

June 2018 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 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: lists.unc.edu/read/all_forums/subscribe?name=ncpji.

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

The following instructions are included in this supplement:

- 102.11 Negligence Issue – Definition of Common Law Negligence.
- 102.13 Negligence of Minor Between Seven and Fourteen Years of Age.
- 102.84 Negligence – Infliction of Severe Emotional Distress.
- 104.10 Contributory Negligence Issue – Burden of Proof – Definition.
- 104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age.
- 501.01 Contracts – Issue of Formation – Common Law.
- 501.01A Contracts – Issue of Formation – UCC.
- 501.05 Contracts – Issue of Formation – Defense of Lack of Mental Capacity.
- 501.55 Contracts – Issue of Formation – Defense of Constructive Fraud.
- 502.05 Contracts – Issue of Breach by Repudiation.
- 502.40 Contracts – Issue of Breach – Defense of Illegality or Unenforceability.
- 640.01 Employment Relationship – Status of Person as Employee.
- 640.27 Employment Discrimination – Pretext Case.
- 640.29A Employment Relationship – Adverse Employment Action in Violation of the North Carolina Whistleblower Act – Introduction.
- 800.00 Fraud.
- 800.05 Constructive Fraud.
- 800.06 Constructive Fraud – Rebuttal by Proof of Openness, Fairness and Honesty.
- 800.10 Negligent Misrepresentation.
- 805.55 Duty of Owner to Lawful Visitor.
- 805.56 Duty of Owner to Lawful Visitor – Defense of Contributory Negligence.
- 805.72 Duty of Landlord to Residential Tenant – Residential Premises and Common Areas – Defense of Contributory Negligence.

- 805.74 Duty of Landlord to Non-Residential Tenant – Controlled or Common Areas – Defense of Contributory Negligence.
- 810.24 Personal Injury Damages – Defense of Mitigation.
- 814.50 Fraudulent Transfer – Present and Future Creditors – Intent to Delay, Hinder or Defraud.
- 814.70 Fraudulent Transfer – Present Creditors – Insolvent Debtor and Lack of Reasonably Equivalent Value.
- 814.75 Fraudulent Transfer – Present Creditors – Transfer to Insider While Insolvent.
- 820.10 Adverse Possession – Color of Title.
- 820.40 Proof of Title – Real Property Marketable Title Act.
- 860.10 Wills – Holographic – Requirements.
- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship.

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

Volume I
2018 Edition

ISBN 978-1-56011-931-9

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

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

PART I. GENERAL

Chapter 1. Preliminary Instructions.

- 100.10 Opening Statement. (12/2004)
- 100.15 Cameras and Microphones in Courtroom. (5/2004)
- 100.20 Recesses. (6/2010)
- 100.21 Recesses. (6/2010)
- 100.40 Deposition Testimony. (5/2004)
- 100.44 Interrogatories. (12/2004)
- 100.70 Taking of Notes by Jurors. (5/2004)
- 101.00 Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
- 101.05 Function of the Jury. (3/1994)
- 101.10 Burden of Proof and Greater Weight of the Evidence. (3/1994)
- 101.11 Clear, Strong, and Convincing Evidence. (11/2004)
- 101.14 Judicial Notice. (10/1983)
- 101.15 Credibility of Witness. (3/1994)
- 101.20 Weight of the Evidence. (3/1994)
- 101.25 Testimony of Expert Witness. (2/1994)
- 101.30 Testimony of Interested Witness. (3/1994)
- 101.32 Evidence—Limitation as to Parties. (10/1983)
- 101.33 Evidence—Limitation as to Purpose. (3/2017)
- 101.35 Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
- 101.36 Impeachment of Witness or Party by Proof of Crime. (4/1986)
- 101.37 Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
- 101.38 Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
- 101.39 Evidence—Spoliation by a Party. (6/2010)
- 101.40 Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
- 101.41 Stipulations. (1/1988)
- 101.42 Requests for Admissions. (1/1988)
- 101.43 Deposition Evidence. (4/1988)
- 101.45 Circumstantial Evidence. (10/1985)
- 101.46 Definition of [Intent] [Intentionally]. (12/2016)
- 101.50 Duty to Recall Evidence. (3/1994)
- 101.60 Issues. (3/1994)
- 101.62 Presumptions. (4/1984)

101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

102.10 Negligence Issue—Burden of Proof. (5/1994)
102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
102.11 Negligence Issue—Definition of Common Law Negligence. (6/2018)
102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
102.20 Proximate Cause—Peculiar Susceptibility. (3/2017)
102.26 Proximate Cause—Act of God. (5/1994)
102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
102.35 Contentions of Negligence. (3/1994)
102.50 Final Mandate—Negligence Issue. (3/1994)
102.60 Concurring Negligence. (3/2005)
102.65 Insulating/Intervening Negligence. (6/2016)
102.84 Negligence—Infliction of Severe Emotional Distress. (6/2018)
102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

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

Chapter 3a. Contributory Negligence Instructions.

104.10 Contributory Negligence Issue—Burden of Proof—Definition. (6/2018)
104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
104.35 Contentions of Contributory Negligence. (3/1994)
104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

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

Chapter 5. Summary Instructions.

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

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

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

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation—Common Law. (6/2018)
- 501.01A Contracts—Issue of Formation—UCC. (6/2018)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (6/2018)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (6/2018)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)
- 502.05 Contracts—Issue of Breach By Repudiation. (6/2018)
- 502.10 Contracts—Issue of Breach By Prevention. (5/2003)

502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (6/2018)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)

Chapter 4. Issue of Common Law Remedy.

503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)
503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)

- 503.45 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
- 503.48 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
- 503.51 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
- 503.54 Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
- 503.70 Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
- 503.73 Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
- 503.75 Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
- 503.76 Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
- 503.79 Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
- 503.90 Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
- 503.91 Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
- 503.94 Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
- 503.97 Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 5. Issue of UCC Remedy.

- 504.00 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
- 504.03 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
- 504.06 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
- 504.09 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
- 504.12 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
- 504.15 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
- 504.18 Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
- 504.21 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
- 504.24 Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
- 504.27 Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
- 504.30 Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
- 504.33 Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)
- 504.36 Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
- 504.39 Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
- 504.42 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)

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

Chapter 6. Minor’s Claims Where Contract Disavowed.

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

Chapter 7. Agency.

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

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

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

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2018)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (3/2017)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (6/2018)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (6/2018)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)
- 640.29C Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Pretext Case*. (6/2010)
- 640.29D Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Plaintiff). (6/2010)
- 640.29E Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Defendant). (5/2009)

640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (2/2017)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (2/2017)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

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

Chapter 12. Actions for Services Rendered a Decedent.

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

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
736.01	Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

VOLUME II

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

741.00	Warranties in Sales of Goods. (5/1999)
741.05	Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
741.10	Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
741.15	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
741.16	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
741.17	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
741.18	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
741.20	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
741.25	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.26	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.27	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.28	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.30	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.31	Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.32	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.33	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.34	Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.35	Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
741.40	Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
741.45	Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
741.50	Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
741.60	Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
741.65	Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)
741.66	Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
741.67	Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
741.70	Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)

- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

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

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

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)
- 745.07 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessor. (6/2015)

- 745.13 New Motor Vehicles Warranties Act (“Lemon Law”)—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder’s Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2018)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2018)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (6/2018)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2018)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)
- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (12/2016)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)
- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)
- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)
- Chapter 3A. Infliction of Emotional Distress.**
- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)
- Chapter 3B. Loss of Consortium.**

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

Chapter 4. Invasion of Privacy.

800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)

800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)

800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use.
(5/2001)

800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—
Damages. (5/2001)

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

801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)

801.01 Malicious Prosecution—Civil Proceeding. (1/1995)

801.05 Malicious Prosecution—Damages. (10/1994)

801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice.
(5/2001)

802.00 False Imprisonment. (6/2014)

802.01 False Imprisonment—Merchant’s Defenses. (5/2004)

803.00 Abuse of Process. (6/2012)

804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)

804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of
Battery (3/2016)

804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of
Lawfulness of Arrest (3/2016)

804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of
Reasonableness of Force Used (3/2016)

804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages
(3/2016)

804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Verdict Sheet
(3/2016)

804.06 Excessive Force in Making Arrest—Section 1983—Issue of Color of State Law
(3/2016)

804.07 Excessive Force in Making Arrest—Section 1983—Issue of Use of Force (3/2016)

804.08 Excessive Force in Making Arrest—Section 1983—Issue of Color of Lawfulness of
Arrest (3/2016)

804.09 Excessive Force in Making Arrest—Section 1983—Issue of Color of Reasonableness
of Force Used (3/2016)

804.10 Excessive Force in Making Arrest—Section 1983—Damages (3/2016)

804.11 Excessive Force in Making Arrest—Section 1983—Punitive Damages (3/2016)

804.12 Excessive Force in Making Arrest—Section 1983—Verdict Sheet (3/2016)

804.50 Section 1983—Unreasonable Search of Home. (6/2016)

Chapter 6. Nuisances and Trespass.

805.00 Trespass to Real Property. (6/2015)

805.05 Trespass to Real Property—Damages. (5/2001)

805.10 Trespass to Personal Property. (5/2001)

805.15 Trespass to Personal Property—Damages. (5/2001)

805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)

805.55 Duty of Owner to Lawful Visitor. (6/2018)

805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (6/2018)

805.60	Duty of Owner to Licensee. (Delete Sheet). (5/1999)
805.61	Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
805.64	Duty Of Owner to Trespasser—Intentional Harms (6/2013)
805.64A	Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
805.64B	Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
805.64C	Duty of Owner to Trespasser: Position of Peril (6/2013)
805.65	Duty of Owner to Trespasser. (6/2013)
805.65A	Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
805.66	Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
805.67	Duty of Municipality or County to Users of Public Ways. (5/1990)
805.68	Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
805.69	Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
805.70	Duty of Adjoining Landowners—Negligence. (5/1990)
805.71	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
805.72	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (6/2018)
805.73	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
805.74	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (6/2018)
805.80	Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

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

Chapter 9. Defamation.

806.40	Defamation—Preface. (12/2016)
806.50	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (6/2013)
806.51	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.53	Defamation—Libel Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.60	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.61	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Matter of Public Concern. (6/2011)
806.62	Defamation—Libel Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.65	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.66	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.67	Defamation—Slander Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.70	Defamation—Slander Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.71	Defamation—Slander Actionable <i>Per Quod</i> —Matter of Public Concern. (5/2008)

806.72	Defamation—Slander Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.79	Defamation—Libel Actionable <i>Per Se</i> , Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
806.81	Defamation Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
806.82	Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
806.83	Defamation Actionable <i>Per Se</i> —Public Figure or Official—Presumed Damages. (5/2008)
806.84	Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
806.85	Defamation—Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

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

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

809.00	Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
809.00A	Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
809.03	Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
809.03A	Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
809.05	Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.05A	Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.06	Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)

809.65A	Medical Malpractice—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider’s Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider’s Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2018)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)

- 810.41 Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (5/2017)
- 810.42 Wrongful Death Damages—In General. (6/2012)
- 810.44 Wrongful Death Damages—Medical Expenses. (6/2013)
- 810.44A Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
- 810.44B Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
- 810.44C Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
- 810.44D Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
- 810.46 Wrongful Death Damages—Pain and Suffering. (1/2000)
- 810.48 Wrongful Death Damages—Funeral Expenses. (6/2013)
- 810.48A Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
- 810.48B Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
- 810.48C Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
- 810.48D Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
- 810.49 Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
- 810.50 Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
- 810.54 Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
- 810.56 Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
- 810.60 Property Damages—Issue and Burden of Proof. (4/2017)
- 810.62 Property Damages—Diminution in Market Value. (2/2000)
- 810.64 Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
- 810.66 Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
- 810.68 Property Damages—Final Mandate. (2/2000)
- 810.90 Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)
- 810.91 Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
- 810.92 Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
- 810.93 Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
- 810.94 Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
- 810.96 Punitive Damages—Liability of Defendant. (3/2016)
- 810.98 Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

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

Chapter 14. Animals.

- 812.00(Preface) Animals—Liability of Owners and Keepers. (5/1996)
- 812.00 Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)

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

Chapter 15. Trade Regulation.

813.00	Trade Regulation—Preface. (6/2013)
813.05	Model Unfair or Deceptive Trade Practice Charge. (6/2014)
813.20	Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
813.21	Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
813.22	Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
813.23	Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
813.24	Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
813.25	Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
813.26	Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
813.27	Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
813.28	Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
813.29	Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
813.30	Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
813.31	Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
813.33	Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
813.34	Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
813.35	Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)
813.36	Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
813.37	Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
813.38	Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
813.39	Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
813.40	Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
813.41	Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
813.60	Trade Regulation—Commerce—Introduction. (6/2015)
813.62	Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
813.63	Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
813.70	Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
813.80	Trade Regulation—Damages—Issue of Damages. (5/2006)

- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

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

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2018)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (2/2017)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2018)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2018)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (2/2017)
- 814.81 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given—Amount of New Value (5/2017)
- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Good Faith Effort to Rehabilitate. (6/2015)

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

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

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)

815.08	Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
815.10	Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
815.20	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.22	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of Pregnancy or Living Children. (1/1999)
815.23	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.24	Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
815.26	Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge. (1/1999)
815.27	Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
815.28	Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity. (1/1999)
815.29	Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
815.30	Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth of Issue. (1/1999)
815.32	Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity and Understanding—Defense of Ratification. (1/1999)
815.40	Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
815.42	Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental Impairment. (1/1999)
815.44	Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
815.46	Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct of Sane Spouse. (1/1999)
815.50	Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
815.52	Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
815.54	Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
815.56	Divorce—From Bed and Board—Issue of Indignities. (8/2004)
815.58	Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs. (1/1999)
815.60	Divorce—From Bed and Board—Issue of Adultery. (1/1999)
815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (2/2017)
820.10	Adverse Possession—Color of Title. (6/2018)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (2/2017)

Chapter 2. Proof of Title.

- 820.40 Proof of Title—Marketable Title Act. (6/2018)
- 820.50 Proof of Title—Connected Chain of Title from the State. (5/2001)
- 820.60 Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
- 820.61 Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

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

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

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

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

- 835.00 Eminent Domain—Series Preface. (4/1999)
- 835.05 Eminent Domain Memorandum. (Delete Sheet). (4/1999)
- 835.05i Eminent Domain—Introductory Instruction. (8/2015)
- 835.10 Eminent Domain—Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (4/2017)
- 835.12 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 835.12A Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes—Issue of General or Special Benefit. (5/2017)
- 835.13 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes (“Map Act”). (5/2017)
- 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. (5/2017)
- 835.14 Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 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. (5/2017)
- 835.15 Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
- 835.20 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)

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

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (4/2017)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (4/2017)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

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

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)
- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

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

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (4/2017)
- 860.10 Wills—Holographic Wills—Requirements. (6/2018)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (4/2017)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2017)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

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

PART VIII. INSURANCE

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

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

Chapter 2. Accident, Accidental Means, and Suicide.

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

Chapter 3. Disability.

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

Chapter 4. Material Misrepresentations.

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

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2018)

Chapter 6. Fire Insurance.

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

Chapter 7. Damages.

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

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2017)

102.11 NEGLIGENCE ISSUE—DEFINITION OF COMMON LAW NEGLIGENCE.

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [damage]¹ A person's failure to use ordinary care is negligence.²

¹ *Pinyan v. Settle*, 263 N.C. 578, 582, 139 S.E.2d 863, 866 (1965); *Barnes v. Caulbourne*, 240 N.C. 721, 725, 83 S.E.2d 898, 901 (1954).

² "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Williamson v. Clay*, 243 N.C. 337, 343, 90 S.E.2d 727, 731 (1956), quoting *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). But see *Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 120, 457 S.E.2d 875, 879 (1995) (citing 57A Am. Jur.2d *Negligence* § 954 (1989) (now 57B Am. Jur.2d *Negligence* § 863 (2018) for the general principle that "one who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence.") As contributory negligence is merely primary negligence committed by the plaintiff, see *Meinck v. City of Gastonia*, ___ N.C. App. ___, ___, 798 S.E.2d 417, 423 (2017), this general principle as to contributory negligence applies to primary negligence as well.

However, a different rule applies where the person whose conduct is in question has diminished mental faculties not amounting to insanity or total incompetence. *Stacy*, 119 N.C. App. at 120, 457 S.E.2d at 879. Rather than being held to the objective reasonable person standard, such a person is "held only to the exercise of such care as ... a person of like mental capacity under similar circumstances." *Id.* The burden is on the person claiming the lack of mental capacity to show that a "specific 'diminished mental capacity'" rendered him unable to perceive and avoid a particular harm. *Proffitt v. Gosnell*, ___ N.C. App. ___, ___, 809 S.E.2d 200, 208 (2017).

102.13 NEGLIGENCE OF MINOR BETWEEN SEVEN AND 14 YEARS OF AGE.¹

The (*state number*) issue reads:

Was the plaintiff [injured] [damaged] by the negligence of the minor defendant?

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

First, that the minor defendant was capable of negligence. The law presumes that a child who is between seven and fourteen years of age is not capable of negligence. However, this presumption may be overcome by evidence that a child of the minor defendant's age ordinarily would have the discretion, judgment and mental capacity to discern and appreciate circumstances of danger.² It is your duty to consider all of the evidence in the case and determine whether the plaintiff has proven, by the greater weight of the evidence, that a child of the minor defendant's age ordinarily would have the discretion, judgment and mental capacity to use ordinary care to protect *himself* and others from [injury] [damage].³

Second, that the minor defendant was negligent. "Negligence" refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect *himself* and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect *himself* and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

Even if a child who is between seven and fourteen years of age is capable of negligence, the child is not required to exercise the same degree of care for the safety of others that is required of an adult.⁴ The law imposes a duty upon a child to exercise only that degree of care for the safety of others that a

reasonably careful child of the same age, discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances.⁵ A child's failure to exercise the required degree of care would be negligence.

And Third, that the minor defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and one which a reasonable and prudent child of the same age, discretion, knowledge, experience and capacity could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

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

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

Read all contentions of negligence supported by the evidence.

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

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

Give law as to each contention of negligence included above.

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 minor defendant was capable of negligence, was negligent (in any one or more of the ways contended by the plaintiff) and that such negligence was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1 Contributory negligence is merely primary negligence committed by the plaintiff, see *Meinck v. City of Gastonia*, ___ N.C. App. ___, ___, 798 S.E.2d 417, 423 (2017); therefore, the general principles and presumptions discussed in this instruction regarding contributory negligence apply to primary negligence as well. A child under seven is conclusively presumed to be incapable of contributory negligence. *Walston v. Greene*, 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958). A child who has reached his fourteenth birthday is "presumed to have sufficient capacity to be sensible of danger and to have power to avoid it," *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 767 (1967), "and he is chargeable with contributory negligence as a matter of law if he fails to do so," *Burgess v. Mattox*, 260 N.C. 305, 307, 132 S.E.2d 577, 578 (1963).

There is a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Hoots v. Beeson*, 272 N.C. 644, 650, 159 S.E.2d 16, 21 (1968); see also *Caudle v. Seaboard Air Line R.R.*, 202 N.C. 404, 407, 163 S.E. 122, 124 (1932) (citations omitted) ("Prima facie presumption exists that infant between ages of seven and fourteen is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.").

2 See *Walston*, 247 N.C. at 696, 102 S.E.2d at 126. Failure to instruct on the rebuttable presumption is prejudicial error. *Hoots v. Beeson*, 272 N.C. at 650, 159 S.E.2d at 21.

3 *Blue v. Canela*, 139 N.C. App. 191, 193-194, 532 S.E.2d 830, 832 (2000).

4 *Morris v. Sprott*, 207 N.C. 358, 359, 177 S.E. 13, 14 (1934).

5 *Boykin v. Atlantic Coast Line R.R. Co.*, 211 N.C. 113, 115, 189 S.E. 177, 178 (1937).

102.84 NEGLIGENCE – INFLICTION OF SEVERE EMOTIONAL DISTRESS.¹

The (*state number*) issue reads:

“Did the plaintiff suffer severe emotional distress as a proximate result of the negligence of the defendant?”²

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

First, that the defendant was negligent.³ “Negligence” refers to a person's failure to follow a duty of conduct imposed by law. [Every person is under a duty to use ordinary care to protect *himself* and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect *himself* and others from [injury] [damage]. A person's failure to use ordinary care is negligence.] [Every person is (also) under a duty to follow standards of conduct enacted as laws for the safety of the public. A standard of conduct established by a safety statute must be followed.⁴ A person's failure to do so is negligence in and of itself.⁵]

Second, that the plaintiff suffered severe emotional distress. “Severe emotional distress” means [neurosis] [psychosis] [chronic depression] [phobia] [any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so].⁶ (Mere temporary fright or anxiety, disappointment or regret is not severe emotional distress.)⁷

Third, that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress.

Proximate cause is a cause which in a natural and continuous sequence produces a person's severe emotional distress, and one which a reasonable

and prudent person could have foreseen would probably produce such severe emotional distress.

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

*(Use where a plaintiff's severe emotional distress arises due to concern for another person:*⁸ The plaintiff may recover for severe emotional distress due to concern for another person if it was a reasonably foreseeable result of, and was in fact caused by, the defendant's negligence.⁹ You are to make this determination from all the evidence, including how close the plaintiff was to the negligent act when it occurred, the nature of the relationship between the plaintiff and the person for whose welfare the plaintiff was concerned, whether the plaintiff personally observed the negligent act, and any other factor supported by the evidence.)¹⁰

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

Read all contentions of negligence supported by the evidence.

The plaintiff further contends, and the defendant denies, that the plaintiff suffered severe emotional distress in one or more of the following respects:

Read all contentions of severe emotional distress supported by the evidence.

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

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

Give law as to each contention of negligence included above.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent, that the plaintiff suffered severe emotional distress and that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress, 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 For intentional or reckless infliction of emotional distress, see N.C.P.I.-Civil 800.60.

2 See *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 435 S.E.2d 320 (1993); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993); *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

3 As of the date of this instruction, no North Carolina appellate court has addressed directly whether an intentional tort directed at some third person may constitute a negligent act as to the plaintiff.

4 *Aldridge v. Hasty*, 240 N.C. 353, 360, 82 S.E.2d 331, 338 (1954). "A public safety statute is one impos[ing] upon [the defendant] a specific duty for the protection of others." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 382, 770 S.E.2d 702, 715 (2015) (citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (internal citations omitted)). Recommendations, guidance and options that do not impose a specific duty are insufficient to establish negligence per se. *Id.* at 717

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

6 *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. No physical impact, physical injury or physical manifestation of emotional distress need be proven. *Id.*

7 *Id.*

8 "An action for the negligent infliction of emotional distress may arise from a concern for one's own welfare, or concern for another's." *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, disc. review denied, 353 N.C. 676, 545 S.E.2d 228 (2000). Although the relationship between the plaintiff and the person for whom the

plaintiff is concerned is but one of the Johnson v. Ruark foreseeability factors, to date, North Carolina jurisprudence regarding “bystander claims” has recognized the cause of action only in cases involving close familial relationships. See Riddle v. Buncombe County. Bd. of Educ., ___ N.C. App. ___, ___, 805 S.E.2d 757, 761-62 (2017) (dismissal of bystander claim based upon friendship appropriate in the absence of “unusually close relationship” or demonstrable connection between friendship and “peculiar susceptibility”) and the cases cited therein.

9 Johnson, 327 N.C. at 304-05, 395 S.E.2d at 97-98.

10 Id. at 305, 395 S.E.2d at 98.

104.10 CONTRIBUTORY NEGLIGENCE ISSUE – BURDEN OF PROOF –
DEFINITION.

This (*state number*) issue reads:

“Did the plaintiff, by *his* own negligence, contribute to *his* [injury]
[damage]?”¹

You will answer this issue only if you have answered the (*state number*)
issue as to the defendant's negligence “Yes” in favor of the plaintiff.²

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

The test of what is negligence, as I have already defined and explained
it, is the same for the plaintiff as for the defendant. If the plaintiff's negligence
joins with the negligence of the defendant in proximately causing the plaintiff's
own [injury] [damage], it is called contributory negligence, and the plaintiff
cannot recover.³

1 If the contention of the defendant is that plaintiff's agent was negligent, the issue
as stated above should be replaced by an issue as to the agent's negligence and a separate
issue of agency submitted.

2 This sentence will be accurate only when there is a single defendant and there is
no issue as to the negligence of an agent of the defendant. In more complex situations, the
judge must instruct the jury precisely as to what answers to what prior issues will call for an
answer to this issue.

3 Omit the phrase, “and the plaintiff cannot recover” if an issue of last clear chance
is being submitted. For an instruction on last clear chance, refer to N.C.P.I.-MV 105.15.
Note that “[O]ne who is so insane or devoid of intelligence as to be totally unable to
apprehend danger and avoid exposure to it is not a responsible human agency and cannot
be guilty of contributory negligence.” *Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 120,
457 S.E.2d 875, 879 (1995) (citing 57A Am. Jur.2d *Negligence* § 954 (1989) (now 57B Am.
Jur.2d *Negligence* § 863 (2018))).

However, a different rule applies where the person whose conduct is in question has
diminished mental faculties not amounting to insanity or total incompetence. *Stacy*, 119
N.C. App. at 120, 457 S.E.2d at 879. Rather than being held to the objective reasonable

person standard, such a person is “held only to the exercise of such care as ... a person of like mental capacity under similar circumstances.” *Id.* The burden is on the person claiming the lack of mental capacity to show that a “specific ‘diminished mental capacity’” rendered him unable to perceive and avoid a particular harm. *Proffitt v. Gosnell*, ____ N.C. App. ____, ___, 809 S.E.2d 200, 208 (2017).

104.25 CONTRIBUTORY NEGLIGENCE OF MINOR BETWEEN SEVEN AND
FOURTEEN YEARS OF AGE.¹

The (*state number*) issue reads:

"Did the minor plaintiff, by *his* own negligence, contribute to *his* [injury]
[damage]?"

You will answer this issue only if you have answered the (*state number*)
issue as to the defendant's negligence "Yes" in favor of the minor plaintiff.²

On this (*state number*) issue the burden of proof is on the defendant.
This means that the defendant must prove, by the greater weight of the
evidence, three things:

First, that the minor plaintiff was capable of negligence. The law
presumes that a child who is between seven and fourteen years of age is not
capable of negligence. However, this presumption may be overcome by
evidence that a child of the minor plaintiff's age ordinarily would have the
discretion, judgment and mental capacity to discern and appreciate
circumstances of danger.³ It is your duty to consider all of the evidence in the
case and determine whether the defendant has proven, by the greater weight
of the evidence, that a child of the minor plaintiff's age ordinarily would have
the discretion, judgment and mental capacity to understand and avoid
danger.⁴

Second, that the minor plaintiff was negligent. The test of what is
negligence, as I have already defined and explained it, is not the same for the
minor plaintiff as it is for the defendant. Even if a child who is between seven
and fourteen years of age is capable of negligence, the child is not required to
exercise the same degree of care for the safety of others that is required of
an adult⁵. The law imposes a duty upon a child to exercise only that degree of
care for the safety of others that a reasonably careful child of the same age,

discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances.⁶ A child's failure to exercise the required degree of care would be negligence.

And Third, that the minor plaintiff's negligence was a proximate cause of the minor plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and one which a reasonable and prudent child of the same age, discretion, knowledge, experience and capacity could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the defendant need not prove that the minor plaintiff's negligence was the sole proximate cause of the [injury] [damage]. The defendant must prove, by the greater weight of the evidence, only that the minor plaintiff's negligence was a proximate cause. If the minor plaintiff's negligence joins with the negligence of the defendant in proximately causing the minor plaintiff's own [injury] [damage], it is called contributory negligence, and the minor plaintiff cannot recover.⁷

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

Read all contentions of negligence supported by the evidence.

The defendant further contends, and the minor plaintiff denies, that the minor plaintiff's negligence was a proximate cause of *his* own [injury] [damage].

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

Give law as to each contention of negligence included above.

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 minor plaintiff was capable of negligence, was negligent (in any one or more of the ways contended by the defendant) and that such negligence was a proximate cause of the minor plaintiff's [injury] [damage], 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 minor plaintiff.

1 A child under seven is conclusively presumed to be incapable of contributory negligence. *Walston v. Greene*, 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958). A child who has reached his fourteenth birthday is "presumed to have sufficient capacity to be sensible of danger and to have power to avoid it," *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 767 (1967), "and he is chargeable with contributory negligence as a matter of law if he fails to do so," *Burgess v. Mattox*, 260 N.C. 305, 307, 132 S.E.2d 577, 578 (1963).

There is a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Hoots v. Beeson*, 272 N.C. 644, 650, 159 S.E.2d 16, 21 (1968); *see also Caudle v. Seaboard Air Line R.R.*, 202 N.C. 404, 407, 163 S.E. 122, 124 (1932) (citations omitted) ("Prima facie presumption exists that infant between ages of seven and fourteen is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.").

2 This sentence will be accurate only when there is a single defendant and there is no issue as to the negligence of an agent of the defendant. In more complex situations, the judge must instruct the jury precisely as to what answers to what prior issues will call for an answer to this issue.

3 *See Walston*, 247 N.C. at 696, 102 S.E.2d at 126. Failure to instruct on the rebuttable presumption is prejudicial error. *Hoots v. Beeson*, 272 N.C. at 650, 159 S.E.2d at 21.

4 *Blue v. Canela*, 139 N.C. App. 191, 193-194, 532 S.E.2d 830, 832 (2000).

