June 2017 Supplement to Pattern Jury Instructions for Civil Cases

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

Interim Instructions. As the Pattern Jury Instructions Committee considers new or updated instructions, it posts Interim Instructions that are too important to wait until June to distribute as part of the annual hard copy supplements to the School of Government website at www.sog.unc.edu/programs/ncpji. You may check the site periodically for these instructions or join the Pattern Jury Interim Instructions Listserv to receive notification when instructions are posted to the website. Go to the following link to join the Listserv: http://lists.unc.edu/read/all_forums/subscribe?name=ncpjii.

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

The following instructions are included in this supplement:

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

North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

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Volume I

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GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2017

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GENERAL CIVIL VOLUME
MARCH 2017
N.C. Gen. Stat. § 8C-1, RULE 105

101.33 EVIDENCE—LIMITATION AS TO PURPOSE.

NOTE WELL: Use this instruction to limit the use of particular evidence to a specific purpose.[1]

Do not use this charge if there is a more specific pattern instruction available; e.g., N.C.P.I.—Civil 101.35 (prior inconsistent statement), N.C.P.I.—Civil 101.36 (impeachment by prior conviction), N.C.P.I.—Civil 101.37 (character of a witness).

Evidence has been received (*describe nature of evidence*). (You must not consider this evidence (*describe forbidden use of evidence*).)[2] If you [believe this evidence] [find that this evidence (*describe what must be found for evidence to be relevant*)], then you may consider this evidence for the purpose(s) of (*describe permissible purpose*). Except as it bears upon (*specify permissible purpose*), [this evidence] [(*describe evidence*)] may not be used by you in your determination of any other fact in this case.

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1 *See, e.g., Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995) (where trial court used a limiting instruction substantially similar to N.C.P.I.—Civil 101.33, the admission of evidence of liability insurance for the limited purpose of demonstrating bias on the part of the private investigator hired by the insurance company was not an abuse of discretion).

2 Use the parenthetical sentence only when it is desired to specifically point out to the jury the use to which the evidence may not be put.

N.C.P.I.—Civil 101.46
DEFINITION OF [INTENT] [INTENTIONALLY].
GENERAL CIVIL VOLUME
DECEMBER 2016

101.46 DEFINITION OF [INTENT] [INTENTIONALLY].

A person acts intentionally if *he* desires to cause the consequences of *his* act or believes that the consequences are substantially certain to occur.[1] Intent may be proven by direct evidence or inferred from the circumstances.[2]

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1 *See*, *e.g., Jones v. Willamette Indus.*, 120 N.C. App. 591, 594, 463 S.E.2d 294, 297 (1995); *State v. Alston*, 91 N.C. App. 707, 714, 373 S.E.2d 306, 312 (1988); *State v. Locklear*, 84 N.C. App. 637, 643-44, 353 S.E.2d 666, 670 (1987); *State v. Bright*, 78 N.C. App. 239, 243, 337 S.E.2d 87, 89 (1985).

2 *See, e.g., Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E.2d 36, 38 (1929) (alteration in original) (citation omitted in original) ("[T]he intention to inflict injury may be constructive. . . where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent.").

N.C.P.I.—Civil 102.20
PROXIMATE CAUSE—PECULIAR SUSCEPTIBILITY.
GENERAL CIVIL VOLUME
MARCH 2017

102.20 PROXIMATE CAUSE—PECULIAR SUSCEPTIBILITY.

In deciding whether the [injury[1] to the plaintiff] [death of the decedent] was a reasonably foreseeable consequence of the defendant's negligence, you must determine whether such negligent conduct, under the same or similar circumstances, could reasonably have been expected to [injure] [cause the death of] a person of ordinary [physical] [mental] condition.[2] If so, the harmful consequences resulting from the defendant's negligence would be reasonably foreseeable and, therefore, would be a proximate cause of the [plaintiff's injury] [decedent's death]. If not, the harmful consequences resulting from the defendant's negligence would not be reasonably foreseeable and, therefore, would not be a proximate cause of the [plaintiff's injury] [decedent's death].

([*Use when prior knowledge of susceptibility to injury is at issue.*]

Furthermore, even if a person of ordinary [physical] [mental] condition would not be reasonably expected to [be injured] [die], you must determine whether the defendant had knowledge or a reason to know of the plaintiff's peculiar or abnormal [physical] [mental] condition.[3] If so, the harmful consequences resulting from the defendant's negligence would be reasonably foreseeable and, therefore, would be a proximate cause of the [plaintiff's injury] [decedent's death]. Under such circumstance(s), the defendant would be liable for all the harmful consequences which occur, even though these harmful consequences may be unusually extensive because of the peculiar or abnormal [physical] [mental] condition which [happens] [happened] to be present in the [plaintiff] [decedent].

On the other hand, if you determine that the defendant did not have knowledge or a reason to know of the plaintiff's peculiar or abnormal [physical] [mental] condition, the harmful consequences resulting from the

defendant's negligence would not be reasonably foreseeable and, therefore, would not be a proximate cause of the [plaintiff's injury] [decedent's death].)

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1 "Injury" includes all legally recognized forms of personal harm, including activation or reactivation of a disease or aggravation of an existing condition.

2 *Potts v. Howser*, 274 N.C. 49, 53-54, 161 S.E.2d 737, 741 (1968); *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964); *Wyatt v. Gilmore*, 57 N.C. App. 57, 59-60, 290 S.E.2d 790, 791-92 (1982); *Lee v. Regan*, 47 N.C. App. 544, 550, 267 S.E.2d 909, 912, *cert. denied*, 301 N.C. 92, 273 S.E.2d 299 (1980); *Hinson v. Sparrow*, 25 N.C. App. 571, 573-74, 214 S.E.2d 198, 199-200 (1975); *Redding v. F. W. Woolworth Co.*, 9 N.C. App. 406, 409-10, 176 S.E.2d 383, 385 (1970).

3 The Court of Appeals described the impact of prior knowledge of susceptibility on the foreseeability standard as follows:

> Negligence is the failure to use due care under the circumstances. One of the circumstances in a particular case might be the known susceptibility to injury of a person to whom the duty of due care is owed. Obviously, in the exercise of due care one may not act toward a frail old lady in the same way one could act toward a robust young man. The duty owed, to exercise due care, is the same in each instance, but in fulfilling that duty the difference in circumstances requires a difference in conduct by the actor.

Hinson, 25 N.C. App. at 574, 214 S.E. 2d at 200. In such cases, the following supplement to the above charge may be used: "A negligent person is held responsible for knowing of the peculiar condition when, under the circumstances, he should have known or anticipated it."

N.C.P.I.—Civil 501.01
CONTRACTS—ISSUE OF FORMATION—COMMON LAW.
GENERAL CIVIL VOLUME
MAY 2017

501.01 CONTRACTS—ISSUE OF FORMATION—COMMON LAW.

NOTE WELL: Use N.C.P.I. 501.01A for cases in which the Uniform Commercial Code applies.

The (*state number*) issue reads:

"Did the plaintiff and the defendant enter into a contract?"

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[1] things:

First, that the plaintiff and the defendant mutually assented to the same material terms[2] for doing or refraining from doing a particular thing.

Second, that the mutual assent of the parties was supported by an adequate consideration.[3]

I will now explain to you the meaning of these two requirements.

With regard to the first requirement, for the parties to have mutually assented, each of them must have agreed to the same material terms for doing or refraining from doing a particular thing.[4]

Select from among the following optional provisions as applicable:

(Offer and Acceptance. An "offer" is an expression of willingness to do or refrain from doing a particular thing. There is no requirement that the offer be made in any particular form. It may be made orally, in writing or by conduct which reasonably indicates the offering party's intention[5] to be bound if the other party accepts.[6] An "acceptance" is an expression of assent to the offer. [If the [offer does not specify] [the circumstances do not indicate] a particular method, manner or form of acceptance, acceptance can be made in any manner and by any medium reasonable under the circumstances.[7] Acceptance may be oral,[8] in writing[9] or by conduct which reasonably signifies that the accepting party assents to each material term of the offer.] [If the

[offer specifies] [circumstances unambiguously indicate] a particular method, manner or form of acceptance, acceptance must be made in the method, manner or form [specified] [indicated].[10]])

(Mutual Assent. Mutual assent occurs when an offer is communicated by one party to the other, and the other party accepts the offer.[11] Mutual assent must be determined from the [written words] [verbal expressions] [conduct] of the parties. Each party's [written words] [verbal expressions] [conduct][12] must have such meaning as a reasonable person would give under the same or similar circumstances.[13] In determining what meaning a reasonable person would give to the parties' [written words] [verbal expressions] [conduct], you should consider the evidence as to all the circumstances existing at the time of the [offer] [acceptance].)

(Intended, But Unexpressed Term. One party may intend for a certain term to have a special or a particular meaning but fails to express that meaning in *his* [written words] [verbal expressions] [conduct]. Under such circumstances, you should not consider such unexpressed special or particular meaning. However, if you find, by the greater weight of the evidence, that (*name party*) knew or should have known what (*name other party*) meant by certain [written words] [verbal expression] [conduct], that meaning is deemed assented to by (*name party*) unless (*name other party*) knew or should have known that (*name party*) gave such [written words] [verbal expressions] [conduct] a different meaning.)[14]

(All Material Terms Agreed. For a contract to be complete, each party must assent to all material terms. A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. However, not every detail of the parties' transaction need be agreed upon.[15] It is sufficient that there be mutual assent, express or implied, to all of the

material terms.[16] What constitutes the material terms essential to a given contract depends on the facts and circumstances of each transaction.[17] In determining the material terms, you may consider the following factors:

[the subject matter and purpose of the proposed contract]

[the intentions of the parties]

[the anticipated scope of performance by each party]

[the prior dealings of the parties under this or similar contracts]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties know or should have known of its existence]

[*state other factors supported by the evidence*].)

(Supplemental Terms. In some instances, [the parties' course of performance][18] [the parties' course of dealing] [an applicable usage of trade][19] may give particular meaning to and supplement or qualify one or more terms of the parties' contract.

[A course of performance arises out of prior repeated occasions for one party to perform under the contract. When the other party knows about the nature of such prior instances of performance and has an opportunity to object to them but does not, you may consider such course of performance as some evidence of the meaning of the parties' contract.]

[A course of dealing is a sequence of prior conduct between the parties in transactions the same as or similar to the one at issue here which reasonably establishes a basis for their common understanding of a particular meaning of a term in their contract (or which supplements or qualifies a term in their contract).]

[A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will also be observed in the performance of the contract in question.])[20]

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include[21]] [have left open].[22] In the matter before you,

[Good Faith. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement, and each party is deemed to have agreed to act in good faith in [performing] [enforcing] the contract.[23] "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.[24]]

[Time for Performance. Where the parties did not expressly provide a time for the performance of an act or the doing of a thing, the parties are deemed to have agreed that the act may be performed or the thing may be done within a reasonable time.[25] In determining what constitutes a reasonable time,[26] you may consider [the subject matter and purpose of the proposed contract] [the intentions and circumstances of the parties] [the anticipated scope of performance by each party[27]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[Termination. Where the parties did not expressly provide a duration for their contractual relationship, the parties are deemed to have agreed that either of them may terminate their contract upon reasonable notice to the other.[28] In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract[29]] [the length of time the parties should have reasonably expected their contractual

relationship to last[30]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[*State other applicable instances in which the law supplies omitted material terms*][31]).

With regard to the second requirement that the mutual agreement of the parties was supported by an adequate consideration, "consideration" means something of value. Such value may consist of some right, interest, profit or benefit accruing to one party or some forbearance, burden, detriment, loss or responsibility given, suffered or undertaken by the other.[32] (An agreement based upon an exchange of mutual promises is supported by adequate consideration[33] if performance of each of the promises would constitute adequate consideration.[34]) In any event, the benefit to one party or the burden on the other party must result from the bargain which causes the parties to enter into their mutual agreement.[35]

(It is not necessary that the benefit flow to or that the burden fall upon a party to the mutual agreement. [The benefit may flow to a third person for whose benefit one of the parties bargained.[36]] [The burden may likewise fall upon a third person who is to perform for the benefit of one of the parties to the mutual agreement.[37]])

(Consideration is adequate unless it is so grossly inadequate[38] that it shocks the conscience. Consideration does not have to be proportional to the benefit conferred or the burden undertaken, and even slight or trifling consideration is adequate to support a mutual agreement otherwise reached by mutual assent.[39])

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 and the defendant entered into a contract, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 Not all of the essential elements of a contract are set forth in this instruction. In addition to mutual assent and a legally adequate consideration, there must be at least two parties to the contract. *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962); *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N.C. 558, 92 S.E. 706 (1917); *Spruill v. Trader & Trader*, 50 N.C. 39, 42 (1857); *Avery v. Walker*, 8 N.C. 140, 156 (1820). Whether there are enough parties to form a contract would be a jury issue only rarely, so it is omitted as an element of this instruction.

Also, the party against whom enforcement is sought must have had legal capacity to contract. *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the contract was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co*., 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, a third element would need to be added to this instruction.

Finally, the transaction called for by the contract must not be void, illegal or patently contrary to public policy. *See Rose v. Vulcan Materials, Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973) ("Illegality is an affirmative defense and burden of proving illegality is on the party who pleads it.") (citing N.C. R. Civ. P. 8(c)); *see also* N.C.P.I.-Civil 502.40 (noting that, where no genuine dispute exists regarding a contract's substance, whether it is an illegal or unenforceable contract is a question of law for the court).

2 *Richardson v. Greensboro Warehouse and Storage Co.*, 223 N.C. 344, 26 S.E.2d 897 (1943).

3 This second element may be irrelevant if the contract is written and the party against whom enforcement is sought signed under seal. "[A] seal gives to an instrument the same validity at law as if there was a consideration. It amounts to and dispenses with the necessity of the proof of a valuable consideration . . . ." *Woodall v. Prevatt*, 45 N.C. 199, 201 (1853). There are limitations on the use of the seal as a substitute for consideration. First, the seal is operative only in actions at law for damages. *Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 114 S.E.2d 344 (1960); *Coleman v. Whisnant*, 226 N.C. 258, 37 S.E.2d 693 (1946); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925). The seal does not serve as a consideration substitute in equitable proceedings. *Woodall*, 45 N.C. at 201-202; *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E.2d 721 (1978), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963). Second, the General Assembly has eliminated the seal requirement for deeds, N.C. Gen. Stat. § 39-6.5 (1999).

In cases where a seal does serve as a consideration substitute, the court must decide if the party against whom enforcement is sought signed under seal on the face of the contract without ambiguity. If so, the court must hold that, as a matter of law, the contract is under

seal. *Central Sys. v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, *cert. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). However, if the contract is ambiguous as to whether the party signed under seal, it is a question for the jury. *Id.* Under such circumstances, the court should substitute the following for the second element:

> Second, that the defendant signed the (*identify alleged contract*) under seal. Whether the defendant signed the *(identify alleged contract*) under seal is to be determined from all the evidence before you. You may consider whether the word "seal" (or L.S.) appears adjacent to the defendant's signature, whether there is a declaration in the document that the defendant is signing under seal and whether there is any other evidence of the parties' intent to enter into a contract under seal. (The fact that a corporate seal is impressed upon the document, without more, does not mean the document was signed under seal).

Id.; *Currin v. Currin*, 219 N.C. 815, 15 S.E.2d 279 (1941); *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), *cert. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). *See Square D. Co. v. C. J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

4 *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921); *Charles Holmes Machine Co. v. Chalkley*, 143 N.C. 181, 55 S.E. 524 (1906).

5 *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

6 *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 188 S.E.2d 721 (1972).

7 N.C. Gen. Stat. § 25-2-206(1)(a) which appears to agree with North Carolina common law. *Crook v. Cowan*, 64 N.C. 743 (1870).

8 Certain oral offers and acceptances are not enforceable by reason of the statute of frauds. *See*, *e.g.*, N.C. Gen. Stat. § 1-26 (contracts to pay debt otherwise barred by statute of limitation), § 22-1 (suretyship contracts and contracts by executors and administrators), § 22-2 (contracts involving interests in real property), § 22-4 (contracts to revive debts discharged by bankruptcy), § 22-5 (commercial loan commitments over $50,000)25-1-20625-2-201, § 52-10.1 (separation agreements), § 66-99 (business opportunity contracts), § 66-119 (prepaid entertainment contracts) and § 66-132 (discount buying club contracts).

9 "Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms . . . . However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and . . . the offeree's acceptance is properly communicated to the offeror." *Southeast Caissons, LLC v. Choate Construction Co., et al.*, __ N.C. App. __, __, 784 S.E.2d 650, 656 (2016) (quoting JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 2-7-1, at 68-69 (2001)).

10 *See MacEachern v. Rockwell Int'l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979) ("It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed.") (citing *Morrison v. Parks,* 164 N.C. 197, 198, 80 S.E.2d 85, 85 (1913)).

11 *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159

(1982).

12 An implied-in-fact contract may be inferred from the conduct of the parties. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985); *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). An implied-in-fact contract is not the same as a contract implied-in-law. The latter does not require the element of agreement. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

13 A contract is not formed where a material term is left indefinite, vague or patently ambiguous. Mutual assent under such circumstances is lacking. Whether a material term is patently ambiguous (*i.e.*, even competent extrinsic evidence cannot explain the term) is a question of law for the Court. *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E.2d 354 (1984). Thus, omitted from this instruction is optional language dealing with "void for vagueness" situations. If the Court determines that the ambiguity is latent rather than patent, the issue of meaning becomes one for the jury and is considered in conjunction with the issue of breach. N.C.P.I.-502.00 (Contracts - Issue of Breach).

14 *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 31 N.C. App. 490, 229 S.E.2d 697 (1976). *But compare Charles Holmes Machine Co.*, 143 N.C. at 184-85, 55 S.E. at 526. There may be instances where both parties advocate that their unexpressed intentions should have been known to the other and, therefore, become part of the agreement. Where this occurs, the Court should give this component twice, with reciprocal party references. Because of the risk of confusing the jury with reciprocating instructions, the Court should also give the competing contentions of the parties.

15 *Sides v. Tidwell*, 216 N.C. 480, 5 S.E.2d 316 (1939).

16 *MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 359 S.E.2d 50 (1987); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

17 In general, "agreements to agree" which leave one or more material terms open for future assent are void. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). To be enforceable, an agreement to agree "must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Croom*, 182 N.C. at 220, 108 S.E. at 737. All material terms must be settled or there must be a definite agreement on a method by which the terms may be settled. *McMahan*, 285 N.C. 730, 208 S.E.2d 692.

18 *See Cole v. Industrial Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931).

19 *See T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922); *Cohoun v. Hanell*, 180 N.C. 39, 103 S.E. 906 (1920) and *McKinney v. Matthews*, 166 N.C. 576, 82 S.E. 1036 (1914).

20 A usage of trade ordinarily is ordinarily an issue of fact for the jury. However, if the usage of trade is embodied in a written code or some similar writing, its interpretation becomes a question of law for the court. *Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

21 *Kidd v. Early*, 289 N.C. 343, 357-358, 222 S.E.2d 392, 403 (1976). The Court should be careful, however, not to instruct the jury on terms implied-in-law where there is evidence from which the jury could find from the writings, conversations or conduct of the parties that they actually reached agreement on a material term. *See, e.g., Rhyne v. Rhyne*, 151 N.C. 400, 66 S.E. 348 (1909); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

22 A contract with an open term will not cause the contract to fail for indefiniteness if

there are external, objective commercial standards which supply a reasonably certain basis for enforcing the contract by appropriate remedy. N.C. Gen. Stat. § 25-2-204(3). While "open terms" are more readily identified with the Uniform Commercial Code, some North Carolina common law decisions have supplied certain terms left open by the parties. *See North Carolina Comment* to N.C. Gen. Stat. § 25-2-204(3).

23 *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governors Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002); *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003); *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996). *See also Lord of Shatford v. Shelley's Jewelry, Inc.*, 124 F.Supp.2d 779, 787 (W.D.N.C. 2000).

24 *See Blondell v. Ahmed*, ___ N.C. App. ___, ___, 786 S.E.2d 405, 407 (2016) (citing *Weyerhauser Co. v. Godwin Building Supply Co.,* 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) for the basic principle of contract law "that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement."). Good faith extends to reasonableness in enforcing agreements as well. *See Jaudon v. Swink*, 51 N.C. App. 433, 435, 276 S.E.2d 511, 513 (1981) ("'Good Faith' means an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law . . . .").

25 *International Minerals and Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E.2d 472 (1952); *Graves v. O'Connor*, 199 N.C. 231, 154 S.E.37 (1930); *Winders v. Hill*, 141 N.C. 694, 704, 54 S.E. 440, 443 (1906); *Hardee's Food System, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969).

26 The terminability of certain contracts are legislatively restricted. *See*, *e.g.*, N.C. Gen. Stat. § 18B-1205 (wine distribution agreements), § 18B-1305 and § 18B-1306 (beer distributor franchises) and § 20-305(6) (motor vehicle franchises).

27 *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965); *Lambeth v. Thomasville*, 179 N.C. 452, 102 S.E. 775 (1920).

28 *Fulghum v. Town of Selma*, 238 N.C. 100, 104, 76 S.E.2d 368, 371 (1953).

29 *City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E.2d 27, *disc. rev. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973).

30 *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960), *appeal after remand*, 256 N.C. 561, 124 S.E.2d 508 (1962); *East Coast Dev. Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E.2d 72 (1976).

31 At common law, *see*, *e.g.*, reasonable time to repay a loan, *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E.2d 516 (1981), payments to be in cash, *Kidd*, 289 N.C. at 358, 222 S.E.2d at 403, contracts of employment terminable at will, *Rosby v. General Baptist State Convention of North Carolina, Inc.*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), and uncompleted blanks left in the contract document, *Rhyne*, 151 N.C. 400, 66 S.E. 348.

32 *Cherokee County v. Meroney*, 173 N.C. 653, 654, 92 S.E. 616, 616-17 (1917).

33 *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985); *American Aluminum Prods., Inc. v. Pollard*, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

34 Restatement (Second) of Contracts § 75 (1981).

35 Restatement (Second) of Contracts § 71 and comment b. (1981).

36 *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *East Carolina Ry. v. Ziegler Bros.*, 200 N.C. 396, 157 S.E. 57 (1931); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *First Peoples Savings & Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 261 S.E.2d 259 (1980).

37 *See, Craig & Wilson v. Stewart & Jones*, 163 N.C. 531, 79 S.E. 1100 (1913); *Brem v. Covington*, 104 N.C. 589, 10 S.E. 706 (1889). *See also* Restatement (Second) of Contracts § 71(4) and comment e (1981).

38 *Williams v. Chaffin*, 13 N.C. 333, 335 (1830).

39 *Young v. Bd. of Comm'rs. of Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925); *Gurvin v. Cromartie*, 33 N.C. 174, 178-179 (1850).

N.C.P.I.—Civil 501.01A
CONTRACTS—ISSUE OF FORMATION-UCC.
GENERAL CIVIL VOLUME
MAY 2017

501.01A CONTRACTS—ISSUE OF FORMATION-UCC.

NOTE WELL: Use this instruction for a case in which the Uniform Commercial Code applies. This instruction supplements the language of N.C.P.I. 501.01 by providing select provisions of the UCC. Not all UCC provisions are included herein.

The (*state number*) issue reads:

"Did the plaintiff and the defendant enter into a contract?"

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[1] things:

First, that the plaintiff and the defendant mutually assented to the same material terms[2] for doing or refraining from doing a particular thing.

Second, that the mutual assent of the parties was supported by an adequate consideration.[3]

I will now explain to you the meaning of these two requirements.

With regard to the first requirement, for the parties to have mutually assented, each of them must have agreed to the same material terms for doing or refraining from doing a particular thing.[4]

Select from among the following optional provisions as applicable:

(Offer and Acceptance. An "offer" is an expression of willingness to do or refrain from doing a particular thing. There is no requirement that the offer be made in any particular form. It may be made orally, in writing or by conduct which reasonably indicates the offering party's intention[5] to be bound if the other party accepts.[6] An "acceptance" is an expression of assent to the offer. [If the [offer does not specify] [circumstances do not indicate] a particular method, manner or form of acceptance, acceptance can be made in any manner and by any medium reasonable under the circumstances.[7]

Acceptance may be oral,[8] in writing[9] or by conduct which reasonably signifies that the accepting party assents to each material term of the offer.] [If the [offer specifies] [circumstances unambiguously indicate] a particular method, manner or form of acceptance, acceptance must be made in the method, manner or form [specified] [indicated].[10]] [An order or offer to buy goods for prompt or current shipment invites acceptance either by a prompt promise to ship or a current shipment of conforming goods.[11]] [An order or offer to buy goods for prompt or current shipment invites acceptance either by a prompt promise to ship or a current shipment of non-conforming goods with notice that they are being shipped as an accommodation to the party making the order.[12]])

(Mutual Assent. Mutual assent occurs when an offer is communicated by one party to the other, and the other party accepts the offer.[13] Mutual assent must be determined from the [written words] [verbal expressions] [conduct] of the parties. Each party's [written words] [verbal expressions] [conduct][14] must have such meaning as a reasonable person would give under the same or similar circumstances.[15] In determining what meaning a reasonable person would give to the parties' [written words] [verbal expressions] [conduct], you should consider the evidence as to all the circumstances existing at the time of the [offer] [acceptance].)

