June 2019 Supplement to
North Carolina 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=ncpjii.

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

The following instructions are included in this supplement:

809.66 Medical Negligence—Health Care Provider's Liability for Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency.

809.75 Medical Negligence—Institutional Health Care Provider's Liability for Selection of Attending Physician.

813.22 Trade Regulation—Violation—Definition of Conspiracy.

820.00 Adverse Possession—Holding for Statutory Period.

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835.10 Eminent Domain—Issue of Just Compensation—Total Taking by Department of Transportation or by Municipality for Highway Purposes.

835.12 Eminent Domain—Issue of Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes.

835.13 Eminent Domain—Issue of Just Compensation—Partial Taking by Department of Transportation or by Municipality for Highway Purposes ("Map Act").

835.14 Eminent Domain—Issue of Just Compensation—Taking of an Easement by Department of Transportation or by Municipality for Highway Purposes.

*835.15A Eminent Domain—Issue of Just Compensation—Taking of a Temporary Construction or Drainage Easement by Department of Transportation or by Municipality for Highway Purposes.

840.10 Easement by Prescription.

860.10 Wills—Holographic Wills—Requirements.

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

North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

Volume I
2019 Supplement

ISBN 978-1-56011-967-8

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NORTH CAROLINA PATTERN JURY INSTRUCTIONS

INTRODUCTION

I. PREFACE

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

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

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

The project is carried on by a committee of trial judges chaired by the Honorable Forrest D. Bridges, Senior Resident Judge of the 7th Judicial District. The committee is divided into two subcommittees: one for civil law and one for criminal law matters. The Honorable Charles H. Henry chairs the Civil Law Subcommittee, while the Criminal Law Subcommittee is chaired by the Honorable Quentin T. Sumner.

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

The two subcommittees are each assisted by a reporter, such as an experienced trial lawyer or a law professor. In turn, the reporters are supported by student research assistants from the state’s law schools.

The Committee acknowledges with particular gratitude the assistance and support of Professor Ann Anderson and the UNC School of Government

staff who perform the vital functions of formatting, preparing for publication, printing, storing, and distributing these instructions to the North Carolina trial judges. The School of Government also handles the administrative chores of scheduling, coordinating and fiscal accounting for the Committee.

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

2019-2020 PATTERN JURY INSTRUCTIONS COMMITTEE

Civil Subcommittee	Criminal Subcommittee
Charles H. Henry, *Chair*	Quentin T. Sumner, *Chair*
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II. HISTORY

Years ago, judges had to fashion jury instructions for each new case. Jury instructions that were effective or whose use was affirmed on appeal were

used again in later cases. Over time, individual judges developed their own notebooks of instructions, and judges often shared instructions among themselves. In essence, a judge's instructions became a "pattern" for that judge and other judges in later cases. However, these individual judges' sets of instructions were less than comprehensive, and there was no system for distributing them among all the judges.

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

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

composed of Judges Henry A. McKinnon, Jr., Hugh B. Campbell, E. Maurice Braswell and Howard H. Hubbard.

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

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

In its early years, the committee was fortunate to have as its advisor Henry Brandis, Jr., former Dean of the University of North Carolina School of Law. Over the years, the committee has also benefited from the service of several reporters who assisted with the crafting of the jury instructions. This staff has included: Professor James E. Sizemore of the Wake Forest School of Law; Professor Walter Navin; Professor Arnold Loewy, Professor Kenneth S. Broun, and Professor Walker Blakey of UNC Law School; Gordon Brown,

Attorney; Professor Don Beci of the Campbell University School of Law; the Honorable Joe John; the Honorable Gordon Battle, retired Superior Court Judge, and the Honorable John (Jack) Lewis, retired Court of Appeals and Superior Court Judge, and Mary M. Dillon, Attorney. Currently, the reporters are Robert E. Desmond, Attorney, and Alan Woodlief, Senior Associate Dean and Professor at Elon University School of Law.

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

III. USER'S GUIDE

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

ORGANIZATION OF INSTRUCTIONS, TABLE OF CONTENTS, INDEX

As noted in the Preface, the pattern jury instructions are divided into three large groups: criminal, civil, and motor vehicle negligence. Some of the major parts of the pattern jury instructions are the table of contents and the index. The table of contents serves as the outline of the book, showing the grouping of individual instructions within chapters and parts. For each

instruction, the date of publication for the instruction is provided. For the criminal instructions, the table of contents indicates the statutory source for the instruction and the structured sentencing offense classification for each substantive offense. The system also contains a descriptive-word index. In this index, instructions are grouped under words describing their subject matter.

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

STRUCTURE OF INDIVIDUAL INSTRUCTIONS

Most instructions can be broken into several basic parts: the instruction number; the title of the instruction; where applicable, a statutory reference; and the month and year of the most recent edition of the instruction. For criminal instructions, the level of offense (felony, misdemeanor, or infraction) is provided. The introductory paragraph, the body of the instruction, and the mandate are all read by the judge to the jury.

NOTE WELLS AND ENDNOTES

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

relevant statutes and appellate cases, as well as definitions and explanations of the elements or terms used. In some cases, they may contain instructions to the judge much like the "note wells."

NEED FOR ADAPTATION IN INDIVIDUAL CASES

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

One modification that may be consistently necessary is one with regard to the number and gender of persons treated in the instructions. The committee is currently engaged in a process to bring gender neutrality to all jury instructions. Trial judges using these instructions should be aware this is an ongoing process and adapt gendered terms to the facts of the case.

USE OF BRACKETS, PARENTHESES, AND TYPE STYLES

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

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

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

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

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

IV. CONCLUSION

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

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102.15 NEGLIGENCE ISSUE—DOCTRINE OF SUDDEN EMERGENCY.

A person who, through no negligence of [his] [her] own,[1] is suddenly and unexpectedly confronted[2] with imminent danger to [himself] [herself] or to others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, after perceiving a sudden emergency,[3] a person makes a decision that a reasonable and prudent person would make under the same or similar circumstances, that person has done all that the law requires, even if in hindsight some different decision would have been better or safer.[4]

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1. The doctrine of sudden emergency is not applicable to one who by his own negligence has brought about or contributed to the emergency. "The sudden emergency must have been brought about by some agency over which he had no control and not by his own negligence or wrongful conduct." *Hairston v. Alexander Tank*, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984).

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

2. The doctrine of sudden emergency permits the jury to consider whether an emergency confronting the actor affected the reasonableness of specific conduct being analyzed. *See Rodgers v. Carter*, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1996) ("The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for . . . acting as a reasonable man might act in such an emergency."). The doctrine applies "only to conduct, alleged to be negligent, that occurs *after* the emergency arises." *Goins v. Time Warner Cable Southeast, LLC*, ___ N.C. App. ___, ___, 812 S.E.2d 723, 726 (2018) (emphasis in original).

3. *See Pinckney v. Baker*, 130 N.C. App. 670, 673, 504 S.E.2d 99, 102 (1998) ("It logically follows that in order for perception of an emergency to have affected the reasonableness of the actor's conduct, the [actor] must have perceived the emergency circumstance and reacted to it.").

4. "In North Carolina, the sudden emergency doctrine has been applied only to ordinary negligence claims, mostly those arising out of motor vehicle collisions, and has never been used in a medical negligence case." *Wiggins v. E. Carolina Health-Chowan, Inc*., 234 N.C. App. 759, 766, 760 S.E.2d 323, 325 (2014). *See also McDevitt v. Stacy*, 148 N.C. App. 448, 458, 559 S.E.2d 201, 209 (2002); *Ligon v. Matthew Allen Strickland*, 176 N.C. App. 132, 141, 625 S.E.2d 824, 831 (2006); *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000).

103.10 AGENCY ISSUE—BURDEN OF PROOF—WHEN PRINCIPAL IS LIABLE.

This issue reads:

"Was (*state name of agent*) the agent of the defendant (*state name of defendant*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)]?"[1]

You will answer this issue only if you have answered Issue (*state number of issue addressing agent's negligence*) "Yes" in favor of the plaintiff.

Agency is the relationship which results when one person, called the principal, authorizes another person, called the agent, to act for the principal. This relationship may be created by word of mouth, by writing or may be implied from conduct amounting to consent or acquiescence. A principal is liable to third persons for the [acts] [negligence] of the agent in the transaction of the principal's business if the agent is liable.[2]

(An employer-employee relationship is a principal-agent relationship; and wherever in these instructions I use the word, "principal," this includes "employer," and wherever I use the word, "agent," this includes "employee.")[3]

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

First, that there was a principal-agent relationship between (*state name of principal*) and (*state name of agent*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)].

Second, that (*state name of agent*) was engaged in the work, and was about the business of (*state name of principal*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)].

Third, that the business in which (*state name of agent*) was engaged at the time was within the course and scope of the agent's authority or employment. It would be within the course and scope of (*state name of agent*)'s authority or employment if it was done in furtherance of the business of (*state name of principal*), or was incident to the performance of duties entrusted to (*state name of agent*), or was done in carrying out a direction or order of (*state name of principal*)[4], and was intended to accomplish the purposes of the agency.

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 there was a principal-agent relationship between (*state name of principal*) and (*state name of agent*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)], that (*state name of agent*) was engaged in the work, and was about the business of (*state name of principal*) at the time [services were rendered to the plaintiff] [(*describe other occurrence*)], and that the business upon which (*state name of agent*) was engaged at the time was within the course and scope of [his] [her] authority or employment, 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. "Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court." *Hylton v. Koontz*, 138 N.C. App. 629, 635-36, 532 S.E.2d 252, 257 (2000) (citation omitted), *disc. review denied and dismissed*, 353 N.C. 373, 546 S.E.2d 603-04 (2001).

2. *See Egen v. Excalibur Resort Professional & Travelers Insurance Co.*, 191 N.C. App. 724, 729, 663 S.E.2d 914, 918 (2008) (noting that "[t]he general agency doctrine holds the principal responsible for the acts of his agent").

3. This parenthetical sentence should be used when some or all of the testimony is in terms of employment rather than agency.

4. *See State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005) (noting that the "[t]wo essential elements of any agency relationship are (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent").

103.30 AGENCY ISSUE—CIVIL CONSPIRACY (ONE DEFENDANT).[1]

NOTE WELL: This instruction is to be used only where civil conspiracy is alleged[2] to associate the defendant with others[3] for the purpose of establishing joint and several liability. There is no independent claim for civil conspiracy alone.[4] To create joint and several liability by reason of conspiracy, there must be injury or damage caused by an overt or wrongful act,[5] done by a conspirator, pursuant to the common scheme and in furtherance of the conspiracy.[6]

This issue reads: "Did (*name defendant*) conspire with (*name all alleged co-conspirators*) or any one or more of them to (*state object(s) of conspiracy*)?"

NOTE WELL: Select one bracketed paragraph depending on whether the defendant conspired to do an unlawful act, or conspired to do a lawful act in an unlawful way.

[The plaintiff contends, and the defendant denies, that the defendant and (*name all alleged co-conspirators*) conspired to do an unlawful act, that is (*state claim*). I instruct you, members of the jury, that (*state claim*) is an unlawful act. Thus, if you have answered the (*state number*) issue "Yes" in favor of the plaintiff, you must consider whether the (*name all alleged co-conspirators*) or any one or more of them conspired with the defendant to (*state claim*).]

[The plaintiff contends, and the defendant denies, that the defendant and (*name all alleged co-conspirators*) conspired to do a lawful act in an unlawful way. An act, while lawful in and of itself, may be done with an intent or purpose which makes it unlawful.[7] I instruct you, members of the jury, that (*state act or acts*) [is] [are] not, in and of [itself] [themselves], unlawful. However, if (*state act or acts*) [was] [were] done with the purpose or intent[8]

to (*state object of offense*), then while the act(s) may be lawful in and of [itself] [themselves], this purpose or intent would make [it] [them] unlawful.[9] Thus, if you have answered the (*state number*) issue "Yes" in favor of the plaintiff, you must consider whether the (*name all alleged co-conspirators*) or any one or more of them conspired with the defendant to (*state act or acts*) with the purpose or intent to (*state object of offense*).]

On this issue the plaintiff has the burden of proof. Thus, in order to prove[10] that defendant is liable by reason of conspiracy, the plaintiff must satisfy you, by the greater weight of the evidence, of the existence of the following three things:

First, that (*name all alleged co-conspirators*) or any one or more of them agreed with (*name defendant*) [to do an unlawful act] [to do a lawful act in an unlawful way], and

Second, that one or more of the parties to the agreement then committed an overt act in furtherance of the aims of the agreement,[11] and

Third, that the act(s) committed in furtherance of the aims of the agreement proximately caused [injury] [damage] to the plaintiff.[12]

I will now explain each of these requirements.

First, the plaintiff must prove that (*name all alleged co-conspirators*) or any one or more of them agreed with (*name defendant*) to do an unlawful act or to do a lawful act in an unlawful way. Such an agreement is called a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. There can be no conspiracy unless more than one person is

involved. The very word "conspiracy" means "together with someone else." In other words, a conspiracy is a kind of partnership or joint enterprise in which each member becomes the agent of every other member with respect to the common plan, and each member is held responsible for the acts of or statements made by any other member made or done in furtherance of the common plan.[13] The essence of a conspiracy is an unlawful combination to violate or to disregard the law.[14]

Second, the plaintiff must prove that one or more of the parties to the agreement committed an overt act in furtherance of the aims of the agreement. An overt act is an act which could be neutral in its character, but which is evidence of affirmative action showing an intent to accomplish or further the objects of the alleged conspiracy. It is not necessary for the plaintiff to prove that all or any one of the aims of the agreement was accomplished.[15] The plaintiff must show, however, that one or more of the parties to the agreement performed at least one act in furthering or trying to effect the agreement.

And Third, the plaintiff must prove that the overt act(s) committed in furtherance of the conspiracy [was] [were] a proximate cause of [injury] [damage] to the plaintiff.

Proximate cause is a real cause—a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee 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 party seeking damages need not prove that the overt act(s)

[was] [were] the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the overt act(s) [was] [were] one of the proximate causes.

Finally, with respect to this issue, on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that [an overt act] [overt acts] taken in furtherance of a conspiracy to which (*name defendant*) and (*name all alleged co-conspirators*) or any one or more of them [was] [were] a party proximately caused [injury] [damage] to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. Where there are multiple defendants, the fact of conspiracy between any alleged co-conspirator and each defendant should be determined separately. Thus, there should be an issue submitted as to each defendant's conspiracy with another. *See* N.C.P.I.-Civil 103.31 (Agency Issue-Civil Conspiracy) (Multiple Defendants).

2. In many instances, conspiracy is not pleaded from the outset. The basis for a conspiracy may develop as facts are revealed at trial. In such event and provided there is no timely objection, the pleadings may be deemed amended to conform to the evidence. N.C. Gen. Stat. § 1A-1, Rule 15(b).

3. Conspiracy may exist between parties or between a party and a non-party. All that is required is that one member of the conspiracy be a party to the action. *Burton v. Dixon*, 259 N.C. 473, 477, 131 S.E.2d 27, 30 (1963).

4. ”Accurately speaking, there is no such thing as a civil action for conspiracy.” *Reid v. Holden*, 242 N.C. 408, 414, 88 S.E.2d 125, 130 (1995) (quoting 11 Am.Jur. 577, Conspiracy, sec. 45.). A cause of action for civil conspiracy “does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts of one may be admissible against all.” *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (first citing *Shope v. Boyer*, 269 N.C. 401, 150 S.E.2d 771 (1966); then citing *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951)).

5. The terms "overt act" and "wrongful act" are used interchangeably. *Compare Reid v. Holden*, 242 N.C. at 415, 88 S.E.2d at 130 ("To create civil liability for conspiracy there must have been an overt act . . . .") *with Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950) ("To create civil liability for conspiracy, a wrongful act resulting in injury . . . must be done . . . .").

6. "A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. at 476, 131 S.E.2d at 30. Damages for which recovery may be sought are limited to those proximately caused by specific overt or wrongful acts done "as a part of and in furtherance of the common object." S*ee Muse*, 234 N.C. at 198, 66 S.E.2d at 785 (damages must be those resulting from "acts so done").

7. Stated simply, "[t]he plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1904) ("The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." (citing *Aikens v. Wisconsin*, 195 U.S. 194, 196 (1904))).

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

9. This charge would typically be used where intentional torts are alleged. An example might be the tort of abuse of process as presented in *Chatham Estates v. American National Bank*, 171 N.C. 579, 88 S.E. 783 (1916). In that case (which did not involve conspiracy issues), the plaintiff claimed that defendant had abused legal process by bringing an action and filing a *lis pendens* notice on his property. While the act of filing a notice of *lis pendens* is lawful, if done "for the purpose of injuring and destroying the credit and business of another . . .", it is an offense. *Id.*, 171 N.C. at 582, 88 S.E. at 784; *accord Whyburn v. Norwood*, 47 N.C. App. 310, 267 S.E.2d 374 (1980). In instructing the jury where a conspiracy issue is present, the court might say:

> I instruct you, members of the jury, that the filing of a notice of *lis pendens* is not, in and of itself, unlawful. However, if the filing of the notice of *lis pendens* was done with the purpose or intent to injure and destroy the credit and business of another, while the act may be lawful in and of itself, this purpose or intent will make it unlawful.

