EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR NEGLIGENCE IN HIRING OR SELECTING[1] AN INDEPENDENT CONTRACTOR.

The *(state issue number)* reads: "Was the plaintiff [injured] [damaged] by the negligence[2] of the defendant in

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[1]*NOTE WELL*: Case law appears to use the terms "hiring," "selecting" and "retaining" interchangeably, notwithstanding the implied chronological distinction between the first two terms on the one hand and the third term on the other. *See, e.g.*, *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45 (2005) (describing the action several times either as one for "negligent hiring," or as one for "negligent hiring and retention").

However, because *Woodson v. Rowland,* 329 N.C. 330, 358-60, 407 S.E.2d 222, 238-39 (1991) appears to treat claims of "negligent selection" and "negligent retention" of an independent contractor separately, the Pattern Jury Civil Subcommittee upon careful consideration and deliberation believes that negligent retention of an independent contractor should be the subject of a separate instruction. *Cf.* N.C.P.I. Civil—640.44 ("Employment Relationship—Liability of Employer for Negligence in Retention of Independent Contractor").

Whatever label may be placed upon an individual case by counsel, the burden rests upon the trial court, in selecting appropriate jury instructions, to consider the evidence presented carefully and determine whether the factual circumstances constitute a claim for negligent hiring or selection, negligent retention, or both.

[2]The general rule is that "one who employs an independent contractor is not liable for the independent contractor's negligence." *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234.

However, "[i]n limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability [derived from agency law], but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party." *Little*, 171 N.C. App. at 586, 615 S.E.2d at 48. Thus, "[a] third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the theory that the selection was negligently made." *Woodson,* 329 N.C. at 358, 407 S.E.2d at 239; *but see Dunleavy v. Yates Const. Co., Inc.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197 (1992) (stating that North Carolina law "does not currently recognize claims of an injured employee of an incompetent or unqualified independent contractor against a party for its negligent selection or retention of the independent contractor.").

In order to establish a claim for negligent hiring of an independent contractor, "there must be a legal duty owed by the employer to the injured party." *Little*, 171 N.C. App. at 586-87, 615 S.E.2d at 48. "Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring and retention case: '(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence.'" *Id.* at 587, 615 S.E.2d at 48 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000)). As noted in n.1, a negligent retention claim has an additional element—that the employer had "a reasonable opportunity to discharge" the independent contractor. *See Woodson*, 329 N.C. at 359, 407 S.E.2d at 240, and N.C.P.I. Civil—640.44 ("Employment Relationship—Liability of Employer for Negligence in Retention of Independent Contractor"). In addition, an employer remains "liable for any negligence of his own in connection with the work." Prosser and Keeton on Torts, *Independent Contractors*, § 71, p.512 (2001).

North Carolina has also adopted the "non-delegable duty" exception imposing liability on employers in certain instances without absolving the independent contractor of responsibility for his own actions. *See, generally,* Dan B. Dobbs, *The Law of Torts,* § 337, p.920 (2000) (stating that a "nondelegable duty of care" does not mean "that the independent contractor himself escapes liability"); *but see Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492 (noting that "[i]n more recent decisions, . . . our courts have clarified that it is the negligence of the *employer*, not the independent contractor, that must be considered; liability is direct, not vicarious, in nature . . . . Thus, liability will attach only if *the employer* failed to take the necessary precautions to control the risks associated with the activity." (emphasis in original)).

Instances in which the "non-delegable duty" exception has been held to apply, include 1) "ultrahazardous activities", *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234, 2) those involving an activity denominated "inherently dangerous," *Id.* at 352, 407 S.E.2d at 235, or "peculiarly risky" or "intrinsically dangerous," *Deitz v. Jackson*, 57 N.C. App. 275, 279-80, 291 S.E.2d 282, 286 (1982), and 3) those concerning premises open to the public. *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E.2d 189, 192 (1972); *see also Hendricks v. Fay,* 273 N.C. 59, 65, 159 S.E.2d 362, 367 (1968) (contractual duties performed by a private detective firm hired to maintain security over the property and employees of a textile plant were "non-delegable," and "liability for tortious conduct," including false arrest and malicious prosecution, of the firm and its agents, was "imputable to [the plant] under the doctrine of

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[hiring] [selecting] (*state name of independent contractor*)?[3]

You will answer this issue only if you have answered issue *(state issue number)* "Yes" in favor of the plaintiff.[4]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant was negligent in [hiring] [selecting] (*state name of independent contractor*). Negligence refers to a party's failure to follow a duty of conduct imposed by law. Negligence is not to be presumed from the mere fact of [injury] [damage].