(Intended, But Unexpressed Term. One party may intend for a certain term to have a special or a particular meaning but fails to express that meaning in *his* [written words] [verbal expressions] [conduct]. Under such circumstances, you should not consider such unexpressed special or particular meaning. However, if you find, by the greater weight of the evidence, that (*name party*) knew or should have known what (*name other party*) meant by certain [written words] [verbal expression] [conduct], that meaning is deemed assented to by (*name party*) unless (*name other party*) knew or should have

known that (*name party*) gave such [written words] [verbal expressions] [conduct] a different meaning.)[16]

(All Material Terms Agreed. For a contract to be complete, each party must assent to all material terms. A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. However, not every detail of the parties' transaction need be agreed upon.[17] It is sufficient that there be mutual assent, express or implied, to all of the material terms.[18] What constitutes the material terms essential to a given contract depends on the facts and circumstances of each transaction.[19] In determining the material terms, you may consider the following factors:

[the subject matter and purpose of the proposed contract]

[the intentions of the parties]

[the anticipated scope of performance by each party]

[the prior dealings of the parties under this or similar contracts]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties know or should have known of its existence]

[*state other factors supported by the evidence*].)

(Supplemental Terms. In some instances, [the parties' course of performance][20] [the parties' course of dealing] [an applicable usage of trade][21] may give particular meaning to and supplement or qualify one or more terms of the parties' contract.

[A course of performance arises out of prior repeated occasions for one party to perform under the contract. When the other party knows about the nature of such prior instances of performance and has an opportunity to

object to them but does not, you may consider such course of performance as some evidence of the meaning of the parties' contract.][22]

[A course of dealing is a sequence of prior conduct between the parties in transactions the same as or similar to the one at issue here which reasonably establishes a basis for their common understanding of a particular meaning of a term in their contract (or which supplements or qualifies a term in their contract).][23]

[A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will also be observed in the performance of the contract in question.][24])

(The express terms of a contract and any [course of performance] [course of dealing] [usage of trade] must be interpreted by you so as to be consistent with each other whenever it is reasonable to do so. However, where a consistent interpretation is not reasonably possible,

[express terms override [course of performance] [course of dealing] [usage of trade]]

[course of performance overrides [course of dealing] [usage of trade]]

[course of dealing overrides usage of trade].)[25]

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include[26]] [have left open].[27] In the matter before you,

[Good Faith. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement, and each party is

deemed to have agreed to act in good faith in [performing] [enforcing] the contract.[28] "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.[29] (If a party [deals in goods of the kind] [by *his* occupation holds *himself* out as having knowledge or skill peculiar to the [practice] [goods involved in the contract] [employs an [agent] [broker] [*name other intermediary*] who by *his* occupation holds *himself* out as having knowledge or skill peculiar to the [practice] [goods involved in the contract],[30] "good faith" also means the observance of reasonable commercial standards of fair dealing in the trade.)][31]

[Time for Performance. Where the parties did not expressly provide a time for the performance of an act or the doing of a thing, the parties are deemed to have agreed that the act may be performed or the thing may be done within a reasonable time.[32] In determining what constitutes a reasonable time,[33] you may consider [the subject matter and purpose of the proposed contract] [the intentions and circumstances of the parties] [the anticipated scope of performance by each party[34]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[Termination. Where the parties did not expressly provide a duration for their contractual relationship, the parties are deemed to have agreed that either of them may terminate their contract upon reasonable notice to the other.[35] In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract[36]] [the length of time the parties should have reasonably expected their contractual relationship to last[37]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[*State other applicable instances in which the law supplies omitted material terms*][38]).

With regard to the second requirement that the mutual agreement of the parties was supported by an adequate consideration, "consideration" means something of value. Such value may consist of some right, interest, profit or benefit accruing to one party or some forbearance, burden, detriment, loss or responsibility given, suffered or undertaken by the other.[39] (An agreement based upon an exchange of mutual promises is supported by adequate consideration[40] if performance of each of the promises would constitute adequate consideration.[41]) In any event, the benefit to one party or the burden on the other party must result from the bargain which causes the parties to enter into their mutual agreement.[42]

(It is not necessary that the benefit flow to or that the burden fall upon a party to the mutual agreement. [The benefit may flow to a third person for whose benefit one of the parties bargained.[43]] [The burden may likewise fall upon a third person who is to perform for the benefit of one of the parties to the mutual agreement.[44]])

(Consideration is adequate unless it is so grossly inadequate[45] that it shocks the conscience. Consideration does not have to be proportional to the benefit conferred or the burden undertaken, and even slight or trifling consideration is adequate to support a mutual agreement otherwise reached by mutual assent.[46])

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 and the defendant entered into a contract, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 Not all of the essential elements of a contract are set forth in this instruction. In addition to mutual assent and a legally adequate consideration, there must be at least two parties to the contract. *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962); *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N.C. 558, 92 S.E. 706 (1917); *Spruill v. Trader & Trader*, 50 N.C. 39, 42 (1857); *Avery v. Walker*, 8 N.C. 140, 156 (1820). Whether there are enough parties to form a contract would be a jury issue only rarely, so it is omitted as an element of this instruction.

Also, the party against whom enforcement is sought must have had legal capacity to contract. *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the contract was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co.*, 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, a third element would need to be added to this instruction.

Finally, the transaction called for by the contract must not be void, illegal or patently contrary to public policy. *See Rose v. Vulcan Materials, Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973) ("Illegality is an affirmative defense and burden of proving illegality is on the party who pleads it.") (citing N.C. R. Civ. P. 8(c)); *see also* N.C.P.I.-Civil 502.40 (noting that, where no genuine dispute exists regarding a contract's substance, whether it is an illegal or unenforceable contract is a question of law for the court).

2 *Richardson v. Greensboro Warehouse and Storage Co.*, 223 N.C. 344, 26 S.E.2d 897 (1943).

3 This second element may be irrelevant if the contract is written and the party against whom enforcement is sought signed under seal. "[A] seal gives to an instrument the same validity at law as if there was a consideration. It amounts to and dispenses with the necessity of the proof of a valuable consideration . . . ." *Woodall v. Prevatt*, 45 N.C. 199, 201 (1853). There are limitations on the use of the seal as a substitute for consideration. First, the seal is operative only in actions at law for damages. *Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 114 S.E.2d 344 (1960); *Coleman v. Whisnant*, 226 N.C. 258, 37 S.E.2d 693 (1946); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925). The seal does not serve as a consideration substitute in equitable proceedings. *Woodall*, 45 N.C. at 201-202; *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E.2d 721 (1978), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963). Second, the General Assembly has eliminated the seal requirement for deeds, N.C. Gen. Stat. § 39-6.5 (1999) and has made seals inoperative in contracts for the sale or lease of goods. N.C. Gen. Stat. §§ 25-2-203 and 25-2-203A.

In cases where a seal does serve as a consideration substitute, the court must decide if the party against whom enforcement is sought signed under seal on the face of the contract without ambiguity. If so, the court must hold that, as a matter of law, the contract is under seal. *Central Sys. v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, *cert. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). However, if the contract is ambiguous as to whether the party signed under seal, it is a question for the jury. *Id.* Under

such circumstances, the court should substitute the following for the second element:

> Second, that the defendant signed the (*identify alleged contract*) under seal. Whether the defendant signed the *(identify alleged contract*) under seal is to be determined from all the evidence before you. You may consider whether the word "seal" (or L.S.) appears adjacent to the defendant's signature, whether there is a declaration in the document that the defendant is signing under seal and whether there is any other evidence of the parties' intent to enter into a contract under seal. (The fact that a corporate seal is impressed upon the document, without more, does not mean the document was signed under seal).

Id.; *Currin v. Currin*, 219 N.C. 815, 15 S.E.2d 279 (1941); *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), *cert. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). *See Square D. Co. v. C. J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

4 *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921); *Charles Holmes Machine Co. v. Chalkley*, 143 N.C. 181, 55 S.E. 524 (1906).

5 *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

6 *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 188 S.E.2d 721 (1972).

7 N.C. Gen. Stat. § 25-2-206(1)(a) which appears to agree with North Carolina common law. *Crook v. Cowan*, 64 N.C. 743 (1870).

8 Certain oral offers and acceptances are not enforceable by reason of the statute of frauds. *See*, *e.g.*, N.C. Gen. Stat. § 25-1-206 (sales of personal property (other than goods) over $5,000) and § 25-2-201 (sales of goods over $500).

9 "Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms . . . . However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and . . . the offeree's acceptance is properly communicated to the offeror." *Southeast Caissons, LLC v. Choate Construction Co., et al.*, __ N.C. App. __, __, 784 S.E.2d 650, 656 (2016) (quoting JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 2-7-1, at 68-69 (2001)).

10 *See* N.C. Gen. Stat. § 25-2-206(1)(a) ("Unless otherwise unambiguously indicated by the language or circumstances an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."); *see also MacEachern v. Rockwell Int'l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979) ("It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed.") (citing *Morrison v. Parks,* 164 N.C. 197, 198, 80 S.E.2d 85, 85 (1913)).

11 N.C. Gen. Stat. § 25-2-206(1)(b) and *Crook*, 64 N.C. at 743.

12 *Id.*

13 *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

14 An implied-in-fact contract may be inferred from the conduct of the parties. *Hall v.*

Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985); *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). An implied-in-fact contract is not the same as a contract implied-in-law. The latter does not require the element of agreement. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

15 A contract is not formed where a material term is left indefinite, vague or patently ambiguous. Mutual assent under such circumstances is lacking. Whether a material term is patently ambiguous (*i.e.*, even competent extrinsic evidence cannot explain the term) is a question of law for the Court. *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E.2d 354 (1984). Thus, omitted from this instruction is optional language dealing with "void for vagueness" situations. If the Court determines that the ambiguity is latent rather than patent, the issue of meaning becomes one for the jury and is considered in conjunction with the issue of breach. N.C.P.I.-502.00 (Contracts- Issue of Breach).

16 *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 31 N.C. App. 490, 229 S.E.2d 697 (1976). *But compare Charles Holmes Machine Co. v. Chalkley*, 143 N.C. 181, 184-85, 55 S.E. 524, 526 (1906). There may be instances where both parties advocate that their unexpressed intentions should have been known to the other and, therefore, become part of the agreement. Where this occurs, the Court should give this component twice, with reciprocal party references. Because of the risk of confusing the jury with reciprocating instructions, the Court should also give the competing contentions of the parties.

17 *Sides v. Tidwell*, 216 N.C. 480, 5 S.E.2d 316 (1939).

18 *MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 359 S.E.2d 50 (1987); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

19 In general, "agreements to agree" which leave one or more material terms open for future assent are void. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). To be enforceable, an agreement to agree "must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Croom*, 182 N.C. at 220, 108 S.E. at 737. All material terms must be settled or there must be a definite agreement on a method by which the terms may be settled. *McMahan*, 285 N.C. 730, 208 S.E.2d 692.

20 N.C. Gen. Stat. § 25-1-303(a) for "course of performance." *See Cole v. Industrial Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931).

21 N.C. Gen. Stat. § 25-1-303(c) for "usage of trade". *See T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922); *Cohoun v. Hanell*, 180 N.C. 39, 103 S.E. 906 (1920) and *McKinney v. Matthews*, 166 N.C. 576, 82 S.E. 1036 (1914).

22 N.C. Gen. Stat. § 25-1-303(d) for "course of performance".

23 N.C. Gen. Stat. § 25-1-303(b) for "course of dealing".

24 N.C. Gen. Stat. § 25-1-303(c). A usage of trade ordinarily is ordinarily an issue of fact for the jury. However, if the usage of trade is embodied in a written code or some similar writing, its interpretation becomes a question of law for the court. *Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

25 N.C. Gen. Stat. § 25-1-303(e)(3).

26 *Kidd v. Early*, 289 N.C. 343, 357-358, 222 S.E.2d 392, 403 (1976). The Court should be careful, however, not to instruct the jury on terms implied-in-law where there is evidence from which the jury could find from the writings, conversations or conduct of the parties that they actually reached agreement on a material term. *See, e.g., Rhyne v. Rhyne*,

151 N.C. 400, 66 S.E. 348 (1909); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

27 A contract with an open term will not cause the contract to fail for indefiniteness if there are external, objective commercial standards which supply a reasonably certain basis for enforcing the contract by appropriate remedy. N.C. Gen. Stat. § 25-2-204(3).

28 *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governors Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002); *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003); *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996). *See also Lord of Shatford v. Shelley's Jewelry, Inc.*, 124 F.Supp.2d 779, 787 (W.D.N.C. 2000). See also N.C. Gen. Stat. § 25-1-203.

29 N.C. Gen. Stat. § 25-1-201(20).

30 N.C. Gen. Stat. § 25-2-104(1).

31 N.C. Gen. Stat. § 25-1-201(20).

32 *See* N.C. Gen. Stat. § 25-2-309.

33 The terminability of certain contracts are legislatively restricted. *See*, *e.g.*, N.C. Gen. Stat. § 18B-1205 (wine distribution agreements), § 18B-1305 and § 18B-1306 (beer distributor franchises) and § 20-305(6) (motor vehicle franchises).

34 *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965); *Lambeth v. Thomasville*, 179 N.C. 452, 102 S.E. 775 (1920).

35 *Fulghum v. Town of Selma*, 238 N.C. 100, 104, 76 S.E.2d 368, 371 (1953).

36 *City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E.2d 27, *disc. rev. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973).

37 *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960), *appeal after remand*, 256 N.C. 561, 124 S.E.2d 508 (1962); *East Coast Dev. Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E.2d 72 (1976).

38 Under the Uniform Commercial Code, *see*, *e.g.*, open price terms (N.C. Gen. Stat. § 25-2-305), output terms (N.C. Gen. Stat. § 25-2-306(1)); requirements terms (N.C. Gen. Stat. § 25-2-306(1)); exclusive dealing contracts (N.C. Gen. Stat. § 25-2-306(2)); method of delivery (N.C. Gen. Stat. § 25-2-307); place of delivery (N.C. Gen. Stat. § 25-2-308); time for payment (N.C. Gen. Stat. § 25-2-309).

39 *Cherokee County v. Meroney*, 173 N.C. 653, 654, 92 S.E. 616, 616-17 (1917).

40 *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985); *American Aluminum Prods., Inc. v. Pollard*, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

41 Restatement (Second) of Contracts § 75 (1981).

42 Restatement (Second) of Contracts § 71 and comment b. (1981).

43 *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *East Carolina Ry. v. Ziegler Bros.*, 200 N.C. 396, 157 S.E. 57 (1931); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *First Peoples Savings & Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 261 S.E.2d 259 (1980).

44 *See, Craig & Wilson v. Stewart & Jones*, 163 N.C. 531, 79 S.E. 1100 (1913); *Brem*

v. Covington, 104 N.C. 589, 10 S.E. 706 (1889). *See also* Restatement (Second) of Contracts § 71(4) and comment e (1981).

45 *Williams v. Chaffin*, 13 N.C. 333, 335 (1830).

46 *Young v. Bd. of Comm'rs. of Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925); *Gurvin v. Cromartie*, 33 N.C. 174, 178-179 (1850).

N.C.P.I.—Civil 502.40
CONTRACTS—ISSUE OF BREACH—DEFENSE OF ILLEGALITY OR UNENFORCEABILITY.
GENERAL CIVIL VOLUME
MARCH 2017

502.40 CONTRACTS—ISSUE OF BREACH—DEFENSE OF ILLEGALITY OR UNENFORCEABILITY.

NOTE WELL: Where no genuine dispute exists regarding a contract's substance, whether it is an illegal or unenforceable contract is a question of law for the court. See Fenner v. Tucker, 213 N.C. 419, 423 (1938) (absent conflicting evidence, whether contract is illegal as a gambling contract is a question of law). However, there may be instances where there is a factual dispute as to whether the [promise] [covenant] which the plaintiff seeks to enforce against the defendant is a (*state factual basis for contention that the promise or covenant at issue is illegal or unenforceable*). *See Collins v. Davis, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762 (1984) (purpose for which money and work were contributed is question of fact; unenforceability of implied contract based upon money paid for illegal purpose is question of law).*

The endnotes provide examples of contracts deemed illegal or unenforceable in North Carolina. The body of this instruction provides a model special interrogatory to be used if a predicate fact is genuinely in dispute and must be decided by the jury.

The (*state number*) issue reads:

"Is the [promise] [covenant] which the plaintiff seeks to enforce against the defendant a (*state factual basis for contention that the promise or covenant at issue is illegal or unenforceable*)?"[1]

(You will answer this issue only if you have answered the (*state number*)[2] issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.[3] This means that the defendant must prove, by the greater weight of the evidence, that the [promise] [covenant] which the plaintiff seeks to enforce against the defendant is a (*state factual basis for contention that the promise or covenant at issue is illegal or unenforceable*).

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CONTRACTS—ISSUE OF BREACH—DEFENSE OF ILLEGALITY OR UNENFORCEABILITY.
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Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the [promise] [covenant] which the plaintiff seeks to enforce against the defendant is a (*state factual basis for contention that the promise or covenant at issue is illegal or unenforceable*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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

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1 Certain promises and covenants are deemed illegal or unenforceable at common law or by legislative action. The following list identifies some examples but is by no means exhaustive:

Penalty clauses. "'A penalty is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security . . . to insure that the person injured shall collect his actual damages.'" *Kinston v. Suddreth*, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966) (quoting McCormick, *Damages*, § 146 (1935)). "'The Court will endeavor to ascertain the true intention of the parties and if the sum fixed by the contract is in fact a penalty the measure of damages is the actual loss.'" *Wheedon v. American Bonding & Trust Co.*, 128 N.C. 69, 71, 38 S.E. 255, 255 (1901) (quoting *Hennessy v. Metzger*, 152 Ill. 505, 38 N.E. 1058 (1894)).

Personal liability for deficiencies on purchase money obligations secured by real estate. N.C. Gen. Stat. § 45-21.38.

Contracts to improve real property which adopt the laws of another jurisdiction or which select an exclusive forum in another jurisdiction. N.C. Gen. Stat. § 22B-2.

A covenant (other than a non-consumer loan transaction) that requires the prosecution of an action or an arbitration to be instituted in another state. N.C. Gen. Stat. § 22B-3.

A covenant (other than an arbitration clause) requiring a party to waive his right to a jury trial. N.C. Gen. Stat. § 22B-10.

"Pay when paid" clauses in non-residential contracts between general contractors and subcontractors. N.C. Gen. Stat. § 22C-2.

Contracts to pay interest in excess of the usury limits established by law. N.C. Gen. Stat. § 24-1.1.

Attorneys fees provisions not expressly authorized by statute. *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 11-12, 545 S.E.2d 745, 752, *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001) and *Reavis v. Ecological Dev., Inc.*, 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Contracts in restraint of trade. N.C. Gen. Stat. §§ 75-1, 75-2.

Contracts that are immoral or iniquitous. "'Where a contract grows out of and is concerned with an illegal or immoral act, a court of justice will not lend its aid to enforce it.'" *Lamm v. Crumpler*, 242 N.C. 438, 442-43, 88 S.E.2d 83, 87 (1955) (quoting *Armstrong v. Toler*, 24 U.S. 258, 268 (1826)); *see also Merrell v. Stuart*, 220 N.C. 326, 331, 17 S.E.2d

458, 461 (1941).

Contracts which attempt to limit the personal liability of certain professional licensees for acts or omissions committed in the rendition of professional services. N.C. Gen. Stat. § 55B-9.

> *NOTE WELL: N.C. Gen. Stat. § 22B-1 prohibits any agreement indemnifying architects, engineers and construction contractors against the risk of bodily injury or property damage caused by their own negligence. But, except where prohibited by statute, contractual indemnification against one's own negligence has been expressly recognized as valid and enforceable by North Carolina courts.* See CSX Transp., Inc. v. City of Fayetteville*, __ N.C. App. __, __, 785 S.E.2d 760, 763-64 (2016) (citing* Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 144 S.E.2d 393 (1965)).*

Covenants not to compete that are (1) not in writing, or (2) not made a part of the original contract of employment or otherwise accompanied by a valuable new consideration from the employer, or (3) not reasonable as to time, or (4) not reasonable as to territory, or (5) contrary to some public policy. *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 525, 379 S.E.2d 824, 826 (1989). *See also* N.C. Gen. Stat. § 75-4.

Contracts barred by applicable statutes of frauds. N.C. Gen. Stat. § 22-1 (oral promise to answer for the debt of another), N.C. Gen. Stat. § 22-2 (oral contract for the sale of land or for a lease of land in excess of three years), N.C. Gen. Stat. § 22-4 (oral promise to revive debt of a discharged bankrupt) and N.C. Gen. Stat. § 22-5 (verbal loan commitment by an institutional lender in excess of $50,000).

2 *See*, as appropriate, N.C.P.I.-Civil 502.00 (Contracts-Issue of Breach By Non-Performance) or Civil-502.05 (Contracts-Issue of Breach By Repudiation) or N.C.P.I.-Civil 502.10 (Contracts-Issue of Breach By Prevention).

3 *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973) ("Illegality is an affirmative defense and the burden of proving illegality is on the party who pleads it.") (citing N.C. R. Civ. P. 8(c)).

N.C.P.I.—Civil 640.20
EMPLOYMENT RELATIONSHIP—WRONGFUL (TORTIOUS) TERMINATION.
GENERAL CIVIL VOLUME
MARCH 2017

640.20 EMPLOYMENT RELATIONSHIP—WRONGFUL (TORTIOUS) TERMINATION.

The (*state number*) issue reads:

"Was the plaintiff's [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] a substantial factor in the defendant's decision to terminate the plaintiff's employment?"[1]

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

First, that the plaintiff [participated in conduct protected by law] [refused to participate in unlawful conduct] [refused to participate in conduct which would violate public policy]. I instruct you that

[(*state protected conduct*) is conduct protected by law][2]

[(*state unlawful conduct*) would be unlawful]

[(*state conduct which violated public policy*) would violate public policy].[3]

And Second, that the plaintiff's [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] was a substantial factor in the defendant's decision to terminate the plaintiff.[4] (Absent an agreement to the contrary,[5] an employer may terminate an employee with or without cause, and even for an arbitrary or irrational reason. Where there is an employment agreement, an employer may terminate an employee [for breaching a provision of the employment agreement] [for just cause[6]]. Even so, no employee may be terminated because of *his* [participation in conduct

protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy].[7]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] was a substantial factor in the defendant's decision to terminate the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 *Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 255-59, 461 S.E.2d 801, 804 (1995), *review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996); *see also Abels v. Renfro Corp.*, 126 N.C. App. 800, 805, 486 S.E.2d 735, 738-39, *review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

2 *See, e.g.*, N.C. Gen. Stat. § 95-81 and § 95-83 (prohibiting termination of employment by reason of labor union membership); N.C. Gen. Stat. § 96-15.1 (prohibiting discharge in retaliation for testimony at an Employment Security Hearing); N.C. Gen. Stat. § 95-241 (listing conduct protected under the North Carolina Retaliatory Employment Discrimination Act (REDA)); *see also Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (listing "well-defined exceptions" to the employee-at-will rule, including activity protected by statute), overruled on the "moving residence exception" by *Kurtzman v. Applied Analytical Indus.*, Inc., 347 N.C. 329, 493 S.E.2d 420 (1997); *Rosby v. Gen. Baptist State Convention*, 91 N.C. App. 77, 79, 370 S.E.2d 605, 607, *cert. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988) (discussing protection for terminable-at-will employees who engage in protected activities).

REDA prohibits discrimination or retaliation against an employee who files a complaint or initiates an investigation or other proceeding pursuant to the Worker's Compensation Act, Wage and Hour Act, OSHA, the Mine Safety & Health Act, as well as other specified statutes. N.C. Gen. Stat. § 95-241. For a discussion of the basis of a REDA claim and circumstances where burden-shifting is appropriate, *see Wiley v. UPS*, 164 N.C. App. 183, 186-87, 594 S.E.2d 809, 811 (2004); *Lilly v. Mastec N. Am., Inc.*, 302 F. Supp. 2d 471, 480-81 (M.D.N.C. 2004). *See also Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 510, 593 S.E.2d 808, 812 (2004) (determining that a lack of a close temporal connection between the filing of a claim and the alleged retaliatory act does not warrant dismissal of a REDA claim where there is other evidence of causation).

An employee who proves a willful violation of REDA is entitled to treble the amount awarded. N.C. Gen. Stat. § 95-243(c). "Proving a willful violation of [REDA] requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 867, 788 S.E.2d 154, 161 (2016). Note that N.C. Gen. Stat. § 95-243(c) requires the trial court to determine

whether the violation was willful.

3 Public policy may include federal as well as state public policy. *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 178, 381 S.E.2d 445, 449 (1989) (citations omitted).

4 *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 230, 382 S.E.2d 874, 878, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989).

5 Generally, an "at will" employment contract is one which "does not fix a definite term, [and] it is terminable at the will of either party, with or without cause, except in those instances where the employee is protected from discharge by statute." *Buffaloe v. UCB*, 89 N.C. App. 693, 695, 366 S.E.2d 918, 920 (1988).

6 For a definition of just cause, see N.C.P.I.-Civil 640.14.

7 *Coman*, 325 N.C. at 175, 381 S.E.2d at 447.

N.C.P.I.—Civil 640.46
EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR INJURY TO EMPLOYEE—EXCEPTION TO WORKERS' COMPENSATION EXCLUSION.
GENERAL CIVIL VOLUME
FEBRUARY 2017

640.46 EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR INJURY TO EMPLOYEE—EXCEPTION TO WORKERS' COMPENSATION EXCLUSION.[1]

> *NOTE WELL: In most cases, the plaintiff's status as an employee is stipulated. If the plaintiff's employee status is not stipulated, the jury must find it as a fact. In that situation, the Court must first submit the employment status issue to the jury using N.C.P.I.—Civil 640.00.*

The (*state number*) issue reads:

"Was the plaintiff [injured] [killed] by conduct intentionally engaged in by the defendant with the knowledge that the conduct was substantially certain to cause serious injury or death to an employee?"[2]

(You will answer this issue only if you have answered the (*state number*) issue regarding the plaintiff's employment status "Yes" in favor of the plaintiff.)[3]

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

First, that the defendant[4] intentionally engaged in conduct knowing that it was substantially certain to cause serious injury or death to an employee.[5] Actual intent to cause serious injury or death is not necessary.[6] However, the employer's conduct must be more than willful, wanton or reckless.[7]

Second, the conduct intentionally engaged in by the defendant caused the plaintiff's injury or death. A "cause" is an event or occurrence which in a natural and continuous sequence produces a person's injury or death.