10. In cases where there is an evidentiary basis for a conspiracy, certain rules of evidence are brought into play, most notably the hearsay exception set forth at N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

11. *Evans v. GMC Sales, Inc.*, 268 N.C. 544, 546, 151 S.E.2d 69, 71 (1966); *Curry v. Staley*, 6 N.C. App. 165, 167, 169 S.E.2d 522, 523 (1969). *Cf. McNeil v. Hall*, 220 N.C. 73, 74, 16 S.E.2d 456, 457 (1941) (If the acts complained of are not wrongful or illegal, then absent any intimidation or coercion, no agreement to commit the lawful acts can be called an illegal and wrongful conspiracy.).

12. *Coleman v. Shirlen*, 53 N.C. App. 573, 577, 281 S.E.2d 431, 433 (1981) (abrogated on other grounds).

13. *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 316, 334 (1984) (The complainant must not only show conspiracy, but that injury resulted as well.); *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950). *See also State v. Lee*, 277 N.C. 205, 208, 176 S.E.2d 765, 770 (1970).

14. "If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of guilt of the other." *Curry*, 6 N.C. App. at 169, 169 S.E.2d at 524. *See* ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, 2016 Edition, Ch. 2 A-1 (2016).

In appropriate cases, the instruction may be supplemented as follows:

> The basis of a conspiracy is an agreement or understanding between two or more persons. An agreement or understanding between two or more persons exists when they share a commitment to a common scheme. To establish the existence of a conspiracy, the evidence need not show that its members entered into any formal or written agreement. The agreement itself may have been entirely unspoken. A person can become a member without full knowledge of all of the details of the conspiracy, the identity of all of its members, or the parts such members played in the charged conspiracy. The members of the conspiracy need not necessarily have met together, directly stated what their object or purpose was to one another, or stated the details or the means by which they would accomplish their purpose. To prove a conspiracy existed, the evidence must show that the alleged members of the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose.
>
> A conspiracy may be formed without all parties coming to an agreement at the same time [*such as where competitors separately accept invitations to participate in a plan to restrain*

> *trade*]. Similarly, it is not essential that all persons acted exactly alike, nor is it necessary that they all possessed the same motive for entering the agreement. It is also not necessary that all of the means or methods claimed by plaintiff were agreed upon to carry out the alleged conspiracy, nor that all of the means or methods that were agreed upon were actually used or put into operation, nor that all the persons alleged to be members of the conspiracy were actually members. It is the agreement or understanding to restrain trade [*in the way alleged by plaintiff*] that constitutes a conspiracy. Therefore, you may find a conspiracy existed regardless of whether it succeeded or failed.
>
> Plaintiff may prove the existence of the alleged conspiracy through direct evidence, circumstantial evidence, or both. Direct evidence is explicit and requires no inferences to establish the existence of the alleged conspiracy.
>
> Direct evidence of an agreement may not be available, and therefore a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together, does not by itself establish the existence of a conspiracy. If they acted similarly but independently of one another, without any agreement among them, then there would not be a conspiracy.
>
> In determining whether an agreement or understanding between two or more persons has been proved, you must view the evidence as a whole and not piecemeal.

Id.

15. *See State v. Potter*, 252 N.C. 312, 313, 113 S.E.2d 573, 574 (1960).

103.31 AGENCY ISSUE—CIVIL CONSPIRACY (MULTIPLE DEFENDANTS).

NOTE WELL: This instruction is to be used only where civil conspiracy is alleged[1] to associate defendants together or with others[2] for the purpose of establishing joint and several liability. There is no independent claim for civil conspiracy alone.[3] To create joint and several liability by reason of conspiracy, there must be injury or damage caused by an overt or wrongful act,[4] done by a conspirator, pursuant to the common scheme and in furtherance of the conspiracy.[5]

[In this case, members of the jury, the plaintiff contends, and each defendant denies, that (*name each defendant*) [both] [all] conspired with (*name all alleged co-conspirators*) or any one or more of them to do an unlawful act.]

[In this case, members of the jury, the plaintiff contends, and each defendant denies, that (*name each defendant*) [both] [all] conspired with (*name all alleged co-conspirators*) or any one or more of them to do a lawful act in an unlawful way.]

The existence or non-existence of conspiracy must be determined separately for each defendant pursuant to the instructions I am about to give you. The mere fact that one of a group of defendants conspires with someone else does not necessarily mean that the remainder of those defendants have also conspired. Each defendant is entitled to have the issue of whether that defendant did or did not in fact conspire with another be determined separately.

Thus, I instruct you that you will consider each of the following issues:

"Did (*name first defendant*) conspire with (*name all alleged co-conspirators*) or any one or more of them to (*state object(s) of conspiracy*)?"

"Did (*name second defendant*) conspire with (*name all alleged co-conspirators*) or any one or more of them to (*state object(s) of conspiracy*)?"

(*Add identical issues for each remaining defendant*).

NOTE WELL: Select one bracketed paragraph depending on whether the defendant conspired to do an unlawful act, or conspired to do a lawful act in an unlawful way.

[The plaintiff contends, and the defendants deny, that each defendant and (*name all alleged co-conspirators*) conspired to do an unlawful act, that is (*state claim*). I instruct you, members of the jury, that (*state claim*) is an unlawful act. Thus, if you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then, as to each defendant you must consider whether the (*name all alleged co-conspirators*) or any one or more of them conspired to (*state claim*).]

[The plaintiff contends, and the defendants deny, that each defendant and (*name all alleged co-conspirators*) conspired to do a lawful act in an unlawful way. An act, while lawful in and of itself, may be done with an intent or purpose which makes it unlawful.[6] I instruct you, members of the jury, that (*state act or acts*) [is] [are] not, in and of [itself] [themselves], unlawful. However, if (*state act or acts*) [was] [were] done with the purpose or intent[7] to (*state object of offense*), then while the act(s) may be lawful in and of [itself] [themselves], this purpose or intent would make [it] [them] unlawful.[8] Thus, if you have answered the (*state number*) issue "Yes" in favor of the

plaintiff, then, as to each defendant, you must consider whether the (*name all alleged co-conspirators*) or any one or more of them conspired to (*state act or acts*) with the purpose or intent to (*state object of offense*).]

On this issue the plaintiff has the burden of proof. Thus, as to each defendant you are considering, in order to prove[9] that defendant is liable by reason of conspiracy, the plaintiff must satisfy you, by the greater weight of the evidence, of the existence of the following three things:

First, that the defendant you are considering agreed with (*name all alleged co-conspirators*) or any one or more of them [to do an unlawful act] [to do a lawful act in an unlawful way], and

Second, that one or more of the parties to the agreement then committed an overt act in furtherance of the aims of the agreement,[10] and

Third, that the act(s) committed in furtherance of the aims of the agreement proximately caused [injury] [damage] to the plaintiff.[11]

I will now explain each of these requirements.

First, the plaintiff must prove that the defendant you are considering agreed with (*name all alleged co-conspirators*) or any one or more of them [to do an unlawful act] [to do a lawful act in an unlawful way]. Such an agreement is called a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. There can be no conspiracy unless more than one person is involved. The very word "conspiracy" means "together with someone else." In other words, a conspiracy is a kind of partnership or joint enterprise in which each member becomes the agent of every other

member with respect to the common plan, and each member is held responsible for the acts of or statements made by any other member made or done in furtherance of the common plan.[12] The essence of a conspiracy is an unlawful combination to violate or to disregard the law.[13]

Second, the plaintiff must prove that one or more of the parties to the agreement committed an overt act in furtherance of the aims of the agreement. An overt act is an act which could be neutral in its character, but which is evidence of affirmative action showing an intent to accomplish or further the object(s) of the alleged conspiracy. It is not necessary for the plaintiff to prove that all or any one of the aims of the agreement was accomplished.[14] Plaintiff must show, however, that one or more of the parties to the agreement performed at least one act in furthering or trying to effect the agreement.

And Third, the plaintiff must prove that the overt act(s) committed in furtherance of the conspiracy [was] [were] a proximate cause of [injury] [damage] to the plaintiff.

Proximate cause is a real cause—a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee 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 party seeking damages need not prove that the overt act(s) [was] [were] the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the overt act(s) [was] [were] one of the proximate causes.

Finally, with respect to this issue, as to (*name first defendant*), on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name first defendant*) agreed with (*name all alleged co-conspirators*) or any one or more of them to do [an unlawful act] [a lawful act in an unlawful way], and that one or more of the parties to the agreement then committed [an overt act] [overt acts] in furtherance of the aims of the agreement and that such overt act(s) proximately caused [injury] [damage] to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

Likewise, with respect to this issue, as to (*name second defendant*), on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name second defendant*) agreed with (*name all alleged co-conspirators*) or any one or more of them to do [an unlawful act] [a lawful act in an unlawful way], and that one or more of the parties to the agreement then committed [an overt act] [overt acts] in furtherance of the aims of the agreement and that such overt act(s) proximately caused [injury] [damage] to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

(*Repeat final mandate for each named defendant*).

1. In many instances, conspiracy is not pleaded from the outset. The basis for a conspiracy may develop as facts are revealed at trial. In such event and provided there is no timely objection, the pleadings may be deemed amended to conform to the evidence. N.C. Gen. Stat. § 1A-1, Rule 15(b).

2. Conspiracy may exist between parties or between a party and a non-party. All that is required is that one member of the conspiracy be a party to the action. *Burton v. Dixon*, 259 N.C. 473, 477, 131 S.E.2d 27, 30 (1963).

3. "Accurately speaking, there is no such thing as a civil action for conspiracy." *Reid v. Holden*, 242 N.C. 408, 414, 88 S.E.2d 125, 130 (1955) (quoting 11 Am.Jur. 577, Conspiracy, sec. 45.). A cause of action for civil conspiracy "does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts of one may be admissible against all." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (first citing *Shope v. Boyer*, 269 N.C. 401, 150 S.E.2d 771 (1966); then citing *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951)).

4. 1A-1, Rule 15 The terms "overt act" and "wrongful act" are used interchangeably. *Compare Reid v. Holden*, 242 N.C. at 415, 88 S.E.2d at 130 ("To create civil liability for conspiracy there must have been an overt act . . . .") *with Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950) ("To create civil liability for conspiracy, a wrongful act resulting in injury . . . must be done . . . .").

5. "A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. at 476, 131 S.E.2d at 30. Damages for which recovery may be sought are limited to those proximately caused by specific overt or wrongful acts done "as a part of and in furtherance of the common object". S*ee Muse*, 234 N.C. at 198, 66 S.E.2d at 785 (damages must be those resulting from "acts so done").

6. Stated simply, "[t]he plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1904) ("The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." (citing *Aikens v. Wisconsin*, 195 U.S. 194, 196 (1904))).

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

8. This charge would typically be used where intentional torts are alleged. An example might be the tort of abuse of process as presented in *Chatham Estates v. American National Bank*, 171 N.C. 579, 88 S.E. 783 (1916). In that case (which did not involve conspiracy issues), the plaintiff claimed that defendant had abused legal process by bringing an action and filing a lis pendens notice on his property. While the act of filing a notice of *lis pendens*

is lawful, if done "for the purpose of injuring and destroying the credit and business of another . . .", it is an offense. *Id.*, 171 N.C. at 582, 88 S.E. at 784; *accord, Whyburn v. Norwood*, 47 N.C. App. 310, 267 S.E.2d 374 (1980). In instructing the jury where a conspiracy issue is present, the court might say:

> I instruct you, members of the jury, that the filing of a notice of *lis pendens* is not, in and of itself, unlawful. However, if the filing of the notice of *lis pendens* was done with the purpose or intent to injure and destroy the credit and business of another, while the act may be lawful in and of itself, this purpose or intent will make it unlawful.

9. In cases where there is an evidentiary basis for a conspiracy, certain rules of evidence are brought into play, most notably the hearsay exception set forth at N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

10. *Evans v. GMC Sales, Inc.*, 268 N.C. 544, 546, 151 S.E.2d 69, 71 (1966); *Curry v. Staley*, 6 N.C. App. 165, 167, 169 S.E.2d 522, 523 (1969). *Compare, McNeil v. Hall*, 220 N.C. 73, 74, 16 S.E.2d 456, 457 (1941) (If the acts complained of are not wrongful or illegal, then absent any intimidation or coercion, no agreement to commit the lawful acts can be called an illegal and wrongful conspiracy.).

11. *Coleman v. Shirlen*, 53 N.C. App. 573, 577, 281 S.E.2d 431, 433 (1981) (abrogated by statute on other grounds).

12. *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (The complainant must not only show conspiracy, but that injury occurred as well.); *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950); *see also, State v. Lee*, 277 N.C. 205, 208, 176 S.E.2d 765, 770 (1970).

13. "If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of guilt of the other." *Curry*, *supra*, 6 N.C. App. at 169, 169 S.E.2d at 524. *See* ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, 2016 Edition, Ch. 2 A-1 (2016).

In appropriate cases, the instruction may be supplemented as follows:

> The basis of a conspiracy is an agreement or understanding between two or more persons. An agreement or understanding between two or more persons exists when they share a commitment to a common scheme. To establish the existence of a conspiracy, the evidence need not show that its members

entered into any formal or written agreement. The agreement itself may have been entirely unspoken. A person can become a member without full knowledge of all of the details of the conspiracy, the identity of all of its members, or the parts such members played in the charged conspiracy. The members of the conspiracy need not necessarily have met together, directly stated what their object or purpose was to one another, or stated the details or the means by which they would accomplish their purpose. To prove a conspiracy existed, the evidence must show that the alleged members of the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose.

A conspiracy may be formed without all parties coming to an agreement at the same time [*such as where competitors separately accept invitations to participate in a plan to restrain trade*]. Similarly, it is not essential that all persons acted exactly alike, nor is it necessary that they all possessed the same motive for entering the agreement. It is also not necessary that all of the means or methods claimed by plaintiff were agreed upon to carry out the alleged conspiracy, nor that all of the means or methods that were agreed upon were actually used or put into operation, nor that all the persons alleged to be members of the conspiracy were actually members. It is the agreement or understanding to restrain trade [*in the way alleged by plaintiff*] that constitutes a conspiracy. Therefore, you may find a conspiracy existed regardless of whether it succeeded or failed.

Plaintiff may prove the existence of the alleged conspiracy through direct evidence, circumstantial evidence, or both. Direct evidence is explicit and requires no inferences to establish the existence of the alleged conspiracy.

Direct evidence of an agreement may not be available, and therefore a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together, does not by itself establish the existence of a conspiracy. If they acted similarly but independently of one

another, without any agreement among them, then there would not be a conspiracy.

In determining whether an agreement or understanding between two or more persons has been proved, you must view the evidence as a whole and not piecemeal.

Id.

14. *See State v. Potter*, 252 N.C. 312, 313, 113 S.E.2d 573, 574 (1960).

516.05 AGENCY IN CONTRACT—AUTHORITY OF GENERAL AGENT—ACTUAL OR APPARENT.

NOTE WELL: This instruction applies when there is an issue as to the authority of an agent to bind the principal as to a particular matter. It should be used only in those cases where the existence of some form of agency has been established (either by stipulation, admission or a finding of fact) but a question remains as to the authority of the agent to bind the principal on the particular matter.

This (*state number*) issue reads:

"Was (*name agent*) authorized to (*describe act, e.g., contract for the purchase of a building*) on behalf of (*name principal*)?"[1]

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove that in (*describe act*) (*name agent*) was acting within the scope of actual authority or apparent authority.

[It has been [stipulated] [admitted] [established] [agreed]] [If you have answered the preceding (*state number*) issue "Yes", it has been established][2] that (*describe stipulated or judicially admitted facts or facts established from preceding issue in just enough detail to show an agency; e.g., "John Jones was employed by the defendant as the general manager of his furniture plant"*).] In this situation the relationship between (*name agent*) and (*name principal*) is called an "agency." An agency is a relationship where one person is empowered to take certain action on behalf of the other person.[3] In such situations the person granting the authority to another to act on [his] [her] behalf is called the "principal." And the person who is authorized to act on behalf of such principal is called the "agent." When an agent acts on behalf of the principal, then the principal is bound by such act, so long as the agent

has not exceeded [his] [her] authority. The act of the agent is treated in law as the act of the principal. However, a principal is not bound by the act of an agent unless that act falls within the scope of authority, actual or apparent, granted by the principal to the agent.[4] In order to determine the authority of an agent, it is necessary to look to the conduct and declarations of the principal. An agent may not extend [his] [her] authority by [his] [her] own conduct standing alone and in the absence of conduct or acquiescence on the part of the principal.