5 *Morris v. Sprott*, 207 N.C. 358, 359, 177 S.E. 13, 14 (1934).

6 *Boykin v. Atlantic Coast Line R.R.*, 211 N.C. 113, 115, 189 S.E. 177, 178 (1937).

Page 4 of 4

N.C.P.I.-Civil 104.25

CONTRIBUTORY NEGLIGENCE OF MINOR BETWEEN SEVEN AND 14 YEARS
OF AGE.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

7 Omit the phrase, "and the minor plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to N.C.P.I.-MV 105.15.

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, two¹ things:

First, that the plaintiff and the defendant mutually assented to the same material terms² for doing or refraining from doing a particular thing.

And 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 intention⁵ 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 writing⁹ 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,¹⁵ 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.¹⁶ It is sufficient that there be mutual assent, express or implied, to all

of the material terms.¹⁷ What constitutes the material terms essential to a given contract depends on the facts and circumstances of each transaction.¹⁸ 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]¹⁹ [the parties' course of dealing] [an applicable usage of trade]²⁰ 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.])²¹

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include²²] [have left open].²³ 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.²⁴ "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.²⁵]

[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.²⁶ In determining what constitutes a reasonable time,²⁷ 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 party²⁸] [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.²⁹ In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract³⁰] [the length of

time the parties should have reasonably expected their contractual relationship to last³¹] [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]³²).

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.³³ (An agreement based upon an exchange of mutual promises is supported by adequate consideration³⁴ if performance of each of the promises would constitute adequate consideration.³⁵) 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.³⁶

(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.³⁷] [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.³⁸])

(Consideration is adequate unless it is so grossly inadequate³⁹ 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.⁴⁰)

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.

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. The court should instruct as follows:

And Third, that the (*party seeking enforcement*) had the capacity to enter into a contract. A party to a contract must have sufficient mental capacity to understand the nature, scope and effect of the act in which *he* is engaged, to understand what *he* is contracting to do or refrain from doing, to know with whom *he* is transacting and to understand the purpose for which *he* is contracting and the nature, scope and consequences of *his* act. A party may have sufficient mental capacity although *he* does not act wisely or discreetly, or drive a good bargain. A party may also have sufficient mental capacity, even if suffering from mental weakness or infirmity.

Legal authority for this instruction and additional information regarding capacity to contract may be found in N.C.P.I.-Civil 501.05 (Contracts-Issue of Formation-Defense of Lack of Mental Capacity) and the endnotes therein.

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 and 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) [25-1-206](#) [25-2-201](#), § [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 In a contract for services, compensation is an essential element to the agreement. See *Rider v. Hodges*, __ N.C. App. __, __, 804 S.E.2d 242, 246 (2017) (holding that no enforceable contract exists where the price for services was not included in the agreement).

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

17 *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).

18 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.

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

20 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).

21 A usage of trade 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).

22 *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).

23 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).

24 *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 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).

25 See *Blondell v. Ahmed*, ___ N.C. App. ___, ___, 786 S.E.2d 405, 407 (2016), *aff'd per curiam*, ___ N.C. ___, 804 S.E.2d 183 (2017) (citing *Weyerhaeuser 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 ...

26 *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).

27 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).

28 *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).

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

30 *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).

31 *General Tire and 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).

32 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.

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

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

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

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

37 *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *East Carolina Realty. 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 and Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 261 S.E.2d 259 (1980)

38 *See Craig and Wilson v. Stewart and 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).

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

40 *Young v. Board of Commissioners of Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925); *Gurvin v. Cromartie*, 33 N.C. 174, 178-179 (1850).

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, two¹ things:

First, that the plaintiff and the defendant mutually assented to the same material terms² for doing or refraining from doing a particular thing.

And 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 intention⁵ 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 writing⁹ 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 include²⁶] [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 party³⁴] [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 contract³⁶] [the length of time the parties should have reasonably expected their contractual relationship to last³⁷] [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 consideration⁴⁰ 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 inadequate⁴⁵ 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.

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. The court should instruct as follows:

And Third, that the (*party seeking enforcement*) had the capacity to enter into a contract. A party to a contract must have sufficient mental capacity to understand the nature, scope and effect of the act in which *he* is engaged, to understand what *he* is contracting to do or refrain from doing, to know with whom *he* is transacting and to understand the purpose for which *he* is contracting and the nature, scope and consequences of *his* act. A party may have sufficient mental capacity although *he* does not act wisely or discreetly, or drive a good bargain. A party may also have sufficient mental capacity, even if suffering from mental weakness or infirmity.

Legal authority for this instruction and additional information regarding capacity to contract may be found in N.C.P.I.-Civil 501.05 (Contracts-Issue of Formation-Defense of Lack of Mental Capacity) and the endnotes therein.

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).

501.05 CONTRACTS – ISSUE OF FORMATION – DEFENSE OF LACK OF MENTAL CAPACITY.

The (state number) issue reads:

“Did the defendant lack sufficient mental capacity to enter into the contract with the plaintiff?”

(You will answer this issue only if you have answered the (state number) issue “Yes” in favor of the plaintiff.)¹

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, that the defendant did not possess sufficient mental capacity to enter into the contract with the plaintiff

A party to a contract must have sufficient mental capacity to understand the nature, scope and effect of the act in which he is engaged, to understand what he is contracting to do or refrain from doing, to know with whom he is transacting, and to understand the purpose for which he is contracting and the nature, scope and consequences of his act.³ A party may have sufficient mental capacity although he does not act wisely or discreetly, or drive a good bargain.⁴ A party may also have sufficient mental capacity even if suffering from mental weakness or infirmity.⁵

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 defendant lacked sufficient mental capacity to enter into the contract with the plaintiff, 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.

1 See N.C.P.I.–Civil 501.01 (Contracts-Issue of Formation-Common Law); 501.01A (Contracts-Issue of Formation-UCC).

2 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). Competent persons have the capacity to manage their affairs and enter into contracts. 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 on the issue of capacity to contract falls to the proponent of the contract and should be added as a third element to N.C.P.I.–Civil 501.01 (Contracts–Issue of Formation) (see note 1 thereto); N.C.P.I.–Civil 501.01A (Contracts-Issue of Formation-UCC) (see note 1 thereto).

3 *Hendricks v. Hendricks*, 273 N.C. 733, 735, 161 S.E.2d 97, 98 (1968); *Goins v. McCloud*, 231 N.C. 655, 658, 58 S.E.2d 634, 637 (1950); *Carland v. Allison*, 221 N.C. 120, 123, 19 S.E.2d 245, 247 (1942); *Bond v. Branning Mfg. Co.*, 140 N.C. 381, 52 S.E. 929 (1906); *Sprinkle v. Wellborn*, 40 N.C. 163, 181, 52 S.E. 666, 672 (1905).

4 *Davis*, 223 N.C. at 38, 25 S.E.2d at 182 (“A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope, and effect of the act being performed.”).

5 *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 12 (1994), *disc. rev. denied*, 339 N.C. 610, 452 S.E.2d 247 (1995).

501.55 CONTRACTS-ISSUE OF FORMATION-DEFENSE OF CONSTRUCTIVE FRAUD.

The (state number) issue reads:

“Did the plaintiff take advantage of a position of trust and confidence to induce the defendant to enter into the contract?”

(You are to answer this issue only if you have answered the (state number)¹ issue “Yes” in favor of the plaintiff.)

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

First, that a relationship of trust and confidence existed between the defendant and the plaintiff. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person's interests.³

[(Use where a fiduciary relationship exists as a matter of law; for a list of such relationships, see N.C.P.I.–Civil 900.10) In this case, members of the jury, the plaintiff and the defendant had a relationship of (name fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc.). You are instructed that, under such circumstances, a relationship of trust and confidence existed.]

And Second, that the plaintiff used his position of trust and confidence to induce the defendant to enter into the contract to the detriment of the defendant⁴ and for the benefit of the plaintiff.⁵

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 plaintiff took advantage of a position of trust and confidence to induce the defendant to enter into the contract, 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.

1 See N.C.P.I.-Civil 501.01 (Contracts-Issue of Formation).

2 *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950): "It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."). See also *Sidden v. Mailman*, 137 N.C. App. 669, 677, 529 S.E.2d 266, 272 (2000); compare *Hewitt v. Hewitt*, ___ N.C. App. ___, ___, 798 S.E.2d 796, 800 (2017) (observing that the North Carolina Court of Appeals has defined the essential elements of constructive fraud in varying ways and citing *Crumley and Assocs., P.C. v. Charles Peed and Assocs. P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) for this formulation: "that defendant (1) owes plaintiff a fiduciary duty; (2) breached this duty; and (3) sought to benefit himself in the transaction.").

3 *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

4 *Terry*, 302 N.C. at 83, 273 S.E.2d at 677; *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987).

5 In 1997, our Supreme Court distinguished constructive fraud claims from breach of fiduciary duty claims by adding the additional requirement that constructive fraud claims contain an allegation that the defendant benefitted himself. *Carcano v. JBSS LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 52 (2009). In *Barger v. McCoy Hillard and Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997), the Supreme Court wrote that "implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction." The Court then stated that "[t]he requirement of a benefit to defendant follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence." *Id.* The Court of Appeals has followed this holding that an essential element of constructive fraud is that the "defendant sought to benefit himself." *NationsBank of NC, N.A. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 246 (2000); *Ridenhour v. Int'l Bus. Machines Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777, disc. rev. denied, 350 N.C. 595, 537 S.E.2d 481 (1999); *Sharp v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999); *State ex rel. Long v. Petree Stockton, LLP*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998).

Barger's influence appears to have reshaped prior law on the presumption of fraud that normally follows from proof of the existence of a fiduciary relationship. See, e.g., *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943). After Barger, at least one Court of Appeals decision requires the plaintiff not only to prove the existence of a confidential relationship to survive a directed verdict, but also that the defendant used his position of trust to "take advantage" for his "own benefit." *Ridenhour*, 132 N.C. App. at 566, 512 S.E.2d at 777 (absence of evidence of benefit to defendant grounds for directed verdict). See also *Estate of Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813, disc. rev. denied, 347 N.C. 398, 494 S.E.2d 410 (1997) (directed verdict properly granted where plaintiff failed to prove second element of constructive fraud). But see *Hutchins v. Dowell*,

138 N.C. App. 673, 531 S.E.2d 900 (2000) (presumption of fraud raised when an agent self-deals); *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E.2d 329, 331 (1984) (constructive fraud proven by showing that confidential relationship existed at the time the property was transferred to the fiduciary).

502.05 CONTRACTS – ISSUE OF BREACH BY REPUDIATION.

The (state number) issue reads:

“Did the defendant breach the contract by repudiation?”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 plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that before the time arrived for the defendant to perform, the defendant repudiated [his entire obligation³] [a term going to the whole value of what the defendant was to perform] under the contract.⁴ A party to a contract repudiates⁵ his obligation when he expresses, by words or conduct,⁶ a positive, distinct, unequivocal and absolute [refusal] [inability] to perform.

Second, that at the time of the defendant's repudiation, the plaintiff was ready, willing and able to perform his obligations as agreed and would have done so but for the repudiation by the defendant.⁷

NOTE WELL: If the plaintiff has already fully performed his obligations under the contract, modify the instruction to read, “At the time of the defendant’s repudiation, the plaintiff had performed his obligations as agreed.”⁸

But note: In cases of partial performance, “the effect of breach by anticipatory repudiation is to relieve the non-repudiating party from further performance under the contract.”⁹

Finally, as to the (state number) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract by repudiation, then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

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

¹ Note that a repudiation is not *ipso facto* a breach. The plaintiff must elect to make it a breach. *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d 232, 235 (2010) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)). Consequently, “breach by repudiation depends not only upon the statement and actions of the allegedly repudiating party but also upon the response of the non-repudiating party.” *Profile Invs.*, 207 N.C. App. at 237, 700 S.E.2d at 236 (citation omitted).

² See N.C.P.I.–Civil [501.01](#) (Contracts - Issue of Formation); N.C.P.I.–Civil 501.01A (Contracts - Issue of Formation - UCC).

³ An installment contract invokes discrete and separate obligations in an agreement. See N.C. Gen. Stat. § 25-2-612. Nonetheless, the absolute repudiation of all future obligations in an installment contract triggers the statute of limitations upon the non-breaching party’s discovery of future non-performance, rather than when the performance would have become due. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, ___ N.C. ___, ___, 802 S.E.2d 888, 893 n. 5 (2017) (citation omitted).

⁴ “For repudiation to result in a breach of contract, ‘the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.’” *Profile Invs.*, 207 N.C. App. at 237, 700 S.E.2d at 236 (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)); *see also Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 363, 111 S.E.2d 606, 610 (1959); *Pappas v. Crist*, 223 N.C. 265, 268, 25 S.E.2d 850, 852 (1943); *Cook v. Lawson*, 3 N.C. App. 104, 107-08, 164 S.E.2d 29, 32 (1968).

⁵ See *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (“Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises.”) (citations omitted); *Profile Invs.*, 207 N.C. App. 232, 700 S.E.2d 232 (2010). Sometimes this form of breach is referred to as “anticipatory breach,” *see Millis*, 86 N.C. App. at 510, 358 S.E.2d at 569, or “breach by renunciation,” *see Edwards v. Proctor*, 173 N.C. at 45, 91 S.E. at 585.

⁶ See *Edwards*, 173 N.C. at 46, 91 S.E. at 585; *Gordon v. Howard*, 94 N.C. App. 149, 152, 379 S.E.2d 674, 676 (1989); *see also Phoenix Ltd. P’ship v. Simpson*, 201 N.C. App. 493, 500, 688 S.E.2d 717, 722 (2009) (standing for the proposition that repudiation may be inferred from conduct that naturally leads another person to believe that the repudiating party refuses or is unable to perform on the contract).

⁷ See *Kidd v. Early*, 289 N.C. 343, 364, 222 S.E.2d 392, 407 (1976); *see also Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (“Plaintiff’s offer to perform does not have to be shown where defendant refused to honor or repudiates the contract ... As long as plaintiff is able, ready, and willing to perform the conditions of the contract remaining to be performed, he will not be barred from relief.”) (citation omitted).

⁸ *Millis Constr. Co.*, 86 N.C. App at 512, 358 S.E.2d at 570.

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 or covenant at issue involves an illegal or unenforceable subject matter. 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 nature of promise or covenant alleged to be 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).

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 nature of promise or covenant alleged to be 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.

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 ensure 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](#). But note that N.C. Gen. Stat. § 1G-3 allows the parties to a business contract to agree that North Carolina law shall govern all rights in connection with the contract, irrespective of whether the parties or contract bear a reasonable relation to this State.

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](#).

BUT NOTE WELL: According to N.C. Gen. Stat. § 1G-4, a forum selection clause in a business contract that selects North Carolina as the forum is enforceable so long as the parties agreed that North Carolina law would govern or otherwise agreed to litigate disputes in the courts of this State.

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)). Legality notwithstanding, contracts which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed. See Morrell v. Hardin Creek, Inc. ___ N.C. App. ___, ___, 803 S.E.2d 668, 674 (2017).

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)).

640.01 EMPLOYMENT RELATIONSHIP– STATUS OF PERSON AS EMPLOYEE.

*NOTE WELL: "[W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, the court must determine whether a party is an employee or an independent contractor as a matter of law."*¹

This instruction is appropriate only when there is a genuine issue as to whether an individual is an employee or an independent contractor. Typically, this instruction would follow the issue of the employee/independent contractor's negligence and would be considered only if the jury has answered that issue "Yes" in favor of the plaintiff.

The (state issue number) issue reads:

"Was (state name of employee/independent contractor) an employee of the defendant?"

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

On this issue the burden of proof is on the plaintiff.³ This means that the plaintiff must prove, by the greater weight of the evidence, that (state name of employee/independent contractor) was an employee of the defendant.

A person performing services for hire is either an employee or an independent contractor. A person is an employee rather than an independent contractor when the hiring party retains the right and power to control the method, manner and means by which the details of the work are performed⁴ rather than the right simply to require certain definite results.⁵

In determining whether the defendant retained the right and power to control the method, manner and means by which (state name of employee/independent contractor) performed the details of *his* work, you may consider several factors.⁶ An employee, for example, usually:

(Give one or more of the following factors as indicated by the evidence.)

[is not engaged in an independent business, calling or occupation]

[does not have independent use of *his* special skills, knowledge or training in the performance of the work]

[does work on an hourly wage or salary basis rather than for a fixed price, a lump sum or upon a piece rate basis]

[is subject to discharge if *he* adopts one method of doing the work rather than another]

[regularly performs services for the person for whom the work is being done]

[is not free to use such assistance as *he* thinks proper]

[does not have full control over those assisting in the work]

[does not select *his* own time for working]

[*state any other applicable factor arising from the evidence*]

These factors are to be considered by you along with all of the other evidence in determining whether the defendant had the right and power to control the method, manner and means by which (*state name of employee/independent contractor*) performed the details of *his* work. The existence or nonexistence of one or more of these factors is not necessarily controlling.⁷

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*state name of employee/independent contractor*) was an employee of the defendant, 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 [*Johnson v. News & Observer Pub. Co.*](#), 167 N.C. App. 86, 88, 604 S.E.2d 344, 346 (2004).

2 Insert this sentence when the issue of the employee/independent contractor's negligence has been submitted to the jury and answered "Yes" in favor of the plaintiff.

3 If, in a rare case, it is the defendant who makes the employee contention, this instruction must be varied accordingly.

4 See *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988), and *Hayes v. Elon College*, 224 N.C. 15, 16, 29 S.E.2d 137, 140 (1944) (stating that "[t]he vital test [of one being an independent contractor] is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details."). An independent contractor is subject to his employer only "as to the results of his work." [*Johnson*](#), 167 N.C. App. at 89, 604 S.E.2d at 347; see also *Little v. Poole*, 11 N.C. App. 597, 602, 182 S.E.2d 206, 209-10 (1971) (noting that "[a] life insurance agent who is employed solely to bring about contractual relations between his principal and others on his own initiative, without being subject to the principal's direction as to how he shall accomplish results, is ordinarily held to be an independent contractor.").

5 See [*Rhoney v. Fele*](#), 134 N.C. App. 614, 616-17, 518 S.E.2d 536, 539 (1999) (The test is "whether the party for whom the work is being done *has the right to control the worker with respect to the manner or method of doing the work*, as distinguished from the right merely to require certain definite results conforming to the contract." (citations omitted) (emphasis in original)).

6 See *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 (Factors to be considered in determining whether one is an independent contractor include whether one "(a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time."); see also *Bentley v. Jonathan Piner Constr.*, __ N.C. App. __, __, 802 S.E.2d 161, 165 (2017) (citing the eight-factor test promulgated in *Hayes* and re-emphasizing the principle that these factors must be considered along with all other circumstances in determining whether one is an independent contractor).

7 See *Johnson*, 167 N.C. App. at 89-90, 604 S.E.2d at 347 (stating that "none of [the Hayes] factors is determinative, nor is the presence of all required to indicate an independent contractor relationship. The Hayes factors are considered along with the other circumstances of the employment relationship to determine whether the one employed possesses that degree of independence to require his classification as an independent contractor rather than an employee.").

"Although a contract may designate that an employer-independent contractor, rather than an employer-employee relationship exists, the terms of the contract are not controlling. "[*In re Estate of Redding v. Welborn*](#), 170 N.C. App. 324, 330, 612 S.E.2d 664, 669 (2005); see also [*Johnson*](#), 167 N.C. App. at 89, 604 S.E.2d at 347 (stating that "[a]n employer cannot exonerate himself from his legally imposed liability to a third party for injury resulting from the tortious acts of his employee simply by contracting with the

Page 4 of 4

N.C.P.I.-Civil 640.01

EMPLOYMENT RELATIONSHIP-STATUS OF PERSON AS EMPLOYEE.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

employee that he is to be free from the employer's control." (citing *Yelverton v. Lamm*, 94 N.C. App. 536, 540, 380 S.E.2d 621, 624 (1989))).

640.27 EMPLOYMENT DISCRIMINATION – PRETEXT CASE.

NOTE WELL: This instruction is designed for what is known as a "pretext" case. See 42 U.S.C.A. § 1981.¹ In a pretext case, the plaintiff seeks to prove that the reason given by the defendant for an adverse employment decision was, in reality, a pretext for a discriminatory decision. If, on the other hand, the plaintiff can present sufficiently direct evidence of discrimination, the plaintiff will qualify for the more favorable standards of liability applicable in "mixed-motive" cases. See Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995), abrogated on other grounds, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

If there are multiple claims of discriminatory acts, a separate issue should be submitted to the jury for each claim (one issue for race discrimination, one for sex discrimination, etc.).²

The (state number) issue reads:

"Did the defendant intentionally discriminate against the plaintiff [because of *his* [race] [sex] [age]] [as retaliation for *his* filing a complaint for discrimination] when the defendant [failed to hire] [fired] [disciplined] [failed to promote] [*state other discriminatory act*] the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant intentionally³ discriminated against *him* because of *his* [race] [sex] [age] [having filed a complaint for discrimination].⁴

The plaintiff must prove that *he* was [not hired] [fired] [disciplined] [not promoted] [*state other discriminatory act*] because of *his* [race] [sex] [age] [having filed a complaint for discrimination].⁵ I instruct you that employers are prohibited from treating employees differently because of their [race] [sex] [age] [having filed a complaint for discrimination].

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant intentionally discriminated against the plaintiff [because of *his* [race] [sex]

[age]][as retaliation for *his* having filed a complaint for discrimination] when the defendant [failed to hire] [fired] [disciplined] [failed to promote] [*state other discriminatory act*] the plaintiff then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

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

1 An analysis under 42 U.S.C.A. § 1981 often mirrors the analysis that is required in reviewing Title VII claims. See *Forbes v. City of Durham*, __ N.C. App. __, __, 805 S.E.2d 159, 167 (2017) (“The models and standards developed in jurisprudence under Title VII of the Civil Rights Act of 1964 ... also apply to claims under § 1981.”) (citation omitted).

2 *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 551 S.E.2d 902 (2001), *rev'd. on other grounds*, 357 N.C. 149, 579 S.E.2d 249 (2003); *Edwards v. Hardin*, 113 N.C. App. 613, 439 S.E.2d 808 (1994).

3 For an instruction on intent see N.C.P.I.-Civil 101.46.

4 The N.C. Supreme Court in a *per curiam* decision adopted the dissenting opinion from the Court of Appeals in *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 87, 551 S.E.2d 902, 906 (2001) (Walker, J., dissenting) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)), *rev'd*, 357 N.C. 149, 579 S.E.2d 249 (2003). See also *Love-Lane v. Martin*, 355 F.3d 766, 786-89 (4th Cir. 2004) (concluding the plaintiff failed to offer sufficient evidence of pretext to overcome the defendant's legitimate non-discriminatory reason); *Bryant v. Aiken Reg'l. Med. Ctrs., Inc.*, 333 F.3d 536, 545 (4th Cir. 2003) (holding there was sufficient evidence to support the jury's finding that the defendant unlawfully discriminated against the plaintiff because of her race).

5 *Brewer v. Cabarrus Plastics, Inc.*, 357 N.C. 149, 579 S.E.2d 249 (2003) (*per curiam*), *rev'g in part* *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 551 S.E.2d 902 (2001) (approving the use of phrases such as “on account of” and “because of” in pretext cases because, unlike mixed motive cases, the plaintiff in a pretext case must demonstrate that discrimination was a determinative factor in the employment decision).

EMPLOYMENT RELATIONSHIP-ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT-
INTRODUCTION.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 126-84 et. seq.

640.29A EMPLOYMENT RELATIONSHIP—ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT –
INTRODUCTION.

NOTE WELL: The North Carolina Whistleblower Act (hereinafter, "the Act")¹ creates a cause of action "for damages, an injunction or other remedies"² by "any State employee"³ who has been "discharge[d], threaten[ed] or otherwise discriminate[d] against,"⁴ or "retaliate[d] against"⁵ by the "head of any State department, agency or institution or other State employee exercising supervisory authority."⁶ The Act applies only to actions brought by state employees against state agencies and/or other state employees.⁷

The Act protects a State employee who [either directly or through "a person acting on behalf of the employee"]⁸ "reports or is about to report, verbally or in writing,"⁹ "to [his] supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

- 1) A violation of State or federal law, rule or regulation;*
- 2) Fraud;*
- 3) Misappropriation of State resources;*
- 4) Substantial and specific danger to the public health and safety; or*
- 5) Gross mismanagement, a gross waste of monies, or gross abuse of authority."¹⁰*

The Act also protects a "State employee [who] has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation, or which poses a substantial and specific danger to public safety."¹¹

In Newberne v. Department of Crime Control and Public Safety,¹² the North Carolina Supreme Court held that "the Act requires plaintiffs to prove, by a preponderance of the evidence,¹³ three essential elements: (1) that the

plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff."¹⁴

According to Newberne, the "causal connection" element may be approached by plaintiffs in three different ways:¹⁵ 1) reliance "on the 'employer's admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity,'"¹⁶ otherwise known as a DIRECT ADMISSION case; 2) presentation of "circumstantial evidence that the adverse employment action was retaliatory and that the proffered explanation for the action was pretextual ... , commonly referred to as [a] PRETEXT CASE[];"¹⁷ and 3) showing, in instances "when 'the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive,'" that, "even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken," usually called a MIXED MOTIVE case.¹⁸

Depending upon the evidence presented, an individual case may fall into one of the three foregoing categories.¹⁹ Designation of the approach under which the plaintiff's case falls affects the burden of proof as to the causal issue.

For example, in a DIRECT ADMISSION case or a PRETEXT CASE, the burden of proof remains at all times with the plaintiff.²⁰ In a MIXED MOTIVE CASE, however, if the employee demonstrates by direct evidence that the plaintiff's protected activity was a substantial or motivating factor in the adverse employment action, the burden then shifts to the defendant to prove,

by a preponderance of the evidence, that it would have taken the same action even in the absence of the plaintiff's protected activity.²¹

According to Newberne, claims brought under the Act should be adjudicated according to the following procedures:²²

The plaintiff must endeavor to establish a prima facie case of retaliation under the Act and should include any available direct evidence that the adverse employment action was retaliatory along with circumstantial evidence to that effect.

Although Newberne does not address the point, if the plaintiff fails in establishing prima facie evidence of retaliation under the Act, the case presumably would conclude by directed verdict disposition.²³

Once the plaintiff has established a prima facie case, the burden of production would then shift to the defendant which should present its case, including any evidence as to legitimate reasons for the employment decision.

Although Newberne again does not address the point, it would seem that the plaintiff would then have an opportunity to present rebuttal evidence, both direct and circumstantial, on the retaliation question.

Upon receipt of all the evidence,²⁴ the trial court should determine whether the "mixed motive" or the "pretext" framework is applicable:

If the plaintiff has presented a prima facie case that he engaged in a protected activity and that the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further presented direct evidence²⁵ that the protected conduct was a substantial or motivating factor in the adverse employment action, then the "mixed motive" analysis

would apply, requiring the submission of two issues to the jury.²⁶ The plaintiff would bear the burden of proof on the first issue to establish the three foregoing elements to the satisfaction of the jury.²⁷

If the plaintiff is successful, then the burden on the second issue would shift to the defendant to prove that its legitimate reason(s), standing alone, would have induced it to make the same adverse employment decision regarding the plaintiff.²⁸

If the plaintiff has presented a *prima facie* case that he engaged in a protected activity and that the defendant took adverse action against the plaintiff in his or her employment, but the plaintiff has failed to present direct evidence that the protected conduct was a substantial or motivating factor in the adverse employment action, then the “pretext” analysis would apply and the overall burden of proof would remain with the plaintiff at all times, including demonstrating that any proffered legitimate reasons for its action by the defendant were pretextual.²⁹

If there are multiple claims of discriminatory acts, a separate issue should be submitted to the jury for each claim (e.g., one issue for violation of the North Carolina Whistleblower Act, one for race discrimination, etc.).³⁰

1 N.C. Gen. Stat. §§ 126-84 to -88.

2 *Id.* at N.C. Gen. Stat. § 126-86.

3 *Id.* But note that only a State employee “who is not subject to Article 8 of [Chapter 126: North Carolina Human Resources Act]” may assert a claim under the Whistleblower Act. A State employee who is subject to Article 8, entitled “Employee Appeals of Grievances and Disciplinary Action,” may not assert a *claim* under the Whistleblower Act, but may file a contested case in the Office of Administrative Hearings to assert a whistleblower *grievance* under G.S. 126-34.02(b)(6). See *Brown v. N.C. Department of Public Safety*, ___ N.C. App. ___, ___, 808 S.E.2d 322, 325 (2017), *cert. denied*, ___ S.E.2d __ (2018). (affirming ALJ dismissal of grievance for lack of subject matter jurisdiction where grievance was filed more

EMPLOYMENT RELATIONSHIP-ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT-
INTRODUCTION.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 126-84 et. seq.

than thirty days after the petitioner's receipt of the final agency decision being contested, in violation of G.S. 126-34.02(a)).

4 *Id.* at N.C. Gen. Stat. § 126-85(a).

5 *Id.* at N.C. Gen. Stat. § 126-85(a1).

6 *Id.* at N.C. Gen. Stat. § 126-85(a).