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 plaintiff was [injured] [killed] by conduct intentionally engaged in by the

defendant with the knowledge that it was substantially certain to cause serious injury or death to an employee, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 The Worker's Compensation Act, N.C. Gen. Stat. § 97-1 *et seq*., excludes employers from liability for an employee's "personal injury or death by accident . . . ." N.C. Gen. Stat. §§ 97-9 and 97-10.1. However, the Act does not "relieve employers of civil liability for intentional torts which result in injury or death to employees." *Woodson v. Rowland*, 329 N.C. 330, 338-339, 407 S.E.2d 222, 227 (1991). Cautioning against expanding the "narrow holding" of *Woodson* beyond the specifics of that case, the Supreme Court of North Carolina has explained that the *Woodson* exception, "applies only in the most egregious cases of employer misconduct," and that "such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Blue v. Mountaire Farms, Inc.*__N.C. App.__786 S.E.2d 393, 399 (2016) (quoting *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003)).

2 *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228.

3 *See NOTE WELL* above.

4 Note that liability under *Woodson v. Rowland* not only attaches to corporate employers whose conduct meets the "substantial certainty" standard, but to officers, employees or agents of a corporate employer whose individual conduct meets that standard. *Woodson*, 329 N.C. at 347-348, 407 S.E.2d at 232-233.

5 *Woodson*, 329 N.C. at 341, 407 S.E.2d at 229.

6 *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995); *Rose v. Isenhour Brick & Tile Co.*, 344 N.C. 153, 159, 472 S.E.2d 774, 778 (1996); *Powell v. S&G Prestress Co*., 342 N.C. 182, 183, 463 S.E.2d 79, 80 (1995) (*per curiam*); Echols v. Zarn, Inc., 342 N.C. 184, 185, 463 S.E.2d 228, 229 (1995) (*per curiam*); *Bullins v. Abitibi-Price Corp.*, 124 N.C. App. 530, 533, 477 S.E.2d 691, 692-693 (1996), *review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

7 *Woodson*, 329 N.C. at 341, 407 S.E.2d at 229-230; *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993). A *Woodson* action is based on conduct that is "tantamount to an intentional tort," *id*., but the Supreme Court has taken pains to point out that it is not an "intentional tort" in the true sense of that term. *Owens v. W. K. Deal Printing, Inc.*, 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995) (*per curiam*); *Kolbinsky v. Paramount Home, Inc.*, 126 N.C. App. 533, 535, 485 S.E.2d 900, 902, *review denied*, 347 N.C. 267, 493 S.E.2d 457 (1997). "[I]ntent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow." *Woodson*, 329

N.C. at 341, 407 S.E.2d at 229, quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts*, § 8, at 35 (5th ed. 1984).

N.C.P.I.—Civil 640.60
EMPLOYMENT RELATIONSHIPS—WAGE AND HOUR ACT—WAGE PAYMENT CLAIM.
GENERAL CIVIL VOLUME
FEBRUARY 2017
N.C. Gen. Stat. § 95.25.1 et seq.

640.60 EMPLOYMENT RELATIONSHIPS—WAGE & HOUR ACT—WAGE PAYMENT CLAIM.[1]
N.C. Gen. Stat. § 95-25.1 *et seq*.

> *NOTE WELL: If the plaintiff claims to be owed more than one type of wage payment (such as wages, bonuses and commissions), or wage payments that may be calculated over different time periods (such as bonuses earned prior to separation from employment and bonuses or commissions that were pending when the employment ended but only could be calculated at a future time period), then the Court may want to create separate issues using this instruction for each of the different wage types and/or time periods as established by the evidence.*[2]

The [first] [*(state number)*] issue reads:

"Was the plaintiff entitled to any [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(*identify any other types of payments promised when the employer has a policy or practice of making such payments*)] [[on] [after] [as of] (*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, that the defendant failed to pay [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(*identify any other types of payments promised when the employer has a policy or practice of making such payments*)] that were owed to the plaintiff [[on] [after] [as of] (*date*)].[3] I instruct you that if any such [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(*identify any other types of payments promised when the employer has a policy or practice of*

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making such payments)] were owed, they are considered wages under the North Carolina Wage and Hour Act.

The plaintiff contends that (*describe the contentions as to the wages, bonuses, commissions, sick pay, vacation pay, severance pay, overtime or other payments the plaintiff claims are owed by the defendant under the employer's practices and policies*).

The defendant contends that (*describe the contentions that the alleged wages, bonuses, commissions, sick pay, vacation pay, severance pay, overtime or other payments are not owed to the plaintiff*).

Under the North Carolina Wage and Hour Act, wages are compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission or other basis of calculation.[4] [Wages may include [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [other amounts] promised when the employer has a policy or practice of making such payments.[5]]

[The law also requires payment for overtime.[6] The law requires that every employer pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week.[7] "Workweek" means any period of 168 consecutive hours.[8]]

[The law requires that every employer of seasonal amusement or recreational establishment employees pay each seasonal amusement or recreational establishment employee who works longer than 45 hours in any workweek at a rate of not less than time and one half of the regular rate of

pay of the employee for those hours in excess of 45 per week.[9] A "seasonal amusement or recreational establishment" is an establishment which [does not operate for more than seven months in any calendar year] [during the preceding calendar year had average receipts for any six months of that year of not more than 33 1/3% of its average receipts for the other six months of that year].[10] "Workweek" means any period of 168 consecutive hours.[11]]

The law requires that every employer shall pay every employee all wages [and tips] accruing to the employee on a regular payday.[12] [Wages based upon [bonuses] [commissions] [other forms of calculation] may be paid as infrequently as annually if such period is prescribed in advance.[13]]

An employee whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. [When a separation occurs, wages based on [bonuses] [commissions] [other forms of calculation] shall be paid on the first regular payday after the amount becomes calculable.[14] Such [bonuses] [commissions] [other forms of calculation] do not have to be calculable at the time of separation so long as they will become calculable in the future.[15]]

An employer is required to notify its employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment.[16] An employer is also required to notify employees of its employment practices and policies with respect to promised wages in writing or through a posted notice in a place accessible to its employees.[17]

An employer must notify its employees of any changes to promised wages at least 24 hours prior to such changes. Such notification must be in writing or through a posted notice in a place accessible to its employees.[18]

Wages cannot be forfeited unless the employer provides written notice of such forfeitures or changes which result in forfeitures in accordance with these notice provisions.[19]

[If an employer changes a policy or practice to establish specific earning criteria, such as a policy to provide that an employee must be employed in order to receive a [bonus] [commission] when that criteria was not a part of the initial compensation terms, then the employee is entitled to any [bonus] [commission] earned up to the date of that change in policy or practice. Wages earned under a program that does not have specific earning criteria cannot be reduced or eliminated by a change in policy or practice to impose such criteria. Wages may not be retroactively eliminated and a forfeiture of wages cannot rest on an unwritten policy or practice.]

[Ambiguous employment policies and practices are to be construed against the employer in favor of the employee.]

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 entitled to [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(*identify any other types of payments promised when the employer has a policy or practice of making such payments*)] [[on] [after] [as of] (*date*)] under the rules that I have provided you, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

N.C.P.I.—Civil 640.60
EMPLOYMENT RELATIONSHIPS—WAGE AND HOUR ACT—WAGE PAYMENT CLAIM.
GENERAL CIVIL VOLUME
FEBRUARY 2017
N.C. Gen. Stat. § 95.25.1 et seq.

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

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1 In determining whether an individual is an employee under the Wage and Hour Act, courts consider factors such as: "(1) the degree of control the alleged employer exerted over the person, and (2) the permanency of the relationship between the person and the alleged employer." *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 309, 563 S.E.2d 47, 51 (2002).

2 *See Morris v. Scenera Research, LLC*, 229 N.C. App. 31, 747 S.E.2d 362, 367 (2013) (noting the trial court submitted separate issues to the jury on patent bonuses earned under a bonus program and bonuses pending as of the date the bonus program was eliminated), *aff'd in part and rev'd in part*, 368 N.C. 857, 788 S.E.2d 154 (2016).

3 *See* N.C. Gen. Stat. § 95-25.2(16).

4 *Id.*

5 *Id.*

6 *NOTE WELL: N.C. Gen. Stat. § 95-25.14 sets forth certain exemptions to which the overtime pay requirements of N.C. Gen. Stat. § 95-25.4 do not apply. If the plaintiff falls within any of these exemptions, do not give that portion of this instruction involving overtime.* See, e.g., Bonham v. Wolf Creek Academy, *767 F. Supp. 2d 558, 565 (2011) (noting that claim for unpaid overtime wages under the NC Wage & Hour Act was not allowed where Fair Labor Standards Act governed the employer-employee relationship and thus fell within the exemption set forth in N.C. Gen. Stat. § 95-25.14).*

7 N.C. Gen. Stat. § 95-25.4(a).

8 N.C. Gen. Stat. § 95-25.2(17).

9 N.C. Gen. Stat. § 95-25.4(a).

10 N.C. Gen. Stat. § 95-25.2(13).

11 N.C. Gen. Stat. § 95.25.2(17).

12 N.C. Gen. Stat. § 95-25.6.

13 *Id.*

14 N.C. Gen. Stat. § 95-25.7.

15 *See Morris*, 229 N.C. App. at 44, 747 S.E.2d at 370 (holding the question of calculability under the Wage and Hour Act is a jury question), *aff'd in part and rev'd in part*, 368 N.C. 857, 864, 788 S.E.2d 154, 159 (2016).

16 N.C. Gen. Stat. § 95-25.13(1).

17 N.C. Gen. Stat. § 95-25.13(2).

18 N.C. Gen. Stat. § 95-25.13(3).

19 N.C. Gen. Stat. § 95-25.7.

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

North Carolina
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ALIENATION OF AFFECTION.
GENERAL CIVIL VOLUME
DECEMBER 2016

800.20 ALIENATION OF AFFECTION.

NOTE WELL: N.C. Gen. Stat. § 52-13 (a), effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date, provides as follows:

No act of the defendant shall give rise to a cause of action for alienation of affection . . . that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.

This statutory amendment is incorporated into the bracketed alternative portion of the third element in this instruction which should be used in the trial of actions arising from acts occurring on or after October 1, 2009.

For actions arising from acts occurring prior to October 1, 2009, which are governed solely by the North Carolina Supreme Court decision in McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E. 2d 620 (2006), use of this instruction without the bracketed alternative portion of the third element remains appropriate.*

The (*state number*) issue reads:

"Did the defendant[1] maliciously and wrongfully cause alienation of a genuine marital relationship between the plaintiff and *his* spouse?"

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

First, that the plaintiff and *his* spouse were married and that a genuine marital relationship existed between them.

A genuine marital relationship is one where some degree of love and affection exists between the spouses. Love and affection may be demonstrated by [society] [assistance] [companionship] [comfort] [sexual relationship] [favorable mental attitude] between the spouses.[3] The marital relationship need not be a perfect one nor one free of discord, but must be characterized by some degree of love and affection.

Second, that the genuine marital relationship between the plaintiff and *his* spouse was alienated. Alienation means the destruction or serious diminution of the love and affection of one person for another.[4] The plaintiff must prove by the greater weight of the evidence that the love and affection of *his* spouse for *him* was seriously diminished or destroyed.[5]

And third, that the controlling or effective proximate cause of the alienation of the genuine marital relationship between the plaintiff and *his* spouse[6] was malicious and wrongful conduct on the part of the defendant [which took place in the State of North Carolina[7]] [which occurred before the plaintiff and *his* spouse physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent[8]].

Conduct is malicious when it is intended to (or is recklessly indifferent to the likelihood that it will) destroy or diminish a genuine marital relationship.[9] Malice may be shown by evidence that the defendant knew of the marriage between the plaintiff and *his* spouse and acted intentionally in a way that would probably affect the marriage.[10]

Conduct is wrongful when it amounts to an unjustified or unexcused invasion of a genuine marital relationship. (The consent of the plaintiff's spouse to the conduct of the defendant is no justification or excuse.)[11] (A parent's advice to *his* child concerning the child's marital relationship is not, without more, wrongful conduct. To be wrongful, such advice must be given in bad faith or for an improper motive.)[12]

A proximate cause is a cause that in a natural and continuous sequence produces alienation of a genuine marital relationship, and is a cause that a reasonable and prudent person in the same or similar circumstances could have foreseen would probably produce such alienation.

There may be more than one proximate cause of the alienation of a genuine marital relationship. The plaintiff is not required to prove that the defendant's conduct was the sole proximate cause of the alienation of the genuine marital relationship between the plaintiff and *his* spouse [or that the defendant's conduct resulted in [adultery] [a separation] [divorce]].

Rather, the plaintiff must prove by the greater weight of the evidence that, even though there may have been other contributing causes, the defendant's conduct was the controlling or effective proximate cause of the alienation of the genuine marital relationship between the plaintiff and *his* spouse.[13]

[The malicious and wrongful conduct of the defendant must consist of [an act] [acts] occurring prior to the physical separation of the plaintiff and *his* spouse with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent.[14]

This means that a determination that the malicious and wrongful conduct of the defendant was the controlling or effective proximate cause of the alienation of the genuine marital relationship between the plaintiff and *his* spouse may not be based upon any act[s] of the defendant which occurred after the plaintiff and *his* spouse physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent.]

[Evidence of conduct of the defendant occurring after the plaintiff and *his* spouse physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent may not be considered by you in your determination of any fact in this trial, but may be considered only for the purpose of corroborating or supporting any evidence of malicious and wrongful conduct on the part of the defendant occurring before the plaintiff and *his* spouse physically separated.[15]]]

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 and *his* spouse were married and that a genuine marital relationship existed between them, that this genuine marital relationship was alienated, and that the effective or controlling proximate cause of the alienation of that genuine marital relationship was malicious and wrongful conduct on the part of the defendant [which occurred prior to the physical separation of the plaintiff and *his* spouse with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 "A person may commence a cause of action for alienation of affection . . . against a natural person only." N.C. Gen. Stat. § 52-13(c) (2009). This section, effective October 1, 2009, applies to actions arising from acts occurring on or after that date. 2009 N.C. Sess. Laws 400.

2 *See* N.C. Gen. Stat. § 52-13(a); *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (citation omitted).

3 An alienation of affection claim

> "is comprised of wrongful acts which deprive a married person of the affections of his or her spouse—love, society, companionship and comfort of the other spouse. . . . The gist of the tort is an interference with one spouse's mental attitude toward the other, and the conjugal kindness of the marital relation. . . ."

Darnell v. Rupplin, 91 N.C. App. 349, 350, 371 S.E.2d 743, 744 (1988) (citation omitted); *see also Sebastian v. Kluttz*, 6 N.C. App. 201, 206, 170 S.E.2d 104, 106 (1969) (finding that alienation claim protects against harm to "legally protected marital interests," including "the affections, society and companionship of the other spouse, sexual relations and the exclusive enjoyment thereof").

4 *McCutchen*, 160 N.C. at 283-84, 624 S.E.2d at 623 (citation omitted).

5 *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002) (citation omitted).

6 *Id.*; *Bishop v. Glazener*, 245 N.C. 592, 596, 96 S.E.2d 870, 873 (1957) ("The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections. It suffices . . . if the wrongful and malicious conduct of the defendant is the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation." (citations omitted)); *Heist v. Heist*, 46 N.C. App. 521, 523-24, 265 S.E.2d 434, 436 (1980) (quoting *Bishop*, 245 N.C. at 596, 96 S.E. at 873).

7 After noting that alienation of affections is a "transitory tort," the North Carolina Court of Appeals explained that

> the substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred . . . not the locus of the plaintiff's residence or marriage. Accordingly, where the defendant's involvement with the plaintiff's spouse spans multiple states, for North Carolina substantive law to apply, a plaintiff must show that the tortious injury occurred in North Carolina.

Jones v. Skelley, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009) (internal citations, quotation marks, brackets and ellipses omitted); *see also Hayes v. Waltz*, ___ N.C. App. __, __, 784 S.E.2d 607 (2016). If there is a question as to where the tortious injury occurred, "the issue is generally one for the jury." *Jones v. Skelley*, 195 N.C. App. at 507; 673 S.E.2d at 390.

8 *See supra* note 1; N.C. Gen. Stat. § 52-13(a).

9 *See Nunn*, 154 N.C. App. at 539, 574 S.E.2d at 45-46 (approving this instruction); *Sebastian*, 6 N.C. App. at 206, 170 S.E.2d at 106; *Darnell*, 91 N.C. App. at 350, 371 S.E.2d at 745.

10 *Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42; *see also* Suzanne Reynolds, *1 Lee's North Carolina Family Law* § 5.46(A), 396 (5th ed. 2009) ("Since the tort requires proof of intent, . . . the defendant may successfully defend by establishing that he or she did not know the person was married.")

11 *Scott v. Kiker*, 59 N.C. App. 458, 464, 297 S.E.2d 142, 147 (1982); *Sebastian*, 6 N.C. App. at 208, 170 S.E.2d at 108.

12 *Bishop*, 245 N.C. at 597, 96 S.E.2d at 874.

13 *See supra* note 6. *See also Darnell*, 91 N.C. App. at 350, 371 S.E.2d. at 745 (citation omitted) ("In order for liability to arise for alienation of affections there must be active and affirmative conduct. Inaction is not enough . . . . There must be some act on the part of the defendant intended to induce or accomplish the result. One does not become liable for alienation of affections, without any initiative or encouragement, merely by becoming the object of the affections that are transferred from a spouse.").

14 *See supra* note 1.

15 *See Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855 (2001) (finding in an alienation of affection action that "post-separation conduct is admissible only to the extent that it corroborates pre-separation activities resulting in the alienation of affection"), *overruled on other grounds*, *McCutchen*, 360 N.C. at 285, 624 S.E.2d at 625 ("We . . . overrule *Pharr* to the extent it requires an alienation of affections claim to be based on pre-separation conduct alone."). N.C. Gen. Stat. § 52-13 (2009) effectively reinstates the holding in *Pharr*.

N.C.P.I.—Civil 806.40
DEFAMATION—PREFACE.
GENERAL CIVIL VOLUME
DECEMBER 2016

806.40 DEFAMATION—PREFACE.[1]
(This document has attachments. See Instruction References.)

> *NOTE WELL: Libel, which generally involves written statements, and slander, which generally involves spoken statements, are complex torts. The elements vary depending upon how the claim is classified for common law and for constitutional purposes. The following brief summary of this complicated topic is recommended reading prior to commencing the trial of any defamation claim.*

A defamatory statement [2] is one which is false [3] and which is communicated to a person or persons other than the person defamed, thereby causing injury to the person defamed. Libel actionable *per se* [4], libel actionable *per quod*[5], slander actionable *per se*[6] and slander actionable *per quod* are all distinct varieties of defamation under the common law.

In the landmark decision of *New York Times v. Sullivan*[7], the United States Supreme Court began to alter the common law rule by providing First Amendment protection to certain speech. Subsequent cases established three general types of defamation claims- those involving private figures in matters not of public concern,[8] those involving private figures in matters of public concern,[9] and those involving public figures or public officials.[10]

The trial judge must, as a matter of law[11], determine the classification of a particular defamation claim for both common law and constitutional purposes. Once such classification has been determined, differing fault levels for both liability and damages apply.

In the first category of cases, those involving private figures in matters not of public concern, the fault level to establish liability is negligence.[12] Similarly, in cases involving private figures in matters of public concern, the fault level for liability is also negligence.[13] However, for cases involving public figures or public officials, the liability fault level is actual malice.[14]

The question of damages adds further layers of complexity to defamation cases. Cases actionable *per se*, for example, may involve three different kinds of "compensatory"[15] damages:

1. *Pecuniary/Special Damages*. If a plaintiff seeks recovery for an actual monetary loss (such as lost income), such damages are described as pecuniary or special damages.[16] These damages are subject to specific pleading[17] and proof requirements and are one form of "actual damage."[18]

2. *Actual Harm Damages*. As defined by the U.S. Supreme Court, actual harm damages include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[19] These damages must be proved by competent evidence and are also a form of "actual damage."

3. *Nonproven/Presumed Damages*. Presumed damages may include "mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms."[20] At common law and in certain circumstances dependent upon the type of plaintiff and the subject of the case, these damages may be presumed without particularized proof and may be nominal or in a substantial amount if so determined by the trier of fact.[21]

For defamation cases that are not actionable *per se*, that is middle-tier libel and defamation actionable *per quod*, only the first two categories of damages (pecuniary/special damages and actual harm) are available. Plaintiffs in these cases cannot recover nonproven/ presumed damages, but rather must prove actual damages as an element of the claim.[22]

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4. *Punitive Damages*. In addition to the foregoing categories of damages, a plaintiff may seek punitive damages if *he* can satisfy the proof requirements for the type of plaintiff and speech involved in the case.

As with the issue of liability, the standards for awarding particular types of damages may implicate constitutional principles and vary according to the type of plaintiff and whether or not the speech at issue involves a matter of public concern.

In cases of defamation actionable *per se*, the common law historically allowed a presumption of malice and reputational damages, at least nominally, without specific proof of actual injury.[23] Further, with reference to punitive damages, the North Carolina rule has been that such damages are allowed only upon a showing that the plaintiff sustained actual damages and that the defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and the plaintiff's rights.[24]

Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability,[25] but also to recover presumed and punitive damages.[26] Thus, in a defamation case actionable *per se*, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard[27] and, if proof of actual damage in the form of pecuniary damages or actual harm damages is presented, may seek such damages as well.

In contrast, a private figure plaintiff in a case actionable *per se* involving either a matter of private or public concern may establish liability based upon a negligence standard.[28] In both instances, an actual damage award is available upon the presentation of evidence supporting such an award.

However, in a public matter claim, the private figure plaintiff must establish actual malice in order to receive presumed and punitive damages,[29] but in a private matter claim may receive presumed and punitive damages absent a showing of actual malice.[30] Notwithstanding, with regard to punitive damages, a private figure/private matter plaintiff seeking such damages currently must also satisfy the following statutory provisions:

> N.C. Gen. Stat. § 1D-15. Standards for recovery of punitive damages.
>
> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.[31]

In cases actionable *per se* involving a public figure or official or in private plaintiff/not matter of public concern cases,[32] the presumption of actual damages upon the appropriate fault showing suffices for the showing of actual damages required to seek punitive damages.[33]

In matters actionable *per quod*, punitive damages are available to public figure plaintiffs without an additional showing, to private plaintiffs in a public matter on a showing of actual malice, and to private plaintiffs in a private matter on a showing which satisfies the statutory criteria.[34]

Finally, media defendants receive certain statutory protection from punitive damages awards.[35]

NOTE WELL: The charts that follow are incorporated into this preface, but are printed on single pages for convenience of use.

The first two charts summarize the foregoing recitation of the differing fault levels for both liability and damages in defamation cases:

Charts 1 and 2 found in attached PDF

The last chart shows instruction combinations in various types of defamation cases:

Chart 3 found in attached PDF

1 For commentary on certain aspects of North Carolina defamation law, *see* Allison Van Laningham, *Damages in Defamation Per Se Actions: Presumptions Are Not What They Used to Be*, *The Constitutionalist* (Official Publication of the North Carolina Bar Association, Constitutional Rights and Responsibilities Section), Vol. II, No. 4 (April 2006).

2 *Griffin v. Holden*, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006) ("[T]o make out a *prima facie* case for defamation, 'plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.'" (citation omitted)); *see also Andrews v. Elliot*, 109 N.C. App. at 274, 426 S.E.2d at 432 ("To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed."); *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987); and *Taylor v. Jones Bros. Bakery, Inc.*, 234 N.C. 660, 662, 68 S.E.2d 313, 314 (1951) ("While it is not necessary that the defamatory words be communicated to the public generally, it is necessary that they be communicated to some person or persons other than the person defamed." *overruled on other grounds by*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956)).

Note that the defamatory statement "must be a statement of fact, not opinion, but 'an individual cannot preface an otherwise defamatory statement with *in my opinion* and claim immunity from liability.'" *Desmond v. The News and Observer Publishing Co., et al.*, 241 N.C. App. 10, 772 S.E.2d 128, 135 (2015) (citing *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted in citing source)). The question of whether a statement constitutes fact or opinion is a question of law. When "determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically. . . [courts] consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor . . ." of the statement. *Id.*

3 The element of "falsity" has previously been included in every pattern jury instruction on libel and slander except N.C.P.I.—Civil 806.50 ("Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern") and N.C.P.I.-Civil 806.60 ("Defamation—Libel Actionable *Per Quod*-Private Figure—Not a Matter of Public Concern").

Although the issue is not a settled one and notwithstanding that neither the United States Supreme Court nor North Carolina's appellate courts have spoken definitively in this regard, for the reasons that follow and upon careful consideration, the Pattern Jury Civil Sub-Committee has concluded that the element of falsity should likewise be included in these two instructions.

At common law, defamatory statements were presumed to be false and truth thus was an affirmative defense to a libel claim. However, the First Amendment subsequently has been interpreted to place the burden of proving falsity upon the plaintiff in many types of defamation cases. *See Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767, 775, 89 L.Ed.2d 783, 792 (1986) ("[A] public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.") and *id*. at 775, 793 ("[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant."); *see also* Rodney A. Smolla, *Law of Defamation*, § 5:13 (2d. ed. 2004) (Although *Hepps* did not definitively address all types of defamation cases, the "wisest choice . . . is to place the burden of proof [of falsity] on the plaintiff" in all defamation cases."), and *Herbert v. Lando*, 441 U.S. 153, 176, 60 L. Ed.2d 115, 133 (1979) ("In every or almost every [defamation] case, the plaintiff . . . must prove a false publication . . . ."); *cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 111 L.Ed.2d 1, 20 (1990), n.6 ("In *Hepps* the

Court reserved judgment [as to whether falsity must be proved by a private defamation plaintiff] on cases involving nonmedia defendants . . . and accordingly we do the same."); Dan B. Dobbs, *The Law of Torts* (2001 ed.), § 420, p. 1184 ("[Certain] features of *Hepps* may suggest that, as a practical matter, the states will remain free to presume falsehood when a private person sues on a publication that is not about issues of public concern."); *Restatement (Second) of Torts* § 613 (1)(g) (The plaintiff has the burden of proving "the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication.") and 613 Caveat ("The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication.").