The authority of the agent to act with respect to a particular matter may be actual, or it may be apparent.

"Actual authority" exists where the principal has actually authorized the agent to act on the principal's behalf with respect to a particular matter. It is that authority which the agent reasonably thinks the agent possesses, conferred either intentionally or by want of ordinary care by the principal.[5] It may be granted by the principal by word of mouth, or by writing, or it may be implied by conduct of the principal amounting to consent or acquiescence, or by the nature of the work that the principal has entrusted to the agent.[6]

"Apparent authority," on the other hand, is the authority which the principal has held out the agent as possessing, or which the principal has permitted the agent to hold [himself] [herself] out as possessing.[7] The scope of the agent's apparent authority will be governed by what authority the third person, in the exercise of reasonable care, was justified in believing that the principal had conferred upon the agent.[8] It includes all authority that is usually conferred upon an agent employed to transact the particular business. It includes the authority implied as usual and necessary to the proper

performance of the work entrusted to the agent, and it may be further extended by reason of acts indicating authority which the principal has permitted the agent to do in the course of employment.[9] When the agent acts on behalf of the principal and within the scope of this apparent authority, the principal is bound even though the principal may not have intended to authorize the specific acts in question.[10]

However, the law of apparent authority applies only if the person dealing with the agent, such as the plaintiff in this case, reasonably relied upon the appearance of authority in the agent. Apparent authority does not exist where the person dealing with the agent knows of a limitation on the agent's actual authority.[11] It also does not exist if the circumstances are such as would cause a person of reasonable business prudence to make inquiry as to the agent's authority. (And if a [contract] [(*describe other action*)] is so clearly of an unusual or extraordinary character as to put a person of reasonable business prudence on inquiry, then the doctrine of apparent authority would not apply.)[12] "Reasonable business prudence" means that degree of care which a prudent person gives to important business.[13]

Finally, I instruct you on this (*state number*) issue on which the plaintiff has the burden of proof, that if you find by the greater weight of the evidence[14] either: (1) that (*name principal*), by (*describe word, deed or implication*) granted (*name agent*) actual authority which included the authority to (*describe act*); or (2) that (*name principal*) (*describe evidence of extending authority*) and thereby held (*name agent*) out, or permitted (*name agent*) to hold [himself] [herself] out, as possessing authority which included the authority to (*describe act*) on behalf of (*name principal*), and that the plaintiff reasonably relied upon this appearance of authority in (*describe act, e.g.,*

"*entering into the contract*"), then it would be your duty to answer this issue, "Yes," in favor of the plaintiff.

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

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1. If there is no evidence of actual authority, or if there is evidence of actual authority but none as to apparent authority, make appropriate modifications to this instruction to fit the evidence in the case.

2. Use this language only if the jury is required to answer a preliminary issue of fact as to whether the principal employed or otherwise engaged the agent.

3. Where appropriate, substitute "corporation" or other term for "person."

4. *See Sullivan v. Pugh*, ___ N.C. App. ___, ___, 814 S.E.2d 117, 120 (2018) ("A principal will only be held liable to a third person for the actions of his agent 'when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized has been ratified; or when the agent acts within the scope of his or her apparent authority . . .'") (quoting *First Union Nat'l Bank v. Brown*, 166 N.C. App. 519, 527, 603 S.E.2d 808, 815 (2004)). For an instruction on ratification, see N.C.P.I.-Civil 516.15 ("Agency-Ratification").

5. *Manecke v. Kurtz*, 222 N.C. App. 472, 475, 731 S.E.2d 217, 220 (2012) (quoting *Leiber v. Arboretum Joint Venture, LLC*, 208 N.C. App. 336, 346, 702 S.E.2d 805, 812 (2010)); *see also Harris v. Ray Johnson Constr. Co., Inc.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000).

6. *See Manecke*, 222 N.C. App. at 475, 731 S.E.2d at 220 ("Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question." (quoting *Leiber*, 208 N.C. App. at 346, 702 S.E.2d at 812)); *see also Munn v. Haymount Rehab. & Nursing Ctr., Inc.*, 208 N.C. App. 632, 637–38, 704 S.E.2d 290, 295 (2010); *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 217, 552 S.E.2d 686, 695 (2001); *Harris*, 139 N.C. App. at 830, 534 S.E.2d at 655.

7. *See Manecke*, 222 N.C. App. at 477, 731 S.E.2d at 221 (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 253 (2002)) ("[Apparent authority] is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses."); *see also Munn*, 208 N.C. App.

at 639, 704 S.E.2d at 295; *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (1990).

8. *Manecke*, 222 N.C. App. at 477, 731 S.E.2d at 221 (quoting *Branch*, 151 N.C. App. at 250, 565 S.E.2d at 253) ("Pursuant to the doctrine of apparent authority, the principal's liability is to be determined by what authority a person in the exercise of reasonable care was justified in believing the principal conferred upon his agent.").

9. *Morpul Research Corp. v. Westover Hardware Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 418 (1965).

10. The principal may be bound under the doctrine of apparent authority even if the principal has expressly forbidden the agent to do the act in question. *Id.* at 721, 140 S.E.2d at 419 (Under the doctrine of apparent authority, "the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice.").

11. *See Sullivan v. Pugh*, ___ N.C. App. ___, ___, 814 S.E.2d 117, 120 (2018), citing *Commercial Solvents v. Johnson*, 235 N.C. 237, 242, 69 S.E.2d 716, 720 (1952), for its limitation of the doctrine of apparent authority:

> [The doctrine] may not be invoked by one who knows, or has good reason for knowing, the limits and extent of the agent's authority. In such case, the rule is: Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, or what he is not, empowered to do for his principal.

12. *Morpul*, 263 N.C. at 721, 140 S.E.2d at 418; *Chessom v. Richmond Cedar Works*, 172 N.C. 32, 32, 89 S.E. 800, 801 (1916).

13. *Cf. Holcombe v. Bowman*, 8 N.C. App. 673, 676, 175 S.E.2d 362, 364 (1970).

14. The burden of proving agency is upon the person attempting to hold the principal liable. Once agency is shown, the burden is upon the principal to show that the principal thereafter terminated or limited the agency. *Harvel's Inc. v. Eggleston*, 268 N.C. 388, 394, 150 S.E.2d 786, 792 (1966); *Pac. Southbay Indus., Inc. v. Sure-Fire Distrib., Inc.*, 49 N.C. App. 172, 173, 270 S.E.2d 515, 516 (1980).

516.15 AGENCY—RATIFICATION.

NOTE WELL: This charge should be used when the evidence of agency or authority is lacking or if the jury may resolve those issues against the plaintiff. Ratification applies if (1) the alleged agent represented [himself] [herself] *to be acting for the principal (whether or not the plaintiff was aware of the alleged agent's lack of authority), and (2) the principal, having knowledge of the facts, thereafter ratified the contract negotiated by the alleged agent.*

This (*state number*) issue reads:

"Did the defendant ratify the (*describe transaction*) entered into by the plaintiff and (*name agent*)?"

[You will answer this issue only if you have answered (*specify issues and answers necessary to require an answer to this issue*), thus finding that (*name agent*) was not authorized to act as the defendant's agent in (*describe transaction*) [on] [at] (*specify date or time*).]

When a person without authority, or with limited authority, purports to act as an agent in doing an unauthorized act, the supposed principal, upon discovery of the facts, may ratify the act of the agent and thus give it the same effect as though it had been authorized.[1]

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

First, that (*name agent*) purported to act, or represented [himself] [herself] to be acting, as the agent of the defendant in (*describe transaction*). (When an act is done by a person acting on [his] [her] own, without representation or any suggestion that [he] [she] is acting as agent of the

alleged principal, then the law of ratification does not apply.)[2] (However, the fact that a person dealing with an agent knows at the time that the agent does not have authority to bind the principal in the matter does not prevent ratification of the agreement by the principal.)[3]

Second, that after (*specify transaction*) the defendant knew (or came to know) all the facts material to (*describe transaction*).[4] (The defendant was not required to make an investigation, or even a reasonable inquiry, to become informed of such facts.[5] However, if you find that a person of ordinary intelligence would have inferred or deduced the relevant facts, then you may find that the defendant had knowledge of those facts.[6])

And Third, that the defendant, having such knowledge, ratified the transaction. "Ratification" means an unambiguous expression of an intent to accept or be bound by the transaction. This expression may be by word or deed (or even by silence), so long as it demonstrates an intent to ratify the agreement.[7] However, it is not necessary that the principal actually intend to ratify the unauthorized transaction so long as words or conduct reasonably tend to show an intention to ratify.[8] (Furthermore, I instruct you that the principal, upon discovering the relevant facts, may not ratify the transaction in part and reject it in part.[9] An intent to accept the benefits of an agreement is, in law, sufficient intent to ratify that agreement. (If the principal, by remaining silent, intends to have the benefits should the unauthorized transaction afterwards turn out to be profitable, then that silence amounts to ratification. In such a case, the principal must reject the entire agreement within a reasonable time after learning the facts, or be bound by it.))[10]

So, finally, upon this (*state number*) issue, on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that, in (*describe transaction*), (*name agent*) purported to act as the agent of the defendant, and that the defendant thereafter had knowledge of all facts material to (*describe transaction*), and having such knowledge ratified the agreement by word or deed (or by silence), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 492, 146 S.E.2d 390, 393 (1966).

2. *Inv. Props. of Asheville, Inc. v. Allen*, 283 N.C. 277, 288, 196 S.E.2d 262, 269 (1973).

3. *McCrillis v. A&W Enterprises, Inc.*, 270 N.C. 637, 643, 155 S.E.2d 281, 285 (1967).

4. Applying the doctrine of ratification in the digital age, the Court of Appeals in *IO Moonwalkers v. Banc of Am. Merch. Servs.*, affirmed partial summary judgment on the issue where defendant received and reviewed the proposed contracts via DocuSign, received and reviewed the purportedly final contracts via DocuSign, and then received services from plaintiff covered by those contracts for several months. ___N.C. App. ___, ___, 814 S.E.2d 583, 588 (2018), *disc. rev. denied*, ___N.C. ___, 814 S.E.2d 101 (2018).

5. *Carolina Equip.& Parts Co. v. Anders*, 265 N.C. 393, 401, 144 S.E.2d 252, 258 (1965).

6. *Id.*

7. *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 229, 721 S.E.2d 256, 262 (2012) ("Intent to ratify can be evidenced by a course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts.")

8. *Carolina Equip. & Parts Co.*, 265 N.C. at 401, 144 S.E.2d at 258 (observing that words or conduct *inconsistent* with an intent *not* to ratify signify assent or intent to ratify).

9. *Id.*; *Patterson*, 266 at 494, 146 S.E.2d at 394 (1966). However, the ratification of one act does not require the ratification of another, entirely different act. *Id.*

10. *Greene v. Spivey*, 236 N.C. 435, 445, 73 S.E.2d 488, 495 (1952). For example, a principal may not wait and see if the price of a certain stock will go up before deciding whether or not to ratify the purchase of shares.

640.70 PUBLIC EMPLOYEE—DIRECT NORTH CAROLINA CONSTITUTIONAL CLAIM—ENJOYMENT OF FRUITS OF LABOR.

NOTE WELL: This instruction should be used when a public employee shows that no other state law remedy is available to address the unconstitutional burden on the employee's right to the enjoyment of the fruits of the employee's labor.[1]

This (*state number*) issue reads:

"Was the plaintiff (*state name*) damaged as a result of the defendant's (*state name*) arbitrary and capricious action?"

The North Carolina Constitution guarantees for citizens of North Carolina the inalienable right to "the enjoyment of the fruits of their own labor."[2] This right may not be unconstitutionally burdened by the arbitrary and capricious action of a governmental employer.[3]

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

First, that a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest.[4] Providing a fair procedure that ensures qualified candidates move to the next stage of a promotional process is a legitimate governmental interest.[5]

Second, that the defendant violated the rule or policy. A governmental entity's violation of its own rule or policy is inherently arbitrary.[6]

And Third, that the defendant's violation proximately caused damage to the plaintiff.[7] 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 a similar injurious result.[8]

There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's violation was the sole proximate cause of the plaintiff's damage. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's violation 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 damaged as a result of the defendant's arbitrary and capricious action, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. *Tully v. City of Wilmington*, 370 N.C. 527, 537, 810 S.E.2d 208, 216 (2018) (recognizing that the plaintiff pled adequately a direct constitutional claim, but neither expressing an opinion regarding the ultimate viability of the plaintiff's claim nor establishing the remedy to which the plaintiff would be entitled were he to prevail).

2. *Id.* at 534, 810 S.E.2d at 214 (quoting *State v. Warren*, 252 N.C. 690, 692-93, 114 S.E.2d 660, 663 (1960)).

3. *Id.* at 535, 810 S.E.2d at 215.

4. *Id.* at 536-37, 810 S.E.2d at 216.

5. *Id.*

6. *Id.* at 536, 810 S.E.2d at 215.

7. *Id.* at 537, 810 S.E.2d at 216.

8. *Id.*, citing *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979), in support of the conclusion that, in addition to missing out on promotion within the employee's current employment track, an employee passed over for promotion in violation of a promotional process suffers a "stigma or disability" that impacts the freedom to take advantage of other employment opportunities.

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

North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

Volume II
2019 Supplement

ISBN 978-1-56011-967-8

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This (*state number*) issue reads:

"Was the plaintiff damaged as a result of the defendant's littering?"

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

First, that the defendant [intentionally or recklessly threw, scattered, spilled, or placed litter] [intentionally or recklessly caused litter to be blown, scattered, spilled, thrown, or placed] [otherwise disposed of litter] upon the plaintiff's private property.[2] A person does not litter by placing litter in an appropriate containment vessel, in a manner that will prevent it from being blown or carried away.[3]

The operator of a [vehicle] [watercraft] is presumed to have littered if litter is blown, scattered, spilled, thrown or placed from the [vehicle] [watercraft].[4] If you find that the litter on the plaintiff's private property had been blown, scattered, spilled, thrown or placed from a [vehicle] [watercraft], then you must also find that the operator of that [vehicle] [watercraft] littered. On the other hand, if you fail to find that the litter on the plaintiff's private property had been blown, scattered, spilled, thrown or placed from a [vehicle]

[watercraft], then there would be no presumption that the operator of a [vehicle] [watercraft] littered.

Second, that the litter was [in an amount that exceeded 500 pounds] [discarded in any quantity for commercial purposes] [hazardous waste[5]].[6]

And Third, that the defendant's littering proximately caused damage to the plaintiff.[7] 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 a similar injurious result. There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's violation 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 violation 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 defendant intentionally or recklessly littered, that the litter was [in an amount that exceeded 500 pounds] [discarded in any quantity for commercial purposes] [hazardous waste], and that plaintiff was damaged as a result of defendant's littering, 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. *ABC Servs., LLC v. Wheatly Boys, LLC*, ___ N.C. App. ___ (2018), 817 S.E.2d 397 (2018).

2. N.C. Gen. Stat. § 14-399(a).

3. N.C. Gen. Stat. § 14-399(a); *see also ABC Servs.*, 817 S.E.2d at 402 (holding that the General Assembly intended for the term "litter receptacle" to encompass a "broad range of containment vessels").

4 . N.C. Gen. Stat. § 14-399(b). The presumption does not apply to a vehicle transporting nontoxic and biodegradable agricultural or garden products or supplies. *Id.*

5. N.C. Gen. Stat. § 14-399(e*)* (adopting the definition of hazardous waste found in N.C. Gen. Stat. § 130A-290).

6. N.C. Gen. Stat. § 14-399(e).

7. N.C. Gen. Stat. § 14-399(h).

805.21 LITTERING—CIVIL ACTION FOR DAMAGES FOR FELONIOUS LITTERING—DAMAGES ISSUE.

NOTE WELL: N.C. Gen. Stat. § 14-399(h) creates a cause of action for a person who sustains damage due to felonious littering.[1] *This instruction should be used in conjunction with N.C.P.I.-Civil 805.20 "Littering-Civil Action for Damages for Felonious Littering."*

This (*state number*) issue reads:

"What amount is the plaintiff entitled to recover?"[2]

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages.[3] Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage to the plaintiff's property.[4]

The plaintiff may also be entitled to recover actual damages.[5] On this issue, the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual property damages proximately[6] caused by the defendant's littering.

A proximate cause is a cause which in a natural and continuous sequence produces damage to property, and is a cause which a reasonable and prudent person in the same or similar circumstances could have foreseen would probably produce such damage or some similar damaging result. There may be more than one proximate cause of damage to property. The plaintiff is not required to prove that the defendant's littering was the sole proximate

cause of the damage. The plaintiff must prove by the greater weight of the evidence that the defendant's littering was a proximate cause.

