.25.

Not to compete—See COVENANTS NOT TO COMPETE.

Performance—See PERFORMANCE.

Prevention of compliance—See PREVENTION.

Quantum meruit, 736.00 (basic charge); 736.01 (measure of recovery).

Repudiation—See REPUDIATION.

Services rendered—See SERVICES RENDERED A DECEDENT.

Special damages—loss of profits, 517.20.

CONTRIBUTION, NEGLIGENCE OF THIRD PARTY TORT-FEASOR, 102.30.

CONTRIBUTORY, NEGLIGENCE.

Contentions, 104.35.

Definition, 104.10.

Final mandate, 104.50.

Of minor between seven and fourteen years of age, 104.25.

CONTRIBUTORY NEGLIGENCE, GROSS NEGLIGENCE AS DEFEATING, 102.86.

CONVERSION.

Basic charge, 806.00.

Damages, 806.05.

Defense of abandonment, 806.01.

Defense of gift, 806.03.

Defense of sale or exchange, 806.02.

Significant development explanation, 806.041.

CORPORATIONS.

Breach of duty—corporate officer, 807.50.

Breach of duty—corporate officer, 807.52.

Breach of duty—controlling shareholder of closely held corporation—
issue of closely held corporation, 807.54.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power, 807.56.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power—defense of good faith, care and
diligence, 807.58.

COUNTY, MUNICIPALITY DUTY TO USERS OF PUBLIC WAYS.

General, 805.67.

Handicapped plaintiff contributory negligence, 805.69.

Sui juris plaintiff contributory negligence, 805.68.

COVENANTS NOT TO COMPETE.

Breach of covenant, 645.30.

Damages for breach, 645.50.

Existence of covenant, 645.20.

COURSE OF DEALING.

Implied warranty based on, 741.31; 741.34.

COURT HAS NO OPINION, 150.20.

CREDIBILITY OF WITNESS, 101.15.

CRIMINAL CONVERSATION.

Basic charge, 800.25.

Damages, 800.26.

Statute of limitations, 800.27, 800.27A.

DAMAGES. See MEDICAL MALPRACTICE. See WRONGFUL DEATH.

Alienation of affections, 800.22; 800.21; 800.22.

Breach of contract. See CONTRACTS.

Breach of implied warranty of habitability of dwelling, 747.20.

Breach of warranty, buyer's action, 569.30; 741.40 (rightful rejection); 741.50 (revocation of acceptance); 741.60 (accepted goods retained).

Breach of warranty, new motor vehicles, 745.07 (plaintiff as purchaser); 745.09 (plaintiff as lessee); 745.11 (plaintiff as lessor).

Conversion, 806.05.

Covenants not to compete, 645.50.

Criminal conversation, 800.26.

Invasion of privacy, 800.71; 800.76.

Liquidated damages, UCC Remedy, 504.51; 504.54.

Malicious prosecution (compensatory), 801.05.

Malicious prosecution (punitive), 801.10.

Misappropriation of trade secrets, 813.98.

Parent's claim for injury to child, 810.32.

Personal injury.

Final mandate, 810.20.

In general, 810.02.

Issue, 810.00.

Liability of employer, 640.46 (to employee); 640.48 (to independent contractor's employee).

Loss of consortium, action, 800.65.

Loss of consortium, damages, 810.30.

Loss of earnings, 810.06.

Loss of use of part of body, 810.12.

Medical expenses, 810.04; 810.04A; 810.04B (stipulation); 810.04C; 810.04D (no stipulation).

Mitigation, 810.24.

Pain and suffering, 810.08.

Parent's claim for negligent or wrongful injury to minor child, 810.32.

Permanent injury, 810.14.

Scars and disfigurement, 810.10.

Punitive, 810.90; 810.96.

Trespass.

personal property, 800.15.

real property, 805.05.

Worker's compensation award, setoff and deduction, 810.18.

Property damage.

Final mandate, 810.68.

Issue, 810.60.

No market value ("actual value"), 810.66.

No market value (replacement or repair), 810.64; 810.66.

Punitive.

Issue of existence of malicious, willful, wanton or grossly negligent conduct—
wrongful death, 810.91.

Issue of existence of outrageous or aggravated conduct, 810.90.

Liability of defendant, 810.96.

Whether to make award and amount, 810.93.

Whether to make award and amount (special cases), 810.94.

Tort by child, 815.91.

Wrongful death, 810.40.

Wrongful discharge from employment, 640.50.

DEATH AS EXCUSE FOR NONPERFORMANCE OF CONTRACT. See IMPOSSIBILITY.

DECEDENT. See SERVICES RENDERED A DECEDENT.

DEEDS.