7 For instructions on common law discriminatory employment claims, see N.C.P.I.-Civil 640.27 ("Employment Discrimination-Pretext Case") and N.C.P.I.-Civil 640.28 ("Employment Discrimination-Mixed Motive Case"). For instructions on common law wrongful termination claims, see N.C.P.I.-Civil 640.20 ("Employment Relationship-Wrongful (Tortious) Termination") and N.C.P.I.-Civil 640.22 ("Employment Relationship-Employer's Defense to Wrongful (Tortious) Termination").

8 N.C. Gen. Stat. § 126-85(a).

9 *Id.*

10 *Id.* at N.C. Gen. Stat. § 126-84(a).

11 *Id.* at N.C. Gen. Stat. § 126-85(b).

12 *Newberne v. Dept. of Crime Control and Public Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

13 Although the *Newberne* decision and the federal cases upon which it relies employ the terminology "by a preponderance of the evidence," note that "proof by a preponderance of the evidence and proof by the greater weight of the evidence are synonymous burdens of proof." *Brooks v. Austin Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 219, 401 S.E.2d 795, 800 (1991). Consistent with the practice throughout the North Carolina Pattern Jury Instructions, the latter terminology has been utilized in the instructions based upon the *Newberne* decision and the North Carolina Whistleblower Act.

14 *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206.

15 *Id.* at 790, 618 S.E.2d at 207.

16 *Id.* at 790, 618 S.E.2d at 207 (quoting Michael Delikat, *et al.*, *Retaliation and Whistleblower Claims*, Employment Law Yearbook, § 14:3, at 806-07 (Timothy J. Long ed. 2005)). The *Newberne* court, however, notes further that "[s]uch 'smoking gun' evidence is rare, ... as 'few employers openly state that they are terminating employees [solely] because of their whistleblowing activities.'" *Id.* (quoting Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge*, Ch. 9 § III, at 232 (2d ed. 2004)).

17 *Id.* The *Newberne* court states that such "pretexts" cases "are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). *Id.* The *Newberne* court further explains that "[u]nder the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a *prima facie* case of unlawful retaliation [by circumstantial evidence], the burden shifts to the defendant to articulate a

EMPLOYMENT RELATIONSHIP-ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT-
INTRODUCTION.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 126-84 et. seq.

lawful reason for the employment action at issue. (Citation omitted). If the plaintiff meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. (Citation omitted). The ultimate burden of persuasion rests at all times with the plaintiff." *Id.* at 791, 618 S.E.2d at 207-08.

18 *Id.* at 791, 618 S.E.2d at 208. This category of "cases [is] governed by the proof scheme endorsed by the United States Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), *superceded by statute on other grounds as stated in Rivera v. United States*, 924 F.2d 948, 954 n.7 (9th Cir. 1991), and extended to Title VII actions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989). *Id.* The *Newberne* court explains that "[u]nder the *Mt. Healthy/Price Waterhouse* analysis, once a plaintiff has carried his or her burden to show that protected conduct was a 'substantial' or 'motivating' factor for the adverse employment action, the defendant must prove 'by a preponderance of the evidence' that it would have reached the same decision as to the employment action at issue even in the absence of the protected conduct. (Citations omitted). In contrast to the 'pretext' analysis described in *McDonnell Douglas* and *Burdine*, the ultimate burden of persuasion in a 'mixed motive' case may be allocated to the defendant once a plaintiff has established a *prima facie* case." *Id.* at 791-92, 618 S.E.2d at 208 (citation omitted).

The *Newberne* court goes on to note that "[i]n order to shift the burden to the defendant, however, the plaintiff must first demonstrate 'by direct evidence that an illegitimate criterion was a substantial factor in the decision.' (Citations omitted). 'Direct evidence' has been defined as 'evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision.' (Citation omitted). In the context of the *Price Waterhouse* proof scheme, direct evidence does not include 'stray remarks in the workplace, ... statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself.' (Citation omitted). Once the plaintiff establishes a *prima facie* case including 'direct evidence' on the causation element, the defendant carries the burden 'to show that its legitimate reason, standing alone, would have induced it to make the same decision.'" (Citation omitted) (emphasis in original). *Id.* at 792-93, 618 S.E.2d at 208-09.

19 See *id.* at 793, 618 S.E.2d at 209 (stating that "the essential differences between 'pretext' and 'mixed motive' cases necessitate application of different proof schemes, and therefore ... claims under the North Carolina Whistleblower Act may be subject to either form of analysis, depending on the evidence present in each individual case."). As indicated in n.16 *supra*, a "direct admission" case will rarely come before the court.

20 See *id.* at 791, 618 S.E.2d at 208.

21 See *id.* The *Newberne* court notes, in citing *Price Waterhouse*, that the "very premise of a mixed-motives case' is that the defendant possessed both legitimate and unlawful motives for the adverse employment action taken. (Citation omitted) (emphasis in original). 'Where a decision was the product of a mixture of legitimate and illegitimate motives, ... it simply makes no sense to ask whether the legitimate reason was "the 'true reason'" for the decision-which is the question asked by *Burdine*.' (Citation omitted). Thus, rather than require a plaintiff to 'squeeze [his or] her proof into *Burdine*'s framework,' it is appropriate, once a plaintiff has established that an unlawful motive was present, to require

EMPLOYMENT RELATIONSHIP-ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT-
INTRODUCTION.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 126-84 et. seq.

the defendant to prove by a preponderance of the evidence that the unlawful motive was not a but for cause of the adverse employment action. (Citation omitted) (emphasis in original). Shifting the burden of persuasion to the defendant is justified only when the plaintiff presents direct evidence of an impermissible motive, however, because (1) the defendant is not 'entitled to ... [a] presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is [statutorily] forbidden,' and (2) '[a]s an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's [retaliatory] animus made a difference to the outcome, absent proof to the contrary from the employer.' (Citation omitted) (emphasis in original). Thus, only when such 'direct evidence' is presented do plaintiffs 'qualify for the more advantageous standards of liability applicable in mixed motive cases.'" (Citation omitted).

22 See *id.* at 794, 618 S.E.2d at 209-10 (for ease of reading and comprehension, the language in the text slightly paraphrases that set out in the Court's opinion, and direct quotations and internal citations have been omitted).

23 See *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086 (10th Cir. 2007) (stating that "[i]f a plaintiff is unable to make out a *prima facie* case, judgment as a matter of law is appropriate.").

24 See *Newberne*, at 793, 618 S.E.2d at 210 (noting that "[a]s the trial court's choice between [the 'pretext' model or the 'mixed motive' analysis] depends on the nature of both the plaintiff's and the defendant's evidence, a trial court may not make a final determination as to which of these two proof schemes applies until 'all the evidence has been received.'" (Citation omitted)).

25 See n.18 *supra* (defining "direct evidence"); see also *Newberne*, 793, 618 S.E.2d at 210 n.4 ("acknowledg[ing] that, subsequent to the United States Supreme Court's decision in *Price Waterhouse*, 'Congress codified a new evidentiary rule for mixed motive cases arising under Title VII' of the Civil Rights Act of 1964 that ... permits plaintiffs to avail themselves of the mixed-motive standard in Title VII actions without direct evidence of unlawful discrimination. (Citation omitted). This statutory amendment, however, applies only to claims brought under Title VII of the Civil Rights Act of 1964."

26 See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245, 1788, 104 L.Ed.2d 268, 285 (1989) (explaining that "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.").

27 See N.C.P.I.-Civil 640.29E ("Employment Relationship-Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 et seq.-Mixed Motive Case (Defendant)").

28 See N.C.P.I.-Civil 640.29D ("Employment Relationship-Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 et seq.-Mixed Motive Case (Plaintiff)").

29 See N.C.P.I.-Civil 640.29C ("Employment Relationship-Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 et seq.-Pretext Case").

Page 8 of 8

N.C.P.I.-Civil 640.29A

EMPLOYMENT RELATIONSHIP-ADVERSE EMPLOYMENT ACTION IN
VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT-
INTRODUCTION.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 126-84 et. seq.

30 See *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 87, 551 S.E.2d 902, 906 (2001), *rev'd on other grounds*, 357 N.C. 149, 579 S.E.2d 249 (2003), *Edwards v. Hardin*, 113 N.C. App. 613, 616, 439 S.E.2d 808, 811 (1994).

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

Volume II
2018 Edition

ISBN 978-1-56011-931-9

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

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

PART I. GENERAL

Chapter 1. Preliminary Instructions.

- 100.10 Opening Statement. (12/2004)
- 100.15 Cameras and Microphones in Courtroom. (5/2004)
- 100.20 Recesses. (6/2010)
- 100.21 Recesses. (6/2010)
- 100.40 Deposition Testimony. (5/2004)
- 100.44 Interrogatories. (12/2004)
- 100.70 Taking of Notes by Jurors. (5/2004)
- 101.00 Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
- 101.05 Function of the Jury. (3/1994)
- 101.10 Burden of Proof and Greater Weight of the Evidence. (3/1994)
- 101.11 Clear, Strong, and Convincing Evidence. (11/2004)
- 101.14 Judicial Notice. (10/1983)
- 101.15 Credibility of Witness. (3/1994)
- 101.20 Weight of the Evidence. (3/1994)
- 101.25 Testimony of Expert Witness. (2/1994)
- 101.30 Testimony of Interested Witness. (3/1994)
- 101.32 Evidence—Limitation as to Parties. (10/1983)
- 101.33 Evidence—Limitation as to Purpose. (3/2017)
- 101.35 Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
- 101.36 Impeachment of Witness or Party by Proof of Crime. (4/1986)
- 101.37 Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
- 101.38 Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
- 101.39 Evidence—Spoliation by a Party. (6/2010)
- 101.40 Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
- 101.41 Stipulations. (1/1988)
- 101.42 Requests for Admissions. (1/1988)
- 101.43 Deposition Evidence. (4/1988)
- 101.45 Circumstantial Evidence. (10/1985)
- 101.46 Definition of [Intent] [Intentionally]. (12/2016)
- 101.50 Duty to Recall Evidence. (3/1994)
- 101.60 Issues. (3/1994)
- 101.62 Presumptions. (4/1984)

101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

102.10 Negligence Issue—Burden of Proof. (5/1994)
102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
102.11 Negligence Issue—Definition of Common Law Negligence. (6/2018)
102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
102.20 Proximate Cause—Peculiar Susceptibility. (3/2017)
102.26 Proximate Cause—Act of God. (5/1994)
102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
102.35 Contentions of Negligence. (3/1994)
102.50 Final Mandate—Negligence Issue. (3/1994)
102.60 Concurring Negligence. (3/2005)
102.65 Insulating/Intervening Negligence. (6/2016)
102.84 Negligence—Infliction of Severe Emotional Distress. (6/2018)
102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

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

Chapter 3a. Contributory Negligence Instructions.

104.10 Contributory Negligence Issue—Burden of Proof—Definition. (6/2018)
104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
104.35 Contentions of Contributory Negligence. (3/1994)
104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

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

Chapter 5. Summary Instructions.

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

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

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

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation—Common Law. (6/2018)
- 501.01A Contracts—Issue of Formation—UCC. (6/2018)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (6/2018)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (6/2018)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)
- 502.05 Contracts—Issue of Breach By Repudiation. (6/2018)
- 502.10 Contracts—Issue of Breach By Prevention. (5/2003)

502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (6/2018)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)

Chapter 4. Issue of Common Law Remedy.

503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)
503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)

503.45	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.48	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
503.51	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
503.54	Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
503.70	Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
503.73	Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
503.75	Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
503.76	Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
503.79	Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
503.90	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
503.91	Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
503.94	Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
503.97	Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 5. Issue of UCC Remedy.

504.00	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
504.03	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
504.06	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
504.09	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
504.12	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
504.15	Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
504.18	Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
504.21	Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
504.24	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
504.27	Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
504.30	Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
504.33	Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)
504.36	Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
504.39	Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
504.42	Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)

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

Chapter 6. Minor’s Claims Where Contract Disavowed.

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

Chapter 7. Agency.

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

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

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

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2018)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (3/2017)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (6/2018)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (6/2018)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)
- 640.29C Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Pretext Case*. (6/2010)
- 640.29D Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Plaintiff). (6/2010)
- 640.29E Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Defendant). (5/2009)

640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (2/2017)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (2/2017)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

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

Chapter 12. Actions for Services Rendered a Decedent.

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

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
736.01	Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

VOLUME II

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

741.00	Warranties in Sales of Goods. (5/1999)
741.05	Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
741.10	Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
741.15	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
741.16	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
741.17	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
741.18	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
741.20	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
741.25	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.26	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.27	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.28	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.30	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.31	Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.32	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.33	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.34	Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.35	Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
741.40	Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
741.45	Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
741.50	Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
741.60	Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
741.65	Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)
741.66	Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
741.67	Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
741.70	Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)

- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

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

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

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)
- 745.07 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessor. (6/2015)

- 745.13 New Motor Vehicles Warranties Act (“Lemon Law”)—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder’s Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2018)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2018)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (6/2018)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2018)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)
- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (12/2016)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)
- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)
- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)
- Chapter 3A. Infliction of Emotional Distress.**
- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)
- Chapter 3B. Loss of Consortium.**

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

Chapter 4. Invasion of Privacy.

800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)

800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)

800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use. (5/2001)

800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—Damages. (5/2001)

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

801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)

801.01 Malicious Prosecution—Civil Proceeding. (1/1995)

801.05 Malicious Prosecution—Damages. (10/1994)

801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice. (5/2001)

802.00 False Imprisonment. (6/2014)

802.01 False Imprisonment—Merchant's Defenses. (5/2004)

803.00 Abuse of Process. (6/2012)

804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)

804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery (3/2016)

804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest (3/2016)

804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used (3/2016)

804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages (3/2016)

804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Verdict Sheet (3/2016)

804.06 Excessive Force in Making Arrest—Section 1983—Issue of Color of State Law (3/2016)

804.07 Excessive Force in Making Arrest—Section 1983—Issue of Use of Force (3/2016)

804.08 Excessive Force in Making Arrest—Section 1983—Issue of Color of Lawfulness of Arrest (3/2016)

804.09 Excessive Force in Making Arrest—Section 1983—Issue of Color of Reasonableness of Force Used (3/2016)

804.10 Excessive Force in Making Arrest—Section 1983—Damages (3/2016)

804.11 Excessive Force in Making Arrest—Section 1983—Punitive Damages (3/2016)

804.12 Excessive Force in Making Arrest—Section 1983—Verdict Sheet (3/2016)

804.50 Section 1983—Unreasonable Search of Home. (6/2016)

Chapter 6. Nuisances and Trespass.

805.00 Trespass to Real Property. (6/2015)

805.05 Trespass to Real Property—Damages. (5/2001)

805.10 Trespass to Personal Property. (5/2001)

805.15 Trespass to Personal Property—Damages. (5/2001)

805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)

805.55 Duty of Owner to Lawful Visitor. (6/2018)

805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (6/2018)

805.60	Duty of Owner to Licensee. (Delete Sheet). (5/1999)
805.61	Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
805.64	Duty Of Owner to Trespasser—Intentional Harms (6/2013)
805.64A	Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
805.64B	Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
805.64C	Duty of Owner to Trespasser: Position of Peril (6/2013)
805.65	Duty of Owner to Trespasser. (6/2013)
805.65A	Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
805.66	Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
805.67	Duty of Municipality or County to Users of Public Ways. (5/1990)
805.68	Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
805.69	Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
805.70	Duty of Adjoining Landowners—Negligence. (5/1990)
805.71	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
805.72	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (6/2018)
805.73	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
805.74	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (6/2018)
805.80	Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

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

Chapter 9. Defamation.

806.40	Defamation—Preface. (12/2016)
806.50	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (6/2013)
806.51	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.53	Defamation—Libel Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.60	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.61	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Matter of Public Concern. (6/2011)
806.62	Defamation—Libel Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.65	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.66	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.67	Defamation—Slander Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.70	Defamation—Slander Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.71	Defamation—Slander Actionable <i>Per Quod</i> —Matter of Public Concern. (5/2008)

806.72	Defamation—Slander Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.79	Defamation—Libel Actionable <i>Per Se</i> , Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
806.81	Defamation Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
806.82	Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
806.83	Defamation Actionable <i>Per Se</i> —Public Figure or Official—Presumed Damages. (5/2008)
806.84	Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
806.85	Defamation—Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

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

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

809.00	Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
809.00A	Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
809.03	Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
809.03A	Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
809.05	Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.05A	Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.06	Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)

809.65A	Medical Malpractice—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider’s Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider’s Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2018)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)

- 810.41 Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (5/2017)
- 810.42 Wrongful Death Damages—In General. (6/2012)
- 810.44 Wrongful Death Damages—Medical Expenses. (6/2013)
- 810.44A Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
- 810.44B Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
- 810.44C Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
- 810.44D Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
- 810.46 Wrongful Death Damages—Pain and Suffering. (1/2000)
- 810.48 Wrongful Death Damages—Funeral Expenses. (6/2013)
- 810.48A Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
- 810.48B Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
- 810.48C Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
- 810.48D Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
- 810.49 Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
- 810.50 Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
- 810.54 Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
- 810.56 Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
- 810.60 Property Damages—Issue and Burden of Proof. (4/2017)
- 810.62 Property Damages—Diminution in Market Value. (2/2000)
- 810.64 Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
- 810.66 Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
- 810.68 Property Damages—Final Mandate. (2/2000)
- 810.90 Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)
- 810.91 Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
- 810.92 Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
- 810.93 Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
- 810.94 Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
- 810.96 Punitive Damages—Liability of Defendant. (3/2016)
- 810.98 Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

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

Chapter 14. Animals.

- 812.00(Preface) Animals—Liability of Owners and Keepers. (5/1996)
- 812.00 Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)

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

Chapter 15. Trade Regulation.

813.00	Trade Regulation—Preface. (6/2013)
813.05	Model Unfair or Deceptive Trade Practice Charge. (6/2014)
813.20	Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
813.21	Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
813.22	Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
813.23	Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
813.24	Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
813.25	Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
813.26	Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
813.27	Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
813.28	Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
813.29	Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
813.30	Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
813.31	Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
813.33	Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
813.34	Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
813.35	Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)
813.36	Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
813.37	Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
813.38	Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
813.39	Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
813.40	Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
813.41	Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
813.60	Trade Regulation—Commerce—Introduction. (6/2015)
813.62	Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
813.63	Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
813.70	Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
813.80	Trade Regulation—Damages—Issue of Damages. (5/2006)

- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

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

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2018)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (2/2017)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2018)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2018)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (2/2017)
- 814.81 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given—Amount of New Value (5/2017)
- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Good Faith Effort to Rehabilitate. (6/2015)

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

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

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)

815.08	Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
815.10	Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
815.20	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.22	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of Pregnancy or Living Children. (1/1999)
815.23	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.24	Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
815.26	Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge. (1/1999)
815.27	Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
815.28	Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity. (1/1999)
815.29	Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
815.30	Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth of Issue. (1/1999)
815.32	Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity and Understanding—Defense of Ratification. (1/1999)
815.40	Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
815.42	Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental Impairment. (1/1999)
815.44	Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
815.46	Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct of Sane Spouse. (1/1999)
815.50	Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
815.52	Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
815.54	Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
815.56	Divorce—From Bed and Board—Issue of Indignities. (8/2004)
815.58	Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs. (1/1999)
815.60	Divorce—From Bed and Board—Issue of Adultery. (1/1999)
815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (2/2017)
820.10	Adverse Possession—Color of Title. (6/2018)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (2/2017)

Chapter 2. Proof of Title.

- 820.40 Proof of Title—Marketable Title Act. (6/2018)
- 820.50 Proof of Title—Connected Chain of Title from the State. (5/2001)
- 820.60 Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
- 820.61 Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

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

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

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

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

- 835.00 Eminent Domain—Series Preface. (4/1999)
- 835.05 Eminent Domain Memorandum. (Delete Sheet). (4/1999)
- 835.05i Eminent Domain—Introductory Instruction. (8/2015)
- 835.10 Eminent Domain—Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (4/2017)
- 835.12 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 835.12A Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes—Issue of General or Special Benefit. (5/2017)
- 835.13 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes (“Map Act”). (5/2017)
- 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. (5/2017)
- 835.14 Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 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. (5/2017)
- 835.15 Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
- 835.20 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)

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

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (4/2017)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (4/2017)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

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

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)
- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

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

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (4/2017)
- 860.10 Wills—Holographic Wills—Requirements. (6/2018)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (4/2017)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2017)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

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

PART VIII. INSURANCE

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

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

Chapter 2. Accident, Accidental Means, and Suicide.

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

Chapter 3. Disability.

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

Chapter 4. Material Misrepresentations.

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

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2018)

Chapter 6. Fire Insurance.

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

Chapter 7. Damages.

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

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2017)

800.00 FRAUD.¹

The (*state number*) issue reads:

“Was the plaintiff damaged by the fraud of the defendant?”

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, six things²:

First, that the defendant [made a false representation of] [concealed] a material past or existing fact.³

(A statement of opinion, belief, recommendation, future prospects or a promise ordinarily is not a representation of fact.⁴ However, a promise can be a false representation of fact if, at the time it is made, the person making the promise has no intention of carrying it out.)⁵

(A concealment occurs when a person fails to disclose that which, under the circumstances, *he* should disclose. A person has a duty to disclose all facts material to a transaction or event when [*he* is a fiduciary]⁶ [*he* has made a partial or incomplete representation]⁷ [*he* is specifically questioned about them]⁸ [in an arm’s length transaction, *he* has taken affirmative steps to conceal material facts from the other party]⁹ [*state any other situation where a duty to disclose is imposed by law*]).

Second, that the [false representation] [concealment] was reasonably calculated to deceive.¹⁰ [A representation is calculated to deceive when the person who makes it knows it to be false, or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion.]¹¹ [A concealment is calculated to deceive when the person who makes it knows there is a duty to disclose, or is recklessly indifferent to a duty to disclose].

Third, that the [false representation was made] [concealment was done] with the intent¹² to deceive¹³ and with the intent that it be acted upon.¹⁴

Fourth, that the plaintiff was, in fact, deceived by the [false representation] [concealment] and acted upon it.¹⁵

Fifth, that the plaintiff's reliance upon the [false representation] [concealment] was reasonable.¹⁶ The plaintiff's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for *his* own welfare, [would have relied on the false representation] [would not have discovered the concealment].¹⁷

And Sixth, that the plaintiff suffered damages proximately caused by the defendant's [false representation] [concealment].¹⁸

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

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

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant [made a false representation of] [concealed] a past or existing material fact, that the [false representation] [concealment] was reasonably calculated to deceive, that the [false representation was made] [concealment was done] with the intent to deceive and with the intent that it be acted upon,

that the plaintiff was deceived by the [false representation] [concealment] and acted upon it, that the plaintiff's reliance upon the [false representation] [concealment] was reasonable, and that the plaintiff suffered damages proximately caused by the [false representation] [concealment], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1 See generally *Myers & Chapman, Inc. v. Evans, Inc.*, 323 N.C. 559, 568–69, 374 S.E.2d 385, 391 (1988); *Massey v. Duke U.*, 130 N.C. App. 461, 465, 503 S.E.2d 155, 158 (1998).

2 To make out an actionable case of fraud plaintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury. *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91–92, 261 S.E.2d 99, 103 (1980) (citation omitted).

3 "A fact is material 'if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced [its] judgment or decision in making the contract at all.'" *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75–76, 598 S.E.2d 396, 402 (2004) (quoting *Machine Co. v. Bullock*, 161 N.C. 1, 7, 76 S.E. 634, 636 (1912)).

4 See *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980), overruled on other grounds by *Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 391–92; *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974); *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962).

5 See, e.g., *Britt v. Britt*, 320 N.C. 573, 579, 359 S.E.2d 467, 471 (1987), overruled on other grounds by *Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 391–92; *Phoenix Mut. Life Ins. Co.*, 300 N.C. at 255, 266 S.E.2d at 616 (citations omitted).

6 See *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984) (citing *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)). Where there is no dispute as to whether a fiduciary relationship exists, a peremptory instruction may be given here. Otherwise, a separate issue should be submitted. See N.C.P.I.-Civil 800.05 ("Constructive Fraud").

7 See *Ragsdale*, 286 N.C. at 139–40, 209 S.E.2d at 500–01; *Freese v. Smith*, 110 N.C. App. 28, 35, 428 S.E.2d 841, 846 (1993) ("[E]ven if there is no duty to disclose

information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses.”(citation omitted)).

8 See *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

9 See *Godfrey*, 165 N.C. App. at 75, 598 S.E.2d at 402 (citation omitted).

10 See *Ragsdale*, 286 N.C. at 138, 209 S.E.2d at 500.

11 See *Tarlton v. Keith*, 250 N.C. 298, 304, 108 S.E.2d 621, 624 (1959); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1–2 (1950).

12 For an instruction on intent, see N.C.P.I.–Civil 101.46 (“Definition of [Intent][Intentionally]”).

13 See *Myers & Chapman, Inc.*, 323 N.C. at 568–69, 374 S.E.2d at 391.

14 See *Odom*, 299 N.C. at 92–93, 261 S.E.2d at 103.

15 See *id.*

16 See *State Props., L.L.C. v. Ray*, 155 N.C. App. 65, 72–73, 574 S.E.2d 180, 186 (2002) (citations omitted); *RD & J Props. v. Lauralea-Dilton Enters., L.L.C.*, 165 N.C. App. 737, 744, 600 S.E.2d 492, 498 (2004). “The reasonableness of a party’s reliance is a question for the jury, unless the facts are so clear that they support only one conclusion.” *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007).

17 Reliance is not reasonable if a plaintiff fails to make any independent investigation, ... or if plaintiff is informed of the true condition of the property ... [T]o support a fraud claim, a plaintiff must demonstrate it was denied the opportunity to investigate the property or could not discover the truth about the property’s condition by exercise of reasonable diligence. A plaintiff also must show that it was induced to forego additional investigation by the defendant’s misrepresentations. *State Properties, L.L.C.* at 73, 574 S.E.2d at 186 (citations omitted).

Although the general rule is that reliance is deemed unreasonable if no independent investigation is made, if “a defendant has resorted to an ‘artifice which was reasonably calculated to induce [plaintiffs] to forego investigation,’ plaintiffs’ failure to conduct an independent investigation is not fatal to a claim for fraud.” *Little v. Stogner*, 162 N.C. App. 25, 30, 592 S.E.2d 5, 10 (2004) (citation omitted); see also *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 271, 141 S.E.2d 522, 526 (1965); *Owens*, 263 N.C. at 758, 140 S.E.2d at 314; *Ke v. Zhou*, ___ N.C. App. ___, ___, 808 S.E.2d 458, 460–61 (2017) (standing for the proposition that reliance may be reasonable where limited independent investigation is supported by reasonable statements from the defendant to induce reliance).

18 See *Jay Group, LTD. v. Glasgow*, 139 N.C. App. 595, 599–601, 534 S.E. 2d 233, 236–37 (2000) (“To establish fraud, a plaintiff must show ... that plaintiff suffered damage resulting from defendant’s misrepresentation or concealment. ... [T]he foregoing claim[] asserted by plaintiff[] requires that plaintiff establish the element of proximate causation.” (citation and emphasis in original omitted)).

Inadequacy of consideration alone, if it is shockingly insufficient, will support a finding of fraud without other evidence. See *Wall v. Ruffin*, 261 N.C. 720, 723, 136 S.E.2d 116, 118 (1964) (citations omitted); *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755–56 (1957); *Carland v. Allison*, 221 N.C. 120, 122, 19 S.E.2d 245, 246 (1942); N.C.P.I.–

Page 5 of 5
N.C.P.I.–Civil 800.00
FRAUD.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2018

Civil 501.50 (“Contracts-Issue of Formation-Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”)”).

800.05 CONSTRUCTIVE FRAUD.

The (*state number*) issue reads:

“Did the defendant take advantage of a position of trust and confidence to bring about (*identify 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, two things:¹

First, that a relationship of trust and confidence existed between the plaintiff and the defendant. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person's interests.²

[(*Use where a fiduciary relationship exists as a matter of law; for a list of such relationships, see N.C.P.I.–Civil 900.10.*) In this case, members of the jury, the plaintiff and the defendant had a relationship of (*name fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc.*). You are instructed that, under such circumstances, a relationship of trust and confidence existed.]

And Second, that the defendant used *his* position of trust and confidence to bring about (*identify transaction*) to the detriment of the plaintiff³ and for the benefit of the defendant.⁴

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant took advantage of a position of trust and confidence to bring about (*identify 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.

1 *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950): "It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."); see also *Sidden v. Mailman*, 137 N.C. App. 669, 677, 529 S.E.2d 266, 272 (2000); compare *Hewitt v. Hewitt*, ___ N.C. App. ___, ___, 798 S.E.2d 796, 800 (2017) (observing that the North Carolina Court of Appeals has defined the essential elements of constructive fraud in varying ways and citing *Crumley & Assocs., P.C. v. Charles Peed and Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) for this formulation: "that defendant (1) owes plaintiff a fiduciary duty; (2) breached this duty; and (3) sought to benefit himself in the transaction.").

2 *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

3 *Terry*, 302 N.C. at 83, 273 S.E.2d at 677; *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987).

4 In *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997), the Supreme Court wrote that "implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction." The Court then stated that "[t]he requirement of a benefit to defendant follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence." *Id.* The Court of Appeals has followed this holding that an essential element of constructive fraud is that the "defendant sought to benefit himself." *NationsBank of NC, N.A. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 246 (2000); *Ridenhour v. Int'l Bus. Machines Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777, *disc. rev. denied*, 350 N.C. 595, 537 S.E.2d 481 (1999); *Sharp v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999); *State ex rel Long v. Petree Stockton, LLP*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998).