The purpose of awarding actual damages is to restore the plaintiff's property to its condition prior to the damage proximately caused by the defendant.[7] The monetary amount of actual damages is that sum which you find by the greater weight of the evidence to be the reasonable cost to the plaintiff of the expenses necessary to repair and restore the plaintiff's property. The amount of actual damages may include other reasonable amounts for incidental losses as well.[8] The amount of actual damages is to be reasonably determined from the evidence presented. Although this does not require proof of that amount with mathematical precision,[9] you may not make any award based upon speculation or conjecture.[10]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the monetary amount of actual property damages proximately caused by the defendant's littering, then you will answer this issue by writing that amount in the space provided.

On the other hand, if the plaintiff has failed to prove the monetary amount of actual property damages by the greater weight of the evidence, then you will answer this issue in the space provided by awarding the plaintiff some nominal amount such as one dollar in recognition of the technical damage to the plaintiff's property.

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1. *ABC Servs., LLC v. Wheatly Boys, LLC*, ___ N.C. App. ___, 817 S.E.2d 397 (2018).

2. *NOTE WELL: N.C. Gen. Stat. § 14-399(h) provides for recovery of three times the amount of actual damages or $200.00, whichever is greater. In addition, the plaintiff is entitled to court costs and attorney's fees.* Id.

3. *Bowen v. Fidelity Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936); *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 171-72, 510 S.E.2d 690, 698, *disc. rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999); *Cole v. Sorie*, 41 N.C. App. 485, 490, 255 S.E.2d 271, 274, *disc. rev. denied*, 298 N.C. 294, 259 S.E.2d 911 (1979).

4. N.C. Gen. Stat. § 14-399(h).

5. N.C. Gen. Stat. § 14-399(h) provides for the recovery of damages a "person sustains arising out of a violation." *See also Binder v. Gen. Motors Acceptance Corp.*, 222 N.C. 512, 514-15, 23 S.E.3d 894, 895 (1943), wherein the Supreme Court, quoting *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424, 425 (1917), said:

> A wrongdoer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote; "that direct losses are necessarily proximate, and compensation, therefore, is always recoverable; that consequential losses are proximate when the natural and probable effect of the wrong."

6. Although not addressed again in the felony subsection of the statute, the misdemeanor subsection reflects an intent that the defendant "repair or restore property damaged by, or pay damages for any damage arising out of" littering. N.C. Gen. Stat. § 14-399(e2).

7. *See* N.C. Gen. Stat. § 14-399(e2) and note 7, *supra*; *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 462, 553 S.E.2d 431, 440 (2001) ("Whiteside I") (supporting the proposition that incidental losses might include recovery of plaintiff's reasonable costs incurred to prevent future injury from the littering or abate its harmful effects). For an instruction on incidental damages, see N.C.P.I.-Civil 503.70.

8. *See Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. at 462, 553 S.E.2d at 440.

9. *See State Properties v. Ray*, 155 N.C. App. 65, 76-77, 574 S.E.2d 180, 188 (2002).

809.00A MEDICAL MALPRACTICE—DIRECT EVIDENCE OF NEGLIGENCE ONLY.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.00.)

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged][1] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[2] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][3]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][4] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[5]

A health care provider's violation of [this duty] [any one or more of these duties] is negligence.[6]

As to the second thing that the plaintiff must prove, 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 health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

> *NOTE WELL: In cases where the evidence may give rise to a finding that there was a negligent delay in diagnosing or treating the plaintiff, and there is conflicting evidence on whether the delay increased the probability of injury or death sufficiently to amount to proximate cause of the injury or death, the trial court should further explain proximate cause.*[7] *A similar rule applies in cases where a different treatment probably would have improved the chances of survival or recovery.*[8] *The following special instruction should be given in these circumstances:*

[It is not enough for the plaintiff to show that [different treatment] [earlier [diagnosis] [treatment] [hospitalization]] of [*name plaintiff*] [*name decedent*] would have improved the patient's chances of survival and recovery. Rather, the plaintiff must prove that it is probable that a different outcome would have occurred with [different treatment] [earlier [diagnosis] [treatment] [hospitalization]]. The plaintiff must prove by the greater weight of the evidence that the [treatment] [alleged delay in [diagnosis] [treatment] [hospitalization]] more likely than not caused the [*name the injury or precipitating condition*] [and death] of [*name plaintiff*] [*name decedent*].][9]

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 way(s):

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

[The *(state number)* contention is that the defendant failed to use [his] [her] best judgment in the treatment and care of the patient in that (*describe specific conduct supported by the evidence)*.]

[The *(state number)* contention is that the defendant failed to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care in that *(describe specific conduct supported by the evidence)*.]

[The *(state number)* contention is that the defendant failed to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered in that *(describe specific conduct 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].[10]

(Give law as to each contention of negligence included above.[11])

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use [his] [her] best judgment in the treatment and care of the patient.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, first, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant *(describe health care service rendered, e.g., "operated on the plaintiff")*, and, second, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[12] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.[13]

A violation of this duty is negligence.]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate*:[14]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[15] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the

same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result*. *Note Well: Use only if an issue of guarantee is raised by the evidence.*[16] A health care provider does not, ordinarily, guarantee[17] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success of the *(describe health care service rendered)*.[18] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

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

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1. In death cases, this instruction can be modified to refer to the "decedent's death."

2. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> [a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental

> hygiene, psychiatry, or psychology; [a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D; [a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; [a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; [a]ny paramedic, as defined in N.C. Gen. Stat. § 131E-155(15a).

N.C. Gen. Stat. § 90-21.11(1).

3. *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), quoted with approval in *Wall v. Stout*, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77 (1984). In *Wall*, Chief Justice Branch, writing for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable.

310 N.C. at 192-93, 311 S.E.2d at 576-77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall.*

4. *Wall*, 310 N.C. at 192-93, 311 S.E.2d at 576-77.

5. N.C. Gen.Stat. § 90-21.12(a).

6. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

7. *See Katy v. Capriola*, 226 N.C. App. 470, 479-81, 742 S.E.2d 247, 254-55 (2013).

8. *See id.*; *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

9. *See Katy*, 226 N.C. App. at 479-81, 742 S.E.2d at 254-55.

10. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of *medical* negligence. *Id.* However, expert testimony is not invariably required in all cases. *Id. See also Tice v. Hall*, 310 N.C. 589, 592-94, 313 S.E.2d 565, 565 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App. 66, 68, 251 S.E.2d 900, 901-02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct *and* circumstantial proof of negligence

(i.e., *res ipsa loquitur*), N.C.P.I.-Civil 809.05A should be used instead of this charge for claims arising on or after 1 October 2011.

11. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

12. Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701; *Schaffner*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985) (stating that expert testimony is not invariably required in all cases).

13. *Jackson v. Sanitarium*, 234 N.C. 222, 226-27, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, (1980) *rev'd on other grounds,* 301 N.C. 68, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761, 768 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (quoting *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947)). *See also* other cases cited in *Schaffner*.

14. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

15. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

16. *See generally Wall*, 310 N.C. at 196, 311 S.E.2d at 579.

17. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

18. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.03A MEDICAL MALPRACTICE—INDIRECT EVIDENCE OF NEGLIGENCE ONLY. ("RES IPSA LOQUITUR").
(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.03.)

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a patient's body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."*[1] *In any other instance, this instruction should be used with caution.*[2]

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law.

Every health care provider[4] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][5]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][6] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[7]

A health care provider's violation of [this duty] [any one or more of these duties] is negligence.[8]

As to the second thing that the plaintiff must prove, 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 health care provider 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.

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant and that this act or omission proximately caused [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[9] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has

occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you should infer and find that the defendant was negligent and that this negligence proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on [his] [her] part and contends that you should not infer or find that the defendant was negligent or that such negligence proximately caused the plaintiff's [injury] [damage].

The burden of proof on this issue is on the plaintiff. In order for you to infer and find that the defendant was negligent and that this negligence proximately caused the plaintiff's [injury] [damage],[10] the plaintiff must prove, by the greater weight of the evidence, four things:

First, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[11]

Second, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth, the [injury] [damage] was of a type that would have rarely occurred if the defendant had

[exercised [his] [her] best judgment in the treatment and care of the plaintiff]

[used reasonable care and diligence in the application of [his] [her] knowledge and skill to the plaintiff's care] [and]

[provided health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was provided. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered, e.g., "operated on the plaintiff"*). In determining the standards of practice applicable to this case,[12] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards].[13]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate:*)[14]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage

the services of another health care provider.[15] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result. NOTE WELL: Use only if an issue of guarantee is raised by the evidence.*[16] A health care provider does not, ordinarily, guarantee[17] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success of the (*describe health care service rendered*).[18] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent in any one or more of the ways about which I have instructed you 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 defendant.

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1. *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id.*

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)."

5. *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), quoted with approval in *Wall v. Stout*, 310 N.C. 184, 192–93, 311 S.E.2d 571, 576–77, (1984). In *Wall*, Chief Justice Branch, writing for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. (Citations omitted). If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable.

310 N.C. at 192–93, 311 S.E.2d at 576–77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall*.

6. *Wall*, 310 N.C. at 192–93, 311 S.E.2d at 576–77.

7. N.C. Gen. Stat. § 90-21.12(a).

8. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

9. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id. See also Howie*, 168 N.C. App. at 698, 609 S.E.2d at 251–52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> [T]he basic foundation of the doctrine . . . is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself. . . . [I]n order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant.

See also Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis, *see also Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct and circumstantial proof of negligence (*i.e., res ipsa loquitur*), N.C.P.I.-Civil 809.05A should be used instead of this charge for claims arising on or after 1 October 2011.

10. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

11. *See Schaffner*, *supra* note 9.

12. Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

13. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, *rev'd on other grounds*, 301 N.C. 68, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761, 767 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

14. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

15. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

16. *Wall*, 310 N.C. at 197, 311 S.E.2d at 579.

17. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or

assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

18. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.05A MEDICAL MALPRACTICE—BOTH DIRECT AND INDIRECT EVIDENCE OF NEGLIGENCE.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.05.)

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a patient's body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."[1] In any other instance, this instruction should be used with caution.[2]*

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[4] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][5]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][6] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and

experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[7]

A health care provider's violation of [this duty] [any one or more of these duties] is negligence.[8]

As to the second thing that the plaintiff must prove, 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 health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

> *NOTE WELL: In cases where the evidence may give rise to a finding that there was a negligent delay in diagnosing or treating the plaintiff, and there is conflicting evidence on whether the delay increased the probability of injury or death sufficiently to amount to proximate cause of the injury or death, the trial court should further explain proximate cause.[9] A similar rule applies in cases where a different treatment probably would have improved the chances of survival or recovery.[10] The following special instruction should be given in these circumstances:*

[It is not enough for the plaintiff to show that [different treatment] [earlier [diagnosis] [treatment] [hospitalization]] of [*name plaintiff*] [*name decedent*] would have improved the patient's chances of survival and recovery. Rather, the plaintiff must prove that it is probable that a different outcome would have occurred with [different treatment] [earlier [diagnosis] [treatment] [hospitalization]]. The plaintiff must prove by the greater weight of the evidence that the [treatment] [alleged delay in [diagnosis] [treatment]

[hospitalization]] more likely than not caused the [*name the injury or precipitating condition*] [and death] of [*name plaintiff*] [*name decedent*].[11]

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. Proof of negligence can be shown in two ways. The first is by direct evidence. The second is by circumstantial evidence.

I will instruct you on the plaintiff's burden of proof on this issue, whether by direct or by circumstantial evidence.

I will first instruct you as to the plaintiff's burden of proof with regard to direct evidence of negligence.

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

[The (*state number*) contention is that the defendant failed to use [his] [her] best judgment in the treatment and care of the patient in that (*describe specific conduct supported by the evidence*).]

[The (*state number*) contention is that the defendant failed to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care in that (*describe specific conduct supported by the evidence*).]

[The (*state number*) contention is that the defendant failed to provide health care in accordance with the standards of practice among members of

the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered in that (*describe specific conduct 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].[12]

(Give law as to each contention of negligence included above.)[13]

[With respect to the plaintiff's (*state number*) contention, a health care provider has a duty to use [his] [her] best judgment in the treatment and care of the patient.

A violation of this duty is negligence.]

[With respect to the plaintiff's (*state number*) contention, a health care provider has a duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care.

A violation of this duty is negligence.]

[With respect to the plaintiff's (*state number*) contention, a health care provider has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. In order for you to find that the defendant failed to meet this duty, the plaintiff

must satisfy you, by the greater weight of the evidence, first, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered, e.g., "operated on the plaintiff"*), and, second, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[14] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.[15]

A violation of this duty is negligence.]

I will now instruct you as to the plaintiff's burden of proof with regard to circumstantial evidence of negligence.[16]

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant, and that this act or omission proximately caused the plaintiff's [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[17] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you should infer and find that the defendant was negligent and that this negligence proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on [his] [her] part and contends that you

should not infer or find that the defendant was negligent or that such negligence proximately caused the plaintiff's [injury] [damage].

In order for you to infer and find that the defendant was negligent and that this negligence proximately caused the plaintiff's [injury] [damage],[18] the plaintiff must prove, by the greater weight of the evidence, four things:

First, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[19]

Second, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth, the [injury] [damage] was of a type that would have rarely occurred if the defendant had

[exercised [his] [her] best judgment in the treatment and care of the plaintiff]

[used reasonable care and diligence in the application of [his] [her] knowledge and skill to the plaintiff's care] [and]

[provided health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was provided. In order for

you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered, e.g., "operated on the plaintiff"*). In determining the standards of practice applicable to this case,[20] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards].[21]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate:*[22]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[23] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated

in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in [his] [her] profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result. Note Well: Use only if an issue of guarantee is raised by the evidence.*[24] A health care provider does not, ordinarily, guarantee[25] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success of the (*describe health care service rendered*).[26] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent in any one or more of the ways about which I have instructed you, 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 defendant.

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1. *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id.*

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)."

N.C. Gen. Stat. § 90-21.11(1).

5. *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), *quoted with approval in Wall v. Stout*, 310 N.C. 184, 192–93, 311 S.E.2d 571, 576–77 (1984). In *Wall*, Chief Justice Branch, writing for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable.

310 N.C. at 192–93, 311 S.E.2d at 576–77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall*.

6. *Wall*, 310 N.C. at 192–93, 311 S.E.2d at 576–77.

7. N.C. Gen. Stat. § 90-21.12(a).

8. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

9. *See Katy v. Capriola*, 226 N.C. App. 470, 479-81, 742 S.E.2d 247, 254-55 (2013).

10. *See id.*; *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

11. *See Katy*, 226 N.C. App. at 479-81, 742 S.E.2d at 254-55.

12. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id. See also Howie*, 168 N.C. App. at 698, 609 S.E.2d at 251–52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> These principles contend with the basic foundation of the doctrine, which "is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself. . . . [I]n order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant.

See also Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis, *see also, Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977).

13. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

14. Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of

the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

15. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867 (1980), *rev'd on other grounds*, 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 675, 255 S.E.2d 761, 766 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

16. *See* N.C.P.I.-Civil 101.45 and *supra* note 11.

17. *See supra* note 11.

18. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

19. *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118.

20. *See supra* note 13.

21. *See supra* note 14.

22. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction. See* Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

23. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

24. *Wall*, 310 N.C. at 196, 311 S.E.2d at 579.

25. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed

by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

26. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.22 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION—
DIRECT EVIDENCE OF NEGLIGENCE ONLY.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.00.)

> *NOTE WELL: Medical malpractice can be premised on breach of common law duties recognized in* Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 576-77 (1984) and on breach of the statutory duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. N.C. Gen. Stat. § 90-21.12(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence." Thus, for the standards of practice duty set forth in the statute, the plaintiff has the burden to prove a breach by clear and convincing evidence. The statute, however, is silent as to the common law duties to use best judgment in the treatment and care of a patient and to use reasonable care and diligence in the application of knowledge and skill to a patient's care. Consequently, based on the language of the statute, which addresses only the statutory duty, this instruction incorporates two different burdens of proof: "greater weight of the evidence" for alleged breach of common law duties; and "clear and convincing evidence" for alleged breach of statutory standards of practice.*

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged][1] by the negligence of the defendant in treating the plaintiff's emergency medical condition[2]?"

On this issue the burden of proof is on the plaintiff to prove two things: (1) that the defendant was negligent; and (2) that the negligence proximately caused [injury] [damage] to the plaintiff.