To establish negligence on the part of the defendant in [hiring] [selecting] (*state name of independent contractor*), the plaintiff must prove, by the greater weight of the evidence, four things:[5] 1) that the defendant owed the plaintiff a legal duty[6] of care, 2) that

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respondeat superior"). "Even when the duty is nondelegable, the employer is not responsible for 'collateral negligence' of the independent contractor. Collateral negligence creates a risk that is not a usual or inherent part of the work or is outside the scope of the employer's enterprise." Dobbs, at 924.

[3]If there is a factual dispute as to the named individual defendant-independent contractor's status, then N.C.P.I.—Civil 640.00 ("Employment Relationship—Status of Person as Employee") should be submitted first. A "Yes" answer to that issue would preclude submission of this issue; however, N.C.P.I.—Civil 640.42 ("Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision or Retention of an Employee") might then be appropriate.

[4]*NOTE WELL:* n.2 *supra* references the incompetent independent contactor's "negligent" act resulting in injury to the plaintiff as an element of a negligent hiring or retention claim. This element will have been met by an affirmative answer to the issue addressing the named individual defendant-independent contractor's negligence and need not be resubmitted here.

Obviously, if for some reason the issue of the individual independent contractor's negligence has not been submitted to the jury, this statement referencing the jury's verdict on an earlier issue should not be read. *See Little,* 171 N.C. App. at 585, 615 S.E.2d at 47 (noting that "[t]he plaintiffs' claims against [the employer and the owner] were severed from the claims against [the independent contractor] and only the claims against [employer and owner] were tried before [the trial judge]."). Moreover, an initial element, "that the plaintiff was injured as a proximate result of the negligence of (*state name of independent contractor*)," should then be included here and this instruction should be supplemented to include the elements of a negligence claim against the independent contractor under N.C.P.I.—Civil 102.10 ("Negligence Issue—Burden of Proof").

[5]*See* n.2 *supra*; *see also Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (In a claim for negligent employment or retention, a plaintiff must prove: "(1) the specific negligent act on which the action is founded . . . ; (2) incompetency, by inherent unfitness or previous acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the [employer] of such unfitness or bad habits, or constructive notice . . . by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . ; and (4) that the injury complained of resulted from the incompetency proved." (citations omitted) (emphasis in original omitted)), *Smith v. Privette,* 128 N.C. App. 490, 494-95, 495 S.E.2d 395, 398

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(state name of independent contractor) was incompetent[7] at the time of *his* [hiring] [selection][8], 3) that prior[9] to the (*state name of independent contractor*)'s act resulting in [injury] [damage] to the plaintiff, the defendant had either actual or constructive notice[10] of this incompetence, and 4) that this incompetence was the proximate cause of the plaintiff's [injury] [damage].[11] I will now discuss these things one at a time and explain the terms used.

(1998) ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency."), and *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (the plaintiff must demonstrate that "the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.").

[6]*See Little*, 171 N.C. App. at 586-87, 615 S.E.2d at 48 ("Because plaintiffs' claim against [the entity which hired the independent contractor] is a direct claim, there must be a legal duty owed by the employer to the injured party in order to establish the claim for negligent hiring."); *see also* nn.12-13 *infra.*

[7]*See* n.18 *infra.*

[8]*See Kinsey*, 139 N.C. App. at 377, 533 S.E.2d at 493 (the plaintiff must prove the independent contractor "was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred."). The "incompetent *at the time of hiring*" language does not appear to be applicable to a claim of negligent *retention* as opposed to negligent hiring or selection. *See* N.C.P.I.—Civil 640.44 ("Employment Relationship—Liability of Employer for Negligence in Retaining an Independent Contractor").

[9]*See* n.5 *supra.*

[10]*See* n.1 *supra*; *see also Pleasants v. Barnes,* 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) ("[I]t must be established . . . that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the [incompetency], either actual or constructive."), and *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (The third element of a "negligent hiring" claim is that "the employer had notice, either actual or constructive, of [the employee's] incompetence.").

[11]<u>*NOTE WELL*</u>*: Based upon the lack of certainty in appellate case law noted below, alternatives to the indicated phraseology may include:* [this incompetence was *a proximate cause* of the plaintiff's [injury] [damage]], [this incompetence *proximately caused* the plaintiff's [injury] [damage]], or [the plaintiff's [injury] [damage] *proximately resulted* from this incompetence].