Action to establish validity, 850.00.

Action to set aside.

Lack of mental capacity, 850.05.

Mutual mistake of fact, 850.10.

Undue influence, 850.15.

Duress, 850.20.

Fraud, 850.25.

Intrinsic fraud, 850.30.

Constructive fraud, 850.40.

Constructive, defense of openness, 850.45.

Defense of innocent purchaser, 850.50.

Lack of valid delivery, 850.50.

Lack of legally valid acceptance, 850.55.

DEFAMATION.

Damages.

private figure, actionable per se, presumed damages.

matter of public concern, 806.82.

not matter of public concern, 806.81.

public figure, actionable per se, presumed damages, 806.83.

punitive damages, private figure, matter of public concern, 806.85.

defense of truth, libel—private figure—not matter of public concern, 806.79.

Libel.

Per quod.

private figure, matter of public concern, 806.61.

private figure, not matter of public concern, 806.60.

public figure or official, 806.62.

Per se.

private figure, matter of public concern, 806.51.

private figure, matter of public concern, punitive damages, 806.52.

private figure, not matter of public concern, 806.50.

public figure or official, 806.53.

Preface, 806.40.

Slander.

Per quod.

private figure, matter of public concern, 806.71.

private figure, not matter of public concern, 806.70.

public figure or official, 806.72.

Per se.

private figure, matter of public concern, 806.66.

private figure, not matter of public concern, 806.65.

public figure or official, 806.67.

DEFENSES TO ISSUE OF FORMATION OF CONTRACT. See CONTRACTS.

DEPOSITION.

Evidence, 101.43.

Testimony, 100.43.

DISCHARGE JURY, 150.60.

DIVORCE or DIVORCE FROM BED AND BOARD.

Abandonment, 815.50.

Adultery, 815.60.

Excessive use of alcohol or drugs, 815.58.

Cruelty, 815.54.

Indignities, 815.25; 815.56.

Insanity, 815.44; 815.46.

Knowledge of grounds, 815.10.

Malicious turn out-of-doors, 815.52.

One year separation, 815.40; 815.42.

DOGS.

Failing to destroy dog bitten by mad dog, 812.06.

Keeping vicious domestic animal, 812.00.

Killing or injuring livestock, 812.05.

Running at large at night, 812.01.

Statutory (strict) liability of owner of a dangerous dog, 812.07.

DOMESTIC ANIMALS. See ANIMALS.

DURESS.

Action to set aside deed, 850.20.

Wills, 860.22.

Rescission of written instrument, 505.35.

DUTY OF CORPORATE DIRECTOR, OFFICER AND CONTROLLING SHAREHOLDER.

Breach of duty—corporate officer, 807.50.

Breach of duty—corporate officer, 807.52.

Breach of duty—controlling shareholder of closely held corporation—
issue of closely held corporation, 807.54.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power, 807.56.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power —defense of good faith, care and
diligence, 807.58.

DUTY OF OWNER TO CHILD—ATTRACTIVE NUISANCE, 805.65A.

EASEMENT.

By prescription, 840.10.

Cartway proceeding.

Basic charge, 840.30.

Damages, 840.31.

Definition of, 840.00.

Implied, 840.20.

Way of necessity, 840.25.

EMINENT DOMAIN, 835.00.

Department of Transportation or Municipality for Highway.

Total taking, 835.10.

Partial taking, 835.12.

Easement, 835.12A.

Easements, 835.12A; 835.20; 835.24A.

Introductory instructions, 835.05.

Partial taking.

Department of Transportation or municipality for highway, 835.12.

Private or Local Public Condemnor, 835.20; 835.22; 835.24.

Private and local public condemnors.

Partial taking (value before and after), 835.22; 835.22A.

Partial taking (value of property taken), 835.20; 835.20A.

Partial taking (greater of value of property taken or value before and after),
835.24; 835.24A.

Total taking, 835.15.

Total taking, 835.10; 835.15.

EMOTIONAL DISTRESS, INFLICTION OF.

Intentional, 800.60.

Negligent, 102.84.

EMPLOYMENT RELATIONSHIP.

Blacklisting, 640.25.

Constructive termination, 640.02.

Damages.

General, 640.30.

Mitigation of, 640.32.

Definite term.

Breach of agreement for, 640.12.

Employer's defense of just cause, 640.14.

Employment for, 640.10.

Employer's measure of damages for employee's wrongful termination of contract, 503.54.

Introduction to series, plaintiff's status as employee, 640.00.

Liability.

Injury to employee, 640.46.

Employee negligent hiring independent contractor, 640.43.

Employee negligent retention of independent contractor, 640.44.

Injury to independent contractor's employee, 640.48.