Moreover, in numerous cases the North Carolina appellate courts have repeatedly included "falsity" as an element of defamation. *See Renwick v. News & Observer*, 310 N.C. 312, 319, 312 S.E.2d 405, 410 (1984) ("Although every defamation must be false, not every falsehood is defamatory."); *Brown v. Boney*, 41 N.C. App. 636, 648, 255 S.E.2d 784, 791 (1979) ("If the plaintiff's [libel] case is to succeed, he must show the factual statements made concerning him were false."); *Morrow v. Kings Dept. Stores, Inc.*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (1982) ("A defamatory statement, to be actionable, must be false . . . ."); *Williams v. State Farm Mutual Automobile Ins. Co.*, 67 N.C. App. 271, 274, 312 S.E.2d 905, 907 (1984) ("To be actionable, the statement must be false."); *Boston v. Webb*, 73 N.C. App. 459-60, 326 S.E.2d 104, 106 (1985) ("These statements, if found false by a jury, constituted libel *per se*."); *Gibby v. Murphy*, 73 N.C. App. 128, 132, 325 S.E.2d 673, 676 (1985) ("The allegations . . . were libel *per se*, if a jury found them to be false."); *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 58, 338 S.E.2d 918, 922 (1986) ("Falsity is an essential element of libel."); *Clark v. Brown*, 99 N.C. App. 255, 260-61, 393 S.E.2d 134, 137 (1990) (discussing what "false words" constitute libel *per se*); *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (equating a "statement . . . libel *per se*" with "'a false written statement which on its face is defamatory . . . .'" (quoting *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 393, 159 S.E.2d 896, 899 (1968)); *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993) ("'[D]efamatory statements [in a libel action] must be false in order to be actionable.'"(citation omitted)); Andrews v. Elliot, 109 N.C. App. 271, 274, 426 S.E.2d 420, 432 (1993) ("To be actionable, a defamatory statement must be false . . . ."); *Hanton v. Gilbert*, 126 N.C. App. 561, 569, 486 S.E.2d. 432, 437 (1997) ("In order to be actionable, a defamatory statement must be false."); *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) ("In order to recover for defamation, a plaintiff must allege, [*inter alia*, that the defendant] ma[de] false, defamatory statements.").

Finally, inclusion of the falsity element in N.C.P.I.—Civil 806.50 and 806.60 achieves uniformity between the standards for libel and slander. Falsity is the third element in a claim for slander *per se* brought by a private plaintiff in a matter not of public concern (N.C.P.I.—Civil 806.65) and the sixth element in a private plaintiff's claim for slander *per quod* in a matter not of public concern (N.C.P.I.—Civil 806.70). The N.C. Court of Appeals has stated, in certain contexts, that it see[s] "no reason to distinguish libel *per se* from slander *per se*." *Ausley v. Bishop*, 133 N.C. App. 210, 216, 515 S.E.2d 72, 77 (1999). There appears to be no basis upon which to include the falsity requirement in the instructions for private figure/not matter of public concern slander *per se* and slander *per quod* cases (as well as every other category of both libel and slander), but to exclude falsity from the instructions for private figure/not matter of public concern libel *per se* and libel *per quod* cases.

Notwithstanding, the Committee has included a suggested instruction, N.C.P.I.—Civil

806.79 ("Defamation—Libel Actionable *Per Se* or Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Truth as a Defense"), for use by those judges who feel North Carolina will continue to adhere to the common law rule in the limited instances covered by N.C.P.I—Civil 806.50 and 806.60. *See*, *e.g.*, Pennsylvania Suggested Standard Civil Jury Instructions, Pa. SSJI (Civil) 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern"), citing *Hepps*, 475 U.S. at 776, 89 L. Ed.2d at 791-92 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."). In such an instance, the judge should delete the element of falsity from N.C.P.I.—Civil 806.50 and 806.60 and thereafter submit N.C.P.I.—Civil 806.79. *See* N.C.P.I.—Civil 806.50, n.11 ("NOTE WELL") and N.C.P.I.—Civil 806.60, n.18 ("NOTE WELL").

4 "Under the well established common law of North Carolina, a libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick v. News & Observer Publishing Co.*, 310 N.C. at 317, 312 S.E.2d at 408-09 (citing *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1937)).

5 Libel actionable *per quod* is comprised of those publications "'which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances.'" *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990) (quoting *Flake*, 212 N.C. at 785, 195 S.E. at 59).

North Carolina also recognizes a "middle-tier libel" when a statement is susceptible of two meanings—one of which is defamatory and one of which is not. *See Renwick*, 310 N.C. at 316, 312 S.E.2d at 408 (citation omitted). For jury instruction purposes, however, the instructions for libel actionable *per quod* will suffice in a middle-tier libel claim.

6 "Slander is a tort distinct from libel in that slander involves an oral communication. Like libel, slander may be *per se* or *per quod*, but it cannot fall into the intermediate category where it would be susceptible to two meanings. Slander *per se* involves an oral communication to a third person which amounts to: (1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession; or (3) imputations that the plaintiff has a loathsome disease." *Raymond U v. Duke Univ.*, 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988) (citations omitted); *see also Donovan v. Fiumara*, 114 N.C. App. 524, 527-36, 442 S.E.2d 572, 575-80 (1994) (rejecting the argument that *dicta* in *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624-25 (1988) created a fourth classification of slander *per se*, *i.e.*, "to hold [the plaintiff] up to disgrace, ridicule or contempt").

7 *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964).

8 *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759, 86 L.Ed.2d 593, 604 (1985) ("[S]peech on matters of purely private concern is of less First Amendment concern. As a number of state courts . . . have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.").

9 *Id*. at 758-59, 86 L. Ed.2d at 602 ("[The Supreme Court has] long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern'

that is 'at the heart of the First Amendment's protection.'"(citations omitted)); *see also Rosenbloom v. Metromedia*, 403 U.S. 29, 44, 29 L.Ed.2d 296, 312 (1971) ("[T]he determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

Whether "'speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.'" *Dun & Bradstreet*, 472 U.S. at 761, 86 L.Ed.2d at 604 (citation omitted).

10 "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L.Ed.2d 597, 605 (1966).

The *New York Times* rule was extended from public officials to all public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L.Ed.2d 1094, 1111 (1967).

"[T]he Supreme Court . . . divided [public official and public figure plaintiffs] into three categories[:] . . . involuntary public figures, all purpose public figures, and limited purpose public figures." *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664-65 (2000) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 41 L.Ed.2d 789, 810 (1974)).

"[Although] it may be possible for someone to become a public figure through no purposeful action of his own, . . . the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz*, 418 U.S. at 345, 41 L.Ed.2d at 810. Public figures "assume special prominence in the resolution of public questions . . ." *Id*. at 351, 41 L. Ed.2d at 812.

"In . . . three . . . cases, the Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular 'public controversy' that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Gaunt v. Pittaway*, 139 N.C. App. at 186, 534 S.E.2d at 665.

The United States Court of Appeals for the Fourth Circuit has set forth five requirements for establishing that the plaintiff is a limited purpose public figure: "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation." *Foretich v. Capital Cities/ABC*, 37 F.3rd 1541, 1553 (4th Cir. 1994).

"Under North Carolina law, an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.'" *Gaunt*, 139 N.C. App. at 786, 534 S.E.2d at 665 (citations omitted).

The heightened burden for public officials and public figures is justified by two considerations. First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344, 41 L.Ed.2d at 807-08. Second, "[t]here is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that

involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case . . . . Those classed as public figures stand in a similar position . . . . [Because of their] roles of special prominence in the affairs of society . . . . [or] positions of . . . persuasive power and influence . . . [or because they] have thrust themselves to the forefront of particular public controversies . . . [public figures] invite attention and comment." *Gertz*, 418 U.S. at 344-45, 41 L.Ed.2d at 808.

11 *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 26 (2003) ("Whether a publication is deemed libelous *per se* is a question of law to be determined by the court."); *Renwick*, 310 N.C. at 317-18, 312 S.E.2d at 409 ("[D]efamatory words to be libelous per se must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter* of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." (quoting *Flake*, 212 N.C. at 786, 195 S.E. at 60) (emphasis added)); and *Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E.2d 383, 388 (1958) ("It is noted: '(1) The court determines whether a communication is capable of a defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.'" (quoting *Restatement of the Law of Torts*, Sec. 614)); *see also* 50 Am. Jur.2d, *Libel and Slander* § 488 at 871 ("Examples of questions . . . to be decided by the court as a matter of law include: whether a person is a public official, whether a person is a public figure, and if so, for what purposes, whether a statement is defamatory per se or per quod, . . . [and] whether the statements complained of are capable of the meaning ascribed to them by the plaintiff . . . .").

12 *See Cochran v. Piedmont Publishing Co., Inc.*, 62 N.C. App. 548, 549, 302 S.E.2d 903, 904 (1983) ("In order to recover compensatory damages for libel, [a private figure] plaintiff must establish . . . that the false information was published through the fault or negligence of the defendant." (citations omitted)); *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 531, 393 S.E.2d. 295, 296 (1990) ("[I]n the case of 'private' individuals . . . a lesser showing of fault rather than actual malice is required to recover damages."); *see also Gertz*, 418 U.S. at 353, 41 L.Ed.2d at 813 (Blackmum, J., concurring) ("[The Court] now conditions a libel action by a private person upon a showing of negligence.").

13 *See Neill Grading & Constr. Co., Inc. v. Lingafelt*, 168 N.C. App 36, 46, 106 S.E.2d 734, 741 (2005) ("[W]e now hold that North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence.").

14 *See New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 11 L. Ed.2d at 706 (Where the plaintiff is a "public official" and the alleged defamatory statement concerns his official conduct, he must prove that the statement was "made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."); *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L. Ed.2d 1094, 1011 (1967), and *Varner v. Bryant*, 113 N.C. App. 697, 702-03, 440 S.E.2d 295, 299 (1994).

"The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Dobson v. Harris*, 134 N.C. App. 573, 581, 521 S.E.2d 710, 717 (1999) (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 657, 105 L. Ed.2d 587, 587 (1989)), overruled on other grounds by, *Dobson v. Harris*, 352 N.C. 77, 530 S.E.2d 829 (2000). "Actual malice" may be proved by circumstantial evidence. *Id*.

Note that "actual malice" as employed here in the constitutional sense should be differentiated from "malice" as used elsewhere in the North Carolina Pattern Instructions. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510, 115 L. Ed.2d 447, 468 (1991) (The

New York Times "actual malice" standard may not be established by a showing of personal hostility and thus should be distinguished from state common law malice). For example, in N.C.P.I.-Civil 810.96 ("Punitive Damages-Liability of Defendant"), "malice" is defined as "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." (citing N.C. Gen. Stat. § 1D-5(5)). "Actual malice," on the other hand, appears to be close to the concept of "willful or wanton conduct." *See* N.C.P.I.-Civil 810.96 ("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." (citing N.C. Gen. Stat. § 1D-5(7))).

15 This term is used to distinguish the damages discussed from punitive or other types of exemplary damages. *See Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005) ("Compensatory damages include both general and special damages . . . . '[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' (citations omitted). '[G]eneral damages . . . include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.] . . . [S]pecial damages are usually synonymous with pecuniary loss [such as] [m]edical and hospital expenses, as well as loss of earnings . . . .'" (citation omitted).

16 *See Donovan*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 575 ("In the context of an action for defamation, special damage means 'pecuniary loss'; 'emotional distress and mental suffering are not alone sufficient . . . .'" (citation omitted)).

17 *See* N.C. Gen. Stat. § 1A-1, Rule 9(g) (2001) ("When items of special damage are claimed each shall be averred.")

18 *See Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 473-75 (1991) (actual damage defined as some actual loss, hurt or harm resulting from the illegal invasion of a legal right.").

19 *Gertz*, 418 U.S. at 350, 41 L.Ed.2d at 811.

20 *See Iadanza*, 169 N.C. App. at 779-80, 611 S.E.2d at 221.

Note that the descriptions of actual harm and nonproven/presumed damages are similar and indeed are exactly the same type of damages. It is the level of proof that is assigned to these two categories that makes them distinct from one another. Whether a plaintiff must seek damages based upon actual harm (which requires specific proof) or can seek nonproven/presumed damages (which do not require specific proof) is determined by the classification of the plaintiff and whether the speech at issue involved a matter of public concern.

Nonproven/presumed damages were often called "general" damages at common law. Due to constitutional requirements, the U.S. Supreme Court determined that such "general" damages in some cases would have to be proven as actual harm. The label of "general" damages is now somewhat imprecise because it can be used to describe either actual harm or nonproven/presumed damages.

21 *See* n.23 *infra*; *see also Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987) ("*Ascertainment* of presumed general damages is difficult at best and unavoidably includes an element of speculation.") and *Prosser and Keeton on Torts*, § 116A at 843 (presumed damages are "an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not

be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.").

22 *See Renwick*, 310 N.C. at 317, 312 S.E.2d at 408 ("The complaints failed to bring the editorial within the [category of] . . . libel *per quod* . . . since it was not alleged that the plaintiff suffered special damages." (citing *Flake*, 212 N.C. at 785, 195 S.E. at 59)), and *Raymond U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 707 (1988) ("Under a libel *per quod* theory . . . . special damages must be proven.").

23 *See Dun & Bradstreet v. Greenmoss Builders*, 478 U.S. at 760, 86 L. Ed.2d at 603 ("The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" (quoting Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)); *see also Stewart v. Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971) ("Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages.").

24 *See Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 385 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.") and *Woody v. Catawba Valley Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E.2d 578, 581-82 (1968) ("While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, willful, and in reckless disregard of a plaintiff's rights.").

25 *See* n.14 *supra*.

26 *Gertz*, 418 U.S. at 349, 41 L. Ed.2d at 810-11 ("we hold that the States may not permit recovery of presumed or punitive damages . . . when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

27 As noted in the text, in matters actionable *per se*, "the law presumes that actual damages were sustained." *Harris*, 99 N.C. App. at 183, 392 S.E.2d at 754. Accordingly, in a public figure or public official matter actionable *per se*, once the plaintiff establishes the required showing for liability required under *New York Times* (actual malice), presumed damages are allowed. Such presumed damages thus, in effect, take the place of the actual damage requirement for punitive damages. *See id*. Moreover, because actual malice has already been established, no additional showing that the "defendant's conduct was malicious, wanton, or reckless indifferent to the truth and plaintiff's rights," is necessary in order to award punitive damages. *Id*.

28 *See* nn.12 and 13 *supra*.

29 *Gertz*, 418 U.S. at 349-50 ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth . . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."); *see also Gibby v. Murphy*, 73 N.C. App. 128, 133, 325 S.E.2d 673, 676-77 (1985) (To recover punitive damages a private figure/matter of public concern plaintiff "must prove 'actual malice' on the part of the defendants. Actual malice may be proven by showing that the defendants published the defamatory material with knowledge that it was false, with reckless disregard to

the truth, or with a high degree of awareness of its probable falsity.").

30 *Dun & Bradstreet, Inc.*, 472 U.S. at 761, 86 L. Ed.2d at 603 ("[T]he state interest in awarding presumed and punitive damages . . . is 'substantial' relative to the incidental effect these remedies may have on speech [not at the core of First Amendment concern . . . .] In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages- even absent a showing of 'actual malice.'").

> *NOTE WELL*: *The Pattern Jury Instruction Civil Subcommittee, after careful consideration, suggests that certain language used by the North Carolina Supreme Court in* Renwick v. News & Observer Publishing Co*., 310 N.C. 312, 312 S.E.2d 405 (1984), should be relied upon with caution. Although* Renwick *was issued in 1984 after the U.S. Supreme Court decisions in* N.Y. Times and Gertz*, the N.C. Supreme Court in* Renwick *deemed it unnecessary under the facts to categorize the claim before it under the private/public categories established by the U.S. Supreme Court.* See Renwick*, 310 N.C. at 318, 312 S.E.2d at 409, n.1. However, the Court quoted with approval the following language from* Flake*, a N.C. Supreme Court decision, issued well before establishment of the private/public categories by the U.S. Supreme Court:*

"When an unauthorized publication is libelous per se, malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous per se and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."

Renwick*, 310 N.C. at 316, 312 S.E.2d at 408 (quoting Flake, 212 N.C. at 785, 195 S.E. at 59).*

As noted in the text of this Preface, the U.S. Supreme Court has altered the law of defamation based upon the nature of the plaintiff and the nature of subject matter of the alleged defamation. In the context of a public figure or official presenting a claim for defamation actionable per se, for example, presumed damages are allowed- but only upon a showing of actual malice. See New York Times v. Sullivan*, 376 U.S. at 279-80, 11 L. Ed.2d at 706;* see also *n.14* supra*. In the context of a private plaintiff and a matter of public concern in a claim for defamation actionable per se, liability is predicated upon a showing of negligence, but presumed damages are not allowed unless the plaintiff can establish actual malice.* See Gertz*, 418 U.S. at 349-50, 41 L. Ed. 2d at 810;* see also *n.29* supra*. Finally, in the context of a private plaintiff/not matter of public concern claim for defamation actionable per se, liability and presumed damages are allowed- but only upon a showing of negligence.* See Dun & Bradstreet*, 418 U.S. at 761, 86 L. Ed.2d at 604;* Gertz*, 418 U.S. at 347, 41 L. Ed.2d at 809 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."), and* Walters*, 31 N.C. App. 233, 235, 228 S.E.2d 766, 767 ("[U]nder the* Gertz *decision, a plaintiff in a civil action for libel, if he is a private citizen and not a public official or a public figure, can recover only if he alleges and proves fault, or at least negligence, on the part of the defendant . . . in publishing false and defamatory statements."). Thus, it appears the N.C. Supreme Court's use in* Renwick *of the broad language from* Flake *must be tempered in light of subsequent U.S. Supreme Court jurisprudence.* See Walters*, 31 N.C. App. at 235-36, 228 S.E.2d at 767 (Prior to* Gertz*, "this*

jurisdiction . . . clearly established that a publication charging that someone had committed a crime constituted libel per se and both malice and actual damages were presumed (citation omitted). Under Gertz*, there is no presumption of malice and damages, and fault must be alleged and established by a private citizen who seeks to recover for a defamatory falsehood.").*

31 N.C. Gen. Stat. § 1D-15 (2001). As opposed to constitutional "actual malice" (publication with knowledge of falsity or reckless disregard of falsity, *see* n.14 *supra*), "malice" as used in the statute is common law malice defined as a "sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "Willful or wanton conduct" is defined as "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 negligence." N.C. Gen. Stat. § 1D-5(7). *Cf. Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 395 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.").

32 In a private plaintiff/not matter of public concern claim, a showing of negligence suffices to establish negligence and also allows an award of presumed damages. *See* n.12 *supra*.

33 Thus, in the case of a public figure, punitive damages are available without any further showing, *see* n.27 *supra*. In the case of a private plaintiff in a matter not of public concern, the plaintiff must still satisfy the requirements of N.C. Gen. Stat. § 1D-15 (a)(1)-(3) and N.C. Gen. Stat. § 1D-15(b).

34 Presumed damages are not available in middle-tier libel or libel *per quod* cases. *See* n.22 *supra*; *see also Morris v. Bruney*, 78 N.C. App. 668, 675, 338 S.E.2d 561, 566 (1978) ("[I]f extrinsic facts are needed to show the slander, special damages also must be alleged and proven . . . ."); *Arnold v. Sharp*, 37 N.C. App. 506, 509, 246 S.E.2d 556, 558 (1978) ("Unless a publication is actionable *per se*, the plaintiff must prove special damages."), *rev'd on other grounds*, 296 N.C. 533, 251 S.E.2d 452 (1979).

35 *See* N.C. Gen. Stat. § 99-2.

N.C.P.I.—Civil 806.40
DEFAMATION—PREFACE.
GENERAL CIVIL VOLUME
DECEMBER 2016

806.40 DEFAMATION—PREFACE.[1]
(This document has attachments. See Instruction References.)

> *NOTE WELL: Libel, which generally involves written statements, and slander, which generally involves spoken statements, are complex torts. The elements vary depending upon how the claim is classified for common law and for constitutional purposes. The following brief summary of this complicated topic is recommended reading prior to commencing the trial of any defamation claim.*

A defamatory statement [2] is one which is false [3] and which is communicated to a person or persons other than the person defamed, thereby causing injury to the person defamed. Libel actionable *per se* [4], libel actionable *per quod*[5], slander actionable *per se*[6] and slander actionable *per quod* are all distinct varieties of defamation under the common law.

In the landmark decision of *New York Times v. Sullivan*[7], the United States Supreme Court began to alter the common law rule by providing First Amendment protection to certain speech. Subsequent cases established three general types of defamation claims- those involving private figures in matters not of public concern,[8] those involving private figures in matters of public concern,[9] and those involving public figures or public officials.[10]

The trial judge must, as a matter of law[11], determine the classification of a particular defamation claim for both common law and constitutional purposes. Once such classification has been determined, differing fault levels for both liability and damages apply.

In the first category of cases, those involving private figures in matters not of public concern, the fault level to establish liability is negligence.[12] Similarly, in cases involving private figures in matters of public concern, the fault level for liability is also negligence.[13] However, for cases involving public figures or public officials, the liability fault level is actual malice.[14]

The question of damages adds further layers of complexity to defamation cases. Cases actionable *per se*, for example, may involve three different kinds of "compensatory"[15] damages:

1. *Pecuniary/Special Damages*. If a plaintiff seeks recovery for an actual monetary loss (such as lost income), such damages are described as pecuniary or special damages.[16] These damages are subject to specific pleading[17] and proof requirements and are one form of "actual damage."[18]

2. *Actual Harm Damages*. As defined by the U.S. Supreme Court, actual harm damages include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[19] These damages must be proved by competent evidence and are also a form of "actual damage."

3. *Nonproven/Presumed Damages*. Presumed damages may include "mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms."[20] At common law and in certain circumstances dependent upon the type of plaintiff and the subject of the case, these damages may be presumed without particularized proof and may be nominal or in a substantial amount if so determined by the trier of fact.[21]

For defamation cases that are not actionable *per se*, that is middle-tier libel and defamation actionable *per quod*, only the first two categories of damages (pecuniary/special damages and actual harm) are available. Plaintiffs in these cases cannot recover nonproven/ presumed damages, but rather must prove actual damages as an element of the claim.[22]

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4. *Punitive Damages*. In addition to the foregoing categories of damages, a plaintiff may seek punitive damages if *he* can satisfy the proof requirements for the type of plaintiff and speech involved in the case.

As with the issue of liability, the standards for awarding particular types of damages may implicate constitutional principles and vary according to the type of plaintiff and whether or not the speech at issue involves a matter of public concern.

In cases of defamation actionable *per se*, the common law historically allowed a presumption of malice and reputational damages, at least nominally, without specific proof of actual injury.[23] Further, with reference to punitive damages, the North Carolina rule has been that such damages are allowed only upon a showing that the plaintiff sustained actual damages and that the defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and the plaintiff's rights.[24]

Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability,[25] but also to recover presumed and punitive damages.[26] Thus, in a defamation case actionable *per se*, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard[27] and, if proof of actual damage in the form of pecuniary damages or actual harm damages is presented, may seek such damages as well.

In contrast, a private figure plaintiff in a case actionable *per se* involving either a matter of private or public concern may establish liability based upon a negligence standard.[28] In both instances, an actual damage award is available upon the presentation of evidence supporting such an award.

However, in a public matter claim, the private figure plaintiff must establish actual malice in order to receive presumed and punitive damages,[29] but in a private matter claim may receive presumed and punitive damages absent a showing of actual malice.[30] Notwithstanding, with regard to punitive damages, a private figure/private matter plaintiff seeking such damages currently must also satisfy the following statutory provisions:

> N.C. Gen. Stat. § 1D-15. Standards for recovery of punitive damages.
>
> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.[31]

In cases actionable *per se* involving a public figure or official or in private plaintiff/not matter of public concern cases,[32] the presumption of actual damages upon the appropriate fault showing suffices for the showing of actual damages required to seek punitive damages.[33]

In matters actionable *per quod*, punitive damages are available to public figure plaintiffs without an additional showing, to private plaintiffs in a public matter on a showing of actual malice, and to private plaintiffs in a private matter on a showing which satisfies the statutory criteria.[34]

Finally, media defendants receive certain statutory protection from punitive damages awards.[35]

NOTE WELL: The charts that follow are incorporated into this preface, but are printed on single pages for convenience of use.