Appellate case law is not definitive on the precise language which should be employed. *Little* and *Kinsey* both specifically delineate the final element of a "negligent hiring and retention," *Little,* 171 N.C. App. at 587, 615 S.E.2d at 48, or "negligent selection," *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 493, claim as being that "the plaintiff's injury was *the* proximate result of this incompetence". However, the Court in *Medlin* describes the fourth element of a "claim for negligent employment or retention" in less exclusive language as "that the injury complained of *resulted* from the incompetency proved." *Medlin*, 327 N.C. at 590, 398 S.E.2d at 462 (emphasis added); *see also White v. Consolidated Planning*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004) (citing *Medlin* and stating the fourth element of a "negligent hiring claim" is "injury resulting from the employee's incompetency or unfitness"), *Little*, 171 N.C. App. at 592 (Geer, J., dissenting) (third element of a "claim of negligent hiring of an independent contractor" under "*Woodson, Page and Deitz"* is that "the plaintiff was harmed

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First, the plaintiff must prove that the defendant owed the plaintiff a legal duty of care.[12] This means that the plaintiff must prove[13] that *(state name of independent contractor)* and the plaintiff were in places where each had a right to be when the wrongful act occurred,[14] that the plaintiff encountered *(state name of independent contractor)* as a direct result of *his* employment by the defendant,[15] and that the defendant must reasonably

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as *a* proximate cause of the lack of qualification or incompetence" of the independent contractor)(emphasis added), *Deitz v. Jackson*, 57 N.C. App. 275, 278, 291 S.E.2d 282, 285 (1982) (complaint including allegations that "defendants . . . negligently hired an incompetent construction company and that as *a* proximate result thereof, plaintiff was injured," held to adequately allege "negligent hiring of an independent contractor" claim) (emphasis added), and *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (to hold master liable, servant must establish, *inter alia*, "that he has been injured by reason of carelessness or negligence due to the incompetency of the fellow servant").

[12]The *Little* court stated that "[t]he nature and extent of the duty owed by the employer to injured parties in negligent hiring cases has not been described with great precision in the case law of North Carolina to date." *See Little*, 171 N.C. App. at 587, 615 S.E.2d at 48. Nonetheless, "it is "clear that there must be a duty owed by the employer to the plaintiff in order to support an action for negligent hiring." *Id.* Further, "[i]t is only after a plaintiff has established that the defendant owed a duty of care that the trial court considers the other elements necessary to establish a claim for negligent hiring or retention." *Id.* at 588, 615 S.E.2d at 49.

[13]*See id.* (stating that "[m]ost jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation. Thus, courts have found liability in cases where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments. One commentator . . . [has] noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.").

The *Little* court did not expressly hold that all three elements must be proved; the requirement set out here has been derived from the court's observation that "[c]ourts in other jurisdictions have generally, though not exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* (emphasis in original); *see also Hedrick v. Rains,* 121 N.C. App. 466, 469, 466 S.E.2d 281, 283 (1996) (stating that "[i]n general, there is no duty to prevent harm to another by the conduct of a third person"), and *Leasing Corp. v. Miller*, 45 N.C. App. 400, 406-07, 263 S.E.2d 313, 318, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980) (observing that "[w]hether or not a party has placed himself in such a relation with another so that the law will impose upon him an obligation, sounding in tort and not in contract , to act in such a way that the other will not be injured calls for the balancing of various factors: (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.").

[14]*See O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 185-86, 352 S.E.2d 267, 272 (1987) (employer of work-release inmate employee had no duty to protect third persons from the criminal acts of the employee committed outside the scope the employee's employment when "the employee's criminal act did not occur while on the employer's premises or while the employee was using the employer's property").

[15]According to the *Little* court, "[w]hat is required . . . is a nexus between the employment relationship and the injury." *Little*, at 589, 615 S.E.2d at 52. Further, the court "refuse[d] to make employers insurers to the

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have expected to receive some benefit, even if only potential or indirect, from the encounter between *(state name of independent contractor)* and the plaintiff.

Second, the plaintiff must prove that (*state name of independent contractor*) was incompetent at the time of *his* [hiring] [selection].[16] This means that *(state name of independent contractor)* was not fit for the work in which *he* was engaged.[17] Incompetence may be shown by inherent unfitness, such as [the lack of physical capacity or natural mental gifts] [[,or] the absence of [skill] [training] [experience]].[18]

[Incompetence may also be inferred from [previous specific acts of careless or negligent conduct by (*state name of independent contractor*)][19] [[or] from prior habits of carelessness or inattention on the part of (*state name of independent contractor*) in a kind

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public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment." *Id.* at 588-59, 615 S.E.2d at 49.

[16]*See* n.8 *supra.*

[17]*See Walters v. Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (An employer must exercise "reasonable care in selecting employees who are competent and fitted for the work in which they are engaged."); *see also Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1971) ("[A] condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if . . . the contractor was not properly qualified to undertake the work, [the employer] may be held liable for the negligent acts of the contractor.").