Negligent hiring or retention of employee, 640.42.

Plaintiff's status as employee, 640.00.

Status of person as employee, 640.01.

Termination/resignation, 640.03

Vicarious liability of employer for co-workers torts, 640.40.

Wage and Hour Act

Claim, 640.60

Damages, 640.65

Whistleblower Act

Direct admission, 640.29B.

Introduction, 640.29A.

Mixed motive cases, 640.29D; 640.29E.

Pretext, 640.29C.

Wrongful termination.

Employer's defense to, 640.22.

General charge (tortious termination), 640.20.

EVIDENCE.

Circumstantial, 101.45.

Clear, strong, convincing—definition, 101.11.

Deposition, 101.43.

Duty to recall, 101.50.

Expert witness, 101.25.

Greater weight of—definition, 101.10.

Invocation of the Fifth Amendment privilege against self-incrimination, 101.38.

Jury to consider only matters in evidence, 106.49.

Limiting instruction as to parties, 101.32.

Limiting instruction as to purpose, 101.33.

Maps, 101.40.

Models, 101.40.

Photographs, 101.40.

Presumptions, 101.62.

Recapitulation of, 101.00.

Relating law to, 101.00.

Relating to character of witness, 101.37.

Review of, 101.50.

Spoliation by a party, 101.39.

X-ray, 101.40.

EXCESSIVE FORCE.

Common law claim for battery. See BATTERY.

Section 1983 Claim.

Color of state law, 804.06

Damages, 804.10

Lawfulness of arrest, 804.08

Punitive damages, 804.11

Reasonableness of force, 804.09

Use of force, 804.07

EXPERT WITNESS, 101.25.

FALSE IMPRISONMENT, 802.00.

FALSE LIEN AGAINST PUBLIC OFFICER OR EMPLOYEE, 813.41.

FIDUCIARY RELATIONSHIP.

Constructive fraud, 800.05 (general); 800.06 (defense of openness).

Definition, 900.10.

FIFTH AMENDMENT PRIVILEGE, 101.38.

FIRE INSURANCE.

Defense of fraudulent proof of loss, 910.27.

Hazard increased by insured, 910.20.

Intentional burning by insured, 910.25.

Willful misrepresentation in application, 910.26.

FOOD AND DRINK CASES. See PRODUCTS LIABILITY.

FOREPERSON OF JURY—SELECTION OF, 150.40.

FORECLOSURE ACTION FOR DEFICIENCY JUDGMENT

Amount of debt owed, 855.10

Bid substantially less than true value of property, 855.14

Defense—property fairly worth amount of securing debt, 855.12

Defense—true value of property on date of sale, 855.16

Sample verdict form and judges worksheet, 855.18

FORMATION OF CONTRACTS. See CONTRACTS.

FRAUD. See also FRAUDULENT TRANSFER.

Action to set aside deed, 850.25.

Constructive, 800.05 (fiduciary relationship); 800.06 (defense of openness, etc.).

Elements, 800.00.

Negligent misrepresentation, 800.10.

Negotiable instruments, knowledge that the instrument was an instrument, 625.20.

Statute of Limitations, 800.00A

Written instruments, rescission because of fraud, 505.20.

FRAUDULENT TRANSFER.

To insider while insolvent.

Defenses, 814.80; 814.85; 814.90.

Defined, 814.75.

With intent to delay, hinder, or defraud.

Defined, 814.50.

Transferee's defense, 814.55.

Without receiving reasonably equivalent value, 814.65; 814.70.

FUNCTION OF JURY, 101.05.

GROSS NEGLIGENCE DEFEATING CONTRIBUTORY NEGLIGENCE, 102.86.

IDENTITY THEFT, 870.72; 870.73.

IMPEACHMENT OF WITNESS.

By character evidence, 101.37.

By cross-examination as to prior conviction of crime, 101.36.

By prior inconsistent statement, 101.35.

IMPRISONMENT. See FALSE IMPRISONMENT.

INCOMPETENCY. 817.00

INCIDENTAL DAMAGES.

Breach of warranty, buyer's action, 701.40; 701.50; 701.60.

INDEPENDENT CONTRACTOR, 103.15.

INFANTS.

Contracts, Issue of Formation; Defense of Infancy, 501.65 through 501.75.

INNOCENT PURCHASER, DEFENSE, ACTION TO SET ASIDE DEED, 850.45.

INSULATING/INTERVENING NEGLIGENCE, 102.65.

INSURANCE.

Accident.

Effect of diseased condition, 870.21.

Issue, 870.25.

Accidental means.

Definition, 870.20.

Effect of diseased condition, 870.21.

Actual cash value, 910.80; 910.90.