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. When treating an emergency medical condition, every health care provider[3] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][4]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][5] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[6]

A health care provider's violation of [this duty] [any one or more of these duties] of care is negligence.[7]

As to the second thing the plaintiff must prove, 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 health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

NOTE WELL: In cases where the evidence may give rise to a finding that there was a negligent delay in diagnosing or treating the plaintiff, and there is conflicting evidence on whether the delay increased the probability of injury or death sufficiently to amount to proximate cause of the injury or death, the trial court should further explain proximate cause.[8] A similar rule applies in cases where a different treatment probably would have improved the chances of survival or recovery.[9] The following special instruction should be given in these circumstances:

[It is not enough for the plaintiff to show that [different treatment] [earlier [diagnosis] [treatment] [hospitalization]] of [*name plaintiff*] [*name decedent*] would have improved the patient's chances of survival and recovery. Rather, the plaintiff must prove that it is probable that a different outcome would have occurred with [different treatment] [earlier [diagnosis] [treatment] [hospitalization]]. The plaintiff must prove by the greater weight of the evidence that the [treatment] [alleged delay in [diagnosis] [treatment] [hospitalization]] more likely than not caused the [*name the injury or precipitating condition*] [and death] of [*name plaintiff*] [*name decedent*].][10]

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 such negligence was a proximate cause of the plaintiff's [injury] [damage].

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

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

[The *(state number)* contention is that the defendant failed to use [his] [her] best judgment in the treatment and care of the patient in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered in that (*describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by clear and convincing evidence.[11]

Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.]

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

the burden to prove that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage] by the greater weight of the evidence.

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].[12]

(Give law as to each contention of negligence included above.[13]*)*

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use [his] [her] best judgment in the treatment and care of the patient.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. For you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, first, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant *(describe health care service rendered, e.g., "operated on the plaintiff")*, and, second, by clear and

convincing evidence, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[14] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.[15]

A violation of this duty is negligence.]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate*:[16]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[17] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result*. *Note Well: Use only if an issue of guarantee is raised by the evidence.*[18] A health care provider does not, ordinarily, guarantee[19] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success of the (*describe health care service rendered)*.[20] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

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
> [breached the duty to use [his] [her] best judgment in the
> treatment and care of the patient] [or] [breached the duty to
> use reasonable care and diligence in the application of [his] [her]
> knowledge and skill to the patient's care]] [or]

> [by clear and convincing evidence, that the defendant breached the duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered],

and, by the greater weight of the evidence 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 defendant.

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1. In death cases, this instruction can be modified to refer to the "decedent's death."

2. N.C. Gen. Stat. § 90-21.12(b) specifies that "emergency medical condition" "is defined in 42 U.S.C. 1395dd(e)(1)," which is a provision within the federal Emergency Treatment and Active Labor Act (EMTALA). It defines an "emergency medical condition" as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in
>
> > (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.

42 U.S.C. § 1395dd(e)(1)(A). *See also* N.C.P.I.–Civil 809.20 ("Existence of Emergency Medical Condition").

3. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)".

N.C. Gen. Stat. § 90-21.11(1).

4. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), quoted with approval in *Wall v. Stout*, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77 (1984). In *Wall v. Stout*, Chief Justice Branch, for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable.

310 N.C. at 192-93, 311 S.E.2d at 576-77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall*.

5. *Wall*, 310 N.C. at 192-93, 311 S.E.2d at 576-77.

6. N.C. Gen. Stat. § 90-21.12(a).

7. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

8. *See Katy v. Capriola*, 226 N.C. App. 470, 479-81, 742 S.E.2d 247, 254-55 (2013).

9. *See id.*; *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

10. *See Katy*, 226 N.C. App. at 479-81, 742 S.E.2d at 254-55.

11. N.C. Gen. Stat. § 90-21.19(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an

emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence."

12. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of *medical* negligence. *Id.* However, expert testimony is not invariably required in all cases. *Id. See also Tice v. Hall*, 310 N.C. 589, 592-94, 313 S.E.2d 565, 567 (1984). *Cf*. *Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App. 66, 68, 251 S.E.2d 900, 901-02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct *and* circumstantial proof of negligence (i.e., *res ipsa loquitur*), N.C.P.I.-Civil 809.26 should be used instead of this charge for claims involving an emergency medical condition arising on or after 1 October 2011.

13. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

14. Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

15. *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E.2d 57 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, *rev'd on other grounds,* 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

16. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

17. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

18. *Wall*, 310 N.C. at 196, 311 S.E.2d at 579.

19. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

20. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.24 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION - INDIRECT EVIDENCE OF NEGLIGENCE ONLY ("RES IPSA LOQUITUR").

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.03.)

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a patient's body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."[1] In any other instance, this instruction should be used with caution.[2]*
>
> *NOTE WELL: Medical malpractice can be premised on breach of common law duties recognized in* Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 576-77 (1984), and on breach of the statutory duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. N.C. Gen. Stat. § 90-21.12(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence." Thus, for the standards of practice duty set forth in the statute, the plaintiff has the burden to prove a breach by clear and convincing evidence. The statute, however, is silent as to the common law duties to use best judgment in the treatment and care of a patient and to use reasonable care and diligence in the application of knowledge and skill to a patient's care. Consequently, based on the language of the statute, which addresses only the statutory duty, this instruction incorporates two different burdens of proof: "greater weight of the evidence" for alleged breach of common law duties; and "clear and convincing evidence" for alleged breach of statutory standards of practice.*

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant in treating the plaintiff's emergency medical condition[4]?"

On this issue the burden of proof is on the plaintiff to prove two things: (1) that the defendant was negligent; and (2) that the negligence proximately caused [injury] [damage] to the plaintiff.

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[5] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][6]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][7] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[8]

A health care provider's violation of [this duty] [any one or more of these duties] is negligence.[9]

As to the second thing that the plaintiff must prove, 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 health care provider 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.

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant and that this act or omission proximately caused [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[10] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you should infer and find that the defendant was negligent and that this negligence proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on [his] [her] part and contends that you should not infer or find that the defendant was negligent or that such negligence proximately caused the plaintiff's [injury] [damage].

The burden of proof on this issue is on the plaintiff. In order for you to infer and find that the defendant was negligent and that this negligence

proximately caused the plaintiff's [injury] [damage],[11] the plaintiff must prove four things:

First, by the greater weight of the evidence, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[12]

Second, by the greater weight of the evidence, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, by the greater weight of the evidence, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth,

[by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had exercised [his] [her] best judgment in the treatment and care of the plaintiff]

[by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had used reasonable care and diligence in the application of [his] [her] knowledge and skill to the plaintiff's care] [or]

[by clear and convincing evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had provided health

care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was provided. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered, e.g., "operated on the plaintiff"*). In determining the standards of practice applicable to this case,[13] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards. Once you have determined the standards of practice applicable to this case, you must decide whether the plaintiff proved a breach of those standards by clear and convincing evidence.

Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.][14]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate.*[15]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care

provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[16] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result. NOTE WELL: Use only if an issue of guarantee is raised by the evidence.*[17] A health care provider does not, ordinarily, guarantee[18] the correctness of [a diagnosis]

[an analysis] [a judgment as to the nature] of a patient's condition or the success of the (*describe health care service rendered*).[19] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

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 [breached the duty to use [his] [her] best judgment in the treatment and care of the patient] [or] [breached the duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care]] [or]
>
> [by clear and convincing evidence, that the defendant breached the duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered],

and, by the greater weight of the evidence 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 defendant.

1. *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id.*

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. N.C. Gen. Stat. § 90-21.12(b) specifies that "emergency medical condition" "is defined in 42 U.S.C. § 1395dd(e)(1)," which is a provision within the federal *Emergency Treatment and Active Labor Act* (EMTALA). It defines an "emergency medical condition" as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-
>
> > (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.

42 U.S.C. § 1395dd(e)(1)(A). *See also* N.C.P.I.-Civil 809.20 ("Existence of Emergency Medical Condition").

5. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)."

N.C. Gen. Stat. § 90-21.11(1).

6. *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), *quoted with approval in Wall v. Stout*, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77, (1984). In *Wall*, Chief Justice Branch, writing for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable.

310 N.C. at 192–93, 311 S.E.2d at 576–77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall*. N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall*.

7. *Wall*, 310 N.C. at 192–93, 311 S.E.2d at 576–77.

8. N.C. Gen. Stat. § 90-21.12(a).

9. Wall, 310 N.C. at 193, 311 S.E.2d at 577.

10. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id. See also Howie*, 168 N.C. App. at 698, 609 S.E.2d at 251–52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> [T]he basic foundation of the doctrine . . . is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself . . . [I]n order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show - without the assistance of expert testimony - that the injury was of a type not typically occurring in absence of some negligence by defendant.

See also Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis, *see also Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d

548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App. 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct and circumstantial proof of negligence (*i.e., res ipsa loquitur*), N.C.P.I.-Civil 809.26 should be used instead of this charge for claims involving an emergency medical condition arising on or after 1 October 2011.

11. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

12. *See Schaffner*, *supra* note 10.

13. Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

14. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, *rev'd on other grounds*, 301 N.C. 68, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761, 767 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

15. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

16. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

17. *Wall*, 310 N.C. at 197, 311 S.E.2d at 579.

18. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

19. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.26 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION—BOTH DIRECT AND INDIRECT EVIDENCE OF NEGLIGENCE.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.05.)

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a patient's body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."[1] In any other instance, this instruction should be used with caution.[2]*
>
> *NOTE WELL: Medical malpractice can be premised on breach of common law duties recognized in* Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 576-77 (1984), and on breach of the statutory duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. N.C. Gen. Stat. § 90-21.12(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence." Thus, for the standards of practice duty set forth in the statute, the plaintiff has the burden to prove a breach by clear and convincing evidence. The statute, however, is silent as to the common law duties to use best judgment in the treatment and care of a patient and to use reasonable care and diligence in the application of knowledge and skill to a patient's care. Consequently, based on the language of the statute, which addresses only the statutory duty, this instruction incorporates two different burdens of proof: "greater weight of the evidence" for alleged breach of common law duties; and "clear and convincing evidence" for alleged breach of statutory standards of practice.*

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant in treating the plaintiff's emergency medical condition[4]?"

On this issue the burden of proof is on the plaintiff to prove two things: (1) that the defendant was negligent; and (2) that the negligence proximately caused [injury] [damage] to the plaintiff.

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. When treating an emergency medical condition, every health care provider[5] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][6]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][7] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered].[8]

A health care provider's violation of [this duty] [any one or more of these duties] of care is negligence.[9]

As to the second thing the plaintiff must prove, 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 health care provider 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 was negligent and that such negligence was a proximate cause of the plaintiff's [injury] [damage].

NOTE WELL: In cases where the evidence may give rise to a finding that there was a negligent delay in diagnosing or treating the plaintiff, and there is conflicting evidence on whether the delay increased the probability of injury or death sufficiently to amount to proximate cause of the injury or death, the trial court should further explain proximate cause.[10] *A similar rule applies in cases where a different treatment probably would have improved the chances of survival or recovery.*[11] *The following special instruction should be given in these circumstances:*

[It is not enough for the plaintiff to show that [different treatment] [earlier [diagnosis] [treatment] [hospitalization]] of [*name plaintiff*] [*name decedent*] would have improved the patient's chances of survival and recovery. Rather, the plaintiff must prove that it is probable that a different outcome would have occurred with [different treatment] [earlier [diagnosis] [treatment] [hospitalization]]. The plaintiff must prove by the greater weight of the evidence that the [treatment] [alleged delay in [diagnosis] [treatment] [hospitalization]] more likely than not caused the [*name the injury or precipitating condition*] [and death] of [*name plaintiff*] [*name decedent*].[12]

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent. Proof of negligence can be shown in two ways. The first is by direct evidence. The second is by circumstantial evidence.

I will instruct you on the plaintiff's burden of proof on this issue, whether by direct or by circumstantial evidence.

I will first instruct you with regard to the plaintiff's burden of proof with regard to direct evidence of negligence,

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

[The *(state number)* contention is that the defendant failed to use [his] [her] best judgment in the treatment and care of the patient in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention, by clear and convincing evidence.[13]

Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.]

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage]. The plaintiff has the burden to prove that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage] by the greater weight of the evidence.

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].[14]

(Give law as to each contention of negligence included above.)[15]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use [his] [her] best judgment in the treatment and care of the patient.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar

training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you first, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered*, e.g., "operated on the plaintiff"), and, second, by clear and convincing evidence, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[16] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.[17]

A violation of this duty is negligence.]

I will now instruct you as to the plaintiff's burden of proof with regard to circumstantial evidence of negligence.[18]

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant, and that this act or omission proximately caused the plaintiff's [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[19] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you should infer and find that the defendant was negligent and that this negligence

proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on [his] [her] and contends that you should not infer or find that the defendant was negligent or that such negligence proximately caused the plaintiff's [injury] [damage].

In order for you to infer and find that the defendant was negligent and that *his* negligence proximately caused the plaintiff's [injury] [damage],[20] the plaintiff must prove four things:

First, by the greater weight of the evidence, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[21]

Second, by the greater weight of the evidence, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, by the greater weight of the evidence, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth, [by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had exercised [his] [her] best judgment in the treatment and care of the plaintiff]

[by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had used reasonable

care and diligence in the application of [his] [her] knowledge and skill to the plaintiff's care] [or]

[by clear and convincing evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had provided health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was provided. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the defendant (*describe health care service rendered*, e.g., "*operated on the plaintiff"*). In determining the standards of practice applicable to this case,[22] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards. Once you have determined the standards of practice applicable to this case, you must decide whether the plaintiff proved a breach of those standards by clear and convincing evidence.][23]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate*:[24]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise

limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[25] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result*. *Note Well: Use only if an issue of guarantee is raised by the evidence.*[26] A health care provider does not, ordinarily, guarantee[27] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success

of the (*describe health care service rendered*).[28] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

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 [breached the duty to use [his] [her] best judgment in the treatment and care of the patient] [or] [breached the duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care]] [or]
>
> [by clear and convincing evidence, that the defendant breached the duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered],

and, by the greater weight of the evidence 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 defendant.

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1. *Howie v. Walsh,* 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester,* 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id.*

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. N.C. Gen. Stat. § 90-21.12(b) specifies that "emergency medical condition" "is defined in 42 U.S.C. 1395dd(e)(1)," which is a provision within the federal Emergency Treatment and Active Labor Act (EMTALA). It defines an "emergency medical condition" as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-
>
> > (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
> > (ii) serious impairment to bodily functions, or
> > (iii) serious dysfunction of any bodily organ or part.

42 U.S.C. § 1395dd(e)(1)(A). *See also* N.C.P.I.–Civil 809.20 ("Existence of Emergency Medical Condition").

5. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)."

N.C. Gen. Stat. § 90-21.11(1).

6. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), quoted with approval in *Wall v. Stout*, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77 (1984). In *Wall v. Stout*, Chief Justice Branch, for a unanimous court, said:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient . . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable."

310 N.C. at 192-93, 311 S.E.2d at 576-77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall.*

7. *Wall*, 310 N.C. at 192-93, 311 S.E.2d at 576-77.

8. N.C. Gen. Stat. § 90-21.12(a).

9. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

10. *See Katy v. Capriola*, 226 N.C. App. 470, 479-81, 742 S.E.2d 247, 254-55 (2013).

11. *See id.*; *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

12. *See Katy*, 470 N.C. App. at 479-81, 742 S.E.2d at 254-55.

13. N.C. Gen. Stat. § 90-21.19(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence."

14. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of *medical* negligence. *Id. See also Howie,* 168 N.C. App. at 698, 609 S.E.2d at 251-52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> These principles contend with the basic foundation of the doctrine, which "is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself . . . [I]n order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant.

See also Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis*, see also*, *Tice v. Hall*, 310 N.C. 589, 592-94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App. 66, 68, 251 S.E.2d 900, 901-02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977).

15. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

16. Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

17*. Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867 (1980), *rev'd on other grounds,* 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 675, 255 S.E.2d 761, 766 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

18*. See* N.C.P.I.-Civil 101.45 and *supra* note 13.

19*. See supra* note 13.

20. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

21*. Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118.

22. *See supra* note 15.

23*. See supra* note 12.

24. *NOTE WELL: In* Wall v. Stout*, the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall*, 310 N.C. at 197, 311 S.E.2d at 579.*

25. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

26. *Wall*, 310 N.C. at 196, 311 S.E.2d at 579.

27. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

28. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).