The first two charts summarize the foregoing recitation of the differing fault levels for both liability and damages in defamation cases:

	Matter Actionable *Per Se*: Private Figure/Not Matter of Public Concern (*Libel-806.50 Slander-806.65)*	**Matter Actionable *Per Se*: Private Figure / Matter of Public Concern *(Libel-806.51 Slander-806.66)***	**Matter Actionable *Per Se*: Public Official or Figure (Libel-806.53 Slander-806.67**
Liability	Negligence	Negligence	Actual Malice
Presumed Damages	No additional proof needed—presumed damage available upon liability showing of negligence	Actual Malice	No additional proof needed—showing of actual malice suffices
Actual Harm/Special Damages	Available if proved by the greater weight of the evidence	Available if proved by the greater weight of the evidence	Available if proved by the greater weight of the evidence
Punitive Damages	Available upon showing of statutory criteria set out in N.C. Gen. Stat. § 1D-15.	Available only upon showing of actual malice	No additional proof needed—liability showing of actual malice suffices

	Matter Actionable *Per Quod*: Private Figure/Not Matter of Public Concern *(Libel-806.60 Slander-806.70)*	**Matter Actionable *Per Quod*: Private Figure/Matter of Public Concern *(Libel-806.61 Slander-806.71)***	**Matter Actionable *Per Quod*: Public Official or Figure *(Libel-806.62 Slander-806.72)***
Liability	Negligence	Negligence	Actual Malice
Presumed Damages	Not Available	Not Available	Not Available
Actual/Special Damages	Available-However, proof of special damages required in order to establish liability	Available-However, proof of special damages required in order to establish liability	Available-However, proof of special damages required in order to establish liability
Punitive Damages	Available upon showing of statutory criteria set out in N.C. Gen. Stat. § 1D-15.	Available only upon a showing of actual malice	No additional proof needed—liability showing of actual malice suffices

The last chart shows instruction combinations in various types of defamation cases:

	Nonproven/ Presumed Damages	**Pecuniary/ Special Damages**	**Actual Harm**	**Punitive Damages**
Private Figure/Not Matter of Public Concern				
Defamation Actionable Per Se	806.81	806.84	806.84	810.96 & 810.98--standard punitive damage PJIs (including statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	810.96 & 810.98—standard punitive damage PJIs (including statutory fault standards)
Private Figure/Matter of Public Concern				
Defamation Actionable Per Se	806.82	806.84	806.84	806.85, followed by 810.98-- standard punitive damages PJI (excluding statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	806.85, followed by 810.98--standard punitive damages PJI (excluding statutory fault standards)
Public Figure or Public Official				
Defamation Actionable Per Se	806.83	806.84	806.84	810.98--Standard punitive damages PJI (excluding statutory fault standards)
Middle Tier Libel/ Defamation Actionable Per Quod	Not Available	806.84	806.84	810.98--Standard punitive damages PJI (excluding statutory fault standards)

1 For commentary on certain aspects of North Carolina defamation law, *see* Allison Van Laningham, *Damages in Defamation Per Se Actions: Presumptions Are Not What They Used to Be*, *The Constitutionalist* (Official Publication of the North Carolina Bar Association, Constitutional Rights and Responsibilities Section), Vol. II, No. 4 (April 2006).

2 *Griffin v. Holden*, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006) ("[T]o make out a *prima facie* case for defamation, 'plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.'" (citation omitted)); *see also Andrews v. Elliot*, 109 N.C. App. at 274, 426 S.E.2d at 432 ("To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed."); *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987); and *Taylor v. Jones Bros. Bakery, Inc.*, 234 N.C. 660, 662, 68 S.E.2d 313, 314 (1951) ("While it is not necessary that the defamatory words be communicated to the public generally, it is necessary that they be communicated to some person or persons other than the person defamed." *overruled on other grounds by*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956)).

Note that the defamatory statement "must be a statement of fact, not opinion, but 'an individual cannot preface an otherwise defamatory statement with *in my opinion* and claim immunity from liability.'" *Desmond v. The News and Observer Publishing Co., et al.*, 241 N.C. App. 10, 772 S.E.2d 128, 135 (2015) (citing *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted in citing source)). The question of whether a statement constitutes fact or opinion is a question of law. When "determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically. . . [courts] consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor . . ." of the statement. *Id.*

3 The element of "falsity" has previously been included in every pattern jury instruction on libel and slander except N.C.P.I.—Civil 806.50 ("Defamation—Libel Actionable *Per Se*—Private Figure—Not Matter of Public Concern") and N.C.P.I.-Civil 806.60 ("Defamation—Libel Actionable *Per Quod*-Private Figure—Not a Matter of Public Concern").

Although the issue is not a settled one and notwithstanding that neither the United States Supreme Court nor North Carolina's appellate courts have spoken definitively in this regard, for the reasons that follow and upon careful consideration, the Pattern Jury Civil Sub-Committee has concluded that the element of falsity should likewise be included in these two instructions.

At common law, defamatory statements were presumed to be false and truth thus was an affirmative defense to a libel claim. However, the First Amendment subsequently has been interpreted to place the burden of proving falsity upon the plaintiff in many types of defamation cases. *See Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767, 775, 89 L.Ed.2d 783, 792 (1986) ("[A] public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.") and *id*. at 775, 793 ("[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant."); *see also* Rodney A. Smolla, *Law of Defamation*, § 5:13 (2d. ed. 2004) (Although *Hepps* did not definitively address all types of defamation cases, the "wisest choice . . . is to place the burden of proof [of falsity] on the plaintiff" in all defamation cases."), and *Herbert v. Lando*, 441 U.S. 153, 176, 60 L. Ed.2d 115, 133 (1979) ("In every or almost every [defamation] case, the plaintiff . . . must prove a false publication . . . ."); *cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 111 L.Ed.2d 1, 20 (1990), n.6 ("In *Hepps* the

Court reserved judgment [as to whether falsity must be proved by a private defamation plaintiff] on cases involving nonmedia defendants . . . and accordingly we do the same."); Dan B. Dobbs, *The Law of Torts* (2001 ed.), § 420, p. 1184 ("[Certain] features of *Hepps* may suggest that, as a practical matter, the states will remain free to presume falsehood when a private person sues on a publication that is not about issues of public concern."); *Restatement (Second) of Torts* § 613 (1)(g) (The plaintiff has the burden of proving "the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication.") and 613 Caveat ("The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication.").

Moreover, in numerous cases the North Carolina appellate courts have repeatedly included "falsity" as an element of defamation. *See Renwick v. News & Observer*, 310 N.C. 312, 319, 312 S.E.2d 405, 410 (1984) ("Although every defamation must be false, not every falsehood is defamatory."); *Brown v. Boney*, 41 N.C. App. 636, 648, 255 S.E.2d 784, 791 (1979) ("If the plaintiff's [libel] case is to succeed, he must show the factual statements made concerning him were false."); *Morrow v. Kings Dept. Stores, Inc.*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (1982) ("A defamatory statement, to be actionable, must be false . . . ."); *Williams v. State Farm Mutual Automobile Ins. Co.*, 67 N.C. App. 271, 274, 312 S.E.2d 905, 907 (1984) ("To be actionable, the statement must be false."); *Boston v. Webb*, 73 N.C. App. 459-60, 326 S.E.2d 104, 106 (1985) ("These statements, if found false by a jury, constituted libel *per se*."); *Gibby v. Murphy*, 73 N.C. App. 128, 132, 325 S.E.2d 673, 676 (1985) ("The allegations . . . were libel *per se*, if a jury found them to be false."); *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 58, 338 S.E.2d 918, 922 (1986) ("Falsity is an essential element of libel."); *Clark v. Brown*, 99 N.C. App. 255, 260-61, 393 S.E.2d 134, 137 (1990) (discussing what "false words" constitute libel *per se*); *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (equating a "statement . . . libel *per se*" with "'a false written statement which on its face is defamatory . . . .'" (quoting *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 393, 159 S.E.2d 896, 899 (1968)); *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993) ("'[D]efamatory statements [in a libel action] must be false in order to be actionable.'"(citation omitted)); Andrews v. Elliot, 109 N.C. App. 271, 274, 426 S.E.2d 420, 432 (1993) ("To be actionable, a defamatory statement must be false . . . ."); *Hanton v. Gilbert*, 126 N.C. App. 561, 569, 486 S.E.2d. 432, 437 (1997) ("In order to be actionable, a defamatory statement must be false."); *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) ("In order to recover for defamation, a plaintiff must allege, [*inter alia*, that the defendant] ma[de] false, defamatory statements.").

Finally, inclusion of the falsity element in N.C.P.I.—Civil 806.50 and 806.60 achieves uniformity between the standards for libel and slander. Falsity is the third element in a claim for slander *per se* brought by a private plaintiff in a matter not of public concern (N.C.P.I.—Civil 806.65) and the sixth element in a private plaintiff's claim for slander *per quod* in a matter not of public concern (N.C.P.I.—Civil 806.70). The N.C. Court of Appeals has stated, in certain contexts, that it see[s] "no reason to distinguish libel *per se* from slander *per se*." *Ausley v. Bishop*, 133 N.C. App. 210, 216, 515 S.E.2d 72, 77 (1999). There appears to be no basis upon which to include the falsity requirement in the instructions for private figure/not matter of public concern slander *per se* and slander *per quod* cases (as well as every other category of both libel and slander), but to exclude falsity from the instructions for private figure/not matter of public concern libel *per se* and libel *per quod* cases.

Notwithstanding, the Committee has included a suggested instruction, N.C.P.I.—Civil

806.79 ("Defamation—Libel Actionable *Per Se* or Libel Actionable *Per Quod*—Private Figure—Not Matter of Public Concern—Truth as a Defense"), for use by those judges who feel North Carolina will continue to adhere to the common law rule in the limited instances covered by N.C.P.I—Civil 806.50 and 806.60. *See*, *e.g.*, Pennsylvania Suggested Standard Civil Jury Instructions, Pa. SSJI (Civil) 13.08 ("Defamation—For Cases Involving Private Plaintiffs Where the Matter is not of Public Concern"), citing *Hepps*, 475 U.S. at 776, 89 L. Ed.2d at 791-92 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."). In such an instance, the judge should delete the element of falsity from N.C.P.I.—Civil 806.50 and 806.60 and thereafter submit N.C.P.I.—Civil 806.79. *See* N.C.P.I.—Civil 806.50, n.11 ("NOTE WELL") and N.C.P.I.—Civil 806.60, n.18 ("NOTE WELL").

4 "Under the well established common law of North Carolina, a libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick v. News & Observer Publishing Co.*, 310 N.C. at 317, 312 S.E.2d at 408-09 (citing *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1937)).

5 Libel actionable *per quod* is comprised of those publications "'which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances.'" *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990) (quoting *Flake*, 212 N.C. at 785, 195 S.E. at 59).

North Carolina also recognizes a "middle-tier libel" when a statement is susceptible of two meanings—one of which is defamatory and one of which is not. *See Renwick*, 310 N.C. at 316, 312 S.E.2d at 408 (citation omitted). For jury instruction purposes, however, the instructions for libel actionable *per quod* will suffice in a middle-tier libel claim.

6 "Slander is a tort distinct from libel in that slander involves an oral communication. Like libel, slander may be *per se* or *per quod*, but it cannot fall into the intermediate category where it would be susceptible to two meanings. Slander *per se* involves an oral communication to a third person which amounts to: (1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession; or (3) imputations that the plaintiff has a loathsome disease." *Raymond U v. Duke Univ.*, 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988) (citations omitted); *see also Donovan v. Fiumara*, 114 N.C. App. 524, 527-36, 442 S.E.2d 572, 575-80 (1994) (rejecting the argument that *dicta* in *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624-25 (1988) created a fourth classification of slander *per se*, *i.e.*, "to hold [the plaintiff] up to disgrace, ridicule or contempt").

7 *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964).

8 *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759, 86 L.Ed.2d 593, 604 (1985) ("[S]peech on matters of purely private concern is of less First Amendment concern. As a number of state courts . . . have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.").

9 *Id*. at 758-59, 86 L. Ed.2d at 602 ("[The Supreme Court has] long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern'

that is 'at the heart of the First Amendment's protection.'"(citations omitted)); *see also Rosenbloom v. Metromedia*, 403 U.S. 29, 44, 29 L.Ed.2d 296, 312 (1971) ("[T]he determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

Whether "'speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.'" *Dun & Bradstreet*, 472 U.S. at 761, 86 L.Ed.2d at 604 (citation omitted).

10 "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L.Ed.2d 597, 605 (1966).

The *New York Times* rule was extended from public officials to all public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L.Ed.2d 1094, 1111 (1967).

"[T]he Supreme Court . . . divided [public official and public figure plaintiffs] into three categories[:] . . . involuntary public figures, all purpose public figures, and limited purpose public figures." *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664-65 (2000) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 41 L.Ed.2d 789, 810 (1974)).

"[Although] it may be possible for someone to become a public figure through no purposeful action of his own, . . . the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz*, 418 U.S. at 345, 41 L.Ed.2d at 810. Public figures "assume special prominence in the resolution of public questions . . ." *Id*. at 351, 41 L. Ed.2d at 812.

"In . . . three . . . cases, the Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular 'public controversy' that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Gaunt v. Pittaway*, 139 N.C. App. at 186, 534 S.E.2d at 665.

The United States Court of Appeals for the Fourth Circuit has set forth five requirements for establishing that the plaintiff is a limited purpose public figure: "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation." *Foretich v. Capital Cities/ABC*, 37 F.3rd 1541, 1553 (4th Cir. 1994).

"Under North Carolina law, an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.'" *Gaunt*, 139 N.C. App. at 786, 534 S.E.2d at 665 (citations omitted).

The heightened burden for public officials and public figures is justified by two considerations. First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344, 41 L.Ed.2d at 807-08. Second, "[t]here is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that

involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case . . . . Those classed as public figures stand in a similar position . . . . [Because of their] roles of special prominence in the affairs of society . . . . [or] positions of . . . persuasive power and influence . . . [or because they] have thrust themselves to the forefront of particular public controversies . . . [public figures] invite attention and comment." *Gertz*, 418 U.S. at 344-45, 41 L.Ed.2d at 808.

11 *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 26 (2003) ("Whether a publication is deemed libelous *per se* is a question of law to be determined by the court."); *Renwick*, 310 N.C. at 317-18, 312 S.E.2d at 409 ("[D]efamatory words to be libelous per se must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter* of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." (quoting *Flake*, 212 N.C. at 786, 195 S.E. at 60) (emphasis added)); and *Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E.2d 383, 388 (1958) ("It is noted: '(1) The court determines whether a communication is capable of a defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.'" (quoting *Restatement of the Law of Torts*, Sec. 614)); *see also* 50 Am. Jur.2d, *Libel and Slander* § 488 at 871 ("Examples of questions . . . to be decided by the court as a matter of law include: whether a person is a public official, whether a person is a public figure, and if so, for what purposes, whether a statement is defamatory per se or per quod, . . . [and] whether the statements complained of are capable of the meaning ascribed to them by the plaintiff . . . .").

12 *See Cochran v. Piedmont Publishing Co., Inc.*, 62 N.C. App. 548, 549, 302 S.E.2d 903, 904 (1983) ("In order to recover compensatory damages for libel, [a private figure] plaintiff must establish . . . that the false information was published through the fault or negligence of the defendant." (citations omitted)); *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 531, 393 S.E.2d. 295, 296 (1990) ("[I]n the case of 'private' individuals . . . a lesser showing of fault rather than actual malice is required to recover damages."); *see also Gertz*, 418 U.S. at 353, 41 L.Ed.2d at 813 (Blackmum, J., concurring) ("[The Court] now conditions a libel action by a private person upon a showing of negligence.").

13 *See Neill Grading & Constr. Co., Inc. v. Lingafelt*, 168 N.C. App 36, 46, 106 S.E.2d 734, 741 (2005) ("[W]e now hold that North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence.").

14 *See New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 11 L. Ed.2d at 706 (Where the plaintiff is a "public official" and the alleged defamatory statement concerns his official conduct, he must prove that the statement was "made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."); *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 18 L. Ed.2d 1094, 1011 (1967), and *Varner v. Bryant*, 113 N.C. App. 697, 702-03, 440 S.E.2d 295, 299 (1994).

"The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Dobson v. Harris*, 134 N.C. App. 573, 581, 521 S.E.2d 710, 717 (1999) (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 657, 105 L. Ed.2d 587, 587 (1989)), overruled on other grounds by, *Dobson v. Harris*, 352 N.C. 77, 530 S.E.2d 829 (2000). "Actual malice" may be proved by circumstantial evidence. *Id*.

Note that "actual malice" as employed here in the constitutional sense should be differentiated from "malice" as used elsewhere in the North Carolina Pattern Instructions. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510, 115 L. Ed.2d 447, 468 (1991) (The

New York Times "actual malice" standard may not be established by a showing of personal hostility and thus should be distinguished from state common law malice). For example, in N.C.P.I.-Civil 810.96 ("Punitive Damages-Liability of Defendant"), "malice" is defined as "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." (citing N.C. Gen. Stat. § 1D-5(5)). "Actual malice," on the other hand, appears to be close to the concept of "willful or wanton conduct." *See* N.C.P.I.-Civil 810.96 ("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." (citing N.C. Gen. Stat. § 1D-5(7))).

15 This term is used to distinguish the damages discussed from punitive or other types of exemplary damages. *See Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005) ("Compensatory damages include both general and special damages . . . . '[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' (citations omitted). '[G]eneral damages . . . include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.] . . . [S]pecial damages are usually synonymous with pecuniary loss [such as] [m]edical and hospital expenses, as well as loss of earnings . . . .'" (citation omitted).

16 *See Donovan*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 575 ("In the context of an action for defamation, special damage means 'pecuniary loss'; 'emotional distress and mental suffering are not alone sufficient . . . .'" (citation omitted)).

17 *See* N.C. Gen. Stat. § 1A-1, Rule 9(g) (2001) ("When items of special damage are claimed each shall be averred.")

18 *See Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 473-75 (1991) (actual damage defined as some actual loss, hurt or harm resulting from the illegal invasion of a legal right.").

19 *Gertz*, 418 U.S. at 350, 41 L.Ed.2d at 811.

20 *See Iadanza*, 169 N.C. App. at 779-80, 611 S.E.2d at 221.

Note that the descriptions of actual harm and nonproven/presumed damages are similar and indeed are exactly the same type of damages. It is the level of proof that is assigned to these two categories that makes them distinct from one another. Whether a plaintiff must seek damages based upon actual harm (which requires specific proof) or can seek nonproven/presumed damages (which do not require specific proof) is determined by the classification of the plaintiff and whether the speech at issue involved a matter of public concern.

Nonproven/presumed damages were often called "general" damages at common law. Due to constitutional requirements, the U.S. Supreme Court determined that such "general" damages in some cases would have to be proven as actual harm. The label of "general" damages is now somewhat imprecise because it can be used to describe either actual harm or nonproven/presumed damages.

21 *See* n.23 *infra*; *see also Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987) ("*Ascertainment* of presumed general damages is difficult at best and unavoidably includes an element of speculation.") and *Prosser and Keeton on Torts*, § 116A at 843 (presumed damages are "an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not

be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.").

22 *See Renwick*, 310 N.C. at 317, 312 S.E.2d at 408 ("The complaints failed to bring the editorial within the [category of] . . . libel *per quod* . . . since it was not alleged that the plaintiff suffered special damages." (citing *Flake*, 212 N.C. at 785, 195 S.E. at 59)), and *Raymond U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 707 (1988) ("Under a libel *per quod* theory . . . . special damages must be proven.").

23 *See Dun & Bradstreet v. Greenmoss Builders*, 478 U.S. at 760, 86 L. Ed.2d at 603 ("The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" (quoting Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)); *see also Stewart v. Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971) ("Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages.").

24 *See Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 385 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.") and *Woody v. Catawba Valley Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E.2d 578, 581-82 (1968) ("While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, willful, and in reckless disregard of a plaintiff's rights.").

25 *See* n.14 *supra*.

26 *Gertz*, 418 U.S. at 349, 41 L. Ed.2d at 810-11 ("we hold that the States may not permit recovery of presumed or punitive damages . . . when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

27 As noted in the text, in matters actionable *per se*, "the law presumes that actual damages were sustained." *Harris*, 99 N.C. App. at 183, 392 S.E.2d at 754. Accordingly, in a public figure or public official matter actionable *per se*, once the plaintiff establishes the required showing for liability required under *New York Times* (actual malice), presumed damages are allowed. Such presumed damages thus, in effect, take the place of the actual damage requirement for punitive damages. *See id*. Moreover, because actual malice has already been established, no additional showing that the "defendant's conduct was malicious, wanton, or reckless indifferent to the truth and plaintiff's rights," is necessary in order to award punitive damages. *Id*.

28 *See* nn.12 and 13 *supra*.

29 *Gertz*, 418 U.S. at 349-50 ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth . . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."); *see also Gibby v. Murphy*, 73 N.C. App. 128, 133, 325 S.E.2d 673, 676-77 (1985) (To recover punitive damages a private figure/matter of public concern plaintiff "must prove 'actual malice' on the part of the defendants. Actual malice may be proven by showing that the defendants published the defamatory material with knowledge that it was false, with reckless disregard to

the truth, or with a high degree of awareness of its probable falsity.").

30 *Dun & Bradstreet, Inc.*, 472 U.S. at 761, 86 L. Ed.2d at 603 ("[T]he state interest in awarding presumed and punitive damages . . . is 'substantial' relative to the incidental effect these remedies may have on speech [not at the core of First Amendment concern . . . .] In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages- even absent a showing of 'actual malice.'").

> *NOTE WELL*: *The Pattern Jury Instruction Civil Subcommittee, after careful consideration, suggests that certain language used by the North Carolina Supreme Court in* Renwick v. News & Observer Publishing Co*., 310 N.C. 312, 312 S.E.2d 405 (1984), should be relied upon with caution. Although* Renwick *was issued in 1984 after the U.S. Supreme Court decisions in* N.Y. Times and Gertz*, the N.C. Supreme Court in* Renwick *deemed it unnecessary under the facts to categorize the claim before it under the private/public categories established by the U.S. Supreme Court.* See Renwick*, 310 N.C. at 318, 312 S.E.2d at 409, n.1. However, the Court quoted with approval the following language from* Flake*, a N.C. Supreme Court decision, issued well before establishment of the private/public categories by the U.S. Supreme Court:*

"When an unauthorized publication is libelous per se, malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous per se and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."

Renwick*, 310 N.C. at 316, 312 S.E.2d at 408 (quoting Flake, 212 N.C. at 785, 195 S.E. at 59).*

As noted in the text of this Preface, the U.S. Supreme Court has altered the law of defamation based upon the nature of the plaintiff and the nature of subject matter of the alleged defamation. In the context of a public figure or official presenting a claim for defamation actionable per se, for example, presumed damages are allowed- but only upon a showing of actual malice. See New York Times v. Sullivan*, 376 U.S. at 279-80, 11 L. Ed.2d at 706;* see also *n.14* supra*. In the context of a private plaintiff and a matter of public concern in a claim for defamation actionable per se, liability is predicated upon a showing of negligence, but presumed damages are not allowed unless the plaintiff can establish actual malice.* See Gertz*, 418 U.S. at 349-50, 41 L. Ed. 2d at 810;* see also *n.29* supra*. Finally, in the context of a private plaintiff/not matter of public concern claim for defamation actionable per se, liability and presumed damages are allowed- but only upon a showing of negligence.* See Dun & Bradstreet*, 418 U.S. at 761, 86 L. Ed.2d at 604;* Gertz*, 418 U.S. at 347, 41 L. Ed.2d at 809 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."), and* Walters*, 31 N.C. App. 233, 235, 228 S.E.2d 766, 767 ("[U]nder the* Gertz *decision, a plaintiff in a civil action for libel, if he is a private citizen and not a public official or a public figure, can recover only if he alleges and proves fault, or at least negligence, on the part of the defendant . . . in publishing false and defamatory statements."). Thus, it appears the N.C. Supreme Court's use in* Renwick *of the broad language from* Flake *must be tempered in light of subsequent U.S. Supreme Court jurisprudence.* See Walters*, 31 N.C. App. at 235-36, 228 S.E.2d at 767 (Prior to* Gertz*, "this*

jurisdiction . . . clearly established that a publication charging that someone had committed a crime constituted libel per se and both malice and actual damages were presumed (citation omitted). Under Gertz*, there is no presumption of malice and damages, and fault must be alleged and established by a private citizen who seeks to recover for a defamatory falsehood.").*

31 N.C. Gen. Stat. § 1D-15 (2001). As opposed to constitutional "actual malice" (publication with knowledge of falsity or reckless disregard of falsity, *see* n.14 *supra*), "malice" as used in the statute is common law malice defined as a "sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "Willful or wanton conduct" is defined as "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 negligence." N.C. Gen. Stat. § 1D-5(7). *Cf. Harris v. Temple*, 99 N.C. App. 179, 183, 392 S.E.2d 752, 753, *rev. denied*, 327 N.C. 428, 395 S.E.2d 678 (1990) ("Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights.").

32 In a private plaintiff/not matter of public concern claim, a showing of negligence suffices to establish negligence and also allows an award of presumed damages. *See* n.12 *supra*.

33 Thus, in the case of a public figure, punitive damages are available without any further showing, *see* n.27 *supra*. In the case of a private plaintiff in a matter not of public concern, the plaintiff must still satisfy the requirements of N.C. Gen. Stat. § 1D-15 (a)(1)-(3) and N.C. Gen. Stat. § 1D-15(b).

34 Presumed damages are not available in middle-tier libel or libel *per quod* cases. *See* n.22 *supra*; *see also Morris v. Bruney*, 78 N.C. App. 668, 675, 338 S.E.2d 561, 566 (1978) ("[I]f extrinsic facts are needed to show the slander, special damages also must be alleged and proven . . . ."); *Arnold v. Sharp*, 37 N.C. App. 506, 509, 246 S.E.2d 556, 558 (1978) ("Unless a publication is actionable *per se*, the plaintiff must prove special damages."), *rev'd on other grounds*, 296 N.C. 533, 251 S.E.2d 452 (1979).

35 *See* N.C. Gen. Stat. § 99-2.

North Carolina
Conference of Superior Court Judges
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North Carolina
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GENERAL CIVIL VOLUME
MAY 2017

810.41 WRONGFUL DEATH DAMAGES—SET OFF/DEDUCTION OF WORKERS' COMPENSATION AWARD.

Evidence has been introduced that the estate received (*state dollar amount*) in workers' compensation benefits from (*name deceased's*) employer, (*state employer's name*). Under North Carolina law, the Court is required to deduct this amount from any amount of damages that you award the estate.[1]

I have advised you of the amount of the estate's workers' compensation award for the sole purpose of informing you that such amount will be deducted by the Court from any amount of damages you award the estate. You are not to consider the amount of the estate's workers' compensation recovery for any other purpose. Such awards are not calculated in accordance with the law of damages applicable to a civil trial. They are determined by statute, according to a fixed formula.