Application. See INSURANCE, Misrepresentation in application.

Concealment of material fact, non-marine policy, 880.26.

Disability.

Constant care of physician, 880.02.

Continuous confinement within doors, 880.01.

Continuous and total disability, 880.00.

Estoppel, false answer to application by agent, 880.20; 880.30.

Failure to procure.

Contract issue, 870.10.

Negligence issue, 870.00.

Fraudulent proof of loss, 910.27.

Hazard of fire increased by insured, 910.20.

Intentional burning by insured, 910.25.

Misrepresentation in application.

Concealment of material fact in non-marine policy, 880.26.

Factual dispute, 880.14.

False answer by agent, 880.30.

Falsity of representation, 880.15.

Fire insurance policy, willful misrepresentation, 880.25.

Materiality of, 880.20.

Suicide defense to life insurance, 870.30.

INTERESTED WITNESS, 101.30.

INTERFERENCE, WRONGFUL.

with contract right, 807.00.

with prospective contract, 807.10.

INTERROGATORIES, 100.44.

INVASION OF PRIVACY.

Appropriation of name or likeness for commercial use, 800.75.

Appropriation of name or likeness for commercial use—damages, 800.76.

Offensive intrusion, 800.70.

Offensive intrusion—damages, 800.71.

ISSUES—GENERAL EXPLANATION, 101.60.

JUDGE STATING THE EVIDENCE, 101.00.

JUDICIAL NOTICE, 101.14.

JUROR NOTE-TAKING, 100.70.

JURY.

Consider all contentions, 150.10.

Consider only matters in evidence, 106.49.

Discharging, 150.60.

Failure to reach verdict, 150.50.

Function of, 101.05.

Render verdict based on fact, not consequences, 150.12.

Unanimous verdict, 150.30.

LAND-DISTURBING ACTIVITY. 847.00, 847.01

LANDLORDS.

Duty to non-residential tenant.

Controlled or common areas, 805.73.

Defense of contributory negligence, 805.74.

Duty to provide fit residential premises.

Basic, 845.30.

Damages, 845.35.

Duty to residential tenant.

Defense of contributory negligence, 805.72.

Residential premises and common areas, 805.71.

Duty to vacation rental, 805.80.

Summary ejectment.

Damages, 845.20.

Defense of tender, 845.04.

Defense of waiver of breach by accepting rent, 845.15.

Failure to pay rent, 845.05

Holding over after end of lease period, 845.10.

Violation of provision in lease, 845.00.

LANDOWNERS.

Contributory negligence of lawful visitor, 805.56.

Duty to.

Lawful visitor, 805.55.

Gross contributory negligence.

Of trespasser, 805.66.

Municipal and County.

Duty to users of public ways, 805.67.

Handicapped contributory negligence, 805.69.

Sui juris contributory negligence, 805.68.

See LANDLORDS.

LAWFUL VISITOR.

Status, 805.50.

Duty of owner, 805.55.

Defense of contributory negligence, 805.56.

LEMON LAW. See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

LIBEL. See DEFAMATION.

Defense of truth, private figure, not matter of public concern, 806.79.

Per quod.

private figure, matter of public concern, 806.61.

private figure, not matter of public concern, 806.60.

public figure or official, 806.62.

Per se.

- private figure, matter of public concern, 806.51.
- private figure, not matter of public concern, 806.50.
- public figure or official, 806.53.

LIEN, False lien against public officer or employee, 813.41.

MALICIOUS PROSECUTION.

- Civil proceeding, 801.01.
- Criminal proceeding, 801.00.
- Damages, 801.05.
- Punitive damages, 801.10.

MALPRACTICE. See MEDICAL MALPRACTICE.

- Agents, liability for acts of, 809.65 (non-employee agents); 809.80 (liability of institutional health care provider).
- Consent, informed, 809.45.
- Damages—See DAMAGES, Personal injury.
- Direct evidence, 809.00.
- Direct and indirect evidence, 809.05.
- Doctor not insurer of results, 809.00; 809.03; 809.05.
- Duty to attend, 809.00; 809.03; 809.05.
- General instruction.
 - Direct evidence, 809.00.
 - Direct and indirect evidence, 809.05.
 - Indirect evidence, 809.03.
- Highest degree of skill not required, 809.00; 809.03; 809.05.
- Health care provider not insurer of diagnosis, etc., 809.00; 809.03; 809.05.
- Hospital.
 - Liability for agent, 809.80.
 - Selection of doctor, 809.75.
- Indirect evidence, 809.03.
- Limitation by notice or special agreement, 809.07.
- Res Ipsa Loquitor, 809.03; 809.05.

MAPS, 101.40.