Barger's influence appears to have reshaped prior law on the presumption of fraud that normally follows from proof of the existence of a fiduciary relationship. See, e.g., *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943). After *Barger*, at least one Court of Appeals decision requires the plaintiff not only to prove the existence of a confidential relationship to survive a directed verdict, but also that the defendant used his position of trust to "take advantage" for his "own benefit." *Ridenhour*, 132 N.C. App. at 566, 512 S.E.2d at 777 (absence of evidence of benefit to defendant grounds for directed verdict); see also *Estate of Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813, *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 410 (1997) (directed verdict properly granted where plaintiff failed to prove second element of constructive fraud). But see *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000) (presumption of fraud raised when an agent self-deals); *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E.2d 329, 331 (1984) (constructive fraud proven by showing that confidential relationship existed at the time the property was transferred to the fiduciary).

800.06 CONSTRUCTIVE FRAUD-REBUTTAL BY PROOF OF OPENNESS, FAIRNESS AND HONESTY.

The (*state number*) issue reads:

"Did the defendant act openly, fairly and honestly in bringing about (*identify transaction*)?"¹

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

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that, with regard to (*identify transaction*), the defendant made a full, open disclosure of material facts, that *he* dealt with the plaintiff fairly, without oppression, imposition or fraud, and that *he* acted honestly.²

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 defendant acted openly, fairly and honestly in bringing about (*identify transaction*), 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.

¹ The presumption of constructive fraud may be rebutted by the fiduciary's "showing, for example, that the confidence reposed in him was not abused." *Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007) (citation and internal quotation marks omitted); see *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967); *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943); [In re Will of Sechrest](#), 140 N.C. App. 464, 471, 537 S.E.2d 511, 517 (2000), *disc. rev. denied*, 353 N.C. 375, 547 S.E.2d 16 (2001); *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 820, 487 S.E.2d 166, 168 (1997).

² *Underwood v. Stafford*, 270 N.C. 700, 702, 155 S.E.2d 211, 212-13 (1967); *Poore v. Swan Quarter Farms, Inc.*, 95 N.C. App. 449, 450, 382 S.E.2d 835, 836 (1989) (observing that it is the fiduciary's burden to establish fairness, openness, and absence of

Page 2 of 2

N.C.P.I.-Civil 800.06

CONSTRUCTIVE FRAUD-REBUTTAL BY PROOF OF OPENNESS, FAIRNESS AND HONESTY.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

imposition, undue advantage, actual or constructive fraud); *Mountain Top Youth Camp, Inc. v. Lyon*, 20 N.C. App. 694, 697, 202 S.E.2d 498, 500 (1974) (fiduciary must make affirmative showing of full disclosure and fair dealing).

800.10 NEGLIGENT MISREPRESENTATION.¹

The (*state number*) issue reads:

“Was the plaintiff financially damaged by a negligent misrepresentation of the defendant?”

A person has a duty to exercise reasonable care or competence in obtaining or communicating information to other persons, or groups of persons to [whom *he* intends will rely] [whom *he* knows will rely] [whom *he* knows *his* client intends will rely] on information supplied by *him*.² A breach of this duty is a negligent misrepresentation.

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, six things:

First, that in the course of [*his* business] [*his* profession] [*his* employment] [a transaction in which *he* had a financial interest], the defendant supplied information to [the plaintiff] [a limited group of persons of which the plaintiff was a member] [*his* client with the knowledge that *his* client intended to supply the information to [the plaintiff] [a limited group of persons of which the plaintiff was a member]].

Second, that the defendant

[intended for the plaintiff]

[intended for a person within a limited group of which the plaintiff was a member]

[knew that *his* client intended for [the plaintiff] [a person within a limited group of which the plaintiff was a member]]

to rely on that information for guidance or benefit in a particular business transaction (or one substantially similar to it).

Third, that the information supplied by the defendant was false.

Fourth, that the defendant failed to exercise reasonable care or competence in obtaining or communicating the false information. [Reasonable care or competence means that degree of care, knowledge, intelligence or judgment which a prudent person would use under the same or similar circumstances.]³ [Reasonable care or competence in the case of a (state category of business person or professional, *e.g.*, lawyer, accountant, appraiser, engineer) is (*state standard of care applicable to the particular profession*).⁴

Fifth, that the plaintiff actually relied on the false information supplied by the defendant, and that the plaintiff's reliance was justifiable.⁵ Actual reliance is direct reliance upon false information.⁶ Reliance is justifiable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care, [would have relied on the false information] [would not have discovered the information was false].⁷

And sixth, that such reliance proximately caused the plaintiff to incur financial damage.⁸ Proximate cause is a cause which in a natural and continuous sequence produces a person's damage, and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result.

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

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 was financially damaged by a negligent misrepresentation of the defendant, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1 See generally *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (“The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” (citation omitted)); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 595, 394 S.E.2d 643, 648 (1990); *Blackwell v. Dorosko*, 93 N.C. App. 310, 313, 377 S.E.2d 814, 817 (1989); *Stanford v. Owens*, 76 N.C. App. 284, 286, 332 S.E.2d 730, 731-32 (1985), *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985); *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 669, 255 S.E.2d 580, 585 (1979), *cert. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

2 See *Raritan River Steel Co.*, 322 N.C. at 214, 367 S.E.2d at 617 (adopting the standard set forth in the *Restatement (Second) of Torts* § 552 (1977)), the Court states that this approach “recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely”).

3 See *Glover v. Dailey*, ____ N.C. App. ____, ____; 802 S.E.2d 136, 141 (2017) (where a question is susceptible to more than one interpretation, selection of a reasonable interpretation is evidence of reasonable care when communicating an answer).

4 The Court should instruct the jury in conformity with the applicable standard of care. In most cases, the standard may be stated in the language of the first alternative. With regard to certain professionals, the standard of care stated in certain charges or cases should be followed: Attorneys (see N.C.P.I.-Civil [809.90](#) (“Legal Negligence: Duty to Client”)); Accountants (see *Raritan River Steel Co.*, 322 N.C. at 206, 367 S.E.2d at 612-13); Appraisers (see *Ballance v. Rinehart*, 105 N.C. App. 203, 207-08, 412 S.E.2d 106, 109 (1992) and *Alva v. Cloninger*, 51 N.C. App. 602, 611, 277 S.E.2d 535, 540-41 (1981)); Architects (see *Davidson & Jones, Inc.*, 41 N.C. App. at 666-67, 255 S.E.2d at 584); Engineers (see *Stanford v. Owens*, 46 N.C. App. 388, 400, 265 S.E.2d 617, 625 (1980)); Health Care Providers (see N.C.P.I.-Civil [809.00](#) (“Medical Negligence: Direct Evidence of Negligence Only”)); Property Inspectors (see *Johnson v. Beverly-Hanks & Assoc., Inc.*, 97 N.C. App. 335, 345, 388 S.E.2d 584, 590 (1990)); Realtors (see *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 667, 347 S.E.2d 864, 865-66 (1986)); Surveyors (see *Stanford*, 46 N.C. App. at 400, 265 S.E.2d at 625).

5 NOTE WELL: In *Crawford v. Mintz*, 195 N.C. App. 713, 673 S.E.2d 746 (2009), the North Carolina Court of Appeals rejected the dicta appearing in *Forbes*, 99 N.C. App. at 598, 394 S.E.2d at 649; *Blackwell*, 93 N.C. App. at 313, 377 S.E.2d at 817; and *Owens*, 76 N.C. App. at 287, 332 S.E.2d at 732, suggesting that contributory negligence is an affirmative defense to an action for negligent misrepresentation.

In a previous footnote to this instruction, the North Carolina Pattern Jury Instruction Civil Subcommittee recommended against a charge on contributory negligence, pointing out that the foregoing cases did “not appear to recognize that an inconsistent verdict would result from a ‘yes’ on the first issue (where the plaintiff proves by the greater weight that his reliance was justifiable) and

a 'yes' on the issue of contributory negligence (where the defendant proves by the greater weight that the plaintiff's reliance was unreasonable)."

In Crawford, the Court stated that it found the "reasoning in the North Carolina Pattern Jury Instructions persuasive," [Crawford](#), 195 N.C. App. at 717-718, 673 S.E.2d at 749, explaining that the trial court's use of the pattern instruction set out above required the jury to find that Plaintiffs had proved they exercised due care in relying on Defendants' representation, and that Plaintiffs could not have discovered that the property was not connected to the city sewer system through the exercise of due care. This instruction therefore required the jury to make a determination that Plaintiffs were not contributorily negligent in order for the jury to decide the issue of negligent misrepresentation in Plaintiffs' favor. Further, unlike an instruction on contributory negligence, where the burden of proof would have been on Defendants, the burden of proof for negligent misrepresentation remained with Plaintiffs, id.

6 See *Raritan River Steel Co.*, 322 N.C. at 209, 367 S.E.2d at 614.

7 See *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) ("Reliance is not reasonable if a plaintiff fails to make any independent investigation or fails to demonstrate he was prevented from doing so.") (citations omitted) (internal quotation marks omitted); see also *Ke v. Zhou*, ___ N.C. App. ___, ___, ___ S.E.2d ___, __ (2017) (standing for the proposition that reliance *may* be reasonable where limited independent investigation is supported by reasonable statements from the defendant to induce reliance).

8 See *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 40, 626 S.E.2d 315, 322 (2006) (finding no allegation that "the information provided was prepared without reasonable care, or that any supposed breach was a proximate cause of the injury," and finding a "fail[ure] to allege sufficient facts which ... would state a claim for negligent misrepresentation").

805.55 DUTY OF OWNER TO LAWFUL VISITOR.

The (*state number*) issue reads:

“Was the plaintiff¹ [injured] [damaged] by the negligence of the defendant?”

(You will answer this issue only if you have answered the (*state number*) issue “Yes” in favor of the plaintiff. If you answered the (*state number*) issue “No” in favor of the defendant, you will not answer this issue but go on to the (*state next issue*).)²

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

Negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every [owner]³ [person in possession]⁴ to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner.⁵⁵ Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect *himself* and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

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

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

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

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

(Read all contentions of negligence supported by the evidence.)

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

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

(Give law as to each contention of negligence included above. Set forth below are standard statements of law that may apply to given contentions of negligence. NOTE WELL, however, that the jury should be charged only as to statements of law applicable to the contentions.):

[An [owner] [person in possession] is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the [owner] [person in possession] knows or, in the exercise of ordinary care, should have known. (A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person.) However, *he* does not have to warn about concealed conditions of which *he* has no knowledge and of which *he* could not have learned by reasonable inspection and supervision.⁶ *He* is held responsible for knowing of any condition which a reasonable inspection and supervision of the premises would reveal. *He* is also responsible for knowing

of any hidden or concealed dangerous condition which his own conduct (or that of *his* agents or employees) has created.]]⁷

[A dangerous condition can be caused by a third party or some outside force rather than the [owner] [person in possession]. In such case, if the dangerous condition exists long enough for the [owner] [person in possession] to have discovered it through reasonable inspection or supervision, *his* failure to use ordinary care to remedy the condition or to give adequate warning of it would be negligence.]]⁸

[The [owner] [person in possession] does not have to take precautions against unusual or out-of-the-ordinary use of the premises by lawful visitors.]]⁹

[The [owner] [person in possession] is not required to warn of obvious dangers or conditions. *He* does not have to warn of dangerous conditions about which a lawful visitor has equal or superior knowledge.]]¹⁰

[The [owner] [person in possession] is not an insurer of a lawful visitor's safety.]]¹¹

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent (in any one or more ways contended by the plaintiff) and that such negligence was a proximate cause of plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1 The North Carolina Supreme Court has eliminated the distinction between invitees and licensees in premises liability cases. *Nelson v. Freeland*, 349 N.C. 615, 633, 507 S.E.2d 882, 893 (1998). Owners and occupiers of land owe a duty "to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id.*, 615 N.C. at 625,

507 S.E.2d at 892. The separate classification for trespassers has been retained. *Id.* The change in the common law rule, moreover, is retroactive as well as prospective. *Id.*

2 Give only where there is a preliminary issue as to whether the plaintiff was a lawful visitor or a trespasser. See N.C.P.I.-Civil 805.50.

3 The landlord and rental agent may be liable for negligence in allowing a tenant to keep vicious dogs where a landlord retains control over the tenant's dogs. See *Holcomb v. Colonial Assocs. LLC*, 358 N.C. 501, 508–9, 597 S.E.2d 710, 715 (2004).

4 The common law duties imposed upon an owner of land also apply to landlords notwithstanding the enactment of the *Residential Rental Agreement Act*, N.C. Gen. Stat. § 42-38, *et. seq.* *Prince v. Wright*, 141 N.C. App. 262, 270–1, 541 S.E.2d 191, 198 (2000). The duties legislated by the *Residential Rental Agreement Act* are in addition to the common law duties. See N.C.P.I.-Civil 805.71 (Duty of Landlord to Tenant-Leased Premises); N.C.P.I.-Civil 805.73 (Duty of Landlord-Common Areas).

5 Note, however, that the common law rule is modified by N.C. Gen. Stat. § 38A-4 as to all causes of action arising after October 1, 1995, in instances where the landowner directly or indirectly invites or permits a person to use his land without charge (§ 38A-2(1), (3)) for education (§ 38A-2(2)) or recreational (§ 38A-2(5)) purposes. This statute does not affect the doctrine of attractive nuisance (see N.C.P.I.-Civil 805.65A), nor does it abrogate the landowner's responsibility to inform direct lawful visitors of artificial or unusual hazards of which he is aware.

However, there is a narrow exception to the rule that an owner owes a duty of care to a lawful visitor. Where a landowner hires a contractor and the "landowner relinquishes control and possession of property to a contractor, the duty of care, and the concomitant liability for breach of that duty, are also relinquished and should shift to the independent contractor who is exercising control and possession." *McCorkle v. North Point Chrysler Jeep, Inc.*, 208 N.C. App. 711, 715, 703 S.E.2d 750, 753 (2010). This exception extends only when the independent contractor, and not the landowner, is in control of the hazard or danger. *Id.*

6 The doctrine of *res ipsa loquitur* does not apply in these cases. *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966); *Morgan v. Great Atl. & Pac. Tea Co.*, 266 N.C. 221, 226, 145 S.E.2d 877, 881 (1966); *Spell v. Mech. Contractors, Inc.*, 261 N.C. 589, 592, 135 S.E.2d 544, 547 (1964).

7 *Norwood v. Sherwin-William Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981); *Long v. Methodist Home*, 281 N.C. 137, 139–40, 187 S.E.2d 718, 720 (1972).

8 *Long*, 281 N.C. at 140, 187 S.E.2d at 720; *Gaskill v. Great Atl. & Pac. Tea Co.*, 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

9 *Southern Ry. Co. v. ADM Milling Co.*, 58 N.C. App. 667, 675, 294 S.E.2d 750, 756 (1982), *Gaskill*, 6 N.C. App. at 694, 171 S.E.2d at 97.

10 *Long*, 281 N.C. at 139, 187 S.E.2d at 720.

Note Well: According to this State's "Baseball Rule," a baseball field operator is shielded from liability related to a "foul ball" injury, "even when a patron is struck in an unusual way by a batted ball, so long as the operator provides a screened section." *Wheeler v. Cent. Carolina Scholastic Sports, Inc.*, ___ N.C. App. ___, ___ 798 S.E.2d 438, 439 (2017), *aff'd per curiam*, 804 S.E.2d 143 (2017)(*Mem.*). "Spectator[s], with ordinary knowledge of the game of

baseball ... accept[] the common hazards incident to the game” and otherwise share an equal awareness of potential injury with the field operator. *Id.*

11 *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892.

805.56 DUTY OF OWNER TO LAWFUL VISITOR – DEFENSE OF CONTRIBUTORY NEGLIGENCE.

This (*state number*) issue reads:

"Did the plaintiff, by *his* own negligence, contribute to *his* [injury] [damage]?"¹

You will answer this (*state number*) issue only if you have answered the (*state number*) issue as to the defendant's negligence "Yes" in favor of the plaintiff.²

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

As was the case with the plaintiff, negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every lawful visitor to use ordinary care while on the premises of another. Ordinary care means that degree of care which a reasonable and prudent lawful visitor would use under the same or similar circumstances to protect *himself* and others from [injury] [damage] while [on] [using] the premises of another.³ A lawful visitor's failure to use ordinary care is negligence.

If the plaintiff's negligence joins with the negligence of the defendant in proximately causing the plaintiff's own [injury] [damage], it is called contributory negligence, and the plaintiff cannot recover.⁴

As to this issue, the defendant contends,⁵ and the plaintiff denies, that the plaintiff was negligent in one or more of the following ways:

(Read all contentions of contributory negligence supported by the evidence.)

The defendant further contends, and the plaintiff denies, that the plaintiff's negligence was a proximate cause of and contributed to the plaintiff's own [injury] [damage].

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

(Give law as to each contention of contributory negligence included above.)

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

1 If the contention of the defendant is that plaintiff's agent was negligent, the issue as stated above should be replaced by an issue as to the agent's negligence and a separate issue of agency submitted.

2 This sentence will be accurate only when there is a single defendant and there is no issue as to the negligence of an agent of the defendant. In more complex situations, the judge must instruct the jury precisely as to what answers to what prior issues will call for an answer to this issue.

3 *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 896 (2002).

4 Omit the phrase, "and the plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to 105.15 MV.

5 Whether the lawful visitor exercised a proper lookout will be the most frequent contributory negligence contention. In “slip-n’-fall” cases, the “question is not whether a reasonably prudent person would have seen the [hazard] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.” *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

However, the trial judge should be aware that there are a number of circumstances where a lawful visitor's contributory negligence may arise for reasons other than a failure to maintain a proper lookout; for example, a failure to use proper footwear on ice or other slick surfaces. Not every so-called “slip-n’-fall case” involves the classic crash on a sidewalk or grocery store aisle. In the cases which do not involve lookout, the trial judge may rely upon the general duty imposed on lawful visitors as stated or give a more specific instruction (comparable to the “lookout” instruction) where appropriate. See *Enns v. Zayre Corp., Inc.*, 119 N.C. App. 687, 692-93, 449 S.E.2d 478, 482-83 (1994).

805.72 DUTY OF LANDLORD TO RESIDENTIAL TENANT – RESIDENTIAL
PREMISES AND COMMON AREAS – DEFENSE OF CONTRIBUTORY
NEGLIGENCE.

The (*state number*) issue reads:

“Did the plaintiff, by *his* own negligence, contribute to *his* [injury]
[damage]?¹

You will answer this issue only if you have answered the issue as to the
defendant's negligence “Yes” in favor of the plaintiff.

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

The law imposes upon a person the duty to exercise ordinary care to
protect *himself* from [injury] [damage] and to avoid a known danger. When
a person knows or, in the exercise of ordinary care, should know of a danger,
and where such person has a reasonable choice or option to avoid that danger,
the failure to do so is negligence.² When the plaintiff's negligence concurs with
the negligence of the defendant in proximately causing the plaintiff's own
[injury] [damage], it is called contributory negligence, and the plaintiff cannot
recover.³

In this case, the defendant contends, and the plaintiff denies, that the
plaintiff was negligent in one or more of the following respects: (*Read all
contentions of contributory negligence supported by the evidence*).

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

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

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was negligent, and that such negligence was a proximate cause of plaintiff's [injury] [damage], 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.

1 If the contention of the defendant is that plaintiff's agent was negligent, the issue as above stated should be replaced by an issue as to the agent's negligence and a separate issue of agency submitted.

2 *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 707-08 (1982), disc. rev. denied, 305 N.C. 300 (1982).

3 Omit the phrase, "and the plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to N.C.P.I.-MV 105.15.

805.74 DUTY OF LANDLORD TO NON – RESIDENTIAL TENANT – CONTROLLED
OR COMMON AREAS – DEFENSE OF CONTRIBUTORY NEGLIGENCE.

The (*state number*) issue reads:

“Did the plaintiff, by *his* own negligence, contribute to *his* [injury]
[damage]?”

You will answer this issue only if you have answered the issue as to the
defendant's negligence “Yes” in favor of the plaintiff.

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

The law imposes upon a person the duty to exercise ordinary care to
protect *himself* from [injury] [damage] and to avoid a known danger. When a
person knows or, in the exercise of ordinary care, should know of a danger,
and where such person has a reasonable choice or option to avoid that danger,
the failure to do so is negligence.¹

When the plaintiff's negligence concurs with the negligence of the
defendant in proximately causing the plaintiff's own [injury] [damage], it is
called contributory negligence, and the plaintiff cannot recover.²

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

*(Read all contentions of contributory negligence supported by the
evidence).*

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

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

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was negligent, and that such negligence was a proximate cause of plaintiff's [injury] [damage], 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.

¹ *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 707-08 (1982), *disc. rev. denied* 305 N.C. 300 (1982).

² Omit the phrase, "and the plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to N.C.P.I.-MV 105.15.

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

North Carolina
PATTERN JURY
INSTRUCTIONS
for Civil Cases

Volume III
2018 Edition

ISBN 978-1-56011-931-9

TABLE OF CONTENTS

PREFACE

INTRODUCTION

GUIDE TO THE USE OF THIS BOOK

SIGNIFICANT NEW DEVELOPMENTS

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

PART I. GENERAL

Chapter 1. Preliminary Instructions.

- 100.10 Opening Statement. (12/2004)
- 100.15 Cameras and Microphones in Courtroom. (5/2004)
- 100.20 Recesses. (6/2010)
- 100.21 Recesses. (6/2010)
- 100.40 Deposition Testimony. (5/2004)
- 100.44 Interrogatories. (12/2004)
- 100.70 Taking of Notes by Jurors. (5/2004)
- 101.00 Admonition to the Trial Judge on Stating the Evidence and Relating the Law to the Evidence. (10/1985)
- 101.05 Function of the Jury. (3/1994)
- 101.10 Burden of Proof and Greater Weight of the Evidence. (3/1994)
- 101.11 Clear, Strong, and Convincing Evidence. (11/2004)
- 101.14 Judicial Notice. (10/1983)
- 101.15 Credibility of Witness. (3/1994)
- 101.20 Weight of the Evidence. (3/1994)
- 101.25 Testimony of Expert Witness. (2/1994)
- 101.30 Testimony of Interested Witness. (3/1994)
- 101.32 Evidence—Limitation as to Parties. (10/1983)
- 101.33 Evidence—Limitation as to Purpose. (3/2017)
- 101.35 Impeachment of Witness by Prior Inconsistent Statement. (5/1992)
- 101.36 Impeachment of Witness or Party by Proof of Crime. (4/1986)
- 101.37 Evidence Relating to the Character of a Witness (Including Party) for Truthfulness. (4/1986)
- 101.38 Evidence—Invocation by Witness of Fifth Amendment Privilege against Self-Incrimination. (5/2009)
- 101.39 Evidence—Spoliation by a Party. (6/2010)
- 101.40 Photograph, Videotape, Motion Pictures, X-Ray, Other Pictorial Representations; Map, Models, Charts—Illustrative and Substantive Evidence. (10/1985)
- 101.41 Stipulations. (1/1988)
- 101.42 Requests for Admissions. (1/1988)
- 101.43 Deposition Evidence. (4/1988)
- 101.45 Circumstantial Evidence. (10/1985)
- 101.46 Definition of [Intent] [Intentionally]. (12/2016)
- 101.50 Duty to Recall Evidence. (3/1994)
- 101.60 Issues. (3/1994)
- 101.62 Presumptions. (4/1984)

101.65 Peremptory Instruction. (8/1982)

Chapter 2. General Negligence Instructions.

102.10 Negligence Issue—Burden of Proof. (5/1994)
102.10A Negligence Issue—Stipulation of Negligence. (5/2009)
102.11 Negligence Issue—Definition of Common Law Negligence. (6/2018)
102.12 Negligence Issue—Definition of Negligence in and of Itself (Negligence *Per Se*). (8/2015)
102.13 Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
102.14 Negligence Issue—No Duty to Anticipate Negligence of Others. (5/1994)
102.15 Negligence Issue—Doctrine of Sudden Emergency. (6/2015)
102.16 Negligence Issue—Sudden Emergency Exception to Negligence *Per Se*. (5/1994)
102.19 Proximate Cause—Definition; Multiple Causes. (5/2009))
102.20 Proximate Cause—Peculiar Susceptibility. (3/2017)
102.26 Proximate Cause—Act of God. (5/1994)
102.27 Proximate Cause—Concurring Acts of Negligence. (3/2005)
102.28 Proximate Cause—Insulating Acts of Negligence. (6/2010)
102.30 Proximate Cause—Defense of Sudden Incapacitation. (2/2000)
102.32 Negligence Issue—Breach of Parents’ Duty to Supervise Minor Children. (5/1992)
102.35 Contentions of Negligence. (3/1994)
102.50 Final Mandate—Negligence Issue. (3/1994)
102.60 Concurring Negligence. (3/2005)
102.65 Insulating/Intervening Negligence. (6/2016)
102.84 Negligence—Infliction of Severe Emotional Distress. (6/2018)
102.85 Willful or Wanton Conduct Issue (“Gross Negligence”). (5/1997)
102.86 Willful or Wanton Conduct Issue (“Gross Negligence”)—Used to Defeat Contributory Negligence. (12/2003)
102.87 Willful and Malicious Conduct Issue—Used to Defeat Parent-Child Immunity. (3/2016)
102.90 Negligence Issue—Joint Conduct—Multiple Tortfeasors. (3/1994)
102.95 Architect—Project Expediter—Negligence in Scheduling. (5/2005)

Chapter 3. General Agency Instructions.

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

Chapter 3a. Contributory Negligence Instructions.

104.10 Contributory Negligence Issue—Burden of Proof—Definition. (6/2018)
104.25 Contributory Negligence of Minor Between Seven and Fourteen Years of Age. (6/2018)
104.35 Contentions of Contributory Negligence. (3/1994)
104.50 Final Mandate—Contributory Negligence Issue. (3/1994)

Chapter 4. Third Party Defendants.

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

Chapter 5. Summary Instructions.

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

PART II. CONTRACTS

Chapter 1. General Contract Instructions.

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

Chapter 2. Issue of Formation of Contract.

- 501.01 Contracts—Issue of Formation—Common Law. (6/2018)
- 501.01A Contracts—Issue of Formation—UCC. (6/2018)
- 501.02 Contracts—Issue of Formation—Peremptory Instruction. (5/2003)
- 501.03 Contracts—Issue of Formation—Parties Stipulate the Contract. (5/2003)
- 501.05 Contracts—Issue of Formation—Defense of Lack of Mental Capacity. (6/2018)
- 501.10 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Fair Dealing and Lack of Notice. (5/2003)
- 501.15 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Necessities. (5/2003)
- 501.20 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (Incompetent Regains Mental Capacity). (5/2003)
- 501.25 Contracts—Issue of Formation—Defense of Lack of Mental Capacity—Rebuttal by Proof of Ratification (by Agent, Personal Representative or Successor). (5/2003)
- 501.30 Contracts—Issue of Formation—Defense of Mutual Mistake of Fact. (6/2013)
- 501.35 Contracts—Issue of Formation—Defense of Undue Influence. (5/2003)
- 501.40 Contracts—Issue of Formation—Defense of Duress. (5/2003)
- 501.45 Contracts—Issue of Formation—Defense of Fraud. (5/2004)
- 501.50 Contracts—Issue of Formation—Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”). (5/2003)
- 501.52 Contracts—Issue of Formation—Defense of Fraud in the Factum. (5/2003)
- 501.55 Contracts—Issue of Formation—Defense of Constructive Fraud. (6/2018)
- 501.60 Contracts—Issue of Formation—Defense of Constructive Fraud—Rebuttal by Proof of Openness, Fairness, and Honesty. (5/2003)
- 501.65 Contracts—Issue of Formation—Defense of Infancy. (5/2003)
- 501.67 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Emancipation. (5/2003)
- 501.70 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification After Minor Comes of Age. (5/2003)
- 501.75 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Ratification by Guardian, Personal Representative or Agent. (5/2003)
- 501.80 Contracts—Issue of Formation—Defense of Infancy—Rebuttal by Proof of Necessities. (5/2003)

Chapter 3. Issue of Breach.

- 502.00 Contracts—Issue of Breach By Non-Performance. (5/2003)
- 502.05 Contracts—Issue of Breach By Repudiation. (6/2018)
- 502.10 Contracts—Issue of Breach By Prevention. (5/2003)

502.15	Contracts—Issue of Breach—Defense of Waiver. (5/2004)
502.20	Contracts—Issue of Breach—Defense of Prevention by Plaintiff. (5/2003)
502.25	Contracts—Issue of Breach—Defense of Frustration of Purpose. (6/2014)
502.30	Contracts—Issue of Breach—Defense of Impossibility (Destruction of Subject Matter of Contract). (6/2014)
502.35	Contracts—Issue of Breach—Defense of Impossibility (Death, Disability, or Illness of Personal Services Provider). (6/2014)
502.40	Contracts—Issue of Breach—Defense of Illegality or Unenforceability. (6/2018)
502.45	Contracts—Issue of Breach—Defense of Unconscionability. (5/2003)
502.47	Contracts—Issue of Breach—Direct Damages—Defense of Oral Modification of Written Contract. (5/2003)
502.48	Contracts—Issue of Breach—Direct Damages—Defense of Modification. (5/2003)
502.50	Contracts—Issue of Breach—Defense of Rescission. (5/2003)
502.55	Contracts—Issue of Breach—Defense of Novation. (5/2003)
502.60	Contracts—Issue of Breach—Defense of Accord and Satisfaction. (5/2003)

Chapter 4. Issue of Common Law Remedy.