I therefore instruct you that you are not to be guided or influenced by the amount of the estate's workers' compensation award in determining the amount of damages, if any, that you award the estate. Your decision on the amount of the damages the estate is entitled to recover is to be governed exclusively by the evidence in this case and the rules of law I have given you with respect to the measure of damages.

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1. N.C. Gen. Stat. § 97-10.2(e)*; see also Murray v. Moody*, __ N.C. App. __, __, 797 S.E.2d 365, 369 (2017) ("It is well established that our Workers' Compensation Act was never intended to provide an employee with a windfall recovery from both the employer and a third party who is legally responsible for causing the employee's compensable injuries. (citing *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997)). Where '[t]here is one injury, [there is] still only one recovery.'" (quoting *Andrews v. Peters*, 55 N.C. App. 124, 131, 284 S.E.2d 748, 752 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982))).

N.C.P.I.—Civil 810.60
PROPERTY DAMAGES—ISSUE AND BURDEN OF PROOF.
GENERAL CIVIL VOLUME
APRIL 2017

810.60 PROPERTY DAMAGES—ISSUE AND BURDEN OF PROOF.[1]

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover for property damages?"

If you have answered the (*state number*) issue "Yes" (and the (*state number*) issue "No") in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by 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 property damages [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant.[2]

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1 This issue covers only actual damage to the property and not damages for loss of use. Where the evidence could justify recovery for loss of use, that should be submitted as a separate and additional issue. *See*, for example, N.C.P.I.-MV 106.67.

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

N.C.P.I.—Civil 814.50
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.4(a)(1)

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

The (*state number*) issue reads:

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

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that (*name debtor)*[2] [transferred[3] the (*name asset*)[4]] [incurred the (*name obligation*)] with intent[5] to hinder, delay or defraud any[6] of *his* creditors.[7] [It is immaterial whether the plaintiff's claim arose before or after (*name debtor*) [made the transfer] [incurred the obligation].[8]] In determining whether (*name debtor*) had this intent, you may consider:[9]

[whether the [transfer] [obligation] was to an insider[10]]

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

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

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

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

[whether (*name debtor*) absconded]

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

N.C.P.I.—Civil 814.50
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.4(a)(1)

[whether the value of the consideration received by (*name debtor*) was reasonably equivalent to the value of the [asset transferred] [amount of the obligation incurred]][11]

[whether (*name debtor*) was insolvent or became insolvent shortly after the [transfer was made] [obligation was incurred]]. For purposes of determining insolvency, a debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.[12]

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

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

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

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

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

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

N.C.P.I.—Civil 814.50
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—INTENT TO DELAY, HINDER OR DEFRAUD.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.4(a)(1)

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

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1 Section 39-23.9 of the Uniform Voidable Transactions Act (the "Act"), entitled "Extinguishment of claim for relief," is a statute of repose, establishing a finite and fixed time within which claims for relief under the Act may be brought. *KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., et al.*, __ N.C. App. __, __, 790 S.E.2d 559, 568 (2016). A claim brought pursuant to Section 39-23.4(a)(1) must be brought within four years of the date of the transfer, if the transfer was or could reasonably have been discovered within four years of the date it occurred. N.C. Gen. Stat. § 39-23.9(1). However, if the transfer was not discovered and could not reasonably have been discovered within four years of the date it occurred, the claim may be brought within one year of the discovery of the transfer or obligation. N.C. Gen. Stat. § 39-23.9(1). Section 39-23.6 of the Act defines when a transfer is made or an obligation is incurred for purposes of the Act. The period of repose runs from the as-defined date of the transfer or obligation, not the date when a claimant first learns of the fraudulent nature of the transfer or obligation. *KB Aircraft v. Berry*, __ N.C. App. at __, 790 S.E.2d at 568.

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

A "person" is an "individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity." N.C. Gen. Stat. § 39.23.1(9).

NOTE WELL: For transfers made or obligations incurred prior to October 1, 2015, the Act provided a specific definition of insolvency applicable to partnerships. N.C. Gen. Stat. § 39-23.2(c), repealed by Session Laws 2015-23, s.1, effective October 1, 2015.

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

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

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

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

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

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

9 N.C. Gen. Stat. § 39-23.4(b)(1)-(13). The factors enumerated in N.C. Gen. Stat. § 39-23.4(b) is a non-exhaustive list. *Estate of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 170, 750 S.E.2d 14, 20 (2013).

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

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

[a relative of the debtor]
[a relative of a general partner of the debtor]
[a partnership in which the debtor is a general partner]
[a general partner in a partnership in which the debtor is a general partner]
[a corporation of which the debtor is a director, officer, or person in control].*)*

N.C. Gen. Stat. § 39-23.1(7)(a).

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

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

N.C. Gen. Stat. § 39-23.1(7)(b).

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

[a general partner in the debtor]
[a relative of a general partner in, a general partner of, or a person in control of the debtor]
[another partnership in which the debtor is a general partner]
[a general partner in a partnership in which the debtor is a general partner]
[a person in control of the debtor].*)*

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

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

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

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

11 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of*

Hurst ex rel. Cherry v. Jones, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013) (citing N.C. Gen. Stat. § 39-23.5 (2011)).

12 N.C. Gen. Stat. § 39-23.2(a).*Civil 101.62 NOTE WELL: A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence. N.C. Gen. Stat. § 39-23.2(b). For an instruction on this presumption, see the Note Well following the second element in N.C.P.I.-Civil 814.70.*

13 *See supra* note 10 for language to use in instructing the jury as to the meaning of "insider."

N.C.P.I.—Civil 814.65
FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
FEBRUARY 2017
N.C. Gen. Stat. § 39-23.4(a)(2)

814.65 FRAUDULENT TRANSFER—PRESENT AND FUTURE CREDITORS—LACK OF REASONABLY EQUIVALENT VALUE.[1]

The (*state number*) issue reads:

"Was (*name debtor's*)[2] [transfer[3] of the (*name asset*)[4] a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:[5]

First, (*name debtor*) [transferred the (*name asset*)] [incurred the (*name obligation*)] without receiving a reasonably equivalent value in exchange for the [transfer] [obligation].[6]

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

[was engaged or was about to engage in a business or a transaction for which *his* remaining assets were unreasonably small in relation to the business or transaction][7]

[intended to incur or believed *he* would incur debts beyond *his* ability to pay them as they would become due].[8]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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 Section 39-23.9 of the Uniform Voidable Transactions Act (the "Act"), entitled "Extinguishment of claim for relief," is a statute of repose, establishing a finite and fixed time within which claims for relief under the Act may be brought. *KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., et al.*, __ N.C. App. __, __, 790 S.E.2d 559, 568 (2016), *cert. granted*, 797 S.E.2d 3 (2017). For a claim to which N.C.P.I.-Civil 814.65 would apply, one brought pursuant to Section 39-23.4(a)(2), the period of repose is four years after the transfer was made or the obligation was incurred. N.C. Gen. Stat. § 39-23.9(2). Section 39-23.6 of the Act defines when a transfer is made or an obligation is incurred for purposes of the Act. The period of repose runs from the as-defined date of the transfer or obligation, not the date when a claimant first learns of the fraudulent nature of the transfer or obligation. *KB Aircraft v. Berry*, __ N.C. App. at __, 790 S.E.2d at 568.

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

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

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

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

6 N.C. Gen. Stat. § 39-23.4(a)(2). "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013).

7 N.C. Gen. Stat. § 39-23.4(a)(2)(a).

8 N.C. Gen. Stat. § 39-23.4(a)(2)(b).

N.C.P.I.—Civil 814.70
FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(a)

814.70 FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.[1]

The (*state number*) issue reads:

"Was (*name debtor's*)[2] [transfer[3] of the (*name asset*)[4] a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:[5]

First, (*name debtor*) [transferred the (*name asset*)] [incurred the (*name obligation*)] without receiving a reasonably equivalent value[6] in exchange for the [transfer] [obligation].

Second, (*name debtor*)

[was insolvent at the time[7] *he* [transferred the (*name asset*)] [incurred the (*name obligation*)]]

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

A debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.[8]

> *NOTE WELL: A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence. N.C. Gen. Stat. § 39-23.2(b).*
>
> *Where the basic fact of general nonpayment of the debtor's debts is at issue and the defendant has offered evidence to rebut*

the presumption of insolvency, use of the language found in endnote 9 is suggested.[9]

Where the basic fact has been judicially established or where the defendant has offered no rebuttal evidence, the language in endnote 9 should be modified in accordance with N.C.P.I.-Civil 101.62.

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

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

---

1 Section 39-23.9 of the Uniform Voidable Transactions Act ("the Act"), entitled "Extinguishment of claim for relief," is a statute of repose, establishing a finite and fixed time within which claims for relief under the Act may be brought. *KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., et al.*, __ N.C. App. __, __, 790 S.E.2d 559, 568 (2016), *cert. granted*, 797 S.E.2d 3 (2017). For a claim to which N.C.P.I.-Civil 814.70 would apply, one brought pursuant to Section 39-23.5(a), the period of repose is four years after the transfer was made or the obligation was incurred. N.C. Gen. Stat. § 39-23.9(2). Section 39-23.6 of the Act defines when a transfer is made or an obligation is incurred for purposes of the Act. The period of repose runs from the as-defined date of the transfer or obligation, not the date when a claimant first learns of the fraudulent nature of the transfer or obligation. *KB Aircraft v. Berry*, __ N.C. App. at __, 790 S.E.2d at 568.

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

A "person" is an "individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity." N.C. Gen. Stat. § 39.23.1(9).

N.C.P.I.—Civil 814.70
FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(a)

NOTE WELL: For transfers made or obligations incurred prior to October 1, 2015, the Act provided a specific definition of insolvency applicable to partnerships. N.C. Gen. Stat. § 39-23.2(c), repealed by Session Laws 2015-23, s.1, effective October 1, 2015.

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

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

5 N.C. Gen. Stat. § 39-23.5(a).

6 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013) (citing N.C. Gen. Stat. § 39-23.5 (2011)).

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

8 N.C. Gen. Stat. § 39-23.2(a).

9 Where the basic fact of general nonpayment of the debtor's debts is at issue and the defendant has offered evidence to rebut the presumption of insolvency, the following language is suggested:

The plaintiff has offered evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. The defendant has offered evidence that [the debtor was generally paying *his* debts as they became due] [the debtor's general nonpayment of *his* debts was as a result of bona fide dispute]. The burden is on the plaintiff to prove, by the greater weight of the evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. I instruct you that when it is established that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, the law presumes that the debtor is insolvent. If this occurs, the burden of proof would be on the defendant to prove, by the greater weight of the evidence, that the debtor was solvent.

It is your duty to consider all of the evidence in the case. The plaintiff contends that you should find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. On the other hand, the defendant contends that you should not find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, but that even if you do so find, that *he* has offered evidence sufficient to show, by the greater weight of the evidence, that the debtor was solvent.

N.C.P.I.—Civil 814.70
FRAUDULENT TRANSFER—PRESENT CREDITORS—INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(a)

I charge you that if the plaintiff has proved, by the greater weight of the evidence, that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, then the law presumes that the debtor is insolvent. The burden of proof then would be on the defendant, which means that the defendant must prove, by the greater weight of the evidence, that the debtor was solvent. On the other hand, if you fail to find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, then there would be no presumption of insolvency for the defendant to overcome.

10 See Endnote 7.

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

N.C.P.I.—Civil 814.75
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(b)

814.75 FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.[1]

The (*state number*) issue reads:

"Was (*name debtor's*) transfer of the (*name asset*) a voidable transaction?"

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

First, (*name debtor*)[2] transferred[3] the (*name asset*)[4] to (*name transferee*) because of a previous debt owed to (*name transferee*).

Second, at the time[5] of the transfer, (*name debtor*) was insolvent. A debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.[6]

> *NOTE WELL: A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence. N.C. Gen. Stat. § 39-23.2(b).*
>
> *Where the basic fact of general nonpayment of the debtor's debts is at issue and the defendant has offered evidence to rebut the presumption of insolvency, use of the language found in endnote 7 is suggested.*[7]
>
> *Where the basic fact has been judicially established or where the defendant has offered no rebuttal evidence, the language in endnote 7 should be modified in accordance with N.C.P.I.—Civil 101.62.*

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

Fourth, that (*name transferee*) was an insider.[8]

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

[a relative of the debtor]

[a relative of a general partner of the debtor]

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

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

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

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

[a director of the debtor]

[an officer of the debtor]

[a person in control of the debtor]

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

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

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

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

[a general partner in the debtor]

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

N.C.P.I.—Civil 814.75
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(b)

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

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

[a person in control of the debtor].)

(*Use where an affiliate*[9] *is involved*: An "insider" includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor.)

(*Use where there is a managing agent*: An "insider" includes a managing agent of the debtor.)[10]

And Fifth, before[11] the transfer was made, the plaintiff was a creditor[12] of the (*name debtor*).

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*name debtor's*) transfer of the (*name asset*) was a voidable transaction, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 Section 39-23.9 of the Uniform Voidable Transactions Act (the "Act"), entitled "Extinguishment of claim for relief," is a statute of repose, establishing a finite and fixed time within which claims for relief under the Act may be brought. *KB Aircraft Acquisition, LLC v. Jack M. Berry, Jr., et al.*, __ N.C. App. __, __, 790 S.E.2d 559, 568 (2016), *cert. granted*, 797 S.E.2d 3 (2017). For a claim to which N.C.P.I.-Civil 814.75 would apply, one brought pursuant to Section 39-23.5(b), the period of repose is one year after the transfer was made. N.C. Gen. Stat. § 39-23.9(3). Section 39-23.6 of the Act defines when a transfer is made for purposes of the Act. The period of repose runs from the as-defined date of the transfer, not the date when a claimant first learns of the fraudulent nature of the transfer. *KB Aircraft v. Berry*, __ N.C. App. at __, 790 S.E.2d at 568.

2 A "debtor" is a "person" who is liable on a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C. Gen. Stat. § 39-23.1(3) and (6).

A "person" is an "individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity." N.C. Gen. Stat. § 39.23.1(9).

NOTE WELL: For transfers made or obligations incurred prior to October 1, 2015, the Act provided a specific definition of insolvency applicable to partnerships. N.C. Gen. Stat. § 39-23.2(c), repealed by Session Laws 2015-23, s.1, effective October 1, 2015.

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

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

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

6 N.C. Gen. Stat. § 39-23.2(a).

7 Where the basic fact of general nonpayment of the debtor's debts is at issue and the defendant has offered evidence to rebut the presumption of insolvency, the following language is suggested:

The plaintiff has offered evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. The defendant has offered evidence that [the debtor was generally paying *his* debts as they became due] [the debtor's general nonpayment of *his* debts was as a result of bona fide dispute]. The burden is on the plaintiff to prove, by the greater weight of the evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. I instruct you that when it is established that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, the law presumes that the debtor is insolvent. If this occurs, the burden of proof would be on the defendant to prove, by the greater weight of the evidence, that the debtor was solvent.

It is your duty to consider all of the evidence in the case. The plaintiff contends that you should find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due. On the other hand, the defendant contends that you should not find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, but that even if you do so find, that *he* has offered evidence sufficient to show, by the greater weight of the evidence, that the debtor was solvent.

N.C.P.I.—Civil 814.75
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.5(b)

I charge you that if the plaintiff has proved, by the greater weight of the evidence, that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, then the law presumes that the debtor is insolvent. The burden of proof then would be on the defendant, which means that the defendant must prove, by the greater weight of the evidence, that the debtor was solvent. On the other hand, if you fail to find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor's debts as they became due, then there would be no presumption of insolvency for the defendant to overcome.

8 N.C. Gen. Stat. § 39-23.1(7) provides a non-exclusive list of individuals and entities that are insiders for the purposes of the Uniform Voidable Transactions Act.

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

10 N.C. Gen. Stat. § 39-23.1(7)(e).

11 See Endnote 5.

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

N.C.P.I.—Civil 814.80
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF NEW VALUE GIVEN.
GENERAL CIVIL VOLUME
FEBRUARY 2017
N.C. Gen. Stat. § 39-23.8(f)(1)

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

The (*state number*) issue reads:

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

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

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

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

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

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

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

3 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made for purposes of the Uniform Voidable Transactions Act, N.C. Gen. Stat. §§ 39-23.1-23.12.

N.C.P.I.—Civil 814.81
FRAUDULENT TRANSFER—PRESENT CREDITORS—TRANSFER TO INSIDER WHILE INSOLVENT—DEFENSE OF NEW VALUE GIVEN—AMOUNT OF NEW VALUE.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 39-23.8(f)(1)

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

The (*state number*) issue reads:

"What amount of new value did the defendant give to or for the benefit of (*name debtor*)?"

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

On this issue the burden of proof is on the defendant. This means the defendant must prove, by the greater weight of the evidence, the amount of new value[1] that *he* gave to or for the benefit of (*name debtor*) after the transfer was made.[2]

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, it is your duty to write in the blank space provided on the verdict sheet that amount of new value which the defendant has proven by the greater weight of the evidence.

---

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

2 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made for purposes of the Uniform Voidable Transactions Act, N.C. Gen. Stat. §§ 39-23.1-23.12.

N.C.P.I.—Civil 820.00
ADVERSE POSSESSION—HOLDING FOR STATUTORY PERIOD.
GENERAL CIVIL VOLUME
FEBRUARY 2017

820.00 ADVERSE POSSESSION—HOLDING FOR STATUTORY PERIOD.[1]

The (*state number*) issue reads:

"Does the plaintiff hold title to (*identify land*) by adverse possession?"

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

First, that (*identify land*) was actually possessed[3] by the plaintiff (and those through whom *he* claims) by [deed] [will] [(written) (verbal) agreement] [inheritance].[4] Actual possession means physical possession, control and use of the land as if it were one's own property.[5] Actual possession includes any use that the land's size, character, nature, location and circumstances would permit.[6] A mere intention to claim the land is not enough.

Second, that this actual possession was exclusive and hostile[7] to the defendant (and those through whom *he* claims). Possession is hostile when it is without permission and is of such a nature as to give notice that the exclusive right to the land is claimed. "Hostile" does not require a showing of heated controversy, animosity or ill will, or that the persons involved were enemies or even knew each other.[8] (When the possession begins with permission,[9] it becomes hostile if the plaintiff (or one through whom *he* claims) makes the defendant (or one through whom *he* claims) aware by words or conduct that *he* is no longer using the land by permission and claims the exclusive right to it as owner.)[10]

(*Use where there is a claim of actual ouster by a cotenant:* When two or more people possess the land by [deed] [will] [(written) (verbal) agreement] [inheritance], each has certain rights, including the right to share in the possession of the land, the right to share in the rents and profits, and the right to an accounting. Possession becomes hostile when one possessor clearly,

positively and unequivocally denies rights of possession to the other(s).[11] However, mere [occupancy of the land] [payment of taxes] [collection of rents and profits] [failure to account voluntarily for rents and profits] [does] [do] not necessarily prove that the rights of possession have been denied.[12] Hostile possession begins when one of the possessors explicitly refuses to permit the other(s) to share in possession of the land.)

Third, that this actual possession was open and notorious, and was under known and visible lines and boundaries.[13] The possession must have been so open, visible and well known that the defendant (and those through whom *he* claims) knew or, under the circumstances, should have known of the possession.[14] The acts of possession must have been of such a nature that anyone claiming ownership, or anyone in the community, knew or by observing should have known that the plaintiff (and those through whom *he* claims) claimed the land as [*his*] [their] own and [was] [were] not merely (a) temporary or occasional trespasser(s).[15] Such possession must also have been under such known and visible lines and boundaries as to identify the extent of the possession claimed.

Fourth, that this actual, hostile, open and notorious possession under known and visible boundaries must have been continuous and uninterrupted[16] for (*state statutory period*).[17] This means that the plaintiff (and those through whom *he* claims) must continue actual, hostile, open and notorious possession of the land under known and visible boundaries for the entire (*state statutory period*) without interruption by [physical acts] [a lawsuit] [(*state other means*)].[18]

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 holds title to (*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.

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1 Possession for twenty years is required for acquisition of title against an individual without color of title (N.C. Gen. Stat. §§ 1-39, 1-40), and for seven years under color of title (N.C. Gen. Stat. § 1-38). As against the State, possession is required for thirty years without color of title and for twenty-one years under color of title (N.C. Gen. Stat. § 1-35). For an instruction on adverse possession under color of title, *see* N.C.P.I.-Civil 820.10. *See generally Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953); *Alexander v. Cedar Works*, 177 N.C. 137, 98 S.E. 312 (1919); *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916), *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

2 "The party attempting to establish title by adverse possession has the burden of proof." *Town of Winton v. Scott*, 80 N.C. App. 409, 415, 342 S.E.2d 560, 564 (1986), (citing *Power v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953)).

3 *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70, later appeal after remand, 279 N.C. 45, 181 S.E.2d 553 (1969); *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E.2d 168 (1954); *Alexander v. Cedar Works*, 177 N.C. 137, 98 S.E. 312 (1919); *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 47, (1912); *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895). *See also Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (where the pleadings and evidence support a claim of adverse possession of an identified portion of a parcel of land, the trial court is obligated to give a jury instruction permitting the jury to find adverse possession of that portion).

4 "Tacking" is defined in *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974). *See also Vanderbilt v. Chapman*, 172 N.C. at 812, 90 S.E. at 994.

5 *See, e.g., Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

6 *See, e.g., Wiggins v. Taylor*, 31 N.C. App. 79, 228 S.E.2d 476 (1976); *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

7 *See State v. Brooks*, 275 N.C. at 180, 166 S.E.2d at 73; *Brown v. Hurley*, 243 N.C. 138, 140-41, 90 S.E.2d 324, 326 (1955); *Barbee*, 238 N.C. at 220, 77 S.E.2d at 650 (1953).

8 *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985) (holding that when a landowner acts under mistake as to the boundary of his property and that of another his claim of title is adverse).

9 There is a presumption that possession is permissive as between the following: cotenants, *see Collier v. Welker*, 19 N.C. App. 617, 620, 199 S.E.2d 691, 694 (1973); trustee and *cestui que trust*, *see Evans v. Brendle*, 173 N.C. 149, 153, 91 S.E. 723, 725 (1917); spouses, *see Hancock v. Davis*, 179 N.C. 282, 284, 102 S.E. 269, 270 (1920); tenant and landlord, *see Pitman v. Hunt*, 197 N.C. 574, 576, 150 S.E.13, 14 (1929); and agent and principal, *see Hall v. Davis*, 56 N.C. 413, 415 (1857).

10 *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

11 *Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258 (1910); *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

12 *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694 ("One cotenant may not be deprived of his rights by another contenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess."); *see also* N.C. Gen. Stat. §§ 1-39, 1-40. But, "sole and undisturbed possession and use of the property [by one tenant in common] for twenty years, without any demand for rents, profits or possession by the cotenants" gives rise to a presumption of constructive ouster, *see Atl. Coast Properties, Inc. v. Saunders*, __ N.C. App. __, __, 777 S.E.2d 292, 295 (2015) (citing *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985)), *aff'd per curiam,* 368 N.C. 776, 783 S.E.2d 733 (2016), provided "the sole possession for 20 years must have continued without any acknowledgment on the possessor's part of title in his cotenant," *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 434, 257 S.E.2d 85, 90 (1979). The twenty years necessary to establish the presumption also satisfies the twenty years required for adverse possession by constructive ouster to ripen into title. This is because, "[u]pon completion of the requisite 20-year period, ouster relates back to the initial taking of possession." *See Collier*, 19 N.C. App. at 621, 199 S.E.2d at 695.

13 *McDaris v. "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965); *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E.2d 6 (1962); *Shelley v. Grainger*, 204 N.C. 488, 168 S.E. 736 (1933); *May v. Manufacturing Co.*, 164 N.C. 262, 80 S.E. 380 (1913); *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 47 (1912); *Kennedy v. Maness*, 138 N.C. 35, 50 S.E. 450 (1905); N.C. Gen. Stat. §§ 1-38, 1-40.

14 *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1994).

15 *Lake Drive Corp. v. Portner*, 108 N.C. App. 100, 103, 422 S.E.2d 452, 454 (1992).

16 *See Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953); *Cross v. Railroad*, 172 N.C. 120, 90 S.E. 14 (1916); *Williams v. Wallace*, 78 N.C. 354 (1878).

17 *See supra* endnote 1 (identifying the various statutory periods).

18 *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

N.C.P.I.—Civil 820.10
ADVERSE POSSESSION—COLOR OF TITLE.
GENERAL CIVIL VOLUME
FEBRUARY 2017

820.10 ADVERSE POSSESSION—COLOR OF TITLE.[1]

The (*state number*) issue reads:

"Does the plaintiff hold title to (*identify land*) by adverse possession under color of title?"[2]

Color of title means that the person claiming the land has a [deed] [will] [*state other document*] which appears to pass title but which does not do so because of some legal deficiency.[3] (*Here identify the instrument claimed as color of title and describe the deficiency.*)

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 (*identify land*) described in the [deed] [will] [*identify other instrument*] was actually possessed[5] by the plaintiff (and those through whom *he* claims)[6]. Actual possession means physical possession, control and use of the land as if it were one's own property.[7] Actual possession includes any use that the land's size, character, nature, location and circumstances would permit.[8] A mere intention to claim the land is not enough. If the plaintiff is in actual possession of some part of the land described in the [deed] [will] [*identify other instrument*], the law presumes that *he* has possession of all it.[9]

Second, that this actual possession was exclusive and hostile[10] to the defendant (and those through whom *he* claims). Possession is hostile when it is without permission and is of such a nature as to give notice that the exclusive right to the land is claimed. "Hostile" does not require a showing of heated controversy, animosity or ill will, or that the persons involved were enemies or even knew each other.[11] (If the possession begins with permission,[12] it becomes hostile if the plaintiff (or one through whom *he* claims) makes the defendant (or one through whom *he* claims) aware by

words or conduct that *he* is no longer using the land by permission and claims the exclusive right to it as owner.)[13]

(*Use where there is a claim of actual ouster by a cotenant:* When two or more people possess the land by [deed] [will] [oral transfer] [inheritance], each has certain rights, including the right to share in the possession of the land, the right to share in the rents and profits, and the right to an accounting. Possession becomes hostile when one possessor clearly, positively and unequivocally denies rights of possession to the other(s).[14] However, mere [occupancy of the land] [payment of taxes] [collection of rents and profits] [failure to account voluntarily for rents and profits] [does] [do] not necessarily prove that the rights of possession have been denied.[15] Hostile possession begins when one of the possessors explicitly refuses to permit the other to share in possession of the land.)