MINORS CLAIM FOR RESTITUTION WHERE CONTRACT DISAVOWED, 505.20; 505.25.

MEDICAL MALPRACTICE. See MALPRACTICE (for medical negligence claims arising before 1/1/12.)

- Both direct and indirect evidence of negligence, 809.05A
- Corporate or administrative negligence by hospital, nursing home, or adult care home, 809.06
- Damages
 - Personal injury damages
 - Generally—809.100
 - Permanent injury—economic damages, 809.114
 - Permanent injury—non-economic damages, 809.115
 - Final mandate (regular), 809.120

- Final mandate (per diem argument by counsel), 809.122
- Sample verdict form—damages issues, 809.199
- When plaintiff seeks to overcome statutory limit on non-economic damages, 809.160
- Wrongful death
 - Final mandate (per diem argument by counsel), 809.156
 - Final mandate (regular), 809.154
 - Generally, 809.142
 - Present monetary value of deceased to next-of-kin—economic damages, 809.150
 - Present monetary value of deceased to next-of-kin—non-economic damages, 809.151
- Direct evidence of negligence, 809.00A
- Emergency medical condition
 - Both direct and indirect evidence of negligence, 809.26
 - Corporate or administrative negligence by hospital, nursing home, or adult care home, 809.28
 - Direct evidence of negligence, 809.22
 - Existence of emergency medical condition, 809.20
 - Indirect evidence of negligence only ("res ipsa loquitur"), 809.24
- Health care providers liability for acts of non-employee agents, 809.65A
- Indirect evidence of negligence, 809.03A
- MEDICAL NEGLIGENCE, 809.00 through 809.90.
- MILITARY CONTRACTOR DEFENSE, 714.18.
- MENTAL CAPACITY.
 - Contracts, issue of formation, 501.05 through 501.25.
 - Effect of suicide, 860.16.
 - To execute deed, 850.05.
 - To execute will, 860.15.
- MERCHANT, STATUS OF SELLER AS, 704.10.
- MERCHANTABILITY, IMPLIED WARRANTY OF. See WARRANTY.
- MINORS.
 - Basic charge for tort liability of parents, 815.90.
 - Damages, 815.91.
 - Negligence of minor between seven and fourteen, 102.13.
 - Parent's duty to supervise, 102.32.
- MISREPRESENTATION, NEGLIGENT, 800.10.
- MITIGATION OF PERSONAL INJURY DAMAGES, 810.24.
- MODELS, 101.40.
- MOTOR VEHICLE WARRANTIES ("LEMON LAW").
 - Damages, 745.07 (plaintiff as purchaser); 745.09 (plaintiff as lessee); 745.11 (plaintiff as lessor).
 - Defense of abuse, neglect, or unauthorized alterations, 745.05.

Express warranty, breach of, 745.01 (manufacturer's failure to make necessary repairs); 745.03 (manufacturer unable to conform vehicle to warranty).

Unreasonable refusal to comply with requirements of act, 745.13.

NEGLIGENCE.

Burden of proof, 102.10.

Concurring, 102.60.

Contention of, 102.35.

Contribution, third party tort-feasor, 102.30.

Contributory negligence, 104.10; 104.25; 104.35; 104.50.

Definition common law negligence, 102.11.

Doctrine of sudden emergency, 102.15.

Duty of adjoining landowners, 805.70.

Final mandate, 102.50.

Gross negligence, willful or wanton conduct, 102.85; 102.86.

Infliction of severe emotional distress, 102.84.

Insulating, intervening negligence, 102.65.

Landlord's duty to tenant.

Non-residential tenant.

Controlled or common areas, 805.73.

Defense of contributory negligence, 805.74.

Residential tenant.

Defense of contributory negligence, 805.72.

Residential premises and common areas, 805.71.

Vacation rental, 805.80.

Landowner's duty of adjoining, 805.70.

Legal negligence—duty to client, 811.00.

Minor between seven and fourteen, 102.31.

Municipal or county.

Defense of contributory negligence, handicapped plaintiff, 805.69.

Defense of contributory negligence, sui juris plaintiff, 805.68.

Duty to users of public ways, 805.67.

No duty to anticipate negligence of others, 102.14.

Parent's duty to supervise minor, 102.32.

Per se; definition, 102.12.; sudden emergency exception, 102.16.

Proximate cause, 102.19, 102.20.

Res Ipsa Loquitur, 102.30.

Stipulation, 102.10A.

See PRODUCTS LIABILITY.

NEGOTIABLE INSTRUMENTS.

Consumer credit defenses.

Notice by assignee of assignment, 629.50.

Notice by debtor of defenses, 629.51.

Defenses to.

Consumer credit defenses, above.

Good against holders in due course.