503.00	Contracts—Issue of Common Law Remedy—Rescission. (5/2003)
503.01	Contracts—Issue of Common Law Remedy—Rescission—Measure of Restitution. (6/2014)
503.03	Contracts—Issue of Common Law Remedy—Specific Performance. (5/2003)
503.06	Contracts—Issue of Common Law Remedy—Statement of Damages Issue. (5/2003)
503.09	Contracts—Issue of Common Law Remedy—Damages in General. (5/2003)
503.12	Contracts—Issue of Common Law Remedy—Direct Damages—Buyer’s Measure of Recovery for a Seller’s Breach of Contract to Convey Real Property. (5/2003)
503.15	Contracts—Issue of Common Law Remedy—Direct Damages—Seller’s Measure of Recovery for a Buyer’s Breach of Executory Contract to Purchase Real Property. (5/2003)
503.18	Contracts—Issue of Common Law Remedy—Direct Damages—Broker’s Measure of Recovery for a Seller’s Breach of an Exclusive Listing Contract. (5/2003)
503.21	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract. (5/2003)
503.24	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste. (5/2003)
503.27	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Partial Breach of a Repair or Services Contract. (5/2003)
503.30	Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for a Contractor’s Failure to Perform any Work Under a Construction, Repair, or Services Contract. (5/2003)
503.33	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Fully Performed. (5/2003)
503.36	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Has Not Begun Performance. (5/2003)
503.39	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract After the Contractor Delivers Partial Performance. (5/2003)
503.42	Contracts—Issue of Common Law Remedy—Direct Damages—Contractor’s Measure of Recovery for an Owner’s Breach of a Construction, Repair, or Services Contract Where the Contractor Elects to Recover Preparation and Performance Expenditures. (5/2003)

- 503.45 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Rent due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
- 503.48 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Loss of Use Due to a Lessee’s, Occupier’s, or Possessor’s Breach of Lease of Real Estate or Personal Property. (5/2003)
- 503.51 Contracts—Issue of Common Law Remedy—Direct Damages—Owner’s Measure of Recovery for Real Estate or Personal Property Idled by Breach of a Contract Where Proof of Lost Profits or Rental Value Is Speculative. (5/2003)
- 503.54 Contracts—Issue of Common Law Remedy—Direct Damages—Employer’s Measure of Recovery for Employee’s Wrongful Termination of an Employment Contract. (5/2003)
- 503.70 Contracts—Issue of Common Law Remedy—Incidental Damages. (5/2003)
- 503.73 Contracts—Issue of Common Law Remedy—Consequential Damages. (5/2003)
- 503.75 Breach Of Contract—Special Damages—Loss Of Profits (Formerly 517.20) (6/2013)
- 503.76 Contracts—Issue of Common Law Remedy—Future Worth of Damages in Present Value. (5/2003)
- 503.79 Contracts—Issue of Common Law Remedy—Damages Mandate. (5/2003)
- 503.90 Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate. (5/2003)
- 503.91 Contracts—Issue of Common Law Remedy—Defense (Offset) for Failure to Mitigate—Amount of Credit. (5/2003)
- 503.94 Contracts—Issue of Common Law Remedy—Validity of Liquidated Damages Provision. (5/2003)
- 503.97 Contracts—Issue of Common Law Remedy—Amount of Liquidated Damages. (5/2003)

Chapter 5. Issue of UCC Remedy.

- 504.00 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Repudiation. (5/2003)
- 504.03 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Seller’s Failure to Make Delivery or Tender. (5/2003)
- 504.06 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Rightful Rejection. (5/2003)
- 504.09 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Rightful Rejection. (5/2003)
- 504.12 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Justifiable Revocation of Acceptance. (5/2003)
- 504.15 Contracts—Issue of UCC Remedy—Buyer’s Damages Upon Justifiable Revocation of Acceptance. (5/2003)
- 504.18 Contracts—Issue of UCC Remedy—Buyer’s Damages After Acceptance and Retention of Goods. (5/2003)
- 504.21 Contracts—Issue of UCC Remedy—Buyer’s Remedy of Specific Performance. (5/2003)
- 504.24 Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Stopping Delivery of Goods. (5/2003)
- 504.27 Contracts—Issue of UCC Remedy—Seller’s Remedy (or Defense) of Reclaiming Goods Already Delivered. (5/2003)
- 504.30 Contracts—Issue of UCC Remedy—Seller’s Remedy of Resale. (5/2003)
- 504.33 Contracts—Issue of UCC Remedy—Seller’s Resale Damages. (5/2003)
- 504.36 Contracts—Issue of UCC Remedy—Seller’s Contract—Market Damages. (5/2003)
- 504.39 Contracts—Issue of UCC Remedy—Seller’s Lost Profit Damages. (5/2003)
- 504.42 Contracts—Issue of UCC Remedy—Seller’s Remedy of Action for Price (Specific Performance) for Delivered Goods. (5/2003)

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

Chapter 6. Minor’s Claims Where Contract Disavowed.

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

Chapter 7. Agency.

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

Chapter 8. Deleted. (5/2003)

Chapter 9. Action on Account.

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

Chapter 10. Employment Relationship.

- 640.00 Introduction to Employment Relationship Series—Employment Relationship—Plaintiff’s Status as Employee. (6/2014)
- 640.00A Introduction to “Employment Relationship” Series. (6/2010)
- 640.01 Employment Relationship—Status of Person as Employee. (6/2018)
- 640.02 Employment Relationship—Constructive Termination. (6/2010)
- 640.03 Employment Relationship—Termination/Resignation. (6/2010)
- 640.10 Employment Relationship—Employment for a Definite Term. (2/1991)
- 640.12 Employment Relationship—Breach of Agreement for a Definite Term. (5/1991)
- 640.14 Employment Relationship—Employer’s Defense of Just Cause. (2/1991)
- 640.20 Employment Relationship—Wrongful (Tortious) Termination. (3/2017)
- 640.22 Employment Relationship—Employer’s Defense to Wrongful (Tortious) Termination. (4/1998)
- 640.25 Employment Relationship—Blacklisting. (11/1996)
- 640.27 Employment Discrimination—Pretext Case. (6/2018)
- 640.28 Employment Discrimination—Mixed Motive Case. (5/2004)
- 640.29A Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—Introduction. (6/2018)
- 640.29B Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Direct Admission Case*. (6/2010)
- 640.29C Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Pretext Case*. (6/2010)
- 640.29D Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Plaintiff). (6/2010)
- 640.29E Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act—*Mixed Motive Case* (Defendant). (5/2009)

640.30	Employment Relationship—Damages. (6/2010)
640.32	Employment Relationship—Mitigation of Damages. (6/2014)
640.40	Employment Relationship—Vicarious Liability of Employer for Co-Worker Torts. (6/2015)
640.42	Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee. (5/2009)
640.43	Employment Relationship—Liability of Employer for Negligence in Hiring or Selecting an Independent Contractor. (5/2009)
640.44	Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor. (5/2009)
640.46	Employment Relationship—Liability of Employer for Injury to Employee—Exception to Workers' Compensation Exclusion. (2/2017)
640.48	Employment Relationship—Liability of Principal for Negligence of Independent Contractor (Breach of Non-Delegable Duty of Safety)—Inherently Dangerous Activity. (5/2009)
640.60	Employment Relationships—Wage & Hour Act—Wage Payment Claim (2/2017)
640.65	Employment Relationships—Wage & Hour Act—Wage Payment Claim—Damages (6/2014)

Chapter 11. Covenants Not to Compete.

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

Chapter 12. Actions for Services Rendered a Decedent.

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

Chapter 13. Quantum Meruit.

736.00	Quantum Meruit—Quasi Contract—Contract Implied at Law. (5/2016)
736.01	Quantum Meruit—Quasi Contract—Contract Implied at Law: Measure of Recovery. (6/2015)

Chapter 14. Leases.

VOLUME II

Part III. WARRANTIES AND PRODUCTS LIABILITY

Chapter 1. Warranties in Sales of Goods.

741.00	Warranties in Sales of Goods. (5/1999)
741.05	Warranties in Sales of Goods—Issue of Existence of Express Warranty. (5/1999)
741.10	Warranties in Sales of Goods—Issue of Breach of Express Warranty. (5/1999)
741.15	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Merchantability. (6/2013)
741.16	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Merchantability. (5/1999)
741.17	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Merchantability. (5/1999)
741.18	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Merchantability. (5/1999)
741.20	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Merchantability. (12/2003)
741.25	Warranties in Sales of Goods—Issue of Existence of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.26	Warranties in Sales of Goods—Issue of Seller’s Defense of Modification of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.27	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.28	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.30	Warranties in Sales of Goods—Issue of Breach of Implied Warranty of Fitness for a Particular Purpose. (5/1999)
741.31	Warranties in Sales of Goods—Issue of Existence of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.32	Warranties in Sales of Goods—Issue of Seller’s Defense of Exclusion of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.33	Warranties in Sales of Goods—Issue of Seller’s Defense of Buyer’s Actual or Constructive Knowledge of Defects—Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.34	Warranties in Sales of Goods—Issue of Breach of Implied Warranty Created by Course of Dealing or by Usage of Trade. (5/1999)
741.35	Warranties in Sales of Goods—Remedies—Rightful Rejection. (5/1999)
741.40	Warranties in Sales of Goods—Rightful Rejection—Damages. (5/1999)
741.45	Warranties in Sales of Goods—Remedies—Justifiable Revocation of Acceptance. (5/1999)
741.50	Warranties in Sales of Goods—Justifiable Revocation of Acceptance—Damages. (5/1999)
741.60	Warranties in Sales of Goods—Remedy for Breach of Warranty Where Accepted Goods Retained—Damages. (5/1999)
741.65	Express and Implied Warranties—Third Party Rights of Action (Horizontal) Against Buyer’s Seller. (5/1999)
741.66	Implied Warranties—Third Party Rights of Action (Horizontal) Against Manufacturers. (5/2006)
741.67	Implied Warranties—Third Party Rights of Action (Vertical) Against Manufacturers. (5/1999)
741.70	Products Liability—Claim of Inadequate Warning or Instruction. (5/2005)

- 741.71 Products Liability—Claim Against Manufacturer for Inadequate Design or Formulation (Except Firearms or Ammunition). (5/2005)
- 741.72 Products Liability—Firearms or Ammunition—Claim Against Manufacturer or Seller for Defective Design. (5/2005)

Chapter 2. Defenses By Sellers and Manufacturers.

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

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

- 745.01 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Failure to Make Repairs Necessary to Conform New Motor Vehicle to Applicable Express Warranties. (6/2013)
- 745.03 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer Unable to Conform New Motor Vehicle to Express Warranty. (6/2013)
- 745.05 New Motor Vehicles Warranties Act (“Lemon Law”)—Manufacturer’s Affirmative Defense of Abuse, Neglect, or Unauthorized Modifications or Alterations. (6/2013)
- 745.07 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Purchaser. (6/2015)
- 745.09 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessee. (6/2015)
- 745.11 New Motor Vehicles Warranties Act (“Lemon Law”)—Damages When Plaintiff is a Lessor. (6/2015)

- 745.13 New Motor Vehicles Warranties Act (“Lemon Law”)—Unreasonable Refusal to Comply with Requirements of Act. (5/1999)
- Chapter 4. New Dwelling Warranty.**
- 747.00 Warranties in Sales of Dwellings—Issue of Existence of Implied Warranty of Habitability. (5/1999)
- 747.10 Warranties in Sales of Dwellings—Issue of Builder’s Defense that Buyer Had Notice of Defect. (5/1999)
- 747.20 Warranties in Sales of Dwellings—Issue of Breach of Implied Warranty of Habitability. (12/2003)
- 747.30 Warranties in Sales of Dwellings—Remedies—Rescission. (5/1999)
- 747.35 Warranties in Sales of Dwellings—Remedies—Special Damages Following Rescission. (5/1999)
- 747.36 Warranties in Sales of Dwellings—Remedies—Credit to Seller for Reasonable Rental Value. (5/1999)
- 747.40 Warranties in Sales of Dwellings—Remedies—Damages Upon Retention of Dwelling. (5/1999)

Part IV. MISCELLANEOUS TORTS

- Chapter 1. Fraud.**
- 800.00 Fraud. (6/2018)
- 800.00A Fraud—Statute of Limitations (5/2016)
- 800.05 Constructive Fraud. (6/2018)
- 800.06 Constructive Fraud—Rebuttal of Proof of Openness, Fairness and Honesty. (6/2018)
- 800.07 Fraud: Damages. (6/2007)
- 800.10 Negligent Misrepresentation. (6/2018)
- 800.11 Negligent Misrepresentation: Damages. (6/2007)
- Chapter 2. Criminal Conversation and Alienation of Affections.**
- 800.20 Alienation of Affections. (12/2016)
- 800.22 Alienation of Affections—Damages. (6/2007)
- 800.23 Alienation of Affections—Statute of Limitations. (6/2010)
- 800.23A Alienation of Affections—Statute of Limitations. (6/2010)
- 800.25 Criminal Conversation. (Adultery). (6/2010)
- 800.26 Criminal Conversation. (Adultery)—Damages. (6/2010)
- 800.27 Criminal Conversation—Statute of Limitations. (6/2015)
- 800.27A Criminal Conversation—Statute of Limitations. (6/2015)
- Chapter 3. Assault and Battery.**
- 800.50 Assault. (2/1994)
- 800.51 Battery. (2/2016)
- 800.52 Assault and Battery—Defense of Self. (5/1994)
- 800.53 Assault and Battery—Defense of Family Member. (5/1994)
- 800.54 Assault and Battery—Defense of Another from Felonious Assault. (5/2004)
- 800.56 Assault and Battery—Defense of Property. (5/1994)
- Chapter 3A. Infliction of Emotional Distress.**
- 800.60 Intentional or Reckless Infliction of Severe Emotional Distress. (4/2004)
- Chapter 3B. Loss of Consortium.**

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

Chapter 4. Invasion of Privacy.

800.70 Invasion of Privacy—Offensive Intrusion. (6/2013)

800.71 Invasion of Privacy—Offensive Intrusion—Damages. (6/2010)

800.75 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use. (5/2001)

800.76 Invasion of Privacy—Appropriation of Name or Likeness for Commercial Use—Damages. (5/2001)

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

801.00 Malicious Prosecution—Criminal Proceeding. (6/2014)

801.01 Malicious Prosecution—Civil Proceeding. (1/1995)

801.05 Malicious Prosecution—Damages. (10/1994)

801.10 Malicious Prosecution—Punitive Damages—Issue of Existence of Actual Malice. (5/2001)

802.00 False Imprisonment. (6/2014)

802.01 False Imprisonment—Merchant's Defenses. (5/2004)

803.00 Abuse of Process. (6/2012)

804.00 Section 1983—Excessive Force in Making Lawful Arrest. (5/2004)

804.01 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Battery (3/2016)

804.02 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Lawfulness of Arrest (3/2016)

804.03 Excessive Force in Making Arrest—Common Law Claim for Battery—Issue of Reasonableness of Force Used (3/2016)

804.04 Excessive Force in Making Arrest—Common Law Claim for Battery—Damages (3/2016)

804.05 Excessive Force in Making Arrest—Common Law Claim for Battery—Verdict Sheet (3/2016)

804.06 Excessive Force in Making Arrest—Section 1983—Issue of Color of State Law (3/2016)

804.07 Excessive Force in Making Arrest—Section 1983—Issue of Use of Force (3/2016)

804.08 Excessive Force in Making Arrest—Section 1983—Issue of Color of Lawfulness of Arrest (3/2016)

804.09 Excessive Force in Making Arrest—Section 1983—Issue of Color of Reasonableness of Force Used (3/2016)

804.10 Excessive Force in Making Arrest—Section 1983—Damages (3/2016)

804.11 Excessive Force in Making Arrest—Section 1983—Punitive Damages (3/2016)

804.12 Excessive Force in Making Arrest—Section 1983—Verdict Sheet (3/2016)

804.50 Section 1983—Unreasonable Search of Home. (6/2016)

Chapter 6. Nuisances and Trespass.

805.00 Trespass to Real Property. (6/2015)

805.05 Trespass to Real Property—Damages. (5/2001)

805.10 Trespass to Personal Property. (5/2001)

805.15 Trespass to Personal Property—Damages. (5/2001)

805.25 Private Nuisance. (5/1996)

Chapter 7. Owners and Occupiers of Land.

805.50 Status of Party—Lawful Visitor or Trespassor. (5/1999)

805.55 Duty of Owner to Lawful Visitor. (6/2018)

805.56 Duty of Owner to Lawful Visitor—Defense of Contributory Negligence. (6/2018)

805.60	Duty of Owner to Licensee. (Delete Sheet). (5/1999)
805.61	Duty of Owner to Licensee—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (Delete Sheet). (5/1999)
805.64	Duty Of Owner to Trespasser—Intentional Harms (6/2013)
805.64A	Duty of Owner to Trespasser—Use of Reasonable Force Defense (6/2013)
805.64B	Duty of Owner to Child Trespasser: Artificial Condition (6/2013)
805.64C	Duty of Owner to Trespasser: Position of Peril (6/2013)
805.65	Duty of Owner to Trespasser. (6/2013)
805.65A	Duty of Owner to Child Trespasser—Attractive Nuisance. (6/2013)
805.66	Duty of Owner to Trespasser—Defense of Contributory Willful or Wanton Conduct (“Gross Negligence”). (11/2004)
805.67	Duty of Municipality or County to Users of Public Ways. (5/1990)
805.68	Municipal or County Negligence—Defense of Contributory Negligence—Sui Juris Plaintiff. (5/1990)
805.69	Municipal or County Negligence—Defense of Contributory Negligence—Handicapped Plaintiff. (5/1990)
805.70	Duty of Adjoining Landowners—Negligence. (5/1990)
805.71	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas. (5/1990)
805.72	Duty of Landlord to Residential Tenant—Residential Premises and Common Areas—Defense of Contributory Negligence. (6/2018)
805.73	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas. (5/1990)
805.74	Duty of Landlord to Non-Residential Tenant—Controlled or Common Areas—Defense of Contributory Negligence. (6/2018)
805.80	Duty of Landlord to Tenant—Vacation Rental. (5/2001)

Chapter 8. Conversion.

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

Chapter 9. Defamation.

806.40	Defamation—Preface. (12/2016)
806.50	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (6/2013)
806.51	Defamation—Libel Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.53	Defamation—Libel Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.60	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.61	Defamation—Libel Actionable <i>Per Quod</i> —Private Figure—Matter of Public Concern. (6/2011)
806.62	Defamation—Libel Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.65	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.66	Defamation—Slander Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern. (6/2011)
806.67	Defamation—Slander Actionable <i>Per Se</i> —Public Figure or Official. (5/2008)
806.70	Defamation—Slander Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern. (5/2008)
806.71	Defamation—Slander Actionable <i>Per Quod</i> —Matter of Public Concern. (5/2008)

806.72	Defamation—Slander Actionable <i>Per Quod</i> —Public Figure or Official. (5/2008)
806.79	Defamation—Libel Actionable <i>Per Se</i> , Libel Actionable <i>Per Quod</i> —Private Figure—Not Matter of Public Concern—Defense of Truth. (5/2008)
806.81	Defamation Actionable <i>Per Se</i> —Private Figure—Not Matter of Public Concern—Presumed Damages. (5/2008)
806.82	Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Presumed Damages. (5/2008)
806.83	Defamation Actionable <i>Per Se</i> —Public Figure or Official—Presumed Damages. (5/2008)
806.84	Defamation—Private Figure—Matter of Public Concern—Actual Damages. (5/2008)
806.85	Defamation—Defamation Actionable <i>Per Se</i> —Private Figure—Matter of Public Concern—Punitive Damages. (5/2008)

Chapter 10. Interference with Contracts.

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

Chapter 11. Medical Malpractice. Deleted.

Chapter 11A. Medical Negligence/Medical Malpractice.

809.00	Medical Negligence—Direct Evidence of Negligence Only. (6/2014)
809.00A	Medical Malpractice—Direct Evidence of Negligence Only. (6/2014)
809.03	Medical Negligence—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2013)
809.03A	Medical Malpractice—Indirect Evidence of Negligence Only ("Res Ipsa Loquitur"). (6/2012)
809.05	Medical Negligence—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.05A	Medical Malpractice—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.06	Medical Malpractice—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.07	Medical Negligence—Defense of Limitation by Notice or Special Agreement. (5/1998)
809.20	Medical Malpractice—Existence of Emergency Medical Condition. (6/2013)
809.22	Medical Malpractice—Emergency Medical Condition—Direct Evidence of Negligence. (6/2014)
809.24	Medical Malpractice—Emergency Medical Condition—Indirect Evidence of Negligence Only. ("Res Ipsa Loquitur"). (6/2012)
809.26	Medical Malpractice—Emergency Medical Condition—Both Direct and Indirect Evidence of Negligence. (6/2014)
809.28	Medical Malpractice—Emergency Medical Condition—Corporate or Administrative Negligence by Hospital, Nursing Home, or Adult Care Home. (6/2012)
809.45	Medical Negligence—Informed Consent—Actual and Constructive. (6/2012)
809.65	Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)

809.65A	Medical Malpractice—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior. (6/2012)
809.66	Medical Negligence—Health Care Provider’s Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency. (6/2014)
809.75	Medical Negligence—Institutional Health Care Provider’s Liability for Selection of Attending Physician. (6/2012)
809.80	Medical Negligence—Institutional Health Care Provider’s Liability for Agents; Existence of Agency. (6/2012)
809.90	Legal Negligence—Duty to Client (Delete Sheet) (6/2013)
809.100	Medical Malpractice—Damages—Personal Injury Generally. (6/2015)
809.114	Medical Malpractice Personal Injury Damages—Permanent Injury—Economic Damages. (6/2015)
809.115	Medical Malpractice Personal Injury Damages—Permanent Injury—Non-Economic Damages. (6/2015)
809.120	Medical Malpractice Personal Injury Damages Final Mandate. (Regular). (6/2012)
809.122	Medical Malpractice Personal Injury Damages Final Mandate. (Per Diem). (6/2012)
809.142	Medical Malpractice—Damages—Wrongful Death Generally. (6/2015)
809.150	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Economic Damages. (6/2015)
809.151	Medical Malpractice Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin—Non-Economic Damages. (6/2015)
809.154	Medical Malpractice Wrongful Death Damages Final Mandate. (Regular) (6/2012)
809.156	Medical Malpractice Wrongful Death Damages Final Mandate. (Per Diem) (6/2012)
809.160	Medical Malpractice—Damages—No Limit on Non-Economic Damages. (6/2015)
809.199	Medical Malpractice—Sample Verdict Form—Damages Issues. (6/2015)

Chapter 12. Damages.

810 Series	Reorganization Notice—Damages. (2/2000)
810.00	Personal Injury Damages—Issue of Burden of Proof. (6/2012)
810.02	Personal Injury Damages—In General. (6/2012)
810.04	Personal Injury Damages—Medical Expenses. (6/2013)
810.04A	Personal Injury Damages—Medical Expenses—Stipulation. (6/2013)
810.04B	Personal Injury Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.04C	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.04D	Personal Injury Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.06	Personal Injury Damages—Loss of Earnings. (2/2000)
810.08	Personal Injury Damages—Pain and Suffering. (5/2006)
810.10	Scars or Disfigurement. (6/2010)
810.12	Personal Injury Damages—Loss (of Use) of Part of the Body. (6/2010)
810.14	Personal Injury Damages—Permanent Injury. (6/2015)
810.16	Personal Injury Damages—Future Worth in Present Value. (2/2000)
810.18	Personal Injury Damages—Set Off/Deduction of Workers’ Compensation Award. (11/1999)
810.20	Personal Injury Damages—Final Mandate. (Regular). (6/2012)
810.22	Personal Injury Damages—Final Mandate. (Per Diem Argument by Counsel). (6/2012)
810.24	Personal Injury Damages—Defense of Mitigation. (6/2018)
810.30	Personal Injury Damages—Loss of Consortium. (12/1999)
810.32	Personal Injury Damages—Parent’s Claim for Negligent or Wrongful Injury to Minor Child. (6/2010)
810.40	Wrongful Death Damages—Issue and Burden of Proof. (1/2000)

810.41	Wrongful Death Damages—Set Off/Deduction of Workers’ Compensation Award. (5/2017)
810.42	Wrongful Death Damages—In General. (6/2012)
810.44	Wrongful Death Damages—Medical Expenses. (6/2013)
810.44A	Wrongful Death Damages—Medical Expenses—Stipulation. (6/2013)
810.44B	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.44C	Wrongful Death Damages—Medical Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.44D	Wrongful Death Damages—Medical Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.46	Wrongful Death Damages—Pain and Suffering. (1/2000)
810.48	Wrongful Death Damages—Funeral Expenses. (6/2013)
810.48A	Wrongful Death Damages—Funeral Expenses—Stipulation. (6/2013)
810.48B	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, but Not as to Nexus to Conduct. (6/2013)
810.48C	Wrongful Death Damages—Funeral Expenses—No Stipulation as to Amount Paid or Necessary to Be Paid, No Rebuttal Evidence. (6/2013)
810.48D	Wrongful Death Damages—Funeral Expenses—Stipulation as to Amount Paid or Necessary to Be Paid, Rebuttal Evidence Offered. (6/2013)
810.49	Personal Injury Damages—Avoidable Consequences—Failure to Mitigate Damages. (Delete Sheet). (10/1999)
810.50	Wrongful Death Damages—Present Monetary Value of Deceased to Next-of-Kin. (6/2015)
810.54	Wrongful Death Damages—Final Mandate. (Regular). (6/2012)
810.56	Wrongful Death Damages—Final mandate. (Per Diem Argument by Counsel). (6/2012)
810.60	Property Damages—Issue and Burden of Proof. (4/2017)
810.62	Property Damages—Diminution in Market Value. (2/2000)
810.64	Property Damages—No Market Value—Cost of Replacement or Repair. (2/2000)
810.66	Property Damages—No Market Value, Repair, or Replacement—Recovery of Intrinsic Actual Value. (6/2013)
810.68	Property Damages—Final Mandate. (2/2000)
810.90	Punitive Damages—Issue of Existence of Outrageous or Aggravated Conduct. (5/1996)
810.91	Punitive Damages—Issue of Existence of Malicious, Willful or Wanton, or Grossly Negligent Conduct—Wrongful Death Cases. (5/1997)
810.92	Punitive Damages—Insurance Company’s Bad Faith Refusal to Settle a Claim. (5/1996)
810.93	Punitive Damages—Issue of Whether to Make Award and Amount. (5/1996)
810.94	Punitive Damages—Issue of Whether to Make Award and Amount. (Special Case). (5/1996)
810.96	Punitive Damages—Liability of Defendant. (3/2016)
810.98	Punitive Damages—Issue of Whether to Make Award and Amount of Award. (5/2009)

Chapter 13. Legal Malpractice.

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

Chapter 14. Animals.

812.00(Preface)	Animals—Liability of Owners and Keepers. (5/1996)
812.00	Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals. (10/1996)

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

Chapter 15. Trade Regulation.

813.00	Trade Regulation—Preface. (6/2013)
813.05	Model Unfair or Deceptive Trade Practice Charge. (6/2014)
813.20	Trade Regulation—Violation—Issue of Combinations in Restraint of Trade. (1/1995)
813.21	Trade Regulation—Violation—Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2013)
813.22	Trade Regulation—Violation—Definition of Conspiracy. (1/1995)
813.23	Trade Regulation—Violation—Issue of Price Suppression of Goods. (5/1997)
813.24	Trade Regulation—Violation—Issue of Condition Not to Deal in Goods of Competitor. (5/1997)
813.25	Trade Regulation—Violation—Issue of Predatory Acts with Design of Price Fixing. (5/1997)
813.26	Trade Regulation—Violation—Issue of Predatory Pricing. (5/1997)
813.27	Trade Regulation—Violation—Issue of Discriminatory Pricing. (5/1997)
813.28	Trade Regulation—Violation—Issue of Territorial Market Allocation. (5/1997)
813.29	Trade Regulation—Violation—Issue of Price Fixing. (5/1997)
813.30	Trade Regulation—Violation—Tying Between Lender and Insurer. (4/1995)
813.31	Trade Regulation—Violation—Unauthorized Disclosure of Tax Information. (3/1995)
813.33	Trade Regulation—Violation—Unsolicited Calls by Automatic Dialing and Recorded Message Players. (3/1995)
813.34	Trade Regulation—Violation—Work-at-Home Solicitations. (5/1995)
813.35	Trade Regulation—Violation—Representation of Winning a Prize. (5/1995)
813.36	Trade Regulation—Violation—Issue of Representation of Eligibility to Win a Prize. (5/1995)
813.37	Trade Regulation—Violation—Issue of Representation of Being Specially Selected. (5/1995)
813.38	Trade Regulation—Unfair and Deceptive Trade Practices—Simulation of Checks and Invoices. (5/1995)
813.39	Trade Regulation—Violation—Issue of Use of Term “Wholesale” in Advertising. G.S. 75-29. (5/1995)
813.40	Trade Regulation—Violation—Issue of Utilizing the Word “Wholesale” in Company or Firm Name. G.S. 75-29. (5/1995)
813.41	Trade Regulation—Violation—False Lien Or Encumbrance Against A Public Officer or Public Employee (6/2013)
813.60	Trade Regulation—Commerce—Introduction. (6/2015)
813.62	Trade Regulation—Commerce—Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices. (6/2015)
813.63	Trade Regulation—Commerce—Representation of Winning a Prize, Representation of Eligibility to Win a Prize, Representation of Being Specially Selected, and Simulation of Checks and Invoices. (1/1995)
813.70	Trade Regulation—Proximate Cause—Issue of Proximate Cause. (6/2014)
813.80	Trade Regulation—Damages—Issue of Damages. (5/2006)

- 813.90 Misappropriation of Trade Secret—Issue of Existence of Trade Secret. (6/2013)
- 813.92 Misappropriation of Trade Secret—Issue of Misappropriation. (6/2013)
- 813.94 Misappropriation of Trade Secret—Defense to Misappropriation. (Conventional Case). (6/2013)
- 813.96 Misappropriation of Trade Secret—Issue of Causation. (6/2013)
- 813.98 Misappropriation of Trade Secret—Issue of Damages. (6/2013)

Chapter 16. Bailment.