809.45 MEDICAL NEGLIGENCE—INFORMED CONSENT—ACTUAL AND CONSTRUCTIVE.

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][1] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[2] is under a duty to use professional care to inform a patient about the usual and most frequent risks and hazards inherent in the procedures and treatments that provider intends to render and to obtain the consent[3] of the [patient] [person authorized to give the patient's consent][4] to such procedures and treatments in accordance with standards of practice among other health care providers with similar training and experience situated in the same or similar communities under the same or similar circumstances at that time.[5] (This duty, however, does not exist [in cases of emergency where the patient is unconscious] [in cases where the patient is not competent to give consent].)[6]

A health care provider's violation of this duty of professional care is negligence.[7]

As to the second thing that the plaintiff must prove, 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 health care provider 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 that the defendant did not obtain the plaintiff's consent and that, had the defendant properly attempted to do so, a reasonable person, under the same or similar circumstances, would not have given consent. A health care provider fails to obtain consent by not providing information to the patient which, under the same or similar circumstances, would have given a reasonable person a general understanding of the procedures and treatments to be used, and the usual and most frequent risks and hazards inherent in them as recognized by other health care providers in the same or similar communities.[8] A health care provider also fails to obtain consent by not obtaining it in accordance with the standards of practice among other health care providers with similar training and experience situated in the same or similar communities at that time.[9] In determining the standards of

practice[10] applicable to this case, you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice for obtaining consent and not your own ideas of the standards.[11]

The information that should have been communicated had the health care provider done what was necessary to obtain consent must be of such a significant nature that a reasonable person[12] under the same or similar circumstances would not have given consent after obtaining this information.

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].

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 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 defendant.

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1. In death cases, this instruction can be modified to refer to the "decedent's death."

2. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11 as, "without limitation":

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)".

N.C. Gen. Stat. § 90-21.11.

3. N.C. Gen. Stat. § 90-21.13 deals with the question of consent in two ways. First, it sets forth the statutory criteria for determining whether the patient *actually* gave consent. *See* N.C. Gen. Stat. § 90-21.13(a)(1) and (2). This type of consent may be called "actual consent" and it may be oral or written. If written, N.C. Gen. Stat. § 90-21.13(b) identifies it as a "valid consent." Since this special sub-categorization adds nothing to the issue before the jury, namely, the jury must find that the writing constitutes "actual consent" before it can be a "valid consent," it is not referred to in this instruction as a separate element for proof. Its use would be redundant.

The second way in which the statute deals with the issue of consent is to set up a standard for determining whether the reasonable person would have given consent under the same or similar circumstances. *See* N.C. Gen. Stat. § 90-21.13(a)(3). This standard does not ask whether the patient *actually* consented, but whether the patient would have consented. It is thus a standard of "constructive consent."

Throughout this pattern charge, the labels "actual" and "constructive" are dropped for the purposes of conciseness and avoidance of jury confusion. To the plaintiff is allocated the burden of proving that neither standard of consent is present on the facts of the case.

4. For example, the patient's spouse, parent, guardian or nearest relative. *See* N.C. Gen. Stat. § 90-21.13(a). This reference to third parties who might consent on behalf of the plaintiff or decedent is, for the sake of brevity, dropped from the remainder of this pattern charge. Where this situation exists, however, it should be added.

5. *Starnes v. Taylor*, 272 N.C. 386, 392–93, 158 S.E.2d 339, 334 (1967); *Sharpe v. Pugh*, 270 N.C. 598, 604, 155 S.E.2d 108, 112 (1967); *Watson v. Clutts*, 262 N.C. 153, 159–

60, 136 S.E.2d 617, 621 (1964); *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 766 (1955).

6. This pattern charge does *not* address certain issues in rebuttal to the defendant's showing of actual or valid consent (or to the plaintiff's failure to show lack of consent). For example, the evidence may tend to show facts which satisfy the issue of actual or valid consent in defendant's favor. Yet, such actual or valid consent might have been obtained under circumstances of fraud, deception or misrepresentation, or from a person not mentally or physically competent to give it. *See* N.C. Gen. Stat. § 90-21.13(b) and (c). These issues would tend to show no actual or valid consent and, when present, should be addressed to the jury by way of special supplementary instructions. Where these special issues arise, therefore, a separate issue on fraud, deception, misrepresentation or mental or physical competence should be given prior to the submission of this issue on consent. (These special issues will not be needed in conjunction with the constructive consent issue since that question is independent of the means by which the actual or valid consent is attempted to be obtained.)

7. N.C. Gen. Stat. § 90-21.13 governs informed consent claims. Note that, unlike the 2011 amendment to N.C. Gen. Stat. § 90-21.12 (2011), N.C. Gen. Stat. § 90-21.13 was not amended to include the "under the same or similar circumstances" language. Rather, N.C. Gen. Stat. § 90-21.13(a) specifies that the relevant standard is "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities."

8. N.C. Gen. Stat. § 90-21.13(a)(2). In the case of *Osburn v. Danek Med., Inc.*, 135 N.C. App. 234, 520 S.E.2d 88 (1999), *aff'd*, 352 N.C. 143, 530 S.E.2d 54 (2000) (*per curiam*), the Court of Appeals upheld the trial court's refusal to give instructions requested by the plaintiff to the effect that the applicable duty of care required physicians to inform their patients if the proposed procedure or a device used in the procedure was experimental in nature. 135 N.C. at 237, 520 S.E.2d at 91. The Court of Appeals stressed that the applicable standard was statutory, N.C. Gen. Stat. § 90-21.13(a)(2), and that the statute required only such disclosure of information as would lead to a "general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities." *Id*. at 239, 520 S.E.2d at 92. Thus, if it were in keeping with this standard for a health care provider to disclose that the procedure or device was experimental, then failure to make that disclosure would be a breach of the duty of care. In instructing a jury on informed consent, therefore, the trial court should not deviate from the statutory standard, but, as was done in *Osburn*, may properly give the physician's failure to inform the patient of the experimental nature of the procedure or device as a contention of negligence. *See* 135 N.C. App. at 240, 520 S.E.2d at 92.

9. N.C. Gen. Stat. § 90-21.13(a)(1).

10. For cases filed on or after 1 October 2011, Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985) (stating that expert testimony is not invariably required in all cases).

11. *Jackson v. Sanitarium*, 234 N.C. 222, 226, 67 S.E.2d 57, 61-62 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, *rev'd on other grounds*, 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

12. It should be emphasized here that the question is not whether a particular plaintiff would have given consent if advised in accordance with the applicable standards of practice, but whether the *reasonable person* would have consented. Thus, it is improper for the plaintiff to testify from hindsight as to whether he or she would have consented. *Watson v. Clutts*, 262 N.C. 153, 160, 136 S.E.2d 617, 622 (1963). (The court excluded such testimony "which presented a case of looking backwards.")

809.65A MEDICAL MALPRACTICE—HEALTH CARE PROVIDER'S LIABILITY FOR ACTS OF NON-EMPLOYEE AGENTS—*RESPONDEAT SUPERIOR*.[1]

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.-Civil 809.65.) [2]

The (*state number*) issue reads:

"Was (*name nurse, attendant, other person*) the agent of the defendant at the time the (*describe health care service*) was performed?"[3]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that (*name nurse, attendant, other person*) was the defendant's agent at the time the (*describe health care service*) was performed.

Ordinarily, a health care provider[4] is not liable for the negligence of [nurses] [attendants] [(*name other persons*)] who are not the health care provider's employees. However, where, in the preparation and performance of [a medical treatment] [an operation] [(*describe other procedure*)] the health care provider has full control and supervision of the [nurse] [attendant] [(*name other person*)], such person becomes an agent and the health care provider is liable for any negligence of that agent which proximately causes the [injury] [damage]. The [nurse] [attendant] [(*name other person*)] is the agent of the health care provider only if, at the time the (*describe health care service*) was performed, the health care provider possesses the power to control directly and supervise the [nurse] [attendant] [(*name other person*)] while performing the (*state health care service*). The [nurse] [attendant] [(*name other person*)] will be considered an agent of the health care provider if the health care provider possesses this power of supervising the manner of

acting whether or not the power is exercised. (The duties of the health care provider with respect to such supervision and control over such agents are substantially the same as those respecting the other phases of the treatment of the patient generally; that is, in supervising agents, the health care provider is bound

[to exercise [his] [her] best judgment in the treatment and care of [his] [her] patient][5]

[NOTE WELL: This duty does not apply in cases in which the jury has before it only a corporate or administrative medical malpractice claim, pursuant to N.C. Gen. Stat. § 90-21.12(a) (N.C.P.I.–Civil 809.06).]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to [his] [her] patient's care][6]

[NOTE WELL: This duty does not apply in cases involving only a corporate or administrative medical malpractice claim. See prior NOTE WELL.]

[and]

[to follow the standards of practice among health care providers with similar training and experience situated in the same or similar communities under the same or similar circumstances[7] at the time the health care service was rendered].[8])

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name nurse, attendant, other person*) was the agent of the defendant at the time

the (*state health care service*) was performed, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. *See Lewis v. Barnhill*, 267 N.C. 457, 465, 148 S.E.2d 536, 543 (1966); *Davis v. Wilson*, 265 N.C. 139, 145, 143 S.E.2d 107, 111 (1965); *Jackson v. Joyner*, 236 N.C. 259, 261, 72 S.E.2d 589, 591 (1952); *Nash v. Royster*, 189 N.C. 408, 411, 127 S.E. 356, 360 (1925).

2. *NOTE WELL: The instruction previously labeled as N.C.P.I.-Civil 809.65A "Medical Malpractice-Health Care Provider's Liability For Acts of Non-Employee Agents*-Respondeat Superior-*Apparent Agency" has been revised and renumbered as N.C.P.I.-Civil 809.66.*

3. For claims alleging direct negligence against a hospital, nursing home or adult care home for breach of administrative or corporate duties, including negligent monitoring, supervision, hiring, or credentialing, use N.C.P.I.-Civil 809.06, or if the claim arises out of the treatment of an emergency medical condition, N.C.P.I.-Civil 809.28.

4. "Health care provider" is defined by N.C. Gen. Stat. § 90-21.11. In particular, it should be noted that the term "health care provider" specifically includes "[a]ny other person who is legally responsible for the negligence of a person described by [N.C. Gen. Stat. § 90-21.11(1)(a)]," which includes nurses and anyone "rendering assistance to a physician," or "[a]ny other person acting at the direction or under the supervision of [any of the foregoing persons] . . . ." N.C. Gen. Stat. § 90-21.11(1). Note that, although a paramedic is defined as a health care provider by N.C. Gen. Stat. § 90-21.11, that definition appears in subpart (1)(e) rather than (1)(a). Therefore, a person who supervises a paramedic is not included within the definition of health care provider by virtue of that supervision alone.

5. *Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 576 (1984).

6. *Id.*

7. *NOTE WELL: If the malpractice alleged is based on lack of informed consent, delete the phrase "under the same or similar circumstances." Informed consent claims are governed by N.C. Gen. Stat. § 90-21.13, which does not include that language.*

8. N.C. Gen. Stat. § 90-21.12.

809.66 MEDICAL NEGLIGENCE—HEALTH CARE PROVIDER'S LIABILITY FOR ACTS OF NON-EMPLOYEE AGENTS—*RESPONDEAT SUPERIOR*—APPARENT AGENCY.[1]

> *NOTE WELL: This instruction previously was labeled "N.C.P.I.–Civil 809.65A Medical Negligence- Health Care Provider's Liability For Acts of Non-Employee Agents—Respondeat Superior—Apparent Agency." It has been revised and renumbered as N.C.P.I.-Civil 809.66.*

The (*state number*) issue reads:

"Was (*state name of health care provider or other person actually performing service*)[2] the apparent agent of the defendant (*state name of institutional health care provider*) at the time the (*state applicable health care service*) was performed?"[3]

You will answer this issue only if you have answered issue (*state issue number*) "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, that (*state name of health care provider or other person actually performing service*) was the defendant, (*state name of institutional health care provider*)'s, apparent agent at the time the (*state applicable health care service*) was performed.

Ordinarily, [a health care provider] [an institutional health care provider] [a corporate health care provider] [a health care provider association][4] such as the defendant is not liable for the negligence of (s*tate applicable category of health care provider, e.g., physicians, nurses, etc., or other persons*)[5] who are not [the health care provider's] [its] employees. A person is an employee when the hiring party retains the right and power to

control the method, manner and means by which the details of the work are performed rather than the right simply to require certain definite results.[6]

However, [a health care provider] [an institutional health care provider] [a corporate health care provider] [a health care provider association] may be responsible for the acts of (*state applicable category of health care provider*) if those (s*tate applicable category of health care provider*) are the apparent agents of the health care provider at the time of such acts.[7]

On this issue the plaintiff must prove, by the greater weight of the evidence, the following three things:[8]

First, that the defendant has held itself out as providing medical services, such as (*state applicable medical services, e.g., anesthesiology, radiology, etc.*), as opposed simply to providing facilities for the performance of medical services.[9] The holding out of itself by the defendant as providing medical services, such as (*state applicable medical services, e.g., anesthesiology, radiology, etc.*), may be by express verbal representations or by conduct, or it may be general and implied[10] from the circumstances.

Second, that the plaintiff looked to the defendant and not to (*state name of health care provider or other person actually performing service*) to perform those services.[11]

And Third, that the plaintiff accepted those services in the reasonable belief that the services were being rendered by the defendant or its employees. [A health care provider such as the defendant may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.[12]]

In determining whether the plaintiff reasonably believed that the (*state applicable category of medical services*) services were being rendered by the defendant, you must consider whether, under the totality of factors[13] present in this particular case, a reasonable person in the same or similar

circumstances as the plaintiff would have believed that the (*state applicable category of medical services*) services were being rendered by the defendant.[14] As applied to this case, the factors may include:

[the conduct of the defendant, including the defendant's actions or inaction on its part][15]

[whether the defendant gave meaningful notice to the plaintiff that (*state name of health care provider or other person actually performing service*) was an independent contractor][16]

[whether the plaintiff acknowledged receipt of notice that (*state name of health care provider or other person actually performing service*) was an independent contractor]

[whether the plaintiff, when receiving notice that (*state name of health care provider or other person actually performing service*) was an independent contractor, had an adequate opportunity to make an informed choice to accept or reject (*state name of health care provider or other person actually performing service*)'s services, such as in the case of a medical emergency][17]

[whether the plaintiff had any choice in the selection of the provider of (*state applicable category of medical services*) services][18]

[*state any other applicable factor arising from 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, at the time the (*state applicable health care service*) was performed, the defendant held itself out as providing medical services, that the plaintiff looked to the defendant rather than to (*state name of health care provider or other person actually performing service*) to perform those services, and that the plaintiff accepted those services in the reasonable belief that the services were being performed by the defendant or its employees, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

---

1. *NOTE WELL: Although the issue of apparent agency is presented most frequently in medical negligence cases, the concept (and thus this instruction in modified form) is applicable to all circumstances in which "an employer retains an independent contractor but creates the appearance that the contractor is acting as his [employee]." Dan B. Dobbs, The Law of Torts* § 433 *(2d ed. 2011).*

> *"Apparent agency issues arise . . . when an employer retains an independent contractor but creates the appearance that the contractor is acting as his servant. If the plaintiff deals with the independent contractor in the reasonable belief, induced by the employer's conduct, that she is dealing with the employer himself or his servants, she is entitled to hold the employer vicariously liable when she suffers physical harm at the hands of the contractor. In effect, the plaintiff can hold the employer to the appearances he has created."*

Id. For an instruction strictly on the principle of agency, see N.C.P.I.-Civil 103.10 ("Agency Issue-Burden of Proof-When Principal is Liable").

2. "[M]ost courts [have encountered the apparent agency issue] when hospitals farm out some of their routine or "integral" functions to independent physicians. Patients who seek medical assistance in a hospital's regular, full-time emergency room no doubt believe they are getting care provided by the hospital. The hospital, however, may have arranged for physicians' groups to provide emergency-room services as independent contractors. In such

cases courts have said that the hospital has created the appearance that the emergency room is part of the hospital itself and hence that it is subject to liability for emergency-room malpractice under an . . . apparent agency theory, or at least that the jury could so find from the evidence." Dobbs, *supra* note 1, at § 433 (citations omitted).

"The same may be said for other hospital units, so long as the hospital's self-presentation leads the patient reasonably to believe that she is being treated by the hospital and its own physicians. There seems to be no reason to limit the principle to institutions. For this reason, a physician who performs medical procedures in his office but uses the services of a nurse anesthetist who is an independent contractor may be liable for the nurse's negligence under the [apparent] agency rule." *Id.*

North Carolina has adopted the approach set out in the *Restatement (Second) of Torts* § 429 as "consistent with our prior decisions considering apparent agency." *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 307, 628 S.E.2d 851, 862 (2006). Section 429 of the *Restatement (Second) of Torts* provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.
>
> *Restatement (Second) of Torts* § 429.

Note that *Diggs* does not adopt the Restatement (Second) of Agency ("estoppel") approach, which "requires that the employer manifest or create the appearance that the employee is a servant. The *Restatement of Torts* . . . requires only that the services be accepted in the reasonable belief that they are delivered by the defendant rather than an independent contractor." Dobbs, *supra* note 1, at § 433.

3. *NOTE WELL: For claims arising on or after 1 October 2011 alleging direct negligence against a hospital, nursing home or adult care home for breach of administrative or corporate duties (including negligent monitoring, supervision, hiring or credentialing), use N.C.P.I.-Civil 809.06, or, if the claim arises out of the treatment of an emergency medical condition, N.C.P.I.-Civil 809.28.*

4. The term "health care provider" includes hospitals, nursing homes, and adult care homes as well as "a person who . . . is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia,

laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology." N.C. Gen. Stat. § 90-21.11(1)(a).