Fraud in factum, 625.20.

Infancy—See INFANTS.

Good against non-holders in due course.

Acquisition by theft, 624.50.

Breach of contract, 624.50.

Liability dependent on a condition precedent, 624.40; 624.41.

Non-delivery or delivery for a special purpose, 621.45.

Holder in due course.

Basic charge, 622.20.

Definition, 622.10.

Promissory note.

Defense of non-adoption of seal, 591.05.

Defense of want of consideration, 591.06.

Signature in issue.

Evidence offered by both parties, 623.25.

Evidence offered by plaintiff, 623.20.

NEW MOTOR VEHICLES. See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

NOTE-TAKING BY JUROR, 100.70.

NOTICE.

Adequate assurances—See ADEQUATE ASSURANCES.

Consumer credit defenses—See CONSUMER CREDIT DEFENSES.

NUISANCE.

Alteration of surface water flow, 805.30.

Attractive, 805.65A.

Private, 805.25.

OPEN PRICE TERM. See PRICE.

OPENING STATEMENT, 100.10.

ORAL TRUSTS. See PAROL TRUSTS.

OWNERS AND OCCUPIERS OF LAND.

Contributory negligence of lawful visitor, 805.56.

Duty of owner to lawful visitor, 805.55.

Duty of owner to trespasser, 805.65.

Gross contributory negligence of trespasser, 805.66.

Status of party as lawful visitor, trespasser, 805.50.

See LANDLORDS.

PARENTS' LIABILITY FOR CHILD'S TORT, 815.90.

PARENT-CHILD IMMUNITY, 102.87.

PAROL TRUSTS.

By operation of law.

Constructive trusts, 865.75.

- Purchase money resulting trust, 865.65.
- Purchase with fiduciary funds, 865.70.
- Express declaration of trust in personal property, 865.60.
- Express trust in transferred real or personal property, 865.55.
- Express trust in purchased real property or personal property, 865.50.
- PATERNITY, 815.75.
- PECULIAR SUSCEPTIBILITY, 102.20.
- PERFORMANCE.
 - Full, basic charge, 630.10.
 - Impossibility of—See IMPOSSIBILITY.
 - Prevention of—See PREVENTION.
 - Substantial, basic charge, 630.20.
- PER DIEM ARGUMENT, 810.51.
- PEREMPTORY INSTRUCTION, 101.65.
- PERSONAL INJURY DAMAGES. See DAMAGES.
- PHOTOGRAPHS, 101.40.
- PIERCING CORPORATE VEIL, 103.40.
- PRESUMPTIONS, 101.62.
- PRIOR INCONSISTENT STATEMENT OF WITNESS, 101.35.
- PROCESSIONING ACTION, 825.00.
- PRODUCTS LIABILITY.
 - Builder-Vendor—See BUILDER-VENDOR.
 - Defenses
 - Claimant's failure to exercise reasonable care as proximate cause, 743.10; 744.10.
 - Inherent characteristic design, 744.16.
 - Lack of seller's opportunity to inspect.
 - Basic charge, 743.05.
 - Exception, 743.06.
 - Military contractor defense, 714.18.
 - Open and obvious risk, 744.12.
 - Product alteration or modification, 747.07; 744.07.
 - Sealed container defense of seller.
 - Basic charge, 743.05.
 - Exception, 743.06; 744.06.
 - Unreasonable use, given knowledge of unreasonably dangerous condition, 743.09; 744.09.
 - Use contrary to instructions or warnings, 743.08; 744.08.
 - Firearms, defective design claim, 744.15.
 - Inadequate design of formulation claim, 744.14.
 - Inadequate warning claim, 744.11.
 - Motor Vehicle Warranties—See MOTOR VEHICLE WARRANTIES ("LEMON LAW").
 - Prescription drugs.

Defense of delivery of adequate warning, 744.13.

Defense of unavoidably unsafe aspect, 744.17.

Statute of limitations, 744.18.

PROPERTY. See TITLE, PROOF OF.

PROXIMATE CAUSE,

Act of God, 102.26.

Concurring acts of negligence, 102.27.

Definition, 102.19.

Insulating acts of negligence, 102.28.

Multiple causes, 102.19.

Peculiar susceptibility, 102.20.

PUNITIVE DAMAGES.

Existence of outrageous or aggravated conduct, 810.90.

Insurance company's bad faith refusal to settle a claim, 810.92.

Liability of defendant, 810.96.

Malicious prosecution cases, 801.10.

Whether to make award and amount, 810.93; 810.98.

Whether to make award and amount (special cases), 810.94.

Wrongful death cases, 810.91.

QUANTUM MERUIT.

Basic charge, 736.00.