Third, that this actual possession was open and notorious, and was under known and visible lines and boundaries.[16] The possession must have been so open, visible and well known that the defendant (and those through whom *he* claims) knew or, under the circumstances, should have known of the possession.[17] The acts of possession must have been of such a nature that anyone claiming ownership, or anyone in the community, knew or by observing should have known that the plaintiff (and those through whom *he* claims) claimed the land as [*his*] [their] own and [was] [were] not merely (a) temporary or occasional trespasser(s).[18] Such possession must also have been under such known and visible lines and boundaries as to identify the extent of the possession claimed.

Fourth, that this actual, hostile, open and notorious possession of the (*identify land*) under color of title and known and visible boundaries must have been continuous and uninterrupted[19] for (*state statutory period*).[20] This means that the plaintiff (and those through whom *he* claims) must continue

actual, hostile, open and notorious possession of the land under known and visible boundaries for the entire (*state statutory period*) without interruption by [physical acts] [a lawsuit] [(*state other means*)].[21]

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 holds title to (*identify land*) by adverse possession under color of title, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 *See Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943); *Seals v. Seals*, 165 N.C. 409, 81 S.E. 613 (1914); *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889); *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581 (1908).

2 This instruction is to be used when the existence of an instrument which would be color of title that describes the land in dispute is admitted.

3 *State v. Taylor*, 60 N.C. App. 673, 300 S.E.2d 42 (1983).

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 *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70, later app. 279 N.C. 45, 181 S.E.2d 553 (1969); *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E.2d 168 (1954); *Alexander v. Cedar Works*, 177 N.C. 137 98 S.E. 312 (1919); *Locklear v. Savage*, 74 S.E. 47, 159 N.C. 236 (1912); *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895).

6 "Tacking" is defined in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916).

7 *See, e.g. Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

8 *See, e.g. Wiggins v. Taylor*, 31 N.C. App. 79, 228 S.E.2d 476 (1976); *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

9 If the claimant by adverse possession under color of title possesses a part of the land described in the instrument, his color of title makes him the constructive possessor of the rest of the land adequately described in the instrument that is not actually possessed by another person. Webster, *Real Estate Law in North Carolina*, § 264.

Special rules resolve the situation where the color of title claims of rival claimants overlap. Where neither claimant actually possesses any part of the lappage, the senior claimant is deemed to constructively possess the entire lappage. If only one claimant actually possesses a part of the lappage, that claimant is deemed to constructively possess the entire lappage. If both claimants actually possess a part of the lappage, the senior claimant is deemed to possess all parts of the lappage not actually possessed by the junior

claimant. *Price v. Tomrich*, 275 N.C. 385, 167 S.E.2d 766 (1969); Webster, *Real Estate Law in North Carolina*, § 274(b).

10 *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70, later app. 279 N.C. 45, 181 S.E.2d 553 (1969); *Brown v. Hurley*, 243 N.C. 138, 90 S.E.2d 324 (1955); *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

11 *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985) (holding that when a landowner acts under mistake as to the boundary of his property and that of another his claim of title is adverse).

12 There is a presumption that possession is permissive as between the following: cotenants, *see Collier v. Welker*, 19 N.C. App. 617, 620, 199 S.E.2d 691, 694 (1973); trustee and *cestui que trust*, *see Evans v. Brendle*, 173 N.C. 149, 153, 91 S.E. 723, 725 (1917); spouses, *see Hancock v. Davis*, 179 N.C. 282, 284, 102 S.E. 269, 270 (1920); tenant and landlord, *see Pitman v. Hunt*, 197 N.C. 574, 576, 150 S.E.13, 14 (1929); and agent and principal, *see Hall v. Davis*, 56 N.C. 413, 415 (1857).

13 *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694 ("One cotenant may not be deprived of his rights by another contenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess."). If the allegedly disseized cotenant (defendant) has actual knowledge of the ouster, the co-owner's (plaintiff's) title ripens in seven years. *Tharpe v. Holcomb*, 126 N.C. 365, 366-67, 35 S.E. 608 (1900). If the allegedly disseized cotenant has constructive notice only, then twenty years is required to ripen the co-owner's title. *See endnote 15, infra;* if constructive ouster is claimed, *use* N.C.P.I-Civil 820.16.

14 *Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258 (1910); *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

15 *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694; *see also* N.C. Gen. Stat. §§ 1-39, 1-40. But, "sole and undisturbed possession and use of the property [by one tenant in common] for twenty years, without any demand for rents, profits or possession by the cotenants" gives rise to a presumption of constructive ouster, *see Atl. Coast Properties, Inc. v. Saunders*, __ N.C. App. __, __, 777 S.E.2d 292, 295 (2015) (citing *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985)), *aff'd per curiam,* 368 N.C. 776, 783 S.E.2d 733 (2016), provided "the sole possession for 20 years must have continued without any acknowledgment on the possessor's part of title in his cotenant," *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 434, 257 S.E.2d 85, 90 (1979). The twenty years necessary to establish the presumption also satisfies the twenty years required for adverse possession by constructive ouster to ripen into title. This is because, "[u]pon completion of the requisite 20-year period, ouster relates back to the initial taking of possession." *See Collier*, 19 N.C. App. at 621, 199 S.E.2d at 695.

16 *McDaris v. "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965); *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E.2d 6 (1962); *Shelley v. Grainger*, 204 N.C. 488, 168 S.E. 736 (1933); *May v. Manufacturing Co.*, 164 N.C. 262, 80 S.E. 380 (1913); *Locklear v. Savage*, 159 N.C. 236 74 S.E. 47 (1912); *Kennedy v. Maness*, 138 N.C. 35, 50 S.E. 450 (1905); N.C. Gen. Stat. §§ 1-38, 1-40.

17 *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1994).

18 *Lake Drive Corp. v. Portner*, 108 N.C. App. 100, 103, 422 S.E.2d 452, 454 (1992).

19 *See Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953); *Cross v. Railroad*, 172 N.C. 120, 90 S.E. 14 (1916); *Williams v. Wallace*, 78 N.C. 354 (1878).

20 Possession for twenty years is required for acquisition of title against an individual without color of title (N.C. Gen. Stat. §§ 1-39, 1-40), and for seven years is under color of title (N.C. Gen. Stat. § 1-38). As against the State, possession for thirty years without color of title and for twenty-one years under color of title (N.C. Gen. Stat. § 1-35). For an instruction on adverse possession without color of title, *see* N.C.P.I.-Civil 820.00.

21 *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); P*rice v. Tomrich Corp*., 275 N.C. 385, 167 S.E.2d 766 (1969).

N.C.P.I.—Civil 820.16
ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE OUSTER.
GENERAL CIVIL VOLUME
FEBRUARY 2017

820.16 ADVERSE POSSESSION BY A COTENANT[1] CLAIMING CONSTRUCTIVE[2] 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]

> *NOTE WELL: 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 third 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 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.]

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 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.

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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 Atl. Coast Properties, Inc. v. Saunders*, __ N.C. App. __, __, 777 S.E.2d 292, 295 (2015) (citing *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985) for the proposition that the presumption of ouster arises if "one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants."), *aff'd per curiam*, 368 N.C. 776, 783 S.E.2d 733 (2016); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964); *Ange v. Owens*, 224 N.C. 514, 31 S.E.2d 521 (1944). The twenty years necessary to establish the presumption also satisfies the twenty years required for adverse possession by constructive ouster to ripen into title. This is because, "[u]pon completion of the requisite 20-year period, ouster relates back to the initial taking of possession." *See Collier v. Welker*, 19 N.C. App. 617, 621, 199 S.E.2d 691, 695 (1973). Note that a cotenant's adverse possession by *actual ouster* ripens into title in seven years. *Tharpe v. Holcomb*, 126 N.C. 365, 366-67, 35 S.E. 608 (1900).

7 The presumption of ouster does not arise if the party claiming adverse possession "does anything to recognize title of the cotenants during the twenty-year period." *See Atl. Coast Properties*, *supra* endnote 6; *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.

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 835.10
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TOTAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.
GENERAL CIVIL VOLUME
APRIL 2017

835.10 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TOTAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

NOTE WELL: This instruction should only be given when the entire tract is taken and the condemnor is the Department of Transportation exercising its right of eminent domain pursuant to Chapter 136 of the General Statutes or a municipality acquiring rights-of-way for the state highway system pursuant to N.C. Gen. Stat. § 136-66.3(c) and N.C. Gen. Stat. § 40A-3(b)(1).

The issue reads:

"What is the amount of just compensation the [plaintiff] [defendant] is entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff's] [defendant's] property?"

On this issue the burden of proof is on the [plaintiff] [defendant].[1] This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff's] [defendant's] property.

In this case, the [plaintiff] [defendant] has taken all of the [plaintiff's] [defendant's] property.[2] The measure of just compensation to which the [plaintiff] [defendant] is entitled is the fair market value of the property as of the time of the taking.[3]

Fair market value is the amount which would be agreed upon as a fair price by an owner 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.

You must find the fair market value as of the time of the taking – that is, as of (*state date of taking*) and not as of the present day or any other

time.[4] In arriving at the fair market value you should, in light of all the evidence, consider not only the use of the property at the time of the taking,[5] but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[6] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[7] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[8] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, the fair market value of the property at the time of the taking, then you will answer this issue by writing that amount in the blank space provided.

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1 On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2 A lessee's interest may also be the subject of a taking. *See Horton v. Redev. Comm'n of High Point*, 264 N.C. 1, 8-9, 140 S.E.2d 728, 734 (1965) (citations omitted). ("[A] leasehold is a property right . . . [and][a]ny diminution of that right by the sovereign in the exercise of its power of eminent domain entitles lessee to compensation.") However, as personal property is not part of the realty condemned, a lessee is not entitled to compensation for it. *DOT v. Adams Outdoor Adver. of Charlotte Ltd. P'ship*, __ N.C. App. __, __, 785 S.E.2d 151, 157 (2016) (citing N.C. Gen. Stat. § 136-19(a), which limits the NCDOT's authority to condemn to "land, materials, and timber for right of way, not personal property"). A highway billboard has been held to be the personal property of the lessee; therefore, a billboard is not part of the realty condemned and a lessee is entitled to no compensation for it. *Nat'l Adver. Co. v. N.C. Dep't of Transp.*, 124 N.C. App. 620, 625, 478 S.E.2d 248, 250 (1996).

3 N.C. Gen. Stat. § 136-112(2). *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C.

378, 387, 109 S.E.2d 219, 227(1959); *DeBruhl v. Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

4 The point in time when property is "valued" in a condemnation action is the date of taking. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983).

5 Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after actual taking inadmissible).

6 In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, *supra*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

7 In *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1972), and *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (where expert was allowed to base his opinion as to value on hearsay information). In *Department of Transportation v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), expert witness not permitted to state opinion regarding the value of land when opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaniger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) expert allowed to base his opinion of value on the income from a dairy farm business conducted on the property condemned. Also, the Court of Appeals stated in *Dept. of Transportation v. Fleming*, 112 N.C. App. at 584: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985); and *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 64, 330 S.E.2d 622, 626 (1985).

Note that an appraisal "may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board." N.C. Gen. Stat. § 93A-83(f). A licensed real estate broker may prepare a broker price opinion or comparative analysis estimating *the sales or lease price* of a parcel or interest in real estate, but he may not prepare an appraisal, which is an estimate of *the value or worth* of a parcel or interest in real estate. *Id.* ("A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.")

8 The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. N.C. Gen. Stat. §§ 136-113 and 40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

N.C.P.I.—Civil 835.12
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

835.12 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

NOTE WELL: This instruction should only be given when less than the entire tract is taken and the condemnor is the Department of Transportation exercising its right of eminent domain pursuant to Chapter 136 of the General Statutes or a municipality acquiring rights-of-way for the state highway system pursuant to N.C. Gen. Stat. § 136-66.3(c) and N.C. Gen. Stat. § 40A-3(b)(1).

The (*state number)* issue reads:

"What is the amount of just compensation the [plaintiff] [defendant] is entitled to recover from the [plaintiff] [defendant] for the taking of the [plaintiff's] [defendant's] property?"

On this issue the burden of proof is on the [plaintiff] [defendant].[1] This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the [plaintiff's] [defendant's] property.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff's] [defendant's] property. It has taken (*state size of property taken, e.g., five acres*) out of a (*state size of entire tract, e.g., 15 acres*) tract.

The measure of just compensation where a part of a tract is taken is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder of the tract immediately after the taking.[2]

Fair market value is the amount which would be agreed upon as a fair price by an owner 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.

N.C.P.I.—Civil 835.12
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

You must find the fair market value of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking - that is (*state date of taking*) - and not as of the present day or any other time.[3] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[4] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[5] Likewise, in arriving at the fair market value of the remainder immediately after the taking you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project.[6] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[7] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[8] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the entire tract immediately before the

date of taking and the fair market value of the remainder of the tract immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the remainder immediately after the taking is the same as the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

> *NOTE WELL: If the condemnor introduces evidence of general or special benefit for purposes of offset, this instruction should be followed by N.C.P.I. 835.12A.*

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1 On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2 N.C. Gen. Stat. § 136-112. *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227(1959); *DeBruhl v. Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

The rule for measure of damages for partial taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. *Department of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983); *see also Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Board of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977); *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

3 The point in time when property is "valued" in a condemnation action is the date of taking. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983).

4 Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after actual taking inadmissible).

5 In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be

applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

6 *Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

7 In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base his opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state opinion regarding value of land when opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) expert allowed to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

Note that an appraisal "may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board." N.C. Gen. Stat. § 93A-83(f). A licensed real estate broker may prepare a broker price opinion or comparative analysis estimating *the sales or lease price* of a parcel or interest in real estate, but he may not prepare an appraisal, which is an estimate of *the value or worth* of a parcel or interest in real estate. Id. ("A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.")

8 The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. N.C. Gen. Stat. §§ 136-113 and 40A-53 provide for the trial judge to add

interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

N.C.P.I.—Civil 835.12A
EMINENT DOMAIN—JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

835.12A EMINENT DOMAIN—JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.

NOTE WELL: This instruction should be given if the condemnor introduces evidence of general or special benefit for the purposes of offset.[1]

The (*state number)* issue reads:

"What is the amount of offset, if any, to which the [plaintiff] [defendant] is entitled because the remainder of the [plaintiff's] [defendant's] property benefited from (*state project*)?"

On this issue the burden of proof is on the [plaintiff] [defendant].[2] This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence, the amount, if any, by which the remainder of the [plaintiff's] [defendant's] property benefited from (*state project*).[3]

Benefits can be either general or special.[4] General benefits are those which arise from the fulfillment of the highway purposes which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the highway project and from the increased general prosperity resulting from such enjoyment.[5] Special benefits are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the land in question to the highway project, and may result from physical changes in the land, from proximity to the new project, or in various other ways.[6]

N.C.P.I.—Civil 835.12A
EMINENT DOMAIN—JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.
GENERAL CIVIL VOLUME
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N.C. Gen. Stat. § 136-112

You should consider the evidence presented as to general or special benefit to the remainder of the [plaintiff's] [defendant's] property. However, you should not consider remote, uncertain or speculative benefits.[7]

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, the amount of offset, if any, to which the [plaintiff] [defendant] is entitled because the remainder of the [plaintiff's] [defendant's] property benefited from (*state project*), then you will answer this issue by writing that amount in the blank space provided. However, if you fail to so find, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

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1 Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980); *see also Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

2 On this issue, the burden of proof will always be on the condemnor, whether in the capacity of plaintiff or defendant. N.C. Gen. Stat. § 136-112(1); see also *Board of Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) holding that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor.

3 N.C. Gen. Stat. § 136-112(1) requires a jury in a highway condemnation case to consider both special and general benefits to the remainder where only a part of a tract is taken. The statute has been held constitutional. *Dept. of Transp. v. Rowe*, 353 N.C. 671, 677, 549 S.E.2d 203, 208 (2001), reversing 138 N.C. App. 329, 531 S.E.2d 836 (2000). Note that the measure of damages is different under Chapter 40A.

4 Under prior law, offset consideration was available for special benefits only; however, the distinction is immaterial under G.S. 136-112(1), which permits consideration for both special and general benefits. *See Board of Transp. v. Rand*, 299 N.C. at 479, 263 S.E.2d at 569.

Both general and special benefits may arise from a proposed use. Thus, if a new

highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highway and the increased facility of communication is a general benefit, not peculiar to a particular lot.

5 *See Dept. of Trans. v. Rowe*, 353 N.C. 671, 549 S.E.2d 203 (2001); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 118 S.E.2d 918 (1961).

6 *Id.*

7 *Kirkman*, 257 N.C. at 434, 126 S.E.2d at 112 ("Whether benefits are special or general, the courts are agreed on the proposition that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical or hypothetical benefits cannot, under any circumstances, be taken into consideration.") (citations omitted).

N.C.P.I.—Civil 835.13
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT")
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-44.50 to 44.54

835.13 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT").

NOTE WELL: This instruction should only be given when less than the entire tract is taken and the taking is pursuant to the Transportation Corridor Official Map Act (Map Act) (codified as amended at N.C. Gen. Stat. §§136-44.50 to 44.54 (2015)).

Typically, Map Act cases are filed as inverse condemnation actions. For this reason, it is presumed that the plaintiff is the property owner.[1]

The (*state number)* issue reads:

"What is the amount of just compensation the plaintiff is entitled to recover from the defendant for the taking of the plaintiff's property rights?"

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 just compensation owed by the defendant for the taking of the plaintiff's property rights.[2]

In this case, the defendant has not taken all of the plaintiff's property rights. It has restricted the plaintiff's rights to improve, develop and subdivide the plaintiff's property for an indefinite time.

The measure of just compensation where some but not all property rights are taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking.[3]

Fair market value is the amount which would be agreed upon as a fair price by an owner 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.

You must find the fair market value of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking - that is (*state date of taking*[4]) - and not as of the present day or any other time.[5] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[6] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[7] Likewise, in arriving at the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project,[8] as well as the benefit the property owner will receive as a result of any reduction in the *ad valorem* tax on the property subject to the defendant's restrictions on its use.

You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[9] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[10] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the property immediately before the date of taking and the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the property subject to the defendant's restrictions on its use immediately after the taking is the same as, or greater than, the value of the property immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

NOTE WELL: If the condemnor introduces evidence of general or special benefit for purposes of offset, this instruction should be followed by N.C.P.I. 835.13A.

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1 On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2 Like a partial taking, which leaves the property owner with some, but not all, of his property, a taking pursuant to the Map Act leaves the property owner with some, but not all, of his fundamental rights of property ownership. *See Kirby v. North Carolina Dep't of Transp.*, 368 N.C. 847, 856, 786 S.E.2d 919, 925 (2016) (holding that "by recording the corridor maps . . ., which restricted plaintiffs' rights to improve, develop and sub-divide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights.")

3 N.C. Gen. Stat. § 136-112(2). *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227(1959); *DeBruhl v. Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

The rule for measure of damages for partial taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. *Department of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983); *see also Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Board of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977); *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

4 In a Map Act case, the taking occurs at the time of NCDOT's recording of the corridor map at issue. *Kirby v. North Carolina Dep't of Transp.*, 368 N.C. at 848, 786 S.E.2d at 921.

5 The point in time when property is "valued" in a condemnation action is the date of taking. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983).

6 Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after actual taking inadmissible).

7 In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

8 *Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

9 In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base his opinion as to value on hearsay information). In *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not

allowed to state opinion regarding value of land when opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) expert allowed to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

Note that an appraisal "may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board." N.C. Gen. Stat. § 93A-83(f). A licensed real estate broker may prepare a broker price opinion or comparative analysis estimating *the sales or lease price* of a parcel or interest in real estate, but he may not prepare an appraisal, which is an estimate of *the value or worth* of a parcel or interest in real estate. Id. ("A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.")

10 The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. N.C. Gen. Stat. §§ 136-113 and 40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

N.C.P.I.—Civil 835.13A
EMINENT DOMAIN—JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT")—ISSUE OF GENERAL OR SPECIAL BENEFIT.
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N.C. Gen. Stat. § 136-44.50 to 44.54

835.13A EMINENT DOMAIN - JUST COMPENSATION - PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT") – ISSUE OF GENERAL OR SPECIAL BENEFIT.

NOTE WELL: This instruction should be given if the condemnor introduces evidence of general or special benefit for the purposes of offset.[1]

Typically, Map Act cases are filed as inverse condemnation actions. For this reason, it is presumed that the plaintiff is the property owner.

The (*state number)* issue reads:

"What is the amount of offset, if any, to which the defendant is entitled because the plaintiff's property subject to the defendant's restrictions on its use benefited from (*state project*)?"

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 amount, if any, by which the plaintiff's property subject to the defendant's restrictions on its use benefited from (*state project*).[3]

Benefits can be either general or special.[4] General benefits are those which arise from the fulfillment of the highway purposes which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the highway project and from the increased general prosperity resulting from such enjoyment.[5] Special benefits are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the land in question to the highway project, and may result from physical changes in the land, from proximity to the new project, or in various other ways.[6]

You should consider the evidence presented as to general or special benefit to the plaintiff's property subject to the defendant's restrictions on its use. However, you should not consider remote, uncertain or speculative benefits.[7]

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, the amount of offset, if any, to which the defendant is entitled because the plaintiff's property subject to the defendant's restrictions on its use benefited from (*state project*), then you will answer this issue by writing that amount in the blank space provided. However, if you fail to so find, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

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1 Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980); s*ee also Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

2 On this issue, the burden of proof will always be on the condemnor. N.C. Gen. Stat. § 136-112(1); see also *Board of Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) (holding that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor).

3 N.C. Gen. Stat. § 136-112(1) requires a jury in a highway condemnation case to consider both special and general benefits to the remainder where only a part of a tract is taken. The statute has been held constitutional. *Dept. of Transp. v. Rowe*, 353 N.C. 671, 677, 549 S.E.2d 203, 208 (2001), reversing 138 N.C. App. 329, 531 S.E.2d 836 (2000). Note that the measure of damages is different under Chapter 40A.

4 Under prior law, offset consideration was available for special benefits only; however, the distinction is immaterial under G.S. 136-112(1), which permits consideration for both special and general benefits. *See Board of Transp. v. Rand*, 299 N.C. at 479, 263 S.E.2d at

569.

Both general and special benefits may arise from a proposed use. Thus, if a new highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highway and the increased facility of communication is a general benefit, not peculiar to a particular lot.

5 *See Dept. of Trans. v. Rowe*, 353 N.C. 671, 549 S.E.2d 203 (2001); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 118 S.E.2d 918 (1961).

6 *Id.*

7 *Kirkman*, 257 N.C. at 434, 126 S.E.2d at 112 ("Whether benefits are special or general, the courts are agreed on the proposition that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical or hypothetical benefits cannot, under any circumstances, be taken into consideration.") (citations omitted).

N.C.P.I.—Civil 835.14
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

835.14 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

NOTE WELL: This instruction should only be given when an easement is taken and the condemnor is the Department of Transportation exercising its right of eminent domain pursuant to Chapter 136 of the General Statutes or a municipality acquiring rights-of-way for the state highway system pursuant to N.C. Gen. Stat. § 136-66.3(c) and N.C. Gen. Stat. § 40A-3(b)(1).

The issue reads:

"What is the amount of just compensation the [plaintiff] [defendant] is entitled to recover from the [plaintiff] [defendant] for the taking of the easement on the [plaintiff's] [defendant's] property?"

On this issue the burden of proof is on the [plaintiff] [defendant].[1] This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the easement.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff's] [defendant's] property. It has taken an easement or right-of-way for (*state purpose*) across the [plaintiff's] [defendant's] property.[2] Where an easement is taken for (*state purpose*), the landowner does not give up all the title to *his* land. The landowner retains a right to continue to use *his* land in ways that do not interfere with (*state name of condemnor's*) free exercise of the easement acquired.[3]

The measure of just compensation where an easement is taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking - that is, immediately after it was made subject to the easement.[4]

Fair market value is the amount which would be agreed upon as a fair price by an owner 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.

You must find the fair market value of the property immediately before the time of the taking of the easement, and the fair market value of the property immediately after it was made subject to the easement - that is (*state date of taking*) - and not as of the present day or any other time.[5] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[6] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[7] Likewise, in arriving at the fair market value of the property immediately after it was made subject to the easement, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the property immediately after it was made subject to the easement, you should consider the property as it [was] [will be] at the conclusion of the project.[8] You should consider these factors in the same way in which they would be

considered by a willing buyer and a willing seller in arriving at a fair price.[9] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[10] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the entire tract immediately before the date of taking and the fair market value of the property subject to the easement immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the property subject to the easement immediately after the taking is the same as, the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

NOTE WELL: If the condemnor introduces evidence of general or special benefit for purposes of offset, this instruction should be followed by N.C.P.I. 835.14A.

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1 On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2 Where the easement is a temporary construction or drainage easement, the jury should be instructed, additionally, "and the landowner will have his land restored to him after the temporary easement expires."