5. Pursuant to N.C. Gen. Stat. § 90-21.11, the term "health care provider" also includes "any other person who is legally responsible for the negligence of," or "any other person acting at the direction or under the supervision of" those persons listed in note 4, *supra*. Note that, although a paramedic is defined as a health care provider by N.C. Gen. Stat. § 90-21.11, that definition appears in subpart (1)(e) rather than (1)(a). Therefore, a person who supervises a paramedic is not included within the definition of health care provider by virtue of that supervision alone.

6. *See Rhoney v. Fele*, 134 N.C. App. 614, 617–18, 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).

7. *See Hoffman v. Moore Reg'l Hosp.*, 114 N.C. App. 248, 252, 441 S.E.2d 567, 570 (1994) (noting that the doctrine of apparent agency holds that "a principal who represents to a third party that another is his agent is liable for harm caused the third party by the apparent agent if the third party justifiably relied on the principal's representation") (citation omitted).

8. *See Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 307, 628 S.E.2d 851, 862 (2006) ("[C]onsistent with [the *Restatement (Second) of Torts* § 429 and] our prior decisions considering apparent agency . . . a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.").

9. *See id.* at 307, 628 S.E.2d at 862 (noting that in *Hoffman v. Moore Reg'l Hosp.*, 114 N.C. App. 248, 441 S.E.2d 567 (1994), "[t]here was no indication . . . that the hospital was holding itself out as providing the services involved as opposed to simply providing facilities for the performance of the procedure by private practitioners").

10. *See id.* at 303, 628 S.E.2d at 860 ("Courts considering this factor often ask whether the hospital held itself out to the public as a provider of hospital care, for example, by mounting extensive advertising campaigns. In this regard, the hospital need not make express representations to the patient that the treating physician is an employee of the hospital; rather a representation also may be general and implied.") (citation omitted). *See also Brown v. Moore*, 247 F.2d 711, 720–21 (3d Cir. 1957) (finding that numerous factors indicated a "holding out," including the "peculiarly pertinent" one that the hospital collected the bills as well as submitted a bill to the patient; in addition, the release signed by the patient

authorized the hospital to administer necessary treatment and an indemnification agreement referred to the plaintiff as a patient of the hospital); *Osborne v. Adams*, 550 S.E.2d 319, 322 (S.C. 2001) (noting that the hospital's marketing efforts touted its "first rate" neonatal facilities and staff and referenced neonatologists as "an integral part of [the hospital's Neonatal Intensive Care Unit] team"); *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 796 (Ill. 1993) (observing that the treatment consent form expressly stated that the patient would be treated by "physicians and employees of the hospital").

11. *See Estate of Ray v. Forgy,* 227 N.C. App. 24, 28, 744 S.E.2d 468, 471 (2013) (finding decedent looked to her physician separately and distinctly from the hospital where she wrote her physician's name and checked a box labeled "Physician" separately from checking a box labeled "Hospital Personnel").

12. *Diggs*, 177 N.C. App. at 307, 628 S.E.2d at 862 (citing *Cantrell v. N.E. Ga. Med. Ctr.*, 508 S.E.2d 716, 719-20 (Ga. Ct. App. 1998), where the court granted a directed verdict in favor of hospital affirmed where "conspicuous signage was posted and forms signed by the patient or representative revealed the independent contractor status of the doctor"). Nevertheless, the *Diggs* court noted, the Indiana Supreme Court found that "'written notice might not suffice if the patient did not have adequate opportunity to make an informed choice, such as in the case of a medical emergency.'" *Id.* at 304, 628 S.E.2d at 860 (citing *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999)).

13. *See Diggs*, 177 N.C. App. at 304, 628 S.E.2d at 860 (noting *in dicta* that the "ultimate determination" as to "the reasonableness of the patient's belief that the hospital or its employees were rendering health care . . . is made by considering the totality of the circumstances").

14. *Id.* (citing *Simmons v. Tuomey Reg'l Med. Ctr.*, 533 S.E.2d 312, 322 (S.C. 2000)) (noting that one of the factors is whether "a person in similar circumstances [as the plaintiff] reasonably would have believed that the physician who treated him or her was a hospital employee"). *See also Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974) (citations omitted) (noting that "the determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent").

15. *See Diggs*, 177 N.C. App. at 304, 628 S.E.2d at 860 (explaining that the "totality of circumstances includ[es] the actions or inactions of the hospital") (quoting *Sword*, 714 N.E.2d at 152).

16. *See supra* note 8. *See also Ray,* 227 N.C. App. at 28, 744 S.E.2d at 471 (finding it unreasonable for a patient to assume a specific doctor is a hospital employee when presented with a hospital release form to sign which explicitly stated that many of the

hospital's staff physicians are not agents or employees of the hospital but rather are independent contractors).

17. *See supra* note 12. *See also Ray*, 227 N.C. App. at 28, 744 S.E.2d at 471.

18. The *Diggs* court noted that in *Sweatt v. Wong*, 145 N.C. App. 33, 549 S.E.2d 222 (2001), the "[c]ourt stressed that the patient was not given a choice as to which physician would continue her care in the surgeon's absence." 177 N.C. App. at 306, 628 S.E.2d at 862. The court then went on to explain that the "[p]laintiff and other surgical patients had no choice as to who would provide anesthesia services for their operations." *Id.* at 308, 628 S.E.2d at 863.

809.75 MEDICAL NEGLIGENCE—INSTITUTIONAL[1] HEALTH CARE PROVIDER'S LIABILITY FOR SELECTION OF ATTENDING PHYSICIAN.

(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use either N.C.P.I.—Civil 809.00A or N.C.P.I.—Civil 809.06.)

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][2] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every institutional health care provider[3] is under a duty to use care when referring or assigning a patient[4] for treatment of a particular [illness] [injury] to a (*describe attending health care provider*) in accordance with the standards of practice used by other similar hospitals[5] situated in the same or similar communities under the same or similar circumstances at the time the referral or assignment is made.[6]

A health care provider's violation of this duty of care is negligence.[7]

As to the second thing that the plaintiff must prove, 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 health care provider 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 that, when the plaintiff went to the defendant for treatment of a particular [illness] [injury], the defendant referred or assigned the plaintiff to (*name attending physician*), and that such referral or assignment was not in conformity with the standards of practice among other like hospitals situated in the same or similar communities at that time. You must determine what standards of practice are applicable in making such a referral or assignment, that is, what the standards of practice were among other like hospitals situated in the same or similar communities at the time the defendant referred or assigned the plaintiff to (*name attending physician*). On the question of what standards of practice apply to the defendant's conduct, only witnesses who purport to have knowledge of those standards are permitted to testify as to the applicable standards.[8] Therefore, in determining the standards of practice applicable to this case,[9] you must weigh and consider the testimony of [this witness] [these witnesses] and not your own ideas of the standards.

NOTE WELL: Use the following language only if these factors have been addressed and substantially supported by expert testimony presented by the plaintiff:[10]

In determining what the applicable standards of practice are, you may consider these:

(A) the seriousness of the plaintiff's [illness] [injury] upon arrival at the defendant's facility seeking care;

(B) the availability and competency of specialists at the facility and in the surrounding service area; and

(C) the type of hospital according to the level of care offered by the defendant.[11]

While you may consider the factors I have just mentioned, you may also consider any other factor testified to by [that witness] [those witnesses] who purport[s] to have knowledge of the standards of practice applicable to this case.)

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].[12]

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 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 defendant.

---

1. This charge may be used where institutional health care providers (*e.g.*, hospitals, clinics and nursing homes) are alleged to have been negligent in making a referral or in selecting a physician to treat a patient.

This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

2. In death cases, this instruction can be modified to refer to the "decedent's death."

3. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11 as, "without limitation":

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)".

N.C. Gen. Stat. § 90-21.11.

4. If the health care provider is not a hospital, specify what it is [*e.g.*, clinic, group practice, nursing home, etc.]. *See supra* note 1. For the purposes of this instruction,

"hospital" is used throughout, but a different designation should be used if the case involves a health care provider other than a hospital.

5. If the case warrants, the following statement may be inserted at the end of this sentence: "By 'other similar hospitals' I mean hospitals which are of the same class or type of hospital as the defendant according to the level of care it offers." The use of this additional language would be warranted where expert evidence has been received which shows that the applicable level of care varies with the class of hospital, *e.g.*, primary, secondary, tertiary or specialty. *See infra* notes 7, 9.

6. N.C. Gen. Stat. § 90-21.12 provides the following about the "Standard of health care": In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied "by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action."

7. *Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 577 (1984).

8. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867 (1980), *rev'd on other grounds*, 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 675, 255 S.E.2d 761, 766 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

9. For cases filed on or after 1 October 2011, Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases). Further, for cases filed on or after 1 October 2011, Rule 702(h) of the *North Carolina Rules of Evidence* specifies that in a medical malpractice case based on alleged breach of administrative or corporate duties to the patient, a witness "shall not give expert testimony on the appropriate standard of care

. . . unless the person has substantial knowledge, by virtue of his training and experience, about the standard of care among . . . medical facilities[ ] of the same type as the . . . medical facility[ ] whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

10. Institutional health care providers such as hospitals may have some particular duties with regard to some of their ordinary functions. For example, hospitals routinely assign or refer patients to (a) staff (or "agent") physicians and (b) non-staff (or "non-agent") physicians for care and treatment. The hospital's duty to the patient in either case might depend on several factors, including (a) the gravity of the patient's condition upon arrival at the hospital, (b) the availability and competency of physicians at the facility and in the surrounding service area, and (c) the level of care offered at the hospital (primary, secondary or tertiary). Because of the variables, and because of the medical or quasi-medical judgments that must be made in making a patient assignment or referral (whether to a staff or non-staff physician), the hospital's standard of care is appropriately determined in relation to what other like hospitals in the same or similar communities would do. This approach would seem to be consistent with some recent North Carolina decisions which, though not directly on point, suggest that an institutional health care provider has a duty with regard to physician selection and that it varies in accordance with the three factors mentioned above. *See Rucker v. High Point Mem'l Hosp.*, 285 N.C. 519, 206 S.E.2d 196 (1974); *Bost v. Riley*, 44 N.C. App. 644, 262 S.E.2d 391 (1980). While these factors could be relevant, they cannot be communicated to the jury unless and until a foundation has been laid by the testimony of experts. Furthermore, great caution should be exercised to avoid the implication that these factors are the *only* factors to be considered.

11. In this regard, a [primary] [secondary] [tertiary] care hospital is one which (*here state the appropriate definition as supported by the evidence*).

12. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id.* However, expert testimony is not invariably required in all cases. *Id. See also Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct and circumstantial proof of negligence (*i.e., res ipsa loquitur*), N.C.P.I.-Civil 809.05 should be used in conjunction with this charge.

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

North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

Volume III
2019 Supplement

ISBN 978-1-56011-967-8

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APPENDICES.

813.22 TRADE REGULATION—VIOLATION—DEFINITION OF CONSPIRACY.[1]

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

A cause of action for damages resulting from a conspiracy is for the damage caused by acts committed pursuant to a formed conspiracy.[3] The conspiracy is the agreement itself.[4]

(A [person] [corporation] [partnership] [(*name other business association*)] cannot conspire with [himself] [herself] [itself]. Before there can be a conspiracy, there must be more than one person or participant involved.)

(Furthermore, a [corporation] [partnership] [(*name other business association*)] such as (*name corporation or other business association*) cannot conspire with its own [officers] [partners] [employees]. A [corporation] [partnership] [(*name other business association*)] is considered by law to be one person or participant.)[5]

(It is not necessary to show that members of a conspiracy entered into any express, written or oral agreement stating between themselves what their object or purpose was to be, or how it was to be accomplished. Indeed, it would be unusual if there were any such formal agreement, because conspirators do not normally put their agreements in writing, nor do they usually make their plans public. A conspiracy may be inferred from facts and circumstances, including the communications and general conduct of the parties showing a mutual intention to agree.)[6]

(A conspiracy need not be proved by direct evidence, but may be established by circumstantial evidence from which the conspiracy may be inferred. Mere similarity of conduct among various persons, the fact that they may have associated with each other, or the fact they may have assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy. A conspiracy exists when its members, in some way or manner, or through some contrivance, come to an agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means.)[7]

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1. This instruction is to be used in conjunction with N.C.P.I.-Civil 813.20 (Issue of Contracts or Conspiracies in Restraint of Trade) and N.C.P.I.-Civil 813.23 (Issue of Price Suppression of Goods).

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

3. *See Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963).

4. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) ("The common law action for civil conspiracy is for damages caused by acts committed pursuant to a conspiracy rather than for the conspiracy, i.e., the agreement, itself."); *see also Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966) (observing that unless something is actually done by a conspirator that results in damage, no civil action lies against anyone for the conspiracy).

5. So long as a business enterprise is an individual economic unit, there can be no conspiracy or combination among its various officers or employees. *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

An issue may arise in defining "the business enterprise." A parent and its wholly owned subsidiary should be treated as a single entity. *Copperweld Corp. v. Indep. Jube Corp.*, 467 U.S. 752, 771 (1984). Likewise, two wholly owned subsidiaries should be treated as a single entity. *See id.* at 770. However, problems may arise in other areas. First, two subsidiaries may be separate profit-making enterprises if the parent lacks legal or practical control over one. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, § 4.7 at 181 (1994). Second, when a firm hires an independent agent to carry out certain acts, there

is generally no conspiracy between the firm and the agent. However, if the agent has distinct and independent interests in the furtherance of the purpose of the acts, then there might be a conspiracy. *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 469 (1962).

6. *State v. Williams*, 255 N.C. 82, 86, 110 S.E.2d 442, 466 (1961); *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953); *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).

7. See cases cited in note 5.

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

The (*state number*) issue reads:

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

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

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

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

(*Use where there is a claim of actual ouster by a cotenant:* When two or more people possess the land by [deed] [will] [(written) (verbal)

agreement] [inheritance], each has certain rights, including the right to share in the possession of the land, the right to share in the rents and profits, and the right to an accounting. Possession becomes hostile when one possessor clearly, positively and unequivocally denies rights of possession to the other(s).[11] However, mere [occupancy of the land] [payment of taxes] [collection of rents and profits] [failure to account voluntarily for rents and profits] [does] [do] not necessarily prove that the rights of possession have been denied.[12] Hostile possession begins when one of the possessors explicitly refuses to permit the other(s) to share in possession of the land.)

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

Fourth, that this actual, hostile, open and notorious possession under known and visible boundaries must have been continuous and uninterrupted[16] for (*state statutory period*).[17] This means that the plaintiff (and those through whom the plaintiff claims) must continue actual, hostile, open and notorious possession of the land under known and visible boundaries for the entire (*state*

statutory period) without interruption by [physical acts] [a lawsuit] [(*state other means*)].[18]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff holds title to (*identify land*) by adverse possession, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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

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

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

4. "Tacking" is defined in *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). *See also Vanderbilt v. Chapman*, 172 N.C. at 812, 90

S.E. at 994. *BUT NOTE WELL: North Carolina does not follow the majority rule to allow tacking when a grantor adversely possessing property beyond the bounds of a deeded parcel conveys the deeded parcel to a grantee who continues adversely possessing the same additional property.* Cole v. Bonaparte's Retreat Prop. Owner's Ass'n, Inc*., ___ N.C. App. ___, ___, 815 S.E.2d 403, 409 (2018). In North Carolina, a grantee is not permitted to tack a grantor's adverse possession of land that lies outside the boundary of the grantor's conveyance, because "there is no privity of title between him and his predecessors in title as to [that] land."* See Ramsey v. Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476, 477 (1948).*

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

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

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

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

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

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

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

12. *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694 ("One cotenant may not be deprived of his rights by another cotenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess."); *see also* N.C. Gen. Stat. §§ 1-39, 1-40. But, "sole and undisturbed possession and use of the property [by one tenant in common] for twenty years, without any demand for rents, profits or possession by the cotenants" gives rise to a presumption of constructive ouster, *see Atl. Coast Properties, Inc. v. Saunders*, 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.

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

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

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

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

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

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

820.10 ADVERSE POSSESSION—COLOR OF TITLE.[1]

The (*state number*) issue reads:

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

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

On this issue the burden of proof is on the plaintiff.[4] This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that (*identify land*) described in the [deed] [will] [*identify other instrument*] was actually possessed[5] by the plaintiff (and those through whom the plaintiff 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 person has possession of all it.[9]

Second, that this actual possession was exclusive and hostile[10] to the defendant (and those through whom the defendant 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 the plaintiff claims) makes the defendant (or one through whom the defendant claims) aware by words or conduct that the plaintiff 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 the defendant 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 the plaintiff claims) claimed the land as [his] [her] [their] own and [was] [were] not merely (a) temporary or occasional trespasser(s).[18] Such possession must also have been under such known and visible lines and boundaries as to identify the extent of the possession claimed.