Measure of recovery, 736.01.

RACKETEERING. See RICO.

RECAPITULATION OF EVIDENCE, 101.00.

RECESSES, 100.20; 100.21.

RELATING THE LAW TO THE EVIDENCE, 101.00.

REMEDY FOR BREACH OF CONTRACT. See CONTRACTS.

REPAIR AND SERVICE CONTRACTS, DAMAGES FOR BREACH. See CONTRACTS.

REPUDIATION.

As breach of contract, 510.20.

RES IPSA LOQUITUR.

Medical malpractice, 809.03, 809.05.

RESCISSION.

Issue of common law remedy, 503.00; 503.01.

REVIEW OF EVIDENCE AND STIPULATIONS, 101.50.

RICO (Civil)

Attempt, 814.44

Conspiracy, 814.43

Enterprise activity, 814.42

Pattern, 814.41

RIPARIAN RIGHTS, WRONGFUL ALTERATION OF WATER FLOW, 805.30.

SEDIMENTATION CONTROL, 847.00; 847.01

SELLER, STATUS AS MERCHANT, 747.10.

SERVICES RENDERED A DECEDENT.

- Breach of contract, 735.20.

- By family member, presumption of gratuity, 735.15.

- Existence of contract, 735.00.

- Presumption of compensation.

 - Family member, 735.15.

 - Non-family member, 735.10.

- Promise to compensate by will, 735.05.

- Recovery.

 - Basic charge, 735.25.

 - Benefits or offsets, 735.30.

 - Statute of limitations, 735.40.

 - Value of specific property, 735.35.

SERVICE AND REPAIR CONTRACTS, DAMAGES FOR BREACH. See CONTRACTS.

SLANDER. See DEFAMATION.

- Of title, 807.20.

- Per quod.

 - private figure, matter of public concern, 806.71.

 - private figure, not matter of public concern, 806.70.

 - public figure or official, 806.72.

- Per se.

 - private figure, matter of public concern, 806.66.

 - private figure, not matter of public concern, 806.65.

 - public figure or official, 806.67.

SPOILIATION OF EVIDENCE, 101.39.

STIPULATIONS, 101.44.

STIPULATION OF NEGLIGENCE, 102.10A.

SUMMARY EJECTMENT.

- Damages, 845.20.

- Defense of tender, 845.04.

- Defense of waiver of breach by accepting rent, 845.15.

- Failure to pay rent, 845.05.

- Holding over after end of lease period, 845.10.

- Violation of provision in lease, 845.00.

TESTIMONY, DEPOSITION, 100.43.

TIME.

- Lapse of, termination of offer, 502.55.

TITLE, SLANDER OF, 807.20.

TITLE, PROOF OF.

- Connected chain from state, 820.50.

- Superior title from common source.

Source contested, 820.61.

Source uncontested, 820.60.

TRADE REGULATION.

Allocation of territory, 813.28.

Boycott, 813.24.

Combinations in restraint of trade, 813.20.

Commerce, introduction, 813.60.

Commerce, unfair competition, unfair and deceptive practices, 813.62.

Commerce, winning a prize, eligibility to win, specially selected, simulation of checks and invoices, 813.63.

Conspiracy defined, 813.22.

Damages, 813.80.

Discriminatory pricing, 813.27.

False lien or encumbrance against a public officer or employee, 813.41.

Model charge, 813.05.

Misappropriation of trade secret.

Issue of existence of trade secret, 813.90.

Issue of misappropriation, 813.92.

Defense to misappropriation, 813.94.

Issue of causation, 813.96.

Issue of damages, 813.98.

Predatory acts, 813.25.

Predatory pricing, 813.26.

Preface, 813.00.

Price fixing, 813.29.

Price suppression, 813.23.

Proximate cause, 813.70.

Representation of being specially selected, 813.37.

Representation of eligibility to win a prize, 813.36.

Representation of winning a prize, 813.35.

Simulation of checks and invoices, 813.38.

Tying between lender and insurer, 813.30.

Unauthorized disclosure of tax information, 813.31.

Unfair competition, unfair and deceptive practices, 813.21.

Unsolicited calls by automatic device, 813.33.

"Wholesale" used in advertising, 813.39.

"Wholesale" used in firm name, 813.40.

Work at home solicitations, 813.34.

TRESPASS, TO PERSONAL PROPERTY.

Basic charge, 805.10.

Damages, 805.15.

Duty of owner to child trespasser, 805.64B.

Duty of owner to trespasser.

- intentional harm, 805.64.
- position of peril, 805.64C.
- use of reasonable force defense, 805.64A.

TRESPASS, TO REAL PROPERTY.

- Basic charge, 805.00.
- Damages, 805.05.