[18]*See Walters*, 163 N.C. at 542, 80 S.E. at 52 (noting that "this term, incompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which 'renders the employment or retention of the servant dangerous to his fellow-servant'" (citation omitted)), and Pennsylvania Suggested Standard Civil Jury Instructions 4.07A (stating that a contractor may be "incompetent for the work to be performed by reason of inexperience, lack of skill, or previous careless conduct.").

[19]*See Kinsey*, 139 N.C. App. at 377, 535 S.E.2d at 493 (the plaintiff must prove the independent contractor "was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence"), *Walters*, at 542, 80 S.E. at 493 (the plaintiff must prove "incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred"), and *B.B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 567, 424 S.E.2d 172, 175 (1993) (noting that a "plaintiff would have to prove . . . the incompetency of the [employees] to perform their duty, either by inherent unfitness for the job, or by showing such incompetence by previous conduct.").

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of work where careless or inattentive conduct is likely to result in injury.[20] However, any evidence tending to show, if you find that it does so show, that (*state name of independent contractor*) may have been careless or negligent in the past may not be considered by you in any way on the question of whether (*state name of independent contractor*) was negligent on the occasion in question. It may only be considered by you in your determination of whether (*state name of independent contractor*) was incompetent and whether such incompetence was known or should have been known to the defendant.[21]]

Third, the plaintiff must prove that the defendant had either actual or constructive notice of (*state name of independent contractor*)'s incompetence.[22] Actual notice means that prior[23] to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff, the defendant actually knew of (*state name of independent contractor*)'s incompetence.

Constructive notice means that the defendant, in the exercise of reasonable care, should have known of (*state name of independent contractor)*'s incompetence prior to the alleged act of (*state name of independent contractor*) resulting in [injury] [damage] to the plaintiff.[24] Reasonable care is that degree of care in the hiring or selection of an

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[20]*See Walters*, 163 N.C. at 542, 80 S.E. at 51 (Incompetency "would include habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury.").

[21]*See id.* (noting that "specific acts of negligence or carelessness and inattention on the part of the offending fellow-servant should be received, not to show that there was negligence in the particular case . . . , but in so far as they may tend to establish the character of the incompetency and that the same was known to the master or should have been in the exercise of the duties incumbent upon him as an employer of labor.").

[22]*See* n.10 *supra.*

[23]*See* nn.5 and 10 *supra.*

[24]*See Hogan*, 79 N.C. App. at 495, 340 S.E.2d at 124 ("The theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances."), and *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817, *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1971) (stating that "if it appears that the employer either knew, or by the exercise

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independent contractor that a reasonably careful and prudent employer in the same or similar circumstances as the defendant would have exercised.[25]

Fourth, the plaintiff must prove that (*state name of independent contractor*)'s incompetence was the proximate cause of the plaintiff's [injury] [damage].[26]

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause without which the [injury] [damage] would not have occurred and one which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.[27]

[There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that (*state name of independent contractor*)'s incompetence was the sole proximate cause of the plaintiff's [injury] [damage]. The plaintiff must prove only that (*state name of independent contractor*)'s incompetence was a proximate cause.][28]

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

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of reasonable care might have ascertained that the [employee was incompetent], [the employer] may be held liable for the negligent acts of the [employee].").

[25]*See Medlin,* 327 N.C. at 591, 308 S.E.2d at 462 (stating that the plaintiff must prove "either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision.'" (emphasis in original omitted)), and *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 464, 524 S.E.2d 821, 827-28 (2000) (summary judgment against plaintiff in a negligent supervision claim proper because "plaintiff's forecast of evidence was insufficient to show that [the] defendant . . . had actual or constructive knowledge of any tortious acts of [the employee] defendant.").

[26]*See* n.11 *supra.* This language must be modified accordingly if one of the alternatives cited in n.11 is selected.

[27]The *Little* court noted that "'it is axiomatic that proximate cause requires foreseeability.'" *Little,* 171 N.C. App. at 589-90, 615 S.E.2d at 50 (quoting *Johnson v. Skinner*, 99 N.C. 1, 7-8, 392 S.E.2d 634, 637 (1990). The court further emphasized that "the foreseeability of a risk of harm is insufficient unless defendants' negligent hiring or retention of [the independent contractor] in some manner *actually caused* the injury in question." *Id.* (emphasis in original).

[28]This language may be included depending upon the alternative instruction selected for the fourth element.

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a duty of care, that *(state name of independent contractor)* was incompetent at the time of *his* [hiring] [selection], that the defendant had either actual or constructive notice of this incompetence, and that this incompetence was the proximate cause of the plaintiff's [injury] [damage],[29] 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.

[29]*See* n.11 *supra.* This language must be modified accordingly if one of the alternatives cited in n.11 is selected.