See Colonial Pipeline v. Weaver, 310 N.C. 93, 101, 310 S.E.2d 338, 346 (1984); *City of Fayetteville v. M.M. Fowler, Inc.*, 122 N.C. App. 478, 480, 470 S.E.2d 343, 345, *review denied*, 344 N.C. 435 (1996).

3 The jury can be additionally instructed as to the respective rights of the landowner and condemnor with regard to the easement. *See North Asheboro-Central Falls Sanitary District v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960).

4 N.C. Gen. Stat. § 136-112. *See also Colonial Pipeline v. Weaver*, 310 N.C. 93, 99, 310 S.E.2d 338, 341 (1984); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1955).

The rule for measure of damages for part taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *State Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Whether there is any substantial difference in the easement condemned and a fee simple estate depends upon the nature and extent of the easement acquired. Each case must stand on its exact facts. *State Highway Comm'n v. Black*, 239 N.C. at 202, 79 S.E.2d at 782; *Carolina Power and Light Co. v. Clark*, 243 N.C. 577, 582, 91 S.E.2d 569, 572 (1956).

5 The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

6 Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after the actual taking inadmissible).

7 In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R.*

Co. v. Armfield, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

8 *Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

9 In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base his opinion as to value on hearsay information). *In Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state opinion regarding the value of land when the opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (expert allowed to base opinion of value on the income from a dairy farm business conducted on the property condemned). The Court of Appeals stated in *Department of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

Note that an appraisal "may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board." N.C. Gen. Stat. § 93A-83(f). A licensed real estate broker may prepare a broker price opinion or comparative analysis estimating *the sales or lease price* of a parcel or interest in real estate, but he may not prepare an appraisal, which is an estimate of *the value or worth* of a parcel or interest in real estate. Id. ("A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.")

10 The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. N.C. Gen. Stat. §§ 136-113 and 40A-53 provide for the trial

judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. But *see Lea Co. v. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

N.C.P.I.—Civil 835.14A
EMINENT DOMAIN—JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

835.14A EMINENT DOMAIN—JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.

NOTE WELL: This instruction should be given if the condemnor introduces evidence of general or special benefit for the purposes of offset.[1]

The (*state number)* issue reads:

"What is the amount of offset, if any, to which the [plaintiff] [defendant] is entitled because [plaintiff's] [defendant's] property subject to the easement benefited from (*state project*)?"

On this issue the burden of proof is on the [plaintiff] [defendant].[2] This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence, the amount, if any, by which [plaintiff's] [defendant's] property subject to the easement benefited from (*state project*).[3]

Benefits can be either general or special.[4] General benefits are those which arise from the fulfillment of the highway purposes which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the highway project and from the increased general prosperity resulting from such enjoyment.[5] Special benefits are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the land in question to the highway project, and may result from physical changes in the land, from proximity to the new project, or in various other ways.[6]

N.C.P.I.—Civil 835.14A
EMINENT DOMAIN—JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES—ISSUE OF GENERAL OR SPECIAL BENEFIT.
GENERAL CIVIL VOLUME
MAY 2017
N.C. Gen. Stat. § 136-112

You should consider the evidence presented as to general or special benefit to the [plaintiff's] [defendant's] property subject to the easement. However, you should not consider remote, uncertain or speculative benefits.[7]

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, the amount of offset, if any, to which the [plaintiff] [defendant] is entitled because [plaintiff's] [defendant's] property subject to the easement benefited from (*state project*), then you will answer this issue by writing that amount in the blank space provided. However, if you fail to so find, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

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1 Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980); s*ee also Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

2 On this issue, the burden of proof will always be on the condemnor, whether in the capacity of plaintiff or defendant. N.C. Gen. Stat. § 136-112(1); see also *Board of Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) holding that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor.

3 N.C. Gen. Stat. § 136-112(1) requires a jury in a highway condemnation case to consider both special and general benefits to the remainder where only a part of a tract is taken. The statute has been held constitutional. *Dept. of Transp. v. Rowe*, 353 N.C. 671, 677, 549 S.E.2d 203, 208 (2001), reversing 138 N.C. App. 329, 531 S.E.2d 836 (2000). Note that the measure of damages is different under Chapter 40A.

4 Under prior law, offset consideration was available for special benefits only; however, the distinction is immaterial under G.S. 136-112(1), which permits consideration for both special and general benefits. *See Board of Transp. v. Rand*, 299 N.C. at 479, 263 S.E.2d

at 569.

Both general and special benefits may arise from a proposed use. Thus, if a new highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highway and the increased facility of communication is a general benefit, not peculiar to a particular lot.

5 *See Dept. of Trans. v. Rowe*, 353 N.C. 671, 549 S.E.2d 203 (2001); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 118 S.E.2d 918 (1961).

6 *Id.*

7 *Kirkman*, 257 N.C. at 434, 126 S.E.2d at 112 ("Whether benefits are special or general, the courts are agreed on the proposition that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical or hypothetical benefits cannot, under any circumstances, be taken into consideration.") (citations omitted).

N.C.P.I.—Civil 840.10
EASEMENT BY PRESCRIPTION.
GENERAL CIVIL VOLUME
APRIL 2017

840.10 EASEMENT BY PRESCRIPTION.[1]

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

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

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

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

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

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

The (*state number*) issue reads:

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

(An easement is a right to make a specific use (or uses) of land owned by another person.[5] A person who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[6]

The owner of the land which is burdened by the easement continues to have all of the rights of a landowner which are not inconsistent with the easement.[7])

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:[8]

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

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

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

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

And Fourth, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous

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

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

easement), that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and *his* predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious, and that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1 This instruction is written in general language which is intended to be modified in each case to fit the exact nature of the easement claimed. While the most common claim will be for a right of ingress and egress, some cases will involve claims for easements for drainage, *e.g., Lamb v. Lamb*, 177 N.C. 150, 150, 98 S.E. 307, 308 (1919), for the maintenance of a pond, *e.g., Thomas v. Morris*, 190 N.C. 244, 244, 129 S.E. 623, 623-24 (1925) or for other particular uses, *e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 432, 20 S.E.2d 329, 330 (1942) (use of party wall). The general language of the instruction- particularly the mandate- should be tailored in each case to the nature of the easement claimed.

2 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)).

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

4 *Deans v. Mansfield*, 210 N.C. App. 222, 228-29, 707 S.E.2d 658, 664 (2011). *See also* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 14.09 (Matthew Bender, 6th Ed. 2011) (describing the requisite privity as a connection made out where an "initial adverse possessor transfers *his* possession to a successor adverse possessor by some recognized connection," such as a "deed, will, or even by a parol transfer").

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

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

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

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

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

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

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

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

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

11 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)); *see also Coggins v. Fox*, 34 N.C. App. 138, 140, 237 S.E.2d 332, 333 (1977).

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

N.C.P.I.—Civil 845.00
SUMMARY EJECTMENT—VIOLATION OF A PROVISION IN THE LEASE.
GENERAL CIVIL VOLUME
APRIL 2017

845.00 SUMMARY EJECTMENT—VIOLATION OF A PROVISION IN THE LEASE.

NOTE WELL: Use this instruction where parties have entered into a lease specifically providing that the tenant do or not do certain things, and the lease also provides for automatic termination if the tenant violates one of those provisions of the lease. If the parties have not entered into such a lease and the alleged breach is the tenant's failure to pay rent, use N.C.P.I.-Civil 845.05.

This issue reads:

"Is the landlord entitled to possession of the leased premises?"

On this issue the burden of proof is on the landlord. This means that the landlord must prove, by the greater weight of the evidence, [five] [six] things:[1]

First, that the tenant took possession of the premises under a lease with the landlord.[2] A lease is a contract for the exclusive possession of a premises. A lease may be written or verbal.[3]

Second, that the parties agreed as part of the lease that (*state provision(s) of lease that landlord contends has been violated, e.g., tenant would pay the rent by the 5th day of each month or would not keep any pets on the premises*).

Third, that the parties also agreed as part of the lease that it would terminate[4] if (*state provision(s) of lease that landlord contends has been violated*).

Fourth, that (*state manner in which landlord contends tenant has violated the provision(s) that allow for termination of the lease.*).[5]

And [Fifth] [Sixth], that the landlord has demanded the tenant surrender possession of the premises.[6]

Finally, as to this issue on which the landlord has the burden of proof, if you find by the greater weight of the evidence that the landlord is entitled to possession of the leased premises, then it would be your duty to answer this issue "Yes" in favor of the landlord.

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 tenant.

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1 *NOTE WELL: If the landlord is a public housing authority (PHA) and federal law permits but does not require automatic termination of the tenant's lease for the conduct the PHA contends occurred, the PHA bears the burden of establishing that it exercised discretion before pursuing eviction.* See E. Carolina Reg'l Housing Auth. v. Lofton*, __ N.C.__, __, 789 S.E.2d 449, 453 (2016) ("[W]hile a [PHA] may conduct no-fault evictions, it must exercise discretion in doing so.").* See also Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 133-34 (2002) ("[T]he [Public Housing Drug Elimination Act of 1988] does not require eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local [PHA] . . . ."). When required, this instruction should reflect that the PHA must prove six elements and the following language should be inserted as the fifth element:*

> "Fifth, that the landlord exercised discretion before pursuing termination of the lease."

"Discretion 'involve[s] an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment.'" E. Carolina Reg'l Housing*, __ N.C. at __, 789 S.E.2d at 454 (quoting Black's Law Dictionary (10th ed. 2014)). In the public housing context, the exercise of discretion requires consideration of a "wide range of factors," including "the welfare of the entire tenant population."* Id. *(citation omitted).*

2 Summary ejectment is also available when the tenant entered into the lease with someone under whom the landlord claims privity. *McCombs v. Wallace*, 66 N.C. 481, 482 (1872). Modify this instruction accordingly if that situation occurs.

Plaintiff and defendant must have a landlord-tenant relationship. *McLaurin v. McIntyre*, 167 N.C. 350, 352, 83 S.E. 627, 628 (1914); *Hayes v. Turner*, 98 N.C. App. 451, 454, 391 S.E.2d 513, 515 (1990); *Jones v. Swain*, 89 N.C. App. 663, 668, 367 S.E.2d 136, 138-39 (1988).

3 A lease that is for longer than three years from the date of making must be in writing.

4 *Morris v. Austraw*, 269 N.C. 218, 223, 152 S.E.2d 155, 158-59 (1967). If there is an issue as to the interpretation of a specific provision providing for termination or right of

reentry, it may be appropriate for the trial judge to give a peremptory instruction. The meaning of nonambiguous clauses in a lease would be a matter of law for the court.

5 A tender of past due rent and costs does not affect the landlord's right to eject the tenant. *Charlotte Office Tower Assocs. v. Carolina SNS Corp.*, 89 N.C. App. 697, 366 S.E.2d 905 (1988).

NOTE WELL: If the tenant has offered evidence of an attempt to pay the landlord, you may wish to instruct the jury using the following language:

> "Tenant's tender or offer to pay the rent due does not stop the landlord from pursuing this action."

However, if the landlord has accepted rent with full knowledge of the breach for which forfeiture might have been declared without asserting his right to eject the tenant, he may have waived the breach. Stanford v. Mountaineer Container Co., *88 N.C. App. 591, 594, 364 S.E.2d 153, 155 (1988);* Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922). If that is an issue in the case, give N.C.P.I.-Civil 845.15.*

6 N.C. Gen. Stat. § 42-26(a).

N.C.P.I.—Civil 860.05
WILLS—ATTESTED WRITTEN WILL—REQUIREMENTS.
GENERAL CIVIL VOLUME
APRIL 2017

860.05 WILLS—ATTESTED WRITTEN WILL—REQUIREMENTS.

The (*state number*) issue reads:

"Was the propounder's exhibit (*state number*) executed according to the requirements of law[1] for a valid attested will?"

On this issue, the burden of proof is on the propounder.[2] This means that the propounder must prove, by the greater weight of the evidence, three things:[3]

First, that the deceased [signed the propounder's exhibit (*state number*) with the intent[4] that it be *his* will] [directed another to sign *his* name to the propounder's exhibit (*state number*) in *his* presence and with the intent that it be *his* will].[5] (The deceased's signature need not appear on any particular part of the writing. It may appear at the end of the writing or be written in or on the body of the writing, so long as it is put there by [the deceased *himself*] [another person in the presence and at the direction of the deceased].)[6] The law does not require any particular form of signature, and the signing can be in any form so long as it is intended as a signature.

Second, that the deceased must have indicated to at least two witnesses by *his* words or conduct that the signature on the propounder's exhibit (*state number*) was *his* by [signing it in their presence] [by acknowledging to them that the signature on it was *his*].[7] (The deceased may have signed in front of both witnesses, or have acknowledged *his* signature to both witnesses (together or separately) or have signed in front of one witness and acknowledged to the other.)

And Third, that these same witnesses must have signed the propounder's exhibit (*state number*) in the presence and at the request of the deceased.[8] (However, the witnesses need not have signed in the presence of each other.) (The witnesses must have been situated so that the deceased, if *he* chose to, could have seen them sign the writing, whether they were in the same room with *him* or not.)

Finally, as to this issue on which the propounder has the burden of proof, if you find, by the greater weight of the evidence, that the propounder's exhibit (*state number*) was executed according to the requirements of law for a valid attested will, then it would be your duty to answer this issue "Yes" in favor of the propounder.

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 caveator.

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1 According to N.C. Gen. Stat. § 31-46 (2013):

> A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator, or if (i) its execution complies with the law of the place where it is executed at the time of execution; (ii) its execution complies with the law of the place where the testator is domiciled at the time of execution or at the time of death; or (iii) it is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or replacement statute.

2 *In re Morrow's Will*, 234 N.C. 365, 369, 67 S.E.2d 279, 282 (1951) (finding that "the propounder has the burden of proving the formal execution of the will and that he must do so by the greater weight of the evidence"). A caveator may challenge whether a will was properly executed, even where self-proving affidavits accompany the notarized and signed will. *See In re James Junior Phillips*, __ N.C. App. __, __, 795 S.E.2d 273, 283 (2016) (citing *In re Will of Priddy,* 171 N.C. App. 395, 400-01, 614 S.E.2d 454, 458-59 (2005)).

3 N.C. Gen. Stat. § 31-3.3. Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party

seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the will was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co.*, 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, an additional element would need to be added to this instruction.

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

5 *In re Will of Jarvis*, 334 N.C. 140, 142-144, 430 S.E.2d 922, 923 (1993).

6 *In re Will of Jarvis*, 334 N.C. at 143, 430 S.E.2d at 923.

7 *In re Will of Long*, 257 N.C. 598, 600, 126 S.E.2d 313, 314 (1962).

8 *In re Will of Long*, 257 N.C. at 600, 126 S.E.2d at 314 (finding error with jury instructions that required witnesses to sign in each other's presence in order to validly witness the will).

N.C.P.I.—Civil 860.15
WILLS—ISSUE OF LACK OF TESTAMENTARY CAPACITY.
GENERAL CIVIL VOLUME
APRIL 2017

860.15 WILLS—ISSUE OF LACK OF TESTAMENTARY CAPACITY.

The (*state number*) issue reads:

"Did the deceased lack sufficient mental capacity to make and execute a will at the time the propounder's exhibit (*state number*) was executed?"

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

On this issue the burden of proof is on the caveator.[1] This means the caveator must prove, by the greater weight of the evidence, that the deceased did not possess sufficient mental capacity to make and execute a will at the time the propounder's exhibit (*state number*) was executed.[2]

A person has sufficient mental capacity to make and execute a will if *he* understands that *he* is making a will, if *he* knows what property *he* has, if *he* understands the effect the act of making a will would have on *his* property, if *he* understands who would naturally be expected to receive *his* property at *his* death, and if *he* knows to whom *he* intends to give *his* property. A person's inability to understand any one of these things at the time the writing is executed means that *he* lacks sufficient mental capacity to make a will.[3]

However, the lack of sufficient mental capacity may not be presumed from the mere fact a person

[is old]

[is feeble]

[is eccentric][4]

[is intellectually weak][5]

[is physically infirm][6]

[makes what others might consider an unwise, unreasonable or unjust decision concerning *his* property].[7]

In considering whether the deceased had sufficient mental capacity to make a will at the time the propounder's exhibit (*state number*) was executed, you may consider all facts and circumstances in evidence as to whether *he* understood *he* was making a will, whether *he* knew what property *he* had, whether *he* understood the effect the act of making a will would have on *his* property, whether *he* understood who would naturally be expected to receive *his* property at *his* death, and whether *he* knew to whom *he* intended to give *his* property.

(NOTE WELL: Use only in cases where there is some evidence tending to show that the deceased attempted to commit suicide or committed suicide:

> Lack of mental capacity to make a will may not be presumed from the mere fact that the deceased [attempted suicide] [committed suicide]. However, you may consider the deceased's [attempted suicide] [suicide] together with all of the other evidence in the case in determining whether the deceased had sufficient mental capacity to make a will at the time the propounder's exhibit (*state number*) was executed.[8]*)*

Finally, as to this issue on which the caveator has the burden of proof, if you find by the greater weight of the evidence that the deceased lacked sufficient mental capacity to make and execute a will at the time the

propounder's exhibit (*state number*) was executed, then it would be your duty to answer this issue "Yes" in favor of the caveator.

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 propounder.

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1 *In re Will of Simmons*, 268 N.C. 278, 279, 150 S.E.2d 439, 440 (1966); *see also Wing v. Wachovia Bank & Trust*, 301 N.C. 456, 463, 272 S.E.2d 90, 95 (1980); *In re Will of Womack*, 53 N.C. App. 221, 223, 280 S.E.2d 494, 496 (1981). Persons are presumed to be competent unless there has been an adjudication of incompetency. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943). Thus, the burden of proving lack of mental capacity rests with the person taking that position. *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E.2d 614, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982). Where a person has been adjudicated incompetent, he is presumed to lack mental capacity. *Medical College of Va. Med. Div. v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952). This presumption may be rebutted by persons who were not privy to the incompetency proceedings. *Id*. Under such circumstances, the burden of proof falls to the proponent of the will and should be added as an additional element to N.C.P.I.-Civil 860.05 (Wills-Attested Written Will-Requirements) (*See* note 2) and N.C.P.I.-Civil 860.10 (Wills-Holographic Wills-Requirements) (*See* note 1).

2 "To establish lack of testamentary capacity, a caveator need only show that any one of the essential elements of testamentary capacity is lacking." *In re James Junior Phillips*, __ N.C. App. __, __, 795 S.E.2d 273, 282 (2016) (citing *In re Will of Kemp*, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951)). Lack of testamentary capacity is not established where there is no specific evidence "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *In re James Junior Phillips*, __ N.C. App. at __, 795 S.E.2d at 282 (quotations omitted). Witness opinions based solely on general testimony regarding the decedent's deteriorating physical health and mental confusion are insufficient to show testamentary capacity is lacking; however, specific evidence of deteriorating physical health or mental confusion may be sufficient to negate testamentary capacity and support a caveat. *See id.* (holding that genuine issue of material fact exists as to whether testator lacked capacity when caveator introduced death certificate documenting that testator suffered from dementia and affidavit testimony that testator was heavily medicated during time will was executed).

3 *In re Shute's Will*, 251 N.C. 697, 699, 111 S.E.2d 851, 853 (1960); *In re Will of Rose*, 28 N.C. App. 38, 220 S.E.2d 425 (1975).

4 *Dyer v. State*, 102 N.C. App. 480, 482, 402 S.E.2d 464, 466 (1991). The Supreme Court reversed, 331 N.C. 374 (1992), finding that the Court of Appeals improperly weighed the evidence and came to a different conclusion from the jury (*i.e.*, appeals court found that testator was eccentric but that alone did not prove incapacity). Although the Supreme Court does not reject the notion that someone who is eccentric might be mentally capable of

forming proper intent to execute, it is strongly suggested by the Supreme Court that in this case the testator's eccentricity was so extreme that incapacity was the proper verdict.

5 *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993); *In re Craven's Will*, 169 N.C. 561, 568, 86 S.E. 587, 591 (1915); *see also Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 616 (1982).

6 *In re Will of Jarvis*, 334 N.C. at 144, 430 S.E.2d at 924 (noting that validity of the will is not affected by testator's infirmity alone).

7 *In re Frank's Will*, 231 N.C. 252, 259, 56 S.E.2d 668, 674 (1949); *see also In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925.

8 *Matthews v. James*, 88 N.C. App. 32, 41, 362 S.E.2d 594, 600 (1987) (holding that mental incapacity may not be presumed only from suicide or attempted suicide, but that suicide or attempted suicide may be considered with all other proper evidence).

N.C.P.I.—Civil 860.20
WILLS—ISSUE OF UNDUE INFLUENCE.
GENERAL CIVIL VOLUME
MAY 2017

860.20 WILLS—ISSUE OF UNDUE INFLUENCE.

The (*state number*) issue reads:

"Was the execution of propounder's exhibit (*state number*) procured by undue influence?"[1]

You are to answer this issue only if you have answered issue(s) (*state number*) in favor of the propounder.

On this issue the burden of proof is on the caveator.[2] This means that the caveator must prove, by the greater weight of the evidence, that the execution of propounder's exhibit (*state number*) was procured by undue influence.

Undue influence occurs when a person's professed act is not *his* own, but is in fact the act of the person exerting the influence.[3] Influence is undue when it causes a person to make a will which *he* would not have otherwise made.[4] The undue influence must act upon the free will of the person at the time *he* executes *his* will.[5]

The existence of undue influence is for you to determine from all the facts and circumstances in evidence.[6] You may consider, together with all the other relevant facts and circumstances, the deceased's:[7]

[age]

[physical condition]

[mental condition]

[[dependence upon] [association with] [relationship with] [custody by] (*state name of person exerting influence*)]

[opportunity to [associate] [have a relationship] with persons other than (*state name of person exerting influence*)]

[relationship (by blood) to the beneficiary(ies) of the will]

[failure to include in the will those persons who would naturally be expected to receive the property of the deceased]

You may also consider the degree to which:

[the writing is different from and purports to revoke a prior will]

[the deceased was influenced to execute the writing by (*state name of person exerting influence*)]

[(*state any other relevant factors supported by the evidence*)]

(Undue influence does not necessarily involve moral turpitude or even a bad or improper motive.)[8]

(Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to execute a will in *his* favor.)[9]

(Influence gained by kindness and affection, without more, is not undue, even if it induces a person to make an unequal or unjust disposition of *his* property.)[10]

Finally, as to this issue on which the caveator has the burden of proof, if you find by the greater weight of the evidence that the execution of propounder's exhibit (*state number*) was procured by undue influence, then it would be your duty to answer this issue "Yes" in favor of the caveator.

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 propounder.

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1 When the will is procured by undue influence, the entire will is invalid. If undue influence has been exerted to procure only a part of the will, the part of the will not caused by undue influence may be held valid. However, when only a portion of the will is alleged to have been procured by undue influence, the court may submit an issue as to which legacy or devise was procured by undue influence and which portion of the document constitutes the will of the deceased. *See McDonald v. McLendon*, 173 N.C. 172, 177, 91 S.E. 1017, 1019 (1917); *Sumner v. Staton*, 151 N.C. 198, 204, 65 S.E. 902, 906 (1909).

2 *In re Simmons' Will*, 268 N.C. 278, 278, 150 S.E.2d 439, 440 (1966); *In the Matter of Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713 (1993). When the caveator contends that a fiduciary relationship existed between the propounder and the deceased, it may be necessary to submit an issue as to the existence of such fiduciary relationship. A fiduciary relationship exists where "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *see also McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616 (1943). For further definition and explanation of the fiduciary relationship, as well as a list of fiduciary relationships that exist as a matter of law, *see* N.C.P.I. 900.10.

In those cases in which a fiduciary relationship is found to exist, the burden of proof shifts to the propounder to prove "that the will was the free and voluntary act of the testator". *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617(quoting *In re Will of Everett*, 153 N.C. 83, 68 S.E.924, 925 (1910)); *see also In re Estate of Ferguson*, 135 N.C. App. 102, 106 518 S.E.2d 796, 799 (1999) (citing *In re Will of Atkinson*, 225 N.C. 526, 530, 35 S.E.2d 638, 640 (1945) for the proposition that "When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption."). In such cases the burden of proof paragraph and the mandate will need to be altered so as to reflect the shift in the burden of proof.

3 *In re Thompson's Will*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958). *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998) ("There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.")

4 *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993) (indicating that caveators failed to identify who allegedly asserted undue influence or how the will did not conform to testator's intent); *In re Craven's Will*, 169 N.C. 561, 568, 86 S.E. 587, 591, 594 (1915); *see also In re James Junior Phillips*, ___ N.C. App. ___, ___, 795 S.E.2d 273, 283 (2016) (quoting *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974)) ("Undue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.").

5 *Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983); *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

6 *NOTE WELL: Whether a specific factor exists or whether any number of factors together is sufficient to demonstrate undue influence over a decedent's execution of a will are material questions of fact. See In re James Junior Phillips*, ___ N.C. App. at ___, 795 S.E.2d at 282 (quoting *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360, *review denied*, 357 N.C. 506, 588 S.E.2d 474 (2003)).

7 *In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000) (citation omitted) ("It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty."); *see In re James Junior Phillips*, ___ N.C. App. at ___, 795 S.E.2d at 282 (citing *In re Will of McNeil*, 230 N.C. App. 241, 245-46, 749 S.E.2d 499, 503 (2013) for the principle that undue influence is generally proved by a number of factors taken collectively, even where each standing alone would be of little weight); *see also In re Will of Andrews*, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980); *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910); *In re Will of Priddy*, 171 N.C. App. 395, 399, 614 S.E.2d 454, 458 (2005).

8 *In re Will of Turnage*, 208 N.C. at 132, 179 S.E. at 333.

9 *In re Frank's Will*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949).

10 *Id*.

GENERAL CIVIL VOLUME

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.—Civil Instruction numbers)