TRESPASSER.

- Duty to.
 - Defense of gross contributory negligence, 805.66.
 - General, 805.65.
- Status as, 805.50.

TRUSTS.

- Express declaration of trust in personal property, 865.60.
- Express transfer trust, 865.55.
- Express trust, 865.50.
- Purchase money resulting trust, 865.65.
- Purchase with fiduciary funds, 865.70.

UNANIMOUS VERDICT, 150.30.

UNFAIR AND DECEPTIVE TRADE PRACTICES. See TRADE REGULATION.

UNIFORM COMMERCIAL CODE. See CONTRACTS.

USAGE OF TRADE.

- Implied warranty based on, 741.31; 741.34.
- Modification or exclusion of implied warranties by, 711.30.

UNDUE INFLUENCE.

- Action to set aside deed, 850.15.
- In wills, 860.20.
- Rescission of written instrument because of, 505.30.

VACATION RENTAL, DUTY OF LANDLORD TO TENANT, 805.80.

VERDICT—MUST BE UNANIMOUS, 150.30.

VOID and VOIDABLE MARRIAGES. See ANNULMENT.

WARRANTY.

- Breach of, 741.10 (express); 741.20 (merchantability); 741.30 (fitness for particular purpose).
- Express, 741.05; 741.20. See also WARRANTY, Third party right of action.
- Generally, 741.00.
- Implied.
 - Based on course of dealing or usage of trade, 741.31.
 - Fitness for particular purpose, 741.25 (existence); 741.30 (breach).
 - Habitability—See BUILDER-VENDOR.
 - Merchantability, 741.15 (existence); 741.20 (breach); 747.20.
 - Modification or exclusion
 - Of implied warranty of fitness for particular purpose, 741.26 (modification); 741.27 (exclusion); 741.28 (knowledge of defects).

Of implied warranty of merchantability, 741.16 (modification); 741.17 (exclusion); 741.18 (knowledge of defects).

See also WARRANTY, Third party right of action.

Motor Vehicles—See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

Notice of—See PRODUCTS LIABILITY.

Remedies.

Where goods retained, 741.60.

After justifiable revocation, 741.45; 741.50.

After rightful rejection, 741.35; 741.40.

Third party right of action.

Against buyer's seller (horizontal), 741.65.

Against manufacturer, 741.66 (horizontal); 741.67 (vertical).

WATER, ALTERATION OF FLOW, 805.30.

WAY OF NECESSITY, 840.25.

WEIGHT OF EVIDENCE.

Greater weight of—definition, 101.10.

Jury to determine, 101.20.

WILLFUL AND MALICIOUS CONDUCT

Parent-child immunity, 102.87

WILLS.

Constructive fraud, 800.15.

Devisavit non vel, 860.25.

Duress, 860.22.

Introductory statement by court, 860.00.

Issues, 860.00.

Lack of testamentary capacity, 860.15.

Requirements.

Attested written will, 860.05.

Holographic, 860.10.

Suicide as affecting testamentary capacity, 860.16.

Undue Influence, 860.20.

WRITTEN INSTRUMENTS, RESCISSION OF. See RESCISSION OF WRITTEN INSTRUMENTS.

WRONGFUL DEATH.

General, 810.60; 809.142.

Loss of consortium.

Action, 800.65.

Damages, 810.30.

Parent's claim for injury to child, 810.32.

Punitive damages, 810.91.

Wrongful death damages, medical malpractice cases.

Final mandate (regular), 809.154.

Final mandate (per diem argument by counsel), 809.156.

Funeral expenses—stipulation, 810.48A.

Funeral expenses—stipulation as to amount paid or necessary to be paid, but not as to nexus to conduct, 810.48B.

Funeral expenses—no stipulation as to amount paid or necessary to be paid, no rebuttal evidence, 810.48C.

Funeral expenses—no stipulation as to amount paid or necessary to be paid, rebuttal evidence offered, 810.48D.

Medical expenses—no stipulation as to amount paid or necessary to be paid, no rebuttal evidence, 810.44C.

Medical expenses—no stipulation as to amount paid or necessary to be paid, rebuttal evidence offered, 810.44D.

Medical expenses—stipulation, 810.44A.

Medical expenses—stipulation as to amount paid or necessary to be paid, but not as to nexus to conduct, 810.44B.

Present monetary value of deceased to next-of-kin—economic elements, 809.150

Present monetary value of deceased to next-of-kin—non-economic elements, 809.151

WRONGFUL DISCHARGE. See EMPLOYMENT RELATIONSHIPS.

WRONGFUL INTERFERENCE WITH CONTRACTS, 807.00.

X-RAY, 101.40.