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

Chapter 17. Fraudulent Transfer.

- 814.40 Civil RICO—Introduction (5/2016)
- 814.41 Civil RICO—Engaging in a Pattern of Racketeering Activity (5/2016)
- 814.42 Civil RICO—Enterprise Activity (5/2016)
- 814.43 Civil RICO—Conspiracy (5/2016)
- 814.44 Civil RICO—Attempt (5/2016)
- 814.50 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud. (6/2018)
- 814.55 Fraudulent Transfer—Present and Future Creditors—Intent to Delay, Hinder, or Defraud—Transferee’s Defense of Good Faith and Reasonably Equivalent Value. (6/2015)
- 814.65 Fraudulent Transfer—Present and Future Creditors—Lack of Reasonably Equivalent Value. (2/2017)
- 814.70 Fraudulent Transfer—Present and Future Creditors—Insolvent Debtor and Lack of Reasonably Equivalent Value. (6/2018)
- 814.75 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent. (6/2018)
- 814.80 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given. (2/2017)
- 814.81 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of New Value Given—Amount of New Value (5/2017)
- 814.85 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Transfer in the Ordinary Course. (6/2015)
- 814.90 Fraudulent Transfer—Present Creditors—Transfer to Insider While Insolvent—Defense of Good Faith Effort to Rehabilitate. (6/2015)

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

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

PART V. FAMILY MATTERS

- 815 Series Various Family Matters Instructions—Delete Sheet. (1/2000)
- 815.00 Void Marriage—Issue of Lack of Personal Consent. (8/2004)
- 815.02 Void Marriage—Issue of Lack of Proper Solemnization. (1/1999)
- 815.04 Void Marriage—Issue of Bigamy. (1/1999)
- 815.06 Void Marriage—Issue of Marriage to Close Blood Kin. (1/1999)

815.08	Invalid Marriage—Issue of Same Gender Marriage. (1/1999)
815.10	Absolute Divorce—Issue of Knowledge of Grounds. (1/1999)
815.20	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.22	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16—Defense of Pregnancy or Living Children. (1/1999)
815.23	Voidable Marriage (Annulment)—Issue of Marriage of Person Under 16. (1/1999)
815.24	Voidable Marriage (Annulment)—Issue of Impotence. (1/1999)
815.26	Voidable Marriage (Annulment)—Issue of Impotence—Defense of Knowledge. (1/1999)
815.27	Voidable Marriage (Annulment)—Issue of Duress. (5/2006)
815.28	Voidable Marriage (Annulment)—Issue of Lack of Sufficient Mental Capacity. (1/1999)
815.29	Voidable Marriage (Annulment)—Issue of Undue Influence. (5/2006)
815.30	Voidable Marriage (Annulment)—Issues of Marriage to Close Blood Kin, Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence and Lack of Sufficient Mental Capacity and Understanding—Defense of Cohabitation and Birth of Issue. (1/1999)
815.32	Voidable Marriage (Annulment)—Issues of Marriage of Person Under 16, Marriage of Person Between 16 and 18, Impotence, and Lack of Sufficient Mental Capacity and Understanding—Defense of Ratification. (1/1999)
815.40	Divorce—Absolute—Issue of One Year’s Separation. (8/2004)
815.42	Divorce—Absolute—Issue of One Year’s Separation—Defense of Mental Impairment. (1/1999)
815.44	Divorce—Absolute—Issue of Incurable Insanity. (1/1999)
815.46	Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct of Sane Spouse. (1/1999)
815.50	Divorce—From Bed and Board—Issue of Abandonment. (8/2004)
815.52	Divorce—From Bed and Board—Issue of Malicious Turning Out-of-Doors. (1/1999)
815.54	Divorce—From Bed and Board—Issue of Cruelty. (1/1999)
815.56	Divorce—From Bed and Board—Issue of Indignities. (8/2004)
815.58	Divorce—From Bed and Board—Issue of Excessive Use of Alcohol or Drugs. (1/1999)
815.60	Divorce—From Bed and Board—Issue of Adultery. (1/1999)
815.70	Alimony—Issue of Marital Misconduct. (6/2013)
815.71	Alimony—Issue of Condonation. (5/2009)
815.72	Alimony—Issue of Condonation—Violation of Condition. (5/2009)
815.75	Issue of Paternity in Civil Actions. (3/1999)
815.90	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor. G.S. 1-538.1. (3/1999)
815.91	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Issue of Damages. G.S. 1-538.1. (3/1999)
815.92	Parents’ Strict Liability for Personal Injury or Destruction of Property by Minor—Defense of Removal of Legal Custody and Control. (3/1999)
817.00	Incompetency. (6/2007)

PART VI. LAND ACTIONS

Chapter 1. Adverse Possession.

820.00	Adverse Possession—Holding for Statutory Period. (2/2017)
820.10	Adverse Possession—Color of Title. (6/2018)
820.16	Adverse Possession by a Cotenant Claiming Constructive Ouster. (2/2017)

Chapter 2. Proof of Title.

- 820.40 Proof of Title—Marketable Title Act. (6/2018)
- 820.50 Proof of Title—Connected Chain of Title from the State. (5/2001)
- 820.60 Proof of Title—Title from a Common Source—Source Uncontested. (5/2001)
- 820.61 Proof of Title—Title from a Common Source—Source Contested. (5/2001)

Chapter 3. Boundary Dispute.

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

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

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

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

- 835.00 Eminent Domain—Series Preface. (4/1999)
- 835.05 Eminent Domain Memorandum. (Delete Sheet). (4/1999)
- 835.05i Eminent Domain—Introductory Instruction. (8/2015)
- 835.10 Eminent Domain—Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes. (4/2017)
- 835.12 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 835.12A Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes—Issue of General or Special Benefit. (5/2017)
- 835.13 Eminent Domain—Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes (“Map Act”). (5/2017)
- 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. (5/2017)
- 835.14 Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes. (5/2017)
- 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. (5/2017)
- 835.15 Eminent Domain—Issue of Just Compensation—Total Taking by Private or Local Public Condemnors. (5/2006)
- 835.20 Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.20A Eminent Domain—Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Taken. (5/2006)
- 835.22 Eminent Domain—Eminent Domain—Issue of Just Compensation—Partial Taking by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)
- 835.22A Eminent Domain—Issue of Just Compensation—Taking of an Easement by Private or Local Public Condemnors—Fair Market Value of Property Before and After the Taking. (5/2006)

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

Chapter 6. Easements.

- 840.00 Easement—General Definition. (Delete Sheet). (2/2000)
- 840.10 Easement by Prescription. (4/2017)
- 840.20 Implied Easement—Use of Predecessor Common Owner. (6/2015)
- 840.25 Implied Easement—Way of Necessity. (6/2015)
- 840.30 Cartway Proceeding. N.C. Gen Stat. § 136-69 (6/2015)
- 840.31 Cartway Proceeding—Damages. (5/2000)

Chapter 7. Summary Ejectment and Rent Abatement.

- 845.00 Summary Ejectment—Violation of a Provision in the Lease. (4/2017)
- 845.04 Summary Ejectment—Defense of Tender. (2/1993)
- 845.05 Summary Ejectment—Failure to Pay Rent. (2/1993)
- 845.10 Summary Ejectment—Holding Over After the End of the Lease Period. (2/1993)
- 845.15 Summary Ejectment—Defense of Waiver of Breach by Acceptance of Rent. (12/1992)
- 845.20 Summary Ejectment—Damages. (2/1993)
- 845.30 Landlord's Responsibility to Provide Fit Residential Premises. (2/1993)
- 845.35 Landlord's Responsibility to Provide Fit Residential Premises—Issue of Damages. (1/2000)

Chapter 8. Land-Disturbing Activity.

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

PART VII. DEEDS, WILLS, AND TRUSTS

Chapter 1. Deeds.

- 850.00 Deeds—Action to Establish Validity—Requirements. (8/2004)
- 850.05 Deeds—Action to Set Aside—Lack of Mental Capacity. (5/2002)
- 850.10 Deeds—Action to Set Aside—Mutual Mistake of Fact. (6/2013)
- 850.15 Deeds—Action to Set Aside—Undue Influence. (5/2002)
- 850.20 Deeds—Action to Set Aside—Duress. (5/2002)
- 850.25 Deeds—Action to Set Aside—Fraud. (8/2004)
- 850.30 Deeds—Action to Set Aside—Grossly Inadequate Consideration ("Intrinsic Fraud"). (5/2002)
- 850.35 Deeds—Action to Set Aside—Constructive Fraud. (5/2002)
- 850.40 "Deeds—Action to Set Aside—Constructive Fraud—Rebuttal by Proof of Openness, Fairness and Honesty." (5/2002)
- 850.45 Deeds—Action to Set Aside—Defense of Innocent Purchaser. (5/2001)
- 850.50 Deeds—Action to Set Aside—Lack of Valid Delivery. (8/2004)
- 850.55 Deeds—Action to Set Aside—Lack of Adequate Acceptance. (5/2001)

Chapter 1A. Foreclosure Actions.

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

Chapter 2. Wills.

- 860.00 Wills—Introductory Statement by Court. (Optional). (5/2006)
- 860.05 Wills—Attested Written Will—Requirements. (4/2017)
- 860.10 Wills—Holographic Wills—Requirements. (6/2018)
- 860.15 Wills—Issue of Lack of Testamentary Capacity. (4/2017)
- 860.16 Wills—Issue of Lack of Testamentary Capacity—Evidence of Suicide. (Delete Sheet). (5/2001)
- 860.20 Wills—Issue of Undue Influence. (5/2017)
- 860.22 Wills—Issue of Duress. (5/2002)
- 860.25 Wills—Devisavit Vel Non. (5/2001)

Chapter 3. Parol Trusts.

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

PART VIII. INSURANCE

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

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

Chapter 2. Accident, Accidental Means, and Suicide.

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

Chapter 3. Disability.

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

Chapter 4. Material Misrepresentations.

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

Chapter 5. Definitions.

- 900.10 Definition of Fiduciary; Explanation of Fiduciary Relationship. (6/2018)

Chapter 6. Fire Insurance.

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

Chapter 7. Damages.

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

APPENDICES.

- A. TABLE OF SECTIONS OF GENERAL STATUTES INVOLVED IN CIVIL INSTRUCTIONS. (6/1985)
- B. DESCRIPTIVE WORD INDEX. (6/2017)

810.24 PERSONAL INJURY DAMAGES – DEFENSE OF MITIGATION.1

The (*state number*) issue reads:

“By what amount, if any, should the plaintiff's actual damages be reduced because of *his* unreasonable failure to avoid or minimize *his* injuries?”

You are to answer this issue only if you have answered the (*state number*) issue in any amount of actual damages in favor of the plaintiff.

On this issue the burden of proof is on the defendant.² This means the defendant must prove, by the greater weight of the evidence, the amount, if any, by which the plaintiff's actual damages should be reduced because of the plaintiff's unreasonable failure to avoid or minimize *his* injuries.

A person injured by the [negligent] [wrongful] conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to seek treatment, to get well and to avoid or minimize the harmful consequences of *his* injury.³ A person is not permitted to recover for injuries *he* could have avoided by using means which a reasonably prudent person would have used to cure *his* injury or alleviate *his* pain. However, a person is not prevented from recovering damages *he* could have avoided unless *his* failure to avoid those damages was unreasonable.⁴

(If you find that a health care provider advised the plaintiff to [submit to an operation] [(*describe other treatment*)], you would not necessarily conclude that the plaintiff acted unreasonably in declining such [operation] [treatment]. In determining whether the plaintiff's conduct was reasonable, you must consider all of the circumstances as they appeared to the plaintiff at the time *he* chose not to follow the health care provider's advice. These may include [the financial condition of the plaintiff] [the degree of risk involved] [the amount of pain involved] [the likelihood of success] [the benefits to be

obtained from the procedure] [the availability of alternate procedures]
[whether (*name applicable types of health care providers*) agree among
themselves as to the advisability of the procedure] [the knowledge or lack of
knowledge of the plaintiff] [*describe any other factor supported by the
evidence*].)

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
plaintiff's actual damages should be reduced because of *his* unreasonable
failure to avoid or minimize *his* injuries, then it would be your duty to answer
this issue by writing the amount by which the plaintiff's actual damages are
to be reduced in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to
answer this issue by writing "None" in the blank space provided.

1 *Note Well: It remains within the trial court's sound discretion to determine, after the verdict has been reached, that the evidence presented is insufficient to justify the mitigation of damages, notwithstanding the fact that this instruction is not challenged prior to its submission to the jury. Justus v. Rosner, ___ N.C. App. ___, ___, 802 S.E.2d 142, 148-49 (2017).*

2 "The burden is on defendant of showing mitigation of damages. Therefore, while the duty is imposed upon the injured party to use ordinary care and prudence to minimize his damages, nevertheless the burden is upon the injuring party to offer evidence tending to show such breach of duty or failure to exercise the requisite degree of care and prudence to reduce and minimize the loss complained of." *First Nat'l Pictures Distrib. Corp. v. Sewell*, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933) (citation omitted); *Thermal Design, Inc. v. M&M Builders, Inc.*, 207 N.C. App. 79, 89, 698 S.E.2d 516, 524 (2010).

3 *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973); *First Nat'l Pictures Distrib. Corp. v. Sewell*, 205 N.C. 359, 171 S.E. 354 (1933); *Gibbs v. Telegraph Co.*, 196 N.C. 516, 146 S.E. 209 (1929); *Lowery v. Love*, 93 N.C. App. 568, 378 S.E.2d 815 (1989).

4 Where the plaintiff has not been medically cleared to return to work or seek new employment, the plaintiff does not act unreasonably so long as he does "everything he was asked to do by his [treating] doctor." See *Lloyd v. Norfolk S. Ry. Co.*, 231 N.C. App. 368, 372, 752 S.E.2d 704, 706 (2013).

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) [transferred³ the (*name asset*)⁴] [incurred the (*name obligation*)] with intent⁵ to hinder, delay or defraud any⁶ 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 insider¹⁰]

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

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

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

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

[whether (*name debtor*) absconded]

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

[whether the value of the consideration received by (*name debtor*) was reasonably equivalent to the value of the [asset transferred] [amount of the obligation incurred]]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 valuation¹²].

[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 insider¹³ 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.

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), *aff'd per curiam*, 805 S.E.2d 670 (N.C. 2017) (mem.). 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]

[an officer of the debtor]

[a person in control of the debtor]

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

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

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

N.C. Gen. Stat. § 39-23.1(7)(b).

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

[a general partner in the debtor]

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

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

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

[a person in control of the debtor].)

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

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

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

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.*

Page 5 of 5

N.C.P.I.-Civil 814.50

FRAUDULENT TRANSFER – PRESENT AND FUTURE CREDITORS – INTENT TO
DELAY, HINDER OR DEFRAUD.

GENERAL CIVIL VOLUME

REPLACEMENT JUNE 2018

N.C. Gen. Stat. § 39-23.4(a)(1)

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

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 [transfer³ 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 value⁶ in exchange for the [transfer] [obligation].

Second, (*name debtor*)

[was insolvent at the time⁷ *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, before¹⁰ the [transfer was made] [obligation was incurred], the plaintiff was a creditor¹¹ 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 39-23.1 et seq. 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), aff'd per curiam, 805 S.E.2d 670 (N.C. 2017) (mem.). 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).

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 entirety 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.

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).

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 transferred³ the (*name asset*)⁴ to (*name transferee*) because of a previous debt owed to (*name transferee*).

Second, at the time⁵ 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 partner]

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

(Use where the debtor is a partnership: An “insider” is

[a general partner in the debtor]

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

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

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

[a person in control of the debtor].)

(*Use where an affiliate⁹ 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, before¹¹ the transfer was made, the plaintiff was a creditor¹² 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.

1 39-23.1 *et seq.* 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), *aff’d per curiam*, 805 S.E.2d 670 (N.C. 2017) (mem.). 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.

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).

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 possessed⁵ 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 hostile¹⁰ 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 uninterrupted¹⁹ 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.

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. Patrick K. Hetrick & James B. McLaughlin Jr., *Webster’s Real Estate Law in North Carolina* § 264 (6th ed. 2014).

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); see *Parker v. Desherbinin*, ___ N.C. App. ___, ___, 810 S.E.2d 682, 689-690 (2018) (standing for the proposition that when only the adverse claimant actually possesses the land subject to the dispute of overlapping ownership, the adverse claimant's ensuing possession is commensurate with the limits of the tract to which the instrument purports to give him title); Webster's 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 cotenant 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*, 243 N.C. App. 211, 212, 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); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

820.40 PROOF OF TITLE – REAL PROPERTY MARKETABLE TITLE ACT.¹

The (*state number*) issue reads:

“Does the plaintiff² have marketable record title to (*identify land*)?”

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:³

First, that the plaintiff (and *his* predecessor(s)-in-title) [has] [have] been vested with an estate in (*identify land*) which has been of public record for at least 30 years at the time this action was started. A “vested interest” is a present ownership that includes the right to transfer that same ownership to some other person.⁴ An “estate” means an ownership interest in real property.

Second, that the public record shows a title transaction that is at least 30 years old at the time this action was brought through which [the plaintiff] [a predecessor-in-title to the plaintiff] became vested with title to (*identify land*). (A “title transaction” means any transaction affecting title to any interest in real property, including a [warranty deed] [quitclaim deed] [mortgage] [title by will] [title by descent] [tax deed] [trustee's deed] [referee's deed] [commissioner's deed] [guardian's deed] [executor's deed] [administrator's deed] [sheriff's deed] [contract] [lease] [reservation] [judgment] [order of court] [(*state other transaction*)].)⁵ (Each link in the chain of conveyances from (*name the alleged first link in the plaintiff's chain*) to the plaintiff must be valid to pass title.

[*Use in connection with deeds:* Members of the jury, to convey valid title, a deed must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the

greater weight of the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

[the (*identify deed at issue*) names the grantor⁶]

[the (*identify deed at issue*) identifies a then-existing grantee⁶]

[the (*identify deed at issue*) has operative words of conveyance.⁷ It is not necessary that the grantor actually use such words as “convey” or “grant” as long as the words used by the grantor show *his* intent to transfer *his* interest.⁸]

[the (*identify deed at issue*) adequately identifies the land conveyed.⁹ A description is adequate if it is sufficiently definite to identify the land being conveyed or refers to something by which the land may be identified with certainty.¹⁰ A description is not adequate if it leaves the identity of the land in a state of absolute uncertainty and fails to refer to something by which it might be identified with certainty.¹¹]

[the (*identify deed at issue*) was properly signed by the grantor (or *his* authorized agent).¹² (A signature may consist of a mark or a symbol made by the grantor with the intent that it constitute a signing of the deed.¹³) (A mark or symbol put on a deed by someone other than the grantor is nonetheless the grantor's signature if *he* adopts it as *his* signature.¹⁴)]

[*NOTE WELL: Use only for deeds executed prior to June 17, 1999:*¹⁵ the (*identify deed*) was properly sealed.¹⁶ (A deed is sealed when the signature of the grantor is accompanied by a mark, impression or words which indicate that he adopts his signature as his seal. The word “seal” beside (or near) the grantor's name is sufficient.¹⁷)]

[the (*identify deed at issue*) was properly acknowledged by the grantor before an official authorized by law to take such acknowledgments¹⁸ (probated and recorded).¹⁹]

[the (*identify deed*) was validly delivered²⁰ to [the grantee] [someone on the grantee's behalf].

[*Use where the plaintiff relies on a presumption of valid delivery:* You may find, though you are not compelled to do so, that a valid delivery has occurred if (*identify deed*) [is in the possession of the grantee]²¹ [has been probated and recorded in the public registry].²²]

[*Use where the plaintiff relies on proof of grantor's intent to deliver, and a physical transfer:* A valid delivery requires two things.²³ First, the grantor must intend to transfer the deed beyond *his* possession and beyond *his* legal control. Second, the grantor must actually physically transfer the deed from *his* possession with the intent that it shall pass to [the grantee] [someone on the grantee's behalf].²⁴]

[the (*identify deed at issue*) was accepted by the grantee in a legally adequate manner.

[*Use where the plaintiff relies on a presumption of legal acceptance:* You may find, though you are not compelled to do so, that the grantee accepted the deed [if the conveyance was beneficial to *him*²⁵ (even though the grantee [had no knowledge of the conveyance]²⁶ [was an infant]²⁷ [lacked mental capacity to understand what *he* was receiving]²⁸ [*name other disability*]]) [the deed has been probated and recorded in the public registry]²⁹ [the deed is found in the possession of the grantee]³⁰.]

[*Use where the plaintiff relies on proof of actual acceptance:* A grantee's acceptance may be [express] [implied from the circumstances]. [Acceptance is express when, by word or conduct, the grantee assents to the conveyance for *his* benefit.] [Acceptance is implied where a reasonable person, under the

same or similar circumstances, would conclude that the grantee accepted the deed].³¹]]

[(*state other criteria at issue and supported by the evidence*)].]

[*Use in connection with wills:* Members of the jury, to pass valid title, a will must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

[the will is legally sufficient.³² For a will to be legally sufficient, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here read, as appropriate, the elements of N.C.P.I.–Civil 860.05 (Attested Written Will) or N.C.P.I.–Civil 860.10 (Holographic Will).*)]

[the testator was competent.³³ For the testator to be legally competent, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here read, as appropriate, the elements of N.C.P.I. 860.15 (Wills-Testamentary Capacity).*)]

[the will was properly probated and recorded³⁴]

[(*state other criteria at issue and supported by the evidence*)].]

[*Use in connection with transfers by inheritance:* Members of the jury, to pass valid title, a transfer by inheritance must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

(State requirements at issue for transfers by inheritance and supported by the evidence).]

[Use in connection with other types of transfers: Members of the jury, to pass valid title, a *(describe other transfer)* must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether:

(State requirements at issue for any other method of passing title supported by the evidence.)^{35]}

The *(describe property)* must be included in each link in the chain of title starting with the *(name the alleged first link in the plaintiff's chain)* and ending with the [deed] [will] [transfer by inheritance] [*(describe other conveyance)*] to the plaintiff.³⁶⁾

And Third, nothing appears in the public record to divest the plaintiff (one of the plaintiff's predecessors-in-title) of that estate in *(identify land)*. To be divested, the plaintiff (one of the plaintiff's predecessors) must have been vested with title and subsequently lost title to *(identify land)*, whether voluntarily or involuntarily.

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 has marketable record title to *(identify land)*, 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 N.C. Gen. Stat. § 47B-2. A marketable record title is "free and clear of all rights, estates, interests, claims or charges whatsoever" that are created prior to the 30 year period. N.C. Gen. Stat. § 47B-2(c). All such adverse claims are deemed to be "null and void." *Id.* There are, however, statutory exceptions to the purging power of the Real Property Marketable Title Act ("Marketable Title Act"). These exceptions are detailed in N.C. Gen. Stat. § 47B-3. In the event there is a fact issue involving the applicability of one of these exceptions, the jury should be given a separate instruction. The burden of proof as to the applicability of these defenses is on the defendant. *Brothers v. Howard*, 57 N.C. App. 689, 691, 292 S.E.2d 139, 140-41 (1982).

2 It is equally likely that the Marketable Title Act issue will be raised by the defendant. If so, this instruction must be modified accordingly.

3 *Beam v. Kerlee*, 120 N.C. App. 203, 461 S.E.2d 911 (1995). *See also Kirkman v. Wilson*, 98 N.C. App. 242, 390 S.E.2d 698 (1990), *vac'd on other grounds*, 309 N.C. 309, 401 S.E.2d 359 (1991); *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986); *Harris v. Walden*, 70 N.C. App. 616, 320 S.E.2d 435 (1984), *rev'd on other grounds*, 314 N.C. 284, 333 S.E.2d 254 (1985); *Heath v. Turner*, 58 N.C. App. 708, 294 S.E.2d 392 (1982) (applying Real Property Marketable Title Act), *rev'd on other grounds*, 309 N.C. 483, 308 S.E.2d 244 (1983); *Brothers, supra*.

4 Note that a contingent remainder is not to be confused with a vested ownership interest. *See Rutledge v. Feher*, ___ N.C. App. ___, ___, 804 S.E.2d 806, 810 (2017) ("Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent.").

5 N.C. Gen. Stat. § 47B-8(2) (listing definitions).

6 *Estis v. Jackson*, 111 N.C. 145, 16 S.E. 7 (1892). *C.f. Yates v. Dixie Ins. Co.*, 173 N.C. 473, 92 S.E. 356 (1917) (determining that where the names of the grantors are absent, but the name of the grantee is properly present, the deed is not invalid if the grantors are otherwise designated, the grantors sign the document, and other certification formalities are met).

7 *Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428 (1895). *See also Morton v. Thornton*, 259 N.C. 697, 699, 131 S.E.2d 378, 380 (1963); *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905). This statement of the law may require elaboration in certain cases, particularly where the deed is to a dead grantee "or his heirs" or to the "heirs" of a living person. Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* §§ 10-28, 29 (6th ed. 2014). In addition, unborn infants are considered "then-existing" if they are in esse.

8 *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963); *Pope v. Burgess*, 230 N.C. 323, 53 S.E.2d 159 (1949).

9 *New Home Bldg. Supply Co.*, 259 N.C. at 683, 131 S.E.2d at 423. *Waller v. Brown*, 197 N.C. 508, 149 S.E. 687 (1929); *Cobb v. Hines*, 44 N.C. 343 (1853); *Armfield v. Walker*, 27 N.C. 580 (1845).

10 A deed seeking to convey an interest in land "is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347,

348 (1976). An adequate description must allow the court to fit the description to the property conveyed by the deed without the aid of parol evidence that adds to, enlarges or changes the description. *Foreman v. Sholl*, 113 N.C. App. 282, 286, 489 S.E.2d 169, 173 (1994). An inadequate description fails to allow the Court to determine that the description is "sufficient to serve as a guide to the ascertainment of the location of the land." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 590, 248 S.E.2d 430, 432 (1978). However, a latent ambiguity does not necessarily void the deed. If the Court determines that the "essential element" of a "description identifying" the land is present but ambiguous, (for example, a description such as "the old Fletcher Homestead" is latently ambiguous), then parol evidence may be admitted to fit the description to the land. *Foreman*, 113 N.C. App. at 286, 489 S.E.2d at 173.

11 *Overton v. Boyce*, 289 N.C. at 293, 221 S.E.2d at 348.

12 *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976); *Holloman v. Davis*, 238 N.C. 386, 78 S.E.2d 143 (1953). Parol evidence may be used to establish that the land at issue is the same as the land in the description. N.C. Gen. Stat. § 8-39 (identifying land with parol evidence).

13 *Devereux v. McMahon*, 108 N.C. 134, 12 S.E. 902 (1891). See also *New Hanover Rent-A-Car, Inc. v. Martinez*, 136 N.C. App. 642, 645, 525 S.E.2d 487, 491 (2000) ("it is not essential that the signatures should be placed at the end of the deed ... where the law requires signing only").

14 *Sellers v. Sellers*, 98 N.C. 13, 3 S.E. 917 (1887).

15 *Devereux*, 108 N.C. at 136, 12 S.E. at 903.

16 Effective June 17, 1999, the seal requirement for deeds was eliminated. N.C. Gen. Stat. § 39-6.5. See N.C. Gen. Stat. § 47-43.1 (eliminating requirement that powers of attorney empowering the attorney-in-fact to convey real estate be under seal); N.C. Gen. Stat. § 47-18.3 (eliminating attestation and corporate seal requirement for corporate conveyances).

17 *Williams v. North Carolina State Bd. of Educ.*, 284 N.C. 588, 201 S.E.2d 889 (1974). A recital of the seal in the instrument creates a rebuttable presumption that the seal was affixed to the original deed even though it is absent from the recorded deed. *Id.* Note, however, that there are numerous statutes which "cure" seal deficiencies (e.g., N.C. Gen. Stat. §§ 45-20.1, 47-47 to 47-108.27), and no seals were required on deeds during the March 7, 1879 to March 5, 1881 interval.

18 *Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935). See *Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979).