Fourth, that this actual, hostile, open and notorious possession of the (*identify land*) under color of title and known and visible boundaries must have been continuous and uninterrupted[19] for (*state statutory period*).[20] This means that the plaintiff (and those through whom the plaintiff claims) must continue actual, hostile, open and notorious possession of the land under known and visible boundaries for the entire (*state statutory period*) without interruption by [physical acts] [a lawsuit] [(*state other means*)].[21]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff holds title to (*identify land*) by adverse possession under color of title, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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

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) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse

users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916). *BUT NOTE WELL*: *North Carolina does not follow the majority rule to allow tacking when a grantor adversely possessing property beyond the bounds of a deeded parcel conveys the deeded parcel to a grantee who continues adversely possessing the same additional property.* Cole v. Bonaparte's Retreat Prop. Owner's Ass'n, Inc*., ___ N.C. App. ___, ___, 815 S.E.2d 403, 409 (2018). In North Carolina, a grantee is not permitted to tack a grantor's adverse possession of land that lies outside the boundary of the grantor's conveyance, because "there is no privity of title between him and his predecessors in title as to [that] land."* See Ramsey v. Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476, 477 (1948).*

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 Cty. 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, color of title makes the claimant 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, 689-90 (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 adverse claimant's instrument purports to give 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 (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 the landowner's property and that of another, the landowner's 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 Props., 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. Mfg. 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).

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

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

The issue reads:

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

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

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

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value as of the time of the taking – that is, as of (*state date of taking*) and not as of the present day or any other time.[4] In arriving at the fair market value you should, in light of all the evidence, consider not only the use of the property at the time of the taking,[5]

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

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

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

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

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

2. A lessee's interest may also be the subject of a taking. *See Horton v. Redev. Comm'n of High Point*, 264 N.C. 1, 8-9, 140 S.E.2d 728, 734 (1965) (citations omitted). ("[A] leasehold is a property right . . . [and] [a]ny diminution of that right by the sovereign in the exercise of its power of eminent domain entitles lessee to compensation.") However, as personal property is not part of the realty condemned, a lessee is not entitled to compensation for it. *DOT v. Adams Outdoor Adver. of Charlotte Ltd. P'ship*, 247 N.C. App. 39, 48, 785 S.E.2d 151, 157 (2016) (citing N.C. Gen. Stat. § 136-19(a), which limits the NCDOT's authority to condemn to "land, materials, and timber for right of way, not personal property"). A highway billboard has been held to be the personal property of the lessee; therefore, a billboard is not part of the realty condemned and a lessee is entitled to no compensation for it. *Nat'l Adver. Co. v. N.C. Dep't of Transp.*, 124 N.C. App. 620, 625, 478 S.E.2d 248, 250 (1996).

3. N.C. Gen. Stat. § 136-112(2). *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227(1959); *DeBruhl v. Highway Comm'n*, 247 N.C. 671, 676, 102

S.E.2d 229, 233 (1958); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

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

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

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

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

The trial judge should analyze whether a witness is qualified to offer an opinion as to fair market value under Rule 702 of the North Carolina Rules of Evidence. *North Carolina Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018). The limitations on the activities of licensed real estate brokers under N.C. Gen. Stat. § 93A-83 are not applicable to the determination of whether a licensed broker may prepare an expert report and testify in a civil proceeding. *Id.* at 481-83, 810 S.E.2d at 221-22.

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

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

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

The (*state number)* issue reads:

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

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

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

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

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

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

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

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

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

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

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

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

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

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

Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983); *see also Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Bd. of Transp. v. Brown*, 34 N.C.

App. 266, 268, 237 S.E.2d 854, 855 (1977); *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

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

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

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

6. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

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

value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

The trial judge should analyze whether a witness is qualified to offer an opinion as to fair market value under Rule 702 of the North Carolina Rules of Evidence. *North Carolina Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018). The limitations on the activities of licensed real estate brokers under N.C. Gen. Stat. § 93A-83 are not applicable to the determination of whether a licensed broker may prepare an expert report and testify in a civil proceeding. *Id.* at 481-83, 810 S.E.2d at 221-22.

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

N.C.P.I.—Civil 835.13
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT")
General Civil Volume
Replacement April 2019
N.C. Gen. Stat. § 136-44.50 to 44.54

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

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

Typically, Map Act cases are filed as inverse condemnation actions. For this reason, it is presumed that the plaintiff is the property owner.[1]

The (*state number)* issue reads:

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

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of just compensation owed by the defendant for the taking of the plaintiff's property rights.[2]

In this case, the defendant has not taken all of the plaintiff's property rights. It has restricted the plaintiff's rights to improve, develop and subdivide the plaintiff's property for an indefinite time.

The measure of just compensation where some but not all property rights are taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking.[3]

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking - that is (*state date of taking*[4]) - and not as of the present day or any other time.[5] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[6] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[7] Likewise, in arriving at the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project,[8] as well as the benefit the property owner will receive as a result of any reduction in the *ad valorem* tax on the property subject to the defendant's restrictions on its use.

You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[9] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[10] Any interest as the law allows will be added by the court to your verdict.

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

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the property immediately before the date of taking and the fair market value of the property subject to the defendant's restrictions on its use immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the property subject to the defendant's restrictions on its use immediately after the taking is the same as, or greater than, the value of the property immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

NOTE WELL: If the condemnor introduces evidence of general or special benefits for purposes of offset, this instruction should be followed by N.C.P.I. 835.13A.

N.C.P.I.—Civil 835.13
EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES ("MAP ACT")
General Civil Volume
Replacement April 2019
N.C. Gen. Stat. § 136-44.50 to 44.54
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1. On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2. Like a partial taking, which leaves the property owner with some, but not all, of the property, a taking pursuant to the Map Act leaves the property owner with some, but not all, of the fundamental rights of property ownership. *See Kirby v. North Carolina Dep't of Transp.*, 368 N.C. 847, 856, 786 S.E.2d 919, 925 (2016) (holding that "by recording the corridor maps . . ., which restricted plaintiffs' rights to improve, develop and sub-divide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights.")

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

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

Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983); *see also Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977); *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

4. In a Map Act case, the taking occurs at the time of NCDOT's recording of the corridor map at issue. *Kirby v. North Carolina Dep't of Transp.*, 368 N.C. at 848, 786 S.E.2d at 921.

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

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

7. In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner,"

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

8. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

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

Note that the trial judge should analyze whether a witness is qualified to offer an opinion as to fair market value under Rule 702 of the North Carolina Rules of Evidence. *North Carolina Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018). The limitations on the activities of licensed real estate brokers under N.C. Gen. Stat. § 93A-83 are not applicable to the determination of whether a licensed broker may prepare an expert report and testify in a civil proceeding. *Id.* at 481-83, 810 S.E.2d at 221-22.

10. Because the landowner may withdraw the amount deposited with the Court as an estimate of just compensation, the Court is required to add interest only to the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113

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

835.14 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TAKING OF AN EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

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

The issue reads:

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

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

In this case, the [plaintiff] [defendant] has not taken all of the landowner's property. It has taken an easement or right-of-way for (*state purpose*) across the landowner's property.[2] Where an easement is taken for (*state purpose*), the landowner does not give up all the title to the land. The landowner retains a right to continue to use the land in ways that do not interfere with (*state name of condemnor's*) free exercise of the easement acquired.[3]

The measure of just compensation where an easement is taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking - that is, immediately after it was made subject to the easement.[4]

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value of the property immediately before the time of the taking of the easement, and the fair market value of the property immediately after it was made subject to the easement - that is (*state date of taking*) - and not as of the present day or any other time.[5] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[6] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[7] Likewise, in arriving at the fair market value of the property immediately after it was made subject to the easement, you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the property immediately after it was made subject to the easement, you should consider the property as it [was] [will be] at the conclusion of the project.[8] You should consider these factors in the same way in which they would be considered by a willing

buyer and a willing seller in arriving at a fair price.[9] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[10] Any interest as the law allows will be added by the court to your verdict.

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

Finally, as to this issue on which the landowner has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the entire tract immediately before the date of taking and the fair market value of the property subject to the easement immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the property subject to the easement immediately after the taking is the same as, the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

NOTE WELL: If the condemnor introduces evidence of general or special benefit for purposes of offset, this instruction should be followed by N.C.P.I. 835.14A.

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

2. Where the easement is a temporary construction or drainage easement, see N.C.P.I.-Civil 835.15a.

3. The jury can be additionally instructed as to the respective rights of the landowner and condemnor with regard to the easement. *See North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960).

4. N.C. Gen. Stat. § 136-112. *See also Colonial Pipeline v. Weaver*, 310 N.C. 93, 99, 310 S.E.2d 338, 341 (1984); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1955).

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

Whether there is any substantial difference in the easement condemned and a fee simple estate depends upon the nature and extent of the easement acquired. Each case must stand on its exact facts. *State Highway Comm'n v. Black*, 239 N.C. at 202, 79 S.E.2d at 782; *Carolina Power and Light Co. v. Clark*, 243 N.C. 577, 582, 91 S.E.2d 569, 572 (1956).

5. The point in time when property is "valued" in a condemnation action is the "date of taking." *Metro. Sewerage Dist. of Buncombe Cty. v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

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

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

8. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

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

The trial judge should analyze whether a witness is qualified to offer an opinion as to fair market value under Rule 702 of the North Carolina Rules of Evidence. *North Carolina Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018). The limitations on the activities of licensed real estate brokers under N.C. Gen. Stat. § 93A-83 are not applicable to the determination of whether a licensed broker may prepare an expert report and testify in a civil proceeding. *Id.* at 481-83, 810 S.E.2d at 221-22.

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

835.15A EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TAKING OF A TEMPORARY CONSTRUCTION OR DRAINAGE EASEMENT BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

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

The issue reads:

"What is the amount of just compensation the landowner is entitled to recover from the [plaintiff] [defendant] for the taking of the temporary [construction] [drainage] easement on the landowner's property?"

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

In this case, the [plaintiff] [defendant] has not taken all of the landowner's property. It has taken a temporary easement or right-of-way for (*state purpose*) across the property and the landowner will have the land restored to [him] [her] after the temporary easement expires.[2] Where a temporary easement is taken for (*state purpose*), the landowner does not give up all the title to the land. The landowner retains a right to continue to use the land in ways that do not interfere with (*state name of condemnor's*) free exercise of the temporary easement acquired.[3]

The measure of just compensation where the easement is a temporary [construction] [drainage] easement is the rental value of the land actually occupied, for the period of time the land is occupied.[4]

The condemnor is also liable for the damages flowing from the use of the temporary [construction] [drainage] easement. Such damages may include:

[the cost of removal of the landowner's improvements from the easement that are paid by the landowner]

[the cost of constructing an alternate entrance to the property]

[the changes made in the area resulting from the use of the easement that affect the value of the area in the easement or the value of the remaining property of the landowner]

[the removal of trees, crops or improvements from the area in the easement by the condemnor] [and]

[the length of the time the easement was used by the condemnor] [and]

[state other additional elements of damages that are supported by the evidence].

Such damages awarded by you may not include lost profits.[5]

Your verdict must not include any amount for interest.[6] Any interest as the law allows will be added by the court to your verdict.

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

Finally, as to this issue on which the landowner has the burden of proof, if you find, by the greater weight of the evidence, the rental value of the land actually occupied during the period of time the land is occupied, together with any damages sustained by the property flowing from the use of the temporary [construction] [drainage] easement, as I have explained those elements to you, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the land actually occupied had no rental value and that there were no damages flowing from the use of the temporary [construction] [drainage] easement, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

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

2. *See Colonial Pipeline v. Weaver*, 310 N.C. 93, 101, 310 S.E.2d 338, 346 (1984); *City of Fayetteville v. M.M. Fowler, Inc.*, 122 N.C. App. 478, 480, 470 S.E.2d 343, 345, *review denied*, 344 N.C. 435 (1996).

3. The jury can be instructed additionally as to the respective rights of the landowner and condemnor with regard to the easement. *See North Asheboro-Central Falls Sanitary District v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960).

4. *See Town of Nags Head v. Richardson, et al.*, ___ N.C. App. ___, ___, 817 S.E.2d 874, 888 (2018) (citing 4 *Nichols on Eminent Domain* § 12E.01[4] (rev. 3d ed. (2006))).

5. *See Dep't of Transp. v. Jay Butmataji, LLC*, ___ N.C. App. ___ , ___ , 818 S.E.2d 171, 176 (2018) (citing *Colonial Pipeline v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984)).

6. Because the landowner may withdraw the amount deposited with the Court as an estimate of just compensation, the Court is required to add interest only to the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the

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

840.10 EASEMENT BY PRESCRIPTION.[1]

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

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

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

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

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

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

The (*state number*) issue reads:

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

(An easement is a right to make a specific use (or uses) of land owned by another person.[5] A person who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[6]

The owner of the land which is burdened by the easement continues to have all of the rights of a landowner which are not inconsistent with the easement.[7])

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:[8]

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

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

of such nature as to put others on notice that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] claim(s) the right to use the land.

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

Third, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious. This means either that the owner of the land must actually know of the adverse use or that the use must have been so open, visible and well known that a landowner would know of the use if the owner had the same familiarity with the land that an ordinary owner normally would have. The use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] must be of such a nature that anyone in the community, including the owner, knows, or by observing could know,

that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was using the land as if the plaintiff had a right to do so and was not merely a temporary or occasional trespasser.

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

of title] [physically] [by a lawsuit] [(*state other interruptions shown by the evidence*)].

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] actually used (*a portion of*) the land of [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] for (*describe the uses of the land claimed as easement*), that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious, and that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. This instruction is written in general language which is intended to be modified in each case to fit the exact nature of the easement claimed. While the most common claim will

be for a right of ingress and egress, some cases will involve claims for easements for drainage, *see e.g., Lamb v. Lamb*, 177 N.C. 150, 150, 98 S.E. 307, 308 (1919), for the maintenance of a pond, *e.g., Thomas v. Morris*, 190 N.C. 244, 244, 129 S.E. 623, 623-24 (1925) or for other particular uses, *e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 432, 20 S.E.2d 329, 330 (1942) (use of party wall). The general language of the instruction—particularly the mandate—should be tailored in each case to the nature of the easement claimed.

2. *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)).

3. *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). *BUT NOTE WELL: North Carolina does not follow the majority rule to allow tacking when a grantor adversely possessing property beyond the bounds of a deeded parcel conveys the deeded parcel to a grantee who continues adversely possessing the same additional property.* Cole v. Bonaparte's Retreat Prop. Owner's Ass'n, Inc*., ___ N.C. App. ___, ___, 815 S.E.2d 403, 409 (2018). In North Carolina, a grantee is not permitted to tack a grantor's adverse possession of land that lies outside the boundary of the grantor's conveyance, because "there is no privity of title between him and his predecessors in title as to [that] land."* See Ramsey v. Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476, 477 (1948).*

4. *Deans v. Mansfield*, 210 N.C. App. 222, 228-29, 707 S.E.2d 658, 664 (2011); *see also* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 14.09 (Matthew Bender, 6th ed. 2011) (describing the requisite privity as a connection made out where an "initial adverse possessor transfers his possession to a successor adverse possessor by some recognized connection," such as a "deed, will, or even by a parol transfer").

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

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

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

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

The remaining four criteria from *West v. Slick* are more traditional "elements" and are presented as such in this endnote and in the body of the instruction. They are: "(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious

such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period." *Deans*, 210 N.C. App. at 226, 707 S.E.2d at 662 (citing *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)).

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

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

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

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

11. *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)); *see also Coggins v. Fox*, 34 N.C. App. 138, 140, 237 S.E.2d 332, 333 (1977).

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

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 the deceased's handwriting are sufficient to express the deceased's intent[3] to make a will and to dispose of 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 the deceased's 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 found[8] [among the deceased's valuable papers or effects] [in a safe deposit box or other safe place where it was deposited by the deceased or under [his] [her] authority] [in the possession or custody of some person or firm with whom it was deposited by the deceased or under [his] [her] 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] [her] 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.

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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. *See In the Matter of the Will of Allen*, ___ N.C. ___, ___, 821 S.E.2d 396, 400 (2018) ("Regarding wills and codicils, above all, '[t]he discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary instruction.'") (citation omitted). 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). Because codicils by definition are an "addition, explanation or alteration" of a prior will, the Supreme Court of North Carolina emphasized that a valid codicil "need not quote in its entirety any language of the will it intends to alter, and a court should not isolate the handwritten text from the will itself in construing the codicil." *In re Allen*, ___ N.C. at __, 821 S.E.2d at 401.

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).

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).

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.–Civil Instruction numbers)