19 Acknowledgment is not a prerequisite to the validity of a conveyance; however, a proper acknowledgment is a prerequisite to a valid registration. N.C. Gen. Stat. § 47-1. Registration is necessary to protect the grantee from third party purchases for value and lien creditors. *Bowden v. Bowden*, 264 N.C. 296, 141 S.E.2d 621 (1965). It is also permissible for an attesting witness to appear before an officer authorized to take acknowledgments and to acknowledge under oath that the grantor signed the deed in his presence or acknowledged to him the execution thereof. N.C. Gen. Stat. §§ 47-12; 47-13.

20 The probate of a deed by the Clerk of Superior Court (prior to October 1, 1967) or the Register of Deeds (after October 1, 1967) is not a prerequisite to the validity of a

conveyance. It is, however, a prerequisite to registration, *Woodlief v. Woodlief*, 192 N.C. 634, 135 S.E. 612 (1926), and registration is a prerequisite to protection from the claims of third party purchasers for value and lien creditors. N.C. Gen. Stat. § 47-18. Note that, as with acknowledgments, there are many curative statutes for deficient or defective probates. See N.C. Gen. Stat. §§ 47-47 through 47-108.16.

21 *Williams*, 284 N.C. at 593, 201 S.E.2d at 892.

22 Valid delivery may be presumed from the fact the deed is in the possession of the grantee. *Tarlton v. Griggs*, 131 N.C. 216, 42 S.E. 591 (1902). See also *Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 54, 269 S.E.2d 117, 123 (1980).

23 Valid delivery may be presumed from the fact the deed has been duly probated and recorded. *Williams*, 284 N.C. at 592-93, 201 S.E.2d at 892-93.

24 *Vinson v. Smith*, 259 N.C. 95, 130 S.E.2d 45 (1963); *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961); *Elliot v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959).

25 Valid delivery may be presumed from the fact the deed is in the possession of the grantee or the fact the deed is recorded. See *Tarlton v. Griggs*, 131 N.C. 216, 221, 42 S.E. 591, 592 (1902); see also *Elliott v. Goss*, 250 N.C. 185, 188, 108 S.E.2d 475, 479 (1959). Both presumptions are rebuttable. See *Ballard v. Ballard*, 230 N.C. 629, 632, 55 S.E.2d 316, 319 (1949).

26 *Ballard*, 230 N.C. at 632, 55 S.E.2d at 318.

27 *Id.*

28 *Buchanan v. Clark*, 164 N.C. 56, 80 S.E. 424 (1913).

29 Patrick K. Hetrick & James B. McLaughlin Jr., *Webster's Real Estate Law in North Carolina* § 10-28, at 365 n. 287 (6th ed. 2014).

30 *Frank v. Heiner*, 117 N.C. 79, 23 S.E. 42 (1895).

31 *Whitman v. Shingleton*, 108 N.C. 193, 12 S.E. 1027 (1891).

32 See Patrick K. Hetrick & James B. McLaughlin Jr., *Webster's Real Estate Law in North Carolina* § 10-28, at 366 (6th ed. 2014).

33 For the requirements of a legally sufficient will, see N.C. Gen. Stat. § 31-3.3 (attested written will), § 31-11.6 (self-proving will), and § 31-3.4 (holographic will).

34 Most of the issues that arise with respect to the competency of the testator involve his age. Under N.C. Gen. Stat. § 31-1, a single person must be eighteen years of age to make a valid will.

35 N.C. Gen. Stat. § 28A-2A-19.

36 *E.g.*, title by judgment or decree, by adverse possession or by operation of law (bankruptcy, forfeiture, etc.). If the basis for title is adverse possession, see N.C.P.I.–Civil 820.00 (Adverse Possession-Holding for Statutory Period), 820.10 (Adverse Possession-Color of Title) and 820.16 (Adverse Possession by Cotenant Claiming Constructive Ouster).

860.10 WILLS-HOLOGRAPHIC WILLS-REQUIREMENTS.

The (*state number*) issue reads:

“Was the propounder's exhibit (*state number*) executed according to the requirements of law for a valid handwritten will?”

On this issue the burden of proof is on the propounder. This means that the propounder must prove, by the greater weight of the evidence, four things:¹

First, that every word of the writing necessary to constitute a will is entirely in the handwriting of the deceased.² (The fact that there are other words which are not in the deceased's handwriting will not render the writing invalid as a will as long as the words which are in *his* handwriting are sufficient to express *his* intent³ to make a will and to dispose of *his* property.⁴ The other words are surplusage).

Second, that the deceased signed the writing.⁵ (The signature need not appear on any particular part of the writing.⁶ It is sufficient if the deceased's name appears somewhere on the writing in *his* own hand. No particular form of signature is required as long as the signing was intended as a signature). (It is not necessary that the deceased's signature be witnessed).⁷

Third, that after the deceased's death, the writing was found⁸ [among *his* valuable papers or effects] [in a safe deposit box or other safe place where it was deposited by *him* or under *his* authority] [in the possession or custody of some person or firm with whom it was deposited by *him* or under *his* authority for safekeeping].⁹ (“Valuable papers or effects” are such papers or effects as the deceased considered worthy of preservation).¹⁰

And Fourth, that the deceased intended the writing to be *his* will.¹¹ The deceased's intent may be determined from [the words which appear in the writing]¹² [the circumstances surrounding the making of the writing].¹³

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 handwritten 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.

1 N.C. Gen. Stat. § 31-3.4. *In re Will of Penley*, 95 N.C. App. 655, 656, 383 S.E.2d 385, 386 (1989). 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.

2 *Alexander v. Johnston*, 171 N.C. 468, 471, 88 S.E. 785, 786 (1916); *see also In re Will of Lamparter*, 126 N.C. App. 593, 598, 486 S.E.2d 458, 461 (1997), *rev'd on other grounds*, 348 N.C. 45, 497 S.E.2d 692 (1998).

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

4 *Pounds v. Litaker*, 235 N.C. 746, 748, 71 S.E.2d 39, 41 (1952). *But cf.*, *In re Smith's Will*, 218 N.C. 161, 164, 10 S.E.2d 676, 678 (1940) (rejecting a document as a holographic will because typewritten words were essential in determining meaning and intent of handwritten words). Similarly, the North Carolina Court of Appeals has held that "holographic notations are not a valid holographic codicil" to a typewritten will where reference to words not in the handwriting of the testator are "essential to give meaning to the words used." *In the Matter of the Will of Allen*, ____ N.C. App. ____, ____, 801 S.E.2d 380, 384 (2017) (citing *In re Will of Goodman*, 229 N.C. 444, 446, 50 S.E.2d 34, 35 (1948)).

5 *Pounds v. Litaker*, 235 N.C. at 748, 71 S.E.2d at 41.

6 N.C. Gen. Stat. § 31-3.4(a)(2); *In re Will of Jarvis*, 334 N.C. 140, 144, 430 S.E.2d 922, 924 (1993). The requirements for execution of a holographic codicil are the same as those for a holographic will. *In re Allen*, ____ N.C. App. at ____, 801 S.E.2d at 384 (citing N.C. Gen. Stat. § 31-5.1). Therefore, whether a holographic notation appears on a

typewritten or holographic will, the notation itself must be signed by the testator in order to be a valid holographic codicil. *Id.* (citing N.C. Gen. Stat. § 31-3.4(a)(2)).

7 N.C. Gen. Stat. § 31-3.4(b); *In re Will of Gilkey*, 256 N.C. 415, 418, 124 S.E.2d 155, 156 (1962).

8 *In re Will of Jenkins*, 157 N.C. 429, 436, 72 S.E. 1072, 1075 (1911); *see also In re Will of Wilson*, 258 N.C. 310, 313, 128 S.E.2d 601, 603 (1962).

9 N.C. Gen. Stat. § 31-3.4(a)(3); *In re Will of Wilson*, 258 N.C. at 313, 128 S.E.2d at 603.

10 *In re Will of Gilkey*, 256 N.C. at 420, 124 S.E.2d at 159.

11 *In re Johnson's Will*, 181 N.C. 303, 305, 106 S.E. 841, 842 (1921); *see also In re Taylor's Will*, 220 N.C. 524, 525, 17 S.E.2d 654, 655 (1941) (indicating that a present intent to create a will is insufficient intent; instead, the language must indicate that "writer's intent [was] that the paper itself should operate as a disposition to take effect after death").

12 *Id.*

13 *In re Mucci's Will*, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975).

900.10 DEFINITION OF FIDUCIARY; EXPLANATION OF FIDUCIARY RELATIONSHIP.

A fiduciary¹ is a person who is required to act honestly, in good faith and in the best interests of another person because a fiduciary relationship exists between them.²

NOTE WELL: Where the relationship is such that a fiduciary duty arises as a matter of law, use the following bracketed paragraph.

[By law, a fiduciary relationship exists between

[attorneys and their clients³]

[principal and agent, including, *e.g.*, principal operating under power of attorney⁴]

[trustee and beneficiary⁵]

[executor or administrator and heir, legatee or devisee⁶]

[guardians and their wards⁷]

[broker and principal⁸]

[physician and patient⁹]

[partners to a partnership¹⁰]

[spouses¹¹].]

NOTE WELL: For other relationships where it is alleged that a fiduciary relationship exists, use the following bracketed paragraphs.

[A fiduciary relationship may exist in a variety of circumstances.^{12,13} It is not necessary that a fiduciary relationship be a technical or legal relationship,¹⁴ and even where a fiduciary relationship does not normally exist, one may be created by conduct.¹⁵

A fiduciary relationship exists anytime a person undertakes to act for the benefit of another, thus causing the other to place special faith, confidence and trust in the person undertaking to act in the other's best interest.^{16]}

1 May be of particular use with charges on fraud (N.C.P.I.–Civil 800.00 *et seq.*) and parol trusts (N.C.P.I.–Civil 850.00 *et seq.*). *Compare* N.C.P.I.–Civil 800.15.

2 *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971); *Vail v. Vail*, 233 N.C. 109, 25 S.E.2d 407 (1950); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931).

3 "A fiduciary relationship can exist as a matter of fact in those circumstances 'in which there is confidence reposed on one side, and resulting domination and influence on the other.'" *Hewitt v. Hewitt*, ___ N.C. App. ___, ___, 798 S.E.2d 796, 800 (2017) (citing *Abbitt*, 201 N.C. at 598, 160 S.E. at 906).

4 *Abbitt*, 201 N.C. at 598, 160 S.E. at 906.

5 *Id.*

6 *Abbitt*, 201 N.C. at 598, 160 S.E. at 906.

7 *Id.*

8 *Id.*

9 *Hewitt v. Hewitt*, ___ N.C. App. ___, ___, 798 S.E.2d 796, 800 (2017) (citing *King v. Bryant*, ___ N.C. ___, ___, 795 S.E.2d 340, 349 (2017)).

10 *Id.*

11 *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968).

12 Where the existence of a fiduciary relationship is not established by the evidence as a matter of law, it is proper for the trial court to define "fiduciary relationship" but leave to the jury to determine as a matter of fact whether such a relationship has arisen. *Will of Baitschora*, 207 N.C. App. 174, 189-91, 700 S.E. 2d 50, 60-62 (2010).

13 *Abbitt*, 201 N.C. at 598, 160 S.E. at 906.

14 *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971).

15 *See Dallaire v. Bank of Am.*, 376 N.C. 363, 368, 760 S.E.2d 263, 267 (2014) (citing *Branch Bank & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992), for the principle that "given the proper circumstances" even a bank-customer transaction could give rise to fiduciary relationship); *see also Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (citing 86 C.J.S., Tenancy in Common, § 17, p. 377 for the same regarding the duty of a tenant who undertakes to manage property on behalf of a tenancy in common).

16 *See Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (tenant occupied a fiduciary relationship with his co-tenants where he "undertook to manage" land for their benefit, "causing them to repose special faith, confidence and trust in him to represent their best interest ...").

GENERAL CIVIL VOLUME

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.–Civil Instruction numbers)

ABANDONMENT.

See FAMILY MATTERS.

ABSOLUTE DIVORCE. See DIVORCE.

ABUSE OF PROCESS, 803.00.

ACCORD AND SATISFACTION, 515.45.

ACCOUNTS.

Accounts stated, 635.35.

Defense of payment, 635.40.

Unverified account

Amount owed, 635.25.

Liability, 635.20.

Verified itemized account, 635.30.

ACT OF GOD, 102.26.

ADMISSIONS, REQUESTS FOR, 101.42.

ADMONITION TO JUDGE ON STATING EVIDENCE AND RELATING THE LAW THERETO,
101.00.

ADVERSE POSSESSION.

Basic charge, 820.00.

By cotenant.

Actual ouster, 820.00.

Constructive ouster, 820.16.

Color of title, 820.10.

AGENCY.

Actual and apparent authority, 516.05.

Basic charge—issue; definition; burden of proof, 103.10.

Civil Conspiracy, Single defendant, 103.30.

Multiple defendants, 103.31.

Departure from employment, 103.50.

Final mandate, 103.70.

Independent contractor, 103.15.

Piercing corporate veil, 103.40.

Ratification, 516.15.

Undisclosed principal, 516.30.

Willful and intentional injury, 103.55.

ALIENATION OF AFFECTIONS.

By third person, 800.20.

Damages, compensatory and punitive, 800.22.

Statute of Limitations, 800.23, 800.23A.

ALIMONY, 815.70.

ALIMONY, CONDONATION, 815.71; 815.72.

ALLEN CHARGE, 150.50.

AMBIGUITIES, 502.30.

ANIMALS.

Animal control ordinance violation, 812.04.

Dog killing or injuring livestock or fowl, 812.05.

Failure to destroy dog bitten by mad dog, 812.06.

Keeping vicious domestic animals [common law (strict), liability], 812.00.

Liability of owners and keepers, 812.00 (Preface).

Running at large.

Dog at night, 812.01.

Dog that is vicious, 812.00.

Other than dogs, 812.03 (by owner's negligence); 812.02 (with owner's knowledge).

Statutory (strict) liability of owner of a dangerous dog, 812.07.

ANNULMENT.

Bigamy, 815.04, 815.37.

Birth of issue, 815.22; 815.36.

Cohabitation, 815.36.

Issue of Duress, 815.27

Issue of Impotence.

General charge, 815.24; 815.34.

Knowledge of, 815.20; 815.35.

Issue of Undue Influence, 815.29

Mental capacity, 815.28; 815.33.

Nonage.

Living children, 815.22; 815.31.

Pregnancy, 815.22A; 815.31.

Ratification, 815.32; 815.38.

ANTITRUST. See TRADE REGULATION.

ASSAULT AND BATTERY.

Basic charge, 800.50.

Battery, 800.51.

Defense of another, 800.54.

Defense of family member, 800.53A.

Defense of property, 800.56.

Defense of self, 800.52.

ASSENT.

Manner of, 502.20.

Mutual.

Meaning accorded offer and acceptance, 502.25.

Offer and acceptance, 502.10.

ATTRACTIVE NUISANCE, 805.65A.

BAILMENTS.

Issue of bailment, 814.00.

Negligence, 814.02; 814.03 (bailee's); 814.04 (bailor's).

BATTERY.

Basic charge on battery, 800.51.

Defense of property, 800.56.

Defense of self, 800.52.

Excessive force in making arrest

Battery, 804.01

Damages, 804.04

Lawfulness, 804.02

Reasonableness of force, 804.03

BLACKLISTING IN EMPLOYMENT, 640.25.

BOUNDARY, DETERMINATION OF (PROCESSIONING), 825.00.

BREACH OF CONTRACT. See CONTRACTS.

BUDGET DISPUTE; BOARD OF EDUCATION and COUNTY COMMISSIONERS, 814.95

BUILDER-VENDOR.

Breach of implied warranty, 747.20.

Damages for breach of implied warranty.

After rescission, 747.35.

Upon retention of dwelling, 747.40.

Defense to claim of breach, 747.10.

Implied warranty of habitability, 747.00.

Rescission for breach of implied warranty, 747.30.

Seller's recovery of rents, 747.36.

BURDEN OF PROOF.

By greater weight, 101.10.

Clear, strong, and convincing, 101.11.

CAMERAS IN COURTROOM, 100.15.

CAPACITY. See MENTAL CAPACITY and MENTAL INCAPACITY.

CARTWAY PROCEEDING.

Basic charge, 840.30.

Damages, 840.31.

CHARACTER EVIDENCE, 101.37.

CIRCUMSTANTIAL EVIDENCE, 101.45.

CITY NEGLIGENCE. See NEGLIGENCE.

COLOR OF TITLE—ADVERSE POSSESSION, 820.10.

COMMON LAW REMEDY FOR CONTRACT BREACH. See CONTRACTS.

CONCLUDING INSTRUCTIONS, 150.45.

CONDEMNATION. See EMINENT DOMAIN.

CONDITIONS PRECEDENT.

Liability on negotiable instrument dependent upon, 624.40.

Occurrence of, 624.41.

CONDONATION OF ALIMONY, 815.71; 815.72.

CONSEQUENTIAL DAMAGES.

Issue of common law remedy, 503.73.

CONSORTIUM.

Damages, 810.30.

Spouse's claim for loss of, 800.65.

CONSPIRACY—CIVIL (one defendant), 103.30.

(multiple defendants), 103.31.

CONSTRUCTION CONTRACT.

Common law remedy, 503.21 through 503.42.

CONTRACTS.

Employment—See EMPLOYMENT CONTRACTS.

Implied at law, 736.00 (basic charge); 736.01 (measure of recovery).

Infancy—See INFANTS.

Interference, wrongful, 807.00.

Interference with prospective contract, wrongful, 807.10.

Issue of formation, 501.01 through 501.80.

Peremptory instruction, 501.02.

Parties stipulate the contract, 501.03.

Defense of lack of mental capacity, 501.05.

Rebuttal by proof of fair dealing and lack of notice, 501.10.

by proof of necessities, 501.15.

by proof of ratification (incompetent regains mental capacity),
501.20.

by proof of ratification (by agent, personal representative or
successor), 501.25.

Defense of mutual mistake of fact, 501.30.

of undue influence, 501.35.

of duress, 501.40.

of fraud, 501.45.

of grossly inadequate consideration ("intrinsic fraud"), 501.50.

of fraud in the factum, 501.52.

of constructive fraud, 501.55.

Rebuttal by proof of openness, fairness and honesty, 501.60.

of infancy, 501.65.

Rebuttal by proof of emancipation, 501.67.

Rebuttal by proof of ratification after minor comes of age,
501.70.

Rebuttal by proof of ratification by guardian, personal representative or agent, 501.75.

Rebuttal by proof of necessities, 501.80.

UCC, 501.01A.

Issue of breach, 502.00 through 502.60.

by non-performance, 502.00.

by renunciation, 502.05.

by prevention, 502.10.

Defense of waiver, 502.15.

of prevention by plaintiff, 502.20.

of frustration of purpose, 502.25.

of impossibility (destruction of subject matter of contract), 502.30.

of impossibility (death, disability or illness of personal services provider), 502.35.

of illegality or unenforceability, 502.40.

of unconscionability, 502.45.

Direct damages—defense of oral modification of written contract, 502.47.

of modification, 502.48.

Defense of rescission, 502.50.

of novation, 502.55.

of accord and satisfaction, 502.60.

Issue of common law remedy, 503.00 through 503.97.

Rescission, 503.00.

Rescission—measure of restitution, 503.01.

Specific performance, 503.03.

Statement of damages issue, 503.06.

Damages in general, 503.09.

Direct damages—buyer's measure of recovery for a seller's breach of contract to convey real property, 503.12.

Seller's measure of recovery for a buyer's breach of executory contract to purchase real property, 503.15.

Broker's measure of recovery for a seller's breach of an exclusive listing contract, 503.18.

Owner's measure of recovery for a contractor's partial breach of a construction contract, 503.21.

Owner's measure of recovery for a contractor's partial breach of a construction contract where correcting the defect would cause economic waste, 503.24.

Owner's measure of recovery for a partial breach of a repair or services contract, 503.27.

Owner's measure of recovery for a contractor's failure to perform any work under a construction, repair, or services contract, 503.30.

Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where the contractor has fully performed, 503.33.

Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where the contractor has not begun performance, 503.36.

Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract after the contractor delivers partial performance, 503.39.

Contractor's measure of recovery for an owner's breach of a construction, repair, or services contract where contractor elects to recover preparation and performance expenditures, 503.42.

Owner's measure of recovery for loss of rent due to a lessee's, occupier's, or possessor's breach of a lease of real estate or personal property, 503.45.

Owner's measure of recovery for loss of use due to a lessee's, occupier's, or possessor's breach of a lease of real estate or personal property, 503.48.

Owner's measure of recovery for real estate or personal property idled by breach of contract where proof of lost profits or rental value is speculative, 503.51.

Employer's measure of recovery for employee's wrongful termination of an employment contract, 503.54.

Incidental damages, 503.70.

Consequential damages, 503.73.

Future worth of damages in present value, 503.76.

Damages mandate, 503.79.

Defense (Offset) for failure to mitigate, 503.90.

Amount of credit, 503.91.

Validity of liquidated damages provision, 503.94.

Amount of liquidated damages, 503.97.

Issue of UCC remedy, 504.00 through 504.54.

Buyer's damages upon seller's repudiation, 504.00.

Buyer's damages upon seller's failure to make delivery or tender, 504.03.

Buyer's remedy of rightful rejection, 504.06.

Buyer's damages upon rightful rejection, 504.09.

Buyer's remedy of justifiable revocation of acceptance, 504.12.

Buyer's damages upon justifiable revocation of acceptance, 504.15.

Buyer's damages after acceptance and retention of goods, 504.18.

Buyer's remedy of specific performance, 504.21.

Seller's remedy (or defense) of stopping delivery of goods, 504.24.

Seller's remedy (or defense) of reclaiming goods already delivered, 504.27.

Seller's remedy of resale, 504.30.

Seller's resale damages, 504.33.

Seller's contract—market damages, 504.36.

Seller's lost profit damages, 504.39.

Seller's remedy of action for price (specific performance) for delivered goods, 504.42.

Seller's remedy of action for price (specific performance) for undelivered goods, 504.45.

Defense (offset) of failure to mitigate, 504.48.

Validity of liquidated damages provision, 504.51.

Amount of liquidated damages, 504.54.

Issue of remedy—minor's claim for restitution where contract is disavowed, 505.20.

Measure of recovery, 505.25.

Not to compete—See COVENANTS NOT TO COMPETE.

Performance—See PERFORMANCE.

Prevention of compliance—See PREVENTION.

Quantum meruit, 736.00 (basic charge); 736.01 (measure of recovery).

Repudiation—See REPUDIATION.

Services rendered—See SERVICES RENDERED A DECEDENT.

Special damages—loss of profits, 517.20.

CONTRIBUTION, NEGLIGENCE OF THIRD PARTY TORT-FEASOR, 102.30.

CONTRIBUTORY, NEGLIGENCE.

Contentions, 104.35.

Definition, 104.10.

Final mandate, 104.50.

Of minor between seven and fourteen years of age, 104.25.

CONTRIBUTORY NEGLIGENCE, GROSS NEGLIGENCE AS DEFEATING, 102.86.

CONVERSION.

Basic charge, 806.00.

Damages, 806.05.

Defense of abandonment, 806.01.

Defense of gift, 806.03.

Defense of sale or exchange, 806.02.

Significant development explanation, 806.041.

CORPORATIONS.

Breach of duty—corporate officer, 807.50.

Breach of duty—corporate officer, 807.52.

Breach of duty—controlling shareholder of closely held corporation—
issue of closely held corporation, 807.54.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power, 807.56.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power—defense of good faith, care and
diligence, 807.58.

COUNTY, MUNICIPALITY DUTY TO USERS OF PUBLIC WAYS.

General, 805.67.

Handicapped plaintiff contributory negligence, 805.69.

Sui juris plaintiff contributory negligence, 805.68.

COVENANTS NOT TO COMPETE.

Breach of covenant, 645.30.

Damages for breach, 645.50.

Existence of covenant, 645.20.

COURSE OF DEALING.

Implied warranty based on, 741.31; 741.34.

COURT HAS NO OPINION, 150.20.

CREDIBILITY OF WITNESS, 101.15.

CRIMINAL CONVERSATION.

Basic charge, 800.25.

Damages, 800.26.

Statute of limitations, 800.27, 800.27A.

DAMAGES. See MEDICAL MALPRACTICE. See WRONGFUL DEATH.

Alienation of affections, 800.22; 800.21; 800.22.

Breach of contract. See CONTRACTS.

Breach of implied warranty of habitability of dwelling, 747.20.

Breach of warranty, buyer's action, 569.30; 741.40 (rightful rejection); 741.50 (revocation of acceptance); 741.60 (accepted goods retained).

Breach of warranty, new motor vehicles, 745.07 (plaintiff as purchaser); 745.09 (plaintiff as lessee); 745.11 (plaintiff as lessor).

Conversion, 806.05.

Covenants not to compete, 645.50.

Criminal conversation, 800.26.

Invasion of privacy, 800.71; 800.76.

Liquidated damages, UCC Remedy, 504.51; 504.54.

Malicious prosecution (compensatory), 801.05.

Malicious prosecution (punitive), 801.10.

Misappropriation of trade secrets, 813.98.

Parent's claim for injury to child, 810.32.

Personal injury.

Final mandate, 810.20.

In general, 810.02.

Issue, 810.00.

Liability of employer, 640.46 (to employee); 640.48 (to independent contractor's employee).

Loss of consortium, action, 800.65.

Loss of consortium, damages, 810.30.

Loss of earnings, 810.06.

Loss of use of part of body, 810.12.

Medical expenses, 810.04; 810.04A; 810.04B (stipulation); 810.04C; 810.04D (no stipulation).

Mitigation, 810.24.

Pain and suffering, 810.08.

Parent's claim for negligent or wrongful injury to minor child, 810.32.

Permanent injury, 810.14.

Scars and disfigurement, 810.10.

Punitive, 810.90; 810.96.

Trespass.

 personal property, 800.15.

 real property, 805.05.

Worker's compensation award, setoff and deduction, 810.18.

Property damage.

 Final mandate, 810.68.

 Issue, 810.60.

 No market value ("actual value"), 810.66.

 No market value (replacement or repair), 810.64; 810.66.

Punitive.

 Issue of existence of malicious, willful, wanton or grossly negligent conduct—
 wrongful death, 810.91.

 Issue of existence of outrageous or aggravated conduct, 810.90.

 Liability of defendant, 810.96.

 Whether to make award and amount, 810.93.

 Whether to make award and amount (special cases), 810.94.

Tort by child, 815.91.

Wrongful death, 810.40.

Wrongful discharge from employment, 640.50.

DEATH AS EXCUSE FOR NONPERFORMANCE OF CONTRACT. See IMPOSSIBILITY.

DECEDENT. See SERVICES RENDERED A DECEDENT.

DEEDS.

 Action to establish validity, 850.00.

 Action to set aside.

 Lack of mental capacity, 850.05.

 Mutual mistake of fact, 850.10.

 Undue influence, 850.15.

 Duress, 850.20.

 Fraud, 850.25.

 Intrinsic fraud, 850.30.

 Constructive fraud, 850.40.

 Constructive, defense of openness, 850.45.

 Defense of innocent purchaser, 850.50.

 Lack of valid delivery, 850.50.

 Lack of legally valid acceptance, 850.55.

DEFAMATION.

Damages.

- private figure, actionable per se, presumed damages.
 - matter of public concern, 806.82.
 - not matter of public concern, 806.81.
- public figure, actionable per se, presumed damages, 806.83.
- punitive damages, private figure, matter of public concern, 806.85.
 - defense of truth, libel—private figure—not matter of public concern, 806.79.

Libel.

Per quod.

- private figure, matter of public concern, 806.61.
- private figure, not matter of public concern, 806.60.
- public figure or official, 806.62.

Per se.

- private figure, matter of public concern, 806.51.
- private figure, matter of public concern, punitive damages, 806.52.
- private figure, not matter of public concern, 806.50.
- public figure or official, 806.53.

Preface, 806.40.

Slander.

Per quod.

- private figure, matter of public concern, 806.71.
- private figure, not matter of public concern, 806.70.
- public figure or official, 806.72.

Per se.

- private figure, matter of public concern, 806.66.
- private figure, not matter of public concern, 806.65.
- public figure or official, 806.67.

DEFENSES TO ISSUE OF FORMATION OF CONTRACT. See CONTRACTS.

DEPOSITION.

Evidence, 101.43.

Testimony, 100.43.

DISCHARGE JURY, 150.60.

DIVORCE or DIVORCE FROM BED AND BOARD.

Abandonment, 815.50.

Adultery, 815.60.

Excessive use of alcohol or drugs, 815.58.

Cruelty, 815.54.

Indignities, 815.25; 815.56.

Insanity, 815.44; 815.46.

Knowledge of grounds, 815.10.

Malicious turn out-of-doors, 815.52.

One year separation, 815.40; 815.42.

DOGS.

Failing to destroy dog bitten by mad dog, 812.06.

Keeping vicious domestic animal, 812.00.

Killing or injuring livestock, 812.05.

Running at large at night, 812.01.

Statutory (strict) liability of owner of a dangerous dog, 812.07.

DOMESTIC ANIMALS. See ANIMALS.

DURESS.

Action to set aside deed, 850.20.

Wills, 860.22.

Rescission of written instrument, 505.35.

DUTY OF CORPORATE DIRECTOR, OFFICER AND CONTROLLING SHAREHOLDER.

Breach of duty—corporate officer, 807.50.

Breach of duty—corporate officer, 807.52.

Breach of duty—controlling shareholder of closely held corporation—
issue of closely held corporation, 807.54.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power, 807.56.

Breach of duty—controlling shareholder of closely held corporation—
issue of taking improper advantage of power —defense of good faith, care and
diligence, 807.58.

DUTY OF OWNER TO CHILD—ATTRACTIVE NUISANCE, 805.65A.

EASEMENT.

By prescription, 840.10.

Cartway proceeding.

Basic charge, 840.30.

Damages, 840.31.

Definition of, 840.00.

Implied, 840.20.

Way of necessity, 840.25.

EMINENT DOMAIN, 835.00.

Department of Transportation or Municipality for Highway.

Total taking, 835.10.

Partial taking, 835.12, 835.13, 835.13A.

Easement, 835.12A, 835.14, 835.14A.

Easements, 835.12A; 835.14, 835.14A, 835.20; 835.24A.

Introductory instructions, 835.05.

Partial taking.

Department of Transportation or municipality for highway, 835.12, 835.13,
835.13A.

Private or Local Public Condemnor, 835.20; 835.22; 835.24.

Private and local public condemnors.

Partial taking (value before and after), 835.22; 835.22A.

Partial taking (value of property taken), 835.20; 835.20A.

Partial taking (greater of value of property taken or value before and after),
835.24; 835.24A.

Total taking, 835.15.

Total taking, 835.10; 835.15.

EMOTIONAL DISTRESS, INFLICTION OF.

Intentional, 800.60.

Negligent, 102.84.

EMPLOYMENT RELATIONSHIP.

Blacklisting, 640.25.

Constructive termination, 640.02.

Damages.

General, 640.30.

Mitigation of, 640.32.

Definite term.

Breach of agreement for, 640.12.

Employer's defense of just cause, 640.14.

Employment for, 640.10.

Employer's measure of damages for employee's wrongful termination of contract,
503.54.

Introduction to series, plaintiff's status as employee, 640.00.

Liability.

Injury to employee, 640.46.

Employee negligent hiring independent contractor, 640.43.

Employee negligent retention of independent contractor, 640.44.

Injury to independent contractor's employee, 640.48.

Negligent hiring or retention of employee, 640.42.

Plaintiff's status as employee, 640.00.

Status of person as employee, 640.01.

Termination/resignation, 640.03

Vicarious liability of employer for co-workers torts, 640.40.

Wage and Hour Act

Claim, 640.60

Damages, 640.65

Whistleblower Act

Direct admission, 640.29B.

Introduction, 640.29A.

Mixed motive cases, 640.29D; 640.29E.

Pretext, 640.29C.

Wrongful termination.

Employer's defense to, 640.22.

General charge (tortious termination), 640.20.

EVIDENCE.

- Circumstantial, 101.45.
- Clear, strong, convincing—definition, 101.11.
- Deposition, 101.43.
- Duty to recall, 101.50.
- Expert witness, 101.25.
- Greater weight of—definition, 101.10.
- Invocation of the Fifth Amendment privilege against self-incrimination, 101.38.
- Jury to consider only matters in evidence, 106.49.
- Limiting instruction as to parties, 101.32.
- Limiting instruction as to purpose, 101.33.
- Maps, 101.40.
- Models, 101.40.
- Photographs, 101.40.
- Presumptions, 101.62.
- Recapitulation of, 101.00.
- Relating law to, 101.00.
- Relating to character of witness, 101.37.
- Review of, 101.50.
- Spoliation by a party, 101.39.
- X-ray, 101.40.

EXCESSIVE FORCE.

Common law claim for battery. See BATTERY.

Section 1983 Claim.

- Color of state law, 804.06
- Damages, 804.10
- Lawfulness of arrest, 804.08
- Punitive damages, 804.11
- Reasonableness of force, 804.09
- Use of force, 804.07

EXPERT WITNESS, 101.25.

FALSE IMPRISONMENT, 802.00.

FALSE LIEN AGAINST PUBLIC OFFICER OR EMPLOYEE, 813.41.

FIDUCIARY RELATIONSHIP.

- Constructive fraud, 800.05 (general); 800.06 (defense of openness).
- Definition, 900.10.

FIFTH AMENDMENT PRIVILEGE, 101.38.

FIRE INSURANCE.

- Defense of fraudulent proof of loss, 910.27.
- Hazard increased by insured, 910.20.
- Intentional burning by insured, 910.25.

Willful misrepresentation in application, 910.26.

FOOD AND DRINK CASES. See PRODUCTS LIABILITY.

FOREPERSON OF JURY—SELECTION OF, 150.40.

FORECLOSURE ACTION FOR DEFICIENCY JUDGMENT

- Amount of debt owed, 855.10
- Bid substantially less than true value of property, 855.14
- Defense—property fairly worth amount of securing debt, 855.12
- Defense—true value of property on date of sale, 855.16
- Sample verdict form and judges worksheet, 855.18

FORMATION OF CONTRACTS. See CONTRACTS.

FRAUD. See also FRAUDULENT TRANSFER.

- Action to set aside deed, 850.25.
- Constructive, 800.05 (fiduciary relationship); 800.06 (defense of openness, etc.).
- Elements, 800.00.
- Negligent misrepresentation, 800.10.
- Negotiable instruments, knowledge that the instrument was an instrument, 625.20.
- Statute of Limitations, 800.00A
- Written instruments, rescission because of fraud, 505.20.

FRAUDULENT TRANSFER.

- To insider while insolvent.
 - Defenses, 814.80; 814.81; 814.85; 814.90.
 - Defined, 814.75.
- With intent to delay, hinder, or defraud.
 - Defined, 814.50.
 - Transferee's defense, 814.55.
- Without receiving reasonably equivalent value, 814.65; 814.70.

FUNCTION OF JURY, 101.05.

GROSS NEGLIGENCE DEFEATING CONTRIBUTORY NEGLIGENCE, 102.86.

IDENTITY THEFT, 870.72; 870.73.

IMPEACHMENT OF WITNESS.

- By character evidence, 101.37.
- By cross-examination as to prior conviction of crime, 101.36.
- By prior inconsistent statement, 101.35.

IMPRISONMENT. See FALSE IMPRISONMENT.

INCOMPETENCY. 817.00

INCIDENTAL DAMAGES.

- Breach of warranty, buyer's action, 701.40; 701.50; 701.60.

INDEPENDENT CONTRACTOR, 103.15.

INFANTS.

- Contracts, Issue of Formation; Defense of Infancy, 501.65 through 501.75.

INNOCENT PURCHASER, DEFENSE, ACTION TO SET ASIDE DEED, 850.45.

INSULATING/INTERVENING NEGLIGENCE, 102.65.

INSURANCE.

Accident.

Effect of diseased condition, 870.21.

Issue, 870.25.

Accidental means.

Definition, 870.20.

Effect of diseased condition, 870.21.

Actual cash value, 910.80; 910.90.

Application. See INSURANCE, Misrepresentation in application.

Concealment of material fact, non-marine policy, 880.26.

Disability.

Constant care of physician, 880.02.

Continuous confinement within doors, 880.01.

Continuous and total disability, 880.00.

Estoppel, false answer to application by agent, 880.20; 880.30.

Failure to procure.

Contract issue, 870.10.

Negligence issue, 870.00.

Fraudulent proof of loss, 910.27.

Hazard of fire increased by insured, 910.20.

Intentional burning by insured, 910.25.

Misrepresentation in application.

Concealment of material fact in non-marine policy, 880.26.

Factual dispute, 880.14.

False answer by agent, 880.30.

Falsity of representation, 880.15.

Fire insurance policy, willful misrepresentation, 880.25.

Materiality of, 880.20.

Suicide defense to life insurance, 870.30.

INTENT, Definition, 101.46

INTERESTED WITNESS, 101.30.

INTERFERENCE, WRONGFUL.

with contract right, 807.00.

with prospective contract, 807.10.

INTERROGATORIES, 100.44.

INVASION OF PRIVACY.

Appropriation of name or likeness for commercial use, 800.75.

Appropriation of name or likeness for commercial use—damages, 800.76.

Offensive intrusion, 800.70.

Offensive intrusion—damages, 800.71.

ISSUES—GENERAL EXPLANATION, 101.60.

JUDGE STATING THE EVIDENCE, 101.00.

JUDICIAL NOTICE, 101.14.

JUROR NOTE-TAKING, 100.70.

JURY.

- Consider all contentions, 150.10.

- Consider only matters in evidence, 106.49.

- Discharging, 150.60.

- Failure to reach verdict, 150.50.

- Function of, 101.05.

- Render verdict based on fact, not consequences, 150.12.

- Unanimous verdict, 150.30.

LAND-DISTURBING ACTIVITY. 847.00, 847.01

LANDLORDS.

- Duty to non-residential tenant.

 - Controlled or common areas, 805.73.

 - Defense of contributory negligence, 805.74.

- Duty to provide fit residential premises.

 - Basic, 845.30.

 - Damages, 845.35.

- Duty to residential tenant.

 - Defense of contributory negligence, 805.72.

 - Residential premises and common areas, 805.71.

- Duty to vacation rental, 805.80.

- Summary ejectment.

 - Damages, 845.20.

 - Defense of tender, 845.04.

 - Defense of waiver of breach by accepting rent, 845.15.

 - Failure to pay rent, 845.05

 - Holding over after end of lease period, 845.10.

 - Violation of provision in lease, 845.00.

LANDOWNERS.

- Contributory negligence of lawful visitor, 805.56.

- Duty to.

 - Lawful visitor, 805.55.

- Gross contributory negligence.

 - Of trespasser, 805.66.

- Municipal and County.

 - Duty to users of public ways, 805.67.

 - Handicapped contributory negligence, 805.69.

 - Sui juris contributory negligence, 805.68.

- See LANDLORDS.

LAWFUL VISITOR.

- Status, 805.50.

Duty of owner, 805.55.

Defense of contributory negligence, 805.56.

LEMON LAW. See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

LIBEL. See DEFAMATION.

Defense of truth, private figure, not matter of public concern, 806.79.

Per quod.

private figure, matter of public concern, 806.61.

private figure, not matter of public concern, 806.60.

public figure or official, 806.62.

Per se.

private figure, matter of public concern, 806.51.

private figure, not matter of public concern, 806.50.

public figure or official, 806.53.

LIEN, False lien against public officer or employee, 813.41.

MALICIOUS PROSECUTION.

Civil proceeding, 801.01.

Criminal proceeding, 801.00.

Damages, 801.05.

Punitive damages, 801.10.

MALPRACTICE. See MEDICAL MALPRACTICE.

Agents, liability for acts of, 809.65 (non-employee agents); 809.80 (liability of institutional health care provider).

Consent, informed, 809.45.

Damages—See DAMAGES, Personal injury.

Direct evidence, 809.00.

Direct and indirect evidence, 809.05.

Doctor not insurer of results, 809.00; 809.03; 809.05.

Duty to attend, 809.00; 809.03; 809.05.

General instruction.

Direct evidence, 809.00.

Direct and indirect evidence, 809.05.

Indirect evidence, 809.03.

Highest degree of skill not required, 809.00; 809.03; 809.05.

Health care provider not insurer of diagnosis, etc., 809.00; 809.03; 809.05.

Hospital.

Liability for agent, 809.80.

Selection of doctor, 809.75.

Indirect evidence, 809.03.

Limitation by notice or special agreement, 809.07.

Res Ipsa Loquitor, 809.03; 809.05.

MAPS, 101.40.

MINORS CLAIM FOR RESTITUTION WHERE CONTRACT DISAVOWED, 505.20; 505.25.

MEDICAL MALPRACTICE. See MALPRACTICE (for medical negligence claims arising before 1/1/12.)

- Both direct and indirect evidence of negligence, 809.05A

- Corporate or administrative negligence by hospital, nursing home, or adult care home, 809.06

- Damages

 - Personal injury damages

 - Generally—809.100

 - Permanent injury—economic damages, 809.114

 - Permanent injury—non-economic damages, 809.115

 - Final mandate (regular), 809.120

 - Final mandate (per diem argument by counsel), 809.122

 - Sample verdict form—damages issues, 809.199

 - When plaintiff seeks to overcome statutory limit on non-economic damages, 809.160

 - Wrongful death

 - Final mandate (per diem argument by counsel), 809.156

 - Final mandate (regular), 809.154

 - Generally, 809.142

 - Present monetary value of deceased to next-of-kin—economic damages, 809.150

 - Present monetary value of deceased to next-of-kin—non-economic damages, 809.151

- Direct evidence of negligence, 809.00A

- Emergency medical condition

 - Both direct and indirect evidence of negligence, 809.26

 - Corporate or administrative negligence by hospital, nursing home, or adult care home, 809.28

 - Direct evidence of negligence, 809.22

 - Existence of emergency medical condition, 809.20

 - Indirect evidence of negligence only ("res ipsa loquitur"), 809.24

- Health care providers liability for acts of non-employee agents, 809.65A

- Indirect evidence of negligence, 809.03A

MEDICAL NEGLIGENCE, 809.00 through 809.90.

MILITARY CONTRACTOR DEFENSE, 714.18.

MENTAL CAPACITY.

- Contracts, issue of formation, 501.05 through 501.25.

- Effect of suicide, 860.16.

- To execute deed, 850.05.

- To execute will, 860.15.

MERCHANT, STATUS OF SELLER AS, 704.10.

MERCHANTABILITY, IMPLIED WARRANTY OF. See WARRANTY.

MINORS.

Basic charge for tort liability of parents, 815.90.

Damages, 815.91.

Negligence of minor between seven and fourteen, 102.13.

Parent's duty to supervise, 102.32.

MISREPRESENTATION, NEGLIGENT, 800.10.

MITIGATION OF PERSONAL INJURY DAMAGES, 810.24.

MODELS, 101.40.

MOTOR VEHICLE WARRANTIES ("LEMON LAW").

Damages, 745.07 (plaintiff as purchaser); 745.09 (plaintiff as lessee);
745.11 (plaintiff as lessor).

Defense of abuse, neglect, or unauthorized alterations, 745.05.

Express warranty, breach of, 745.01 (manufacturer's failure to make necessary repairs); 745.03 (manufacturer unable to conform vehicle to warranty).

Unreasonable refusal to comply with requirements of act, 745.13.

NEGLIGENCE.

Burden of proof, 102.10.

Concurring, 102.60.

Contention of, 102.35.

Contribution, third party tort-feasor, 102.30.

Contributory negligence, 104.10; 104.25; 104.35; 104.50.

Definition common law negligence, 102.11.

Doctrine of sudden emergency, 102.15.

Duty of adjoining landowners, 805.70.

Final mandate, 102.50.

Gross negligence, willful or wanton conduct, 102.85; 102.86.

Infliction of severe emotional distress, 102.84.

Insulating, intervening negligence, 102.65.

Landlord's duty to tenant.

Non-residential tenant.

Controlled or common areas, 805.73.

Defense of contributory negligence, 805.74.

Residential tenant.

Defense of contributory negligence, 805.72.

Residential premises and common areas, 805.71.

Vacation rental, 805.80.

Landowner's duty of adjoining, 805.70.

Legal negligence—duty to client, 811.00.

Minor between seven and fourteen, 102.31.

Municipal or county.

Defense of contributory negligence, handicapped plaintiff, 805.69.

Defense of contributory negligence, sui juris plaintiff, 805.68.

Duty to users of public ways, 805.67.

No duty to anticipate negligence of others, 102.14.
Parent's duty to supervise minor, 102.32.
Per se; definition, 102.12.; sudden emergency exception, 102.16.
Proximate cause, 102.19, 102.20.
Res Ipsa Loquitur, 102.30.
Stipulation, 102.10A.
See PRODUCTS LIABILITY.

NEGOTIABLE INSTRUMENTS.

Consumer credit defenses.
 Notice by assignee of assignment, 629.50.
 Notice by debtor of defenses, 629.51.
Defenses to.
 Consumer credit defenses, above.
 Good against holders in due course.
 Fraud in factum, 625.20.
 Infancy—See INFANTS.
 Good against non-holders in due course.
 Acquisition by theft, 624.50.
 Breach of contract, 624.50.
 Liability dependent on a condition precedent, 624.40; 624.41.
 Non-delivery or delivery for a special purpose, 621.45.
 Holder in due course.
 Basic charge, 622.20.
 Definition, 622.10.
 Promissory note.
 Defense of non-adoption of seal, 591.05.
 Defense of want of consideration, 591.06.
 Signature in issue.
 Evidence offered by both parties, 623.25.
 Evidence offered by plaintiff, 623.20.

NEW MOTOR VEHICLES. See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

NOTE-TAKING BY JUROR, 100.70.

NOTICE.

Adequate assurances—See ADEQUATE ASSURANCES.
Consumer credit defenses—See CONSUMER CREDIT DEFENSES.

NUISANCE.

Alteration of surface water flow, 805.30.
Attractive, 805.65A.
Private, 805.25.

OPEN PRICE TERM. See PRICE.

OPENING STATEMENT, 100.10.

ORAL TRUSTS. See PAROL TRUSTS.

OWNERS AND OCCUPIERS OF LAND.

Contributory negligence of lawful visitor, 805.56.

Duty of owner to lawful visitor, 805.55.

Duty of owner to trespasser, 805.65.

Gross contributory negligence of trespasser, 805.66.

Status of party as lawful visitor, trespasser, 805.50.

See LANDLORDS.

PARENTS' LIABILITY FOR CHILD'S TORT, 815.90.

PARENT-CHILD IMMUNITY, 102.87.

PAROL TRUSTS.

By operation of law.

Constructive trusts, 865.75.

Purchase money resulting trust, 865.65.

Purchase with fiduciary funds, 865.70.

Express declaration of trust in personal property, 865.60.

Express trust in transferred real or personal property, 865.55.

Express trust in purchased real property or personal property, 865.50.

PATERNITY, 815.75.

PECULIAR SUSCEPTIBILITY, 102.20.

PERFORMANCE.

Full, basic charge, 630.10.

Impossibility of—See IMPOSSIBILITY.

Prevention of—See PREVENTION.

Substantial, basic charge, 630.20.

PER DIEM ARGUMENT, 810.51.

PEREMPTORY INSTRUCTION, 101.65.

PERSONAL INJURY DAMAGES. See DAMAGES.

PHOTOGRAPHS, 101.40.

PIERCING CORPORATE VEIL, 103.40.

PRESUMPTIONS, 101.62.

PRIOR INCONSISTENT STATEMENT OF WITNESS, 101.35.

PROCESSIONING ACTION, 825.00.

PRODUCTS LIABILITY.

Builder-Vendor—See BUILDER-VENDOR.

Defenses

Claimant's failure to exercise reasonable care as proximate cause, 743.10; 744.10.

Inherent characteristic design, 744.16.

Lack of seller's opportunity to inspect.

Basic charge, 743.05.

Exception, 743.06.

Military contractor defense, 714.18.

Open and obvious risk, 744.12.

Product alteration or modification, 747.07; 744.07.

Sealed container defense of seller.

Basic charge, 743.05.

Exception, 743.06; 744.06.

Unreasonable use, given knowledge of unreasonably dangerous condition, 743.09; 744.09.

Use contrary to instructions or warnings, 743.08; 744.08.

Firearms, defective design claim, 744.15.

Inadequate design of formulation claim, 744.14.

Inadequate warning claim, 744.11.

Motor Vehicle Warranties—See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

Prescription drugs.

Defense of delivery of adequate warning, 744.13.

Defense of unavoidably unsafe aspect, 744.17.

Statute of limitations, 744.18.

PROPERTY. See TITLE, PROOF OF.

PROXIMATE CAUSE,

Act of God, 102.26.

Concurring acts of negligence, 102.27.

Definition, 102.19.

Insulating acts of negligence, 102.28.

Multiple causes, 102.19.

Peculiar susceptibility, 102.20.

PUNITIVE DAMAGES.

Existence of outrageous or aggravated conduct, 810.90.

Insurance company's bad faith refusal to settle a claim, 810.92.

Liability of defendant, 810.96.

Malicious prosecution cases, 801.10.

Whether to make award and amount, 810.93; 810.98.

Whether to make award and amount (special cases), 810.94.

Wrongful death cases, 810.91.

QUANTUM MERUIT.

Basic charge, 736.00.

Measure of recovery, 736.01.

RACKETEERING. See RICO.

RECAPITULATION OF EVIDENCE, 101.00.

RECESSES, 100.20; 100.21.

RELATING THE LAW TO THE EVIDENCE, 101.00.

REMEDY FOR BREACH OF CONTRACT. See CONTRACTS.

REPAIR AND SERVICE CONTRACTS, DAMAGES FOR BREACH. See CONTRACTS.

REPUDIATION.

As breach of contract, 510.20.

RES IPSA LOQUITUR.

Medical malpractice, 809.03, 809.05.

RESCISSION.

Issue of common law remedy, 503.00; 503.01.

REVIEW OF EVIDENCE AND STIPULATIONS, 101.50.

RICO (Civil)

Attempt, 814.44

Conspiracy, 814.43

Enterprise activity, 814.42

Pattern, 814.41

RIPARIAN RIGHTS, WRONGFUL ALTERATION OF WATER FLOW, 805.30.

SEDIMENTATION CONTROL, 847.00; 847.01

SELLER, STATUS AS MERCHANT, 747.10.

SERVICES RENDERED A DECEDENT.

Breach of contract, 735.20.

By family member, presumption of gratuity, 735.15.

Existence of contract, 735.00.

Presumption of compensation.

Family member, 735.15.

Non-family member, 735.10.

Promise to compensate by will, 735.05.

Recovery.

Basic charge, 735.25.

Benefits or offsets, 735.30.

Statute of limitations, 735.40.

Value of specific property, 735.35.

SERVICE AND REPAIR CONTRACTS, DAMAGES FOR BREACH. See CONTRACTS.

SLANDER. See DEFAMATION.

Of title, 807.20.

Per quod.

private figure, matter of public concern, 806.71.

private figure, not matter of public concern, 806.70.

public figure or official, 806.72.

Per se.

private figure, matter of public concern, 806.66.

private figure, not matter of public concern, 806.65.

public figure or official, 806.67.

SPOILIATION OF EVIDENCE, 101.39.

STIPULATIONS, 101.44.

STIPULATION OF NEGLIGENCE, 102.10A.

SUMMARY EJECTMENT.

- Damages, 845.20.
- Defense of tender, 845.04.
- Defense of waiver of breach by accepting rent, 845.15.
- Failure to pay rent, 845.05.
- Holding over after end of lease period, 845.10.
- Violation of provision in lease, 845.00.

TESTIMONY, DEPOSITION, 100.43.

TIME.

- Lapse of, termination of offer, 502.55.

TITLE, SLANDER OF, 807.20.

TITLE, PROOF OF.

- Connected chain from state, 820.50.
- Superior title from common source.
 - Source contested, 820.61.
 - Source uncontested, 820.60.

TRADE REGULATION.

- Allocation of territory, 813.28.
- Boycott, 813.24.
- Combinations in restraint of trade, 813.20.
- Commerce, introduction, 813.60.
- Commerce, unfair competition, unfair and deceptive practices, 813.62.
- Commerce, winning a price, eligibility to win, specially selected, simulation of checks and invoices, 813.63.
- Conspiracy defined, 813.22.
- Damages, 813.80.
- Discriminatory pricing, 813.27.
- False lien or encumbrance against a public officer or employee, 813.41.
- Model charge, 813.05.
- Misappropriation of trade secret.
 - Issue of existence of trade secret, 813.90.
 - Issue of misappropriation, 813.92.
 - Defense to misappropriation, 813.94.
 - Issue of causation, 813.96.
 - Issue of damages, 813.98.
- Predatory acts, 813.25.
- Predatory pricing, 813.26.
- Preface, 813.00.
- Price fixing, 813.29.
- Price suppression, 813.23.
- Proximate cause, 813.70.
- Representation of being specially selected, 813.37.

- Representation of eligibility to win a prize, 813.36.
- Representation of winning a prize, 813.35.
- Simulation of checks and invoices, 813.38.
- Tying between lender and insurer, 813.30.
- Unauthorized disclosure of tax information, 813.31.
- Unfair competition, unfair and deceptive practices, 813.21.
- Unsolicited calls by automatic device, 813.33.
- "Wholesale" used in advertising, 813.39.
- "Wholesale" used in firm name, 813.40.
- Work at home solicitations, 813.34.

TRESPASS, TO PERSONAL PROPERTY.

- Basic charge, 805.10.
- Damages, 805.15.
- Duty of owner to child trespasser, 805.64B.
- Duty of owner to trespasser.
 - intentional harm, 805.64.
 - position of peril, 805.64C.
 - use of reasonable force defense, 805.64A.

TRESPASS, TO REAL PROPERTY.

- Basic charge, 805.00.
- Damages, 805.05.

TRESPASSER.

- Duty to.
 - Defense of gross contributory negligence, 805.66.
 - General, 805.65.
- Status as, 805.50.

TRUSTS.

- Express declaration of trust in personal property, 865.60.
- Express transfer trust, 865.55.
- Express trust, 865.50.
- Purchase money resulting trust, 865.65.
- Purchase with fiduciary funds, 865.70.

UNANIMOUS VERDICT, 150.30.

UNFAIR AND DECEPTIVE TRADE PRACTICES. See TRADE REGULATION.

UNIFORM COMMERCIAL CODE. See CONTRACTS.

USAGE OF TRADE.

- Implied warranty based on, 741.31; 741.34.
- Modification or exclusion of implied warranties by, 711.30.

UNDUE INFLUENCE.

- Action to set aside deed, 850.15.
- In wills, 860.20.
- Rescission of written instrument because of, 505.30.

VACATION RENTAL, DUTY OF LANDLORD TO TENANT, 805.80.

VERDICT—MUST BE UNANIMOUS, 150.30.

VOID and VOIDABLE MARRIAGES. See ANNULMENT.

WARRANTY.

Breach of, 741.10 (express); 741.20 (merchantability); 741.30 (fitness for particular purpose).

Express, 741.05; 741.20. See also WARRANTY, Third party right of action.

Generally, 741.00.

Implied.

Based on course of dealing or usage of trade, 741.31.

Fitness for particular purpose, 741.25 (existence); 741.30 (breach).

Habitability—See BUILDER-VENDOR.

Merchantability, 741.15 (existence); 741.20 (breach); 747.20.

Modification or exclusion

Of implied warranty of fitness for particular purpose, 741.26 (modification); 741.27 (exclusion); 741.28 (knowledge of defects).

Of implied warranty of merchantability, 741.16 (modification); 741.17 (exclusion); 741.18 (knowledge of defects).

See also WARRANTY, Third party right of action.

Motor Vehicles—See MOTOR VEHICLE WARRANTIES ("LEMON LAW").

Notice of—See PRODUCTS LIABILITY.

Remedies.

Where goods retained, 741.60.

After justifiable revocation, 741.45; 741.50.

After rightful rejection, 741.35; 741.40.

Third party right of action.

Against buyer's seller (horizontal), 741.65.

Against manufacturer, 741.66 (horizontal); 741.67 (vertical).

WATER, ALTERATION OF FLOW, 805.30.

WAY OF NECESSITY, 840.25.

WEIGHT OF EVIDENCE.

Greater weight of—definition, 101.10.

Jury to determine, 101.20.

WILLFUL AND MALICIOUS CONDUCT

Parent-child immunity, 102.87

WILLS.

Constructive fraud, 800.15.

Devisavit non vel, 860.25.

Duress, 860.22.

Introductory statement by court, 860.00.

Issues, 860.00.

Lack of testamentary capacity, 860.15.

Requirements.

Attested written will, 860.05.

Holographic, 860.10.

Suicide as affecting testamentary capacity, 860.16.

Undue Influence, 860.20.

WRITTEN INSTRUMENTS, RESCISSION OF. See RECISSION OF WRITTEN INSTRUMENTS.

WRONGFUL DEATH.

General, 810.60; 809.142.

Loss of consortium.

Action, 800.65.

Damages, 810.30.

Parent's claim for injury to child, 810.32.

Punitive damages, 810.91.

Wrongful death damages, medical malpractice cases.

Final mandate (regular), 809.154.

Final mandate (per diem argument by counsel), 809.156.

Funeral expenses—stipulation, 810.48A.

Funeral expenses—stipulation as to amount paid or necessary to be paid, but not as to nexus to conduct, 810.48B.

Funeral expenses—no stipulation as to amount paid or necessary to be paid, no rebuttal evidence, 810.48C.

Funeral expenses—no stipulation as to amount paid or necessary to be paid, rebuttal evidence offered, 810.48D.

Medical expenses—no stipulation as to amount paid or necessary to be paid, no rebuttal evidence, 810.44C.

Medical expenses—no stipulation as to amount paid or necessary to be paid, rebuttal evidence offered, 810.44D.

Medical expenses—stipulation, 810.44A.

Medical expenses—stipulation as to amount paid or necessary to be paid, but not as to nexus to conduct, 810.44B.

Present monetary value of deceased to next-of-kin—economic elements, 809.150

Present monetary value of deceased to next-of-kin—non-economic elements, 809.151

WRONGFUL DISCHARGE. See EMPLOYMENT RELATIONSHIPS.

WRONGFUL INTERFERENCE WITH CONTRACTS, 807.00.

X-RAY, 101.40.

2018 Civil Supplement

ISBN-13: 978-1-56011-931-9



9 781560 119319