June 2020 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:

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North Carolina
PATTERN JURY INSTRUCTIONS
for Civil Cases

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APPENDICES.

102.65 INSULATING/INTERVENING NEGLIGENCE.

NOTE WELL: Insulating negligence, also referred to in North Carolina case law as intervening or superseding negligence, Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998), is not a separate issue. It is "an elaboration of a phase of proximate cause."* Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967)*.[1]

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

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

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

other person), the sole proximate cause of the plaintiff's [injury] [damage].[4]

On the other hand, if the causal connection between the negligence of the defendant and the plaintiff's [injury] [damage] was not broken, and the defendant's negligence continued to be a proximate cause of the plaintiff's [injury] [damage] up to the moment of [the collision] [(*describe other occurrence*)],[5] then the defendant would be liable to the plaintiff.[6]

If, at the time of the defendant's negligent act, the defendant reasonably could have foreseen[7] negligent conduct which was likely to produce [injury] [damage] on the part of one in the position of (*state name of other person*),[8] the causal connection would not be broken, and the negligence of the defendant would not be prevented from being a proximate cause of the plaintiff's [injury] [damage].

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

The burden is not on the defendant to prove that [his] [her] negligence, if any, was insulated by the negligence of (*state name of other person*). Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury] [damage].[10]

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

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

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

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

"Where proper instructions on proximate cause are given, the court is under no duty to instruct the jury specifically with respect to insulating negligence in the absence of proper request[.]" *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967). But even when the instruction is requested, the burden of proof does not shift to the defendant to prove that *his* negligence, if any, was insulated by the negligence of another party. The burden remains with the plaintiff, because "[s]uperseding or insulating negligence is an extension of plaintiff's burden of proof on proximate cause." *Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015).

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

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

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

In *Hairston v. Alexander Tank*, 310 N.C. 227, 237, 311 S.E.2d 559, 567 (1984), the Supreme Court of North Carolina characterized the *Harton* analysis of the doctrine of intervening negligence as "determinative with respect to this issue." Applying it, the court reversed a grant of judgment *nov* to an automobile dealership, whose employee had failed to tighten the lug nuts on a wheel, causing the wheel to come off and forcing the car to pull over 3.5 miles from the dealership. The driver of the car was killed when a second vehicle (van), which stopped to provide assistance, was struck by a third vehicle (truck), causing the van to crush the car owner against the car. Whether the negligence of the truck driver was or was reasonably foreseeable by the automobile dealer's employee, could not be resolved as a matter of law. *Hairston*, 310 N.C. at 233, 311 S.E.2d at 565.

3. If the plaintiff is claiming insulating negligence, this instruction should be adapted accordingly.

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

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

6. *See Batts v. Faggart*, 260 N.C. 641, 645, 133 S.E.2d 504, 507 (1963) (quoting *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U.S. 469, 475 (1876):

> The question always is, [w]as there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application.)).

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

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

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

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

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

> In terms of proximate causation[,] it is not unforeseeable that one or more, if not all, of the following cars will not be able to stop in time to avoid a "chain

reaction" collision. The probable consequences reasonably to be anticipated from suddenly stopping on a highway are exactly those outlined here, a line of cars undergoing a series of impacts in an unbroken sequence.

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

10. *See Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015) ("Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause."); *see also Hampton v. Hearn*, --- N.C. App. ---, ---, 838 S.E.2d 650, 657-59 (2020) (considering and rejecting contention that the party asserting subsequent medical care amounted to insulating negligence in a medical malpractice case must make *prima facie* evidentiary showing of the applicable standard of care and breach of that standard of care).

102.84 NEGLIGENCE—INFLICTION OF SEVERE EMOTIONAL DISTRESS.[1]

The (*state number*) issue reads:

"Did the plaintiff suffer severe emotional distress as a proximate result of the negligence of the defendant?"[2]

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

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

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

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

Proximate cause is a cause which in a natural and continuous sequence produces a person's severe emotional distress, and one which a reasonable and prudent person could have foreseen would probably produce such severe emotional distress.

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

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

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

Read all contentions of negligence supported by the evidence.

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

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

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

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

Give law as to each contention of negligence included above.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent, that the plaintiff suffered severe emotional distress and that the defendant's negligence was a proximate cause of the plaintiff's severe emotional distress, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. For intentional or reckless infliction of emotional distress, *see* N.C.P.I.-Civil 800.60.

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

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

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

duty are insufficient to establish negligence *per se*. *Id.* at 717.

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

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

7. *Id*.

8. "An action for the negligent infliction of emotional distress may arise from a concern for one's own welfare, or concern for another's." *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. review denied*, 353 N.C. 676, 545 S.E.2d 228 (2000). Although the relationship between the plaintiff and the person for whom the plaintiff is concerned is but one of the *Johnson v. Ruark* foreseeability factors, to date, North Carolina jurisprudence regarding "bystander claims" has recognized the cause of action only in cases involving close familial relationships. *See Riddle v. Buncombe Cty. Bd. of Educ.*, 256 N.C. App. 72, 77, 805 S.E.2d 757, 761-62 (2017) (dismissal of bystander claim based upon friendship appropriate in the absence of "unusually close relationship" or demonstrable connection between friendship and "peculiar susceptibility") and the cases cited therein.

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

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

103.40 DISREGARD OF CORPORATE ENTITY OF AFFILIATED COMPANY—INSTRUMENTALITY RULE ("PIERCING THE CORPORATE VEIL").[1]

> *NOTE WELL: The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form.*[2]

The (*state number*) issue reads:

"Did the defendant control (*state name of affiliated company*) with regard to the [acts] [omissions] that [injured] [damaged] the plaintiff?"

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

First, that the defendant controlled the conduct of (*state name of affiliated company*) with respect to (*state event forming the basis for liability*) to such an extent that (*state name of affiliated company*) had no separate mind, will or existence of its own. Such control means more than mere majority or complete ownership. It means such complete domination of the finances, policy making and business practices of (*state name of affiliated company*) with respect to the event which [injured] [damaged] the plaintiff[5] that the (*state name of affiliated company*) had at the time no separate mind, will or existence of its own.[6] In determining whether such control existed at the time of the event, you may consider the following factors:[7]

[whether (*state name of affiliated company*) was inadequately capitalized]

[whether (*state name of affiliated company*)'s [shareholders] [directors] [officers] [members] [managers] [partners] complied with the formalities typical of organizations of its kind]

[whether the defendant completely dominated and controlled (*state name of affiliated company*) so that it had no independent identity]

[whether the defendant's business was a single enterprise that was excessively fragmented[8] into multiple companies]

[whether (*state name of affiliated company*) had [paid dividends] [made distributions]]

[whether (*state name of affiliated company*) was insolvent]

[whether the defendant had siphoned[9] funds from (*state name of affiliated company*)]

[whether the [officers] [directors] [members] [managers] [general partners] of (*state name of affiliated company*) were actually functioning and performing the duties of their respective offices in (*state name of affiliated company*)]

[whether (*state name of affiliated company*) was properly maintaining ordinary and necessary company records]

[whether (*state such other factor(s) as may be appropriate based upon the evidence*)].

Second, that the defendant used such control over (*state name of affiliated company*)[10] [to act] [to fail to act] in violation of the plaintiff's legal rights.[11]

Third, that the defendant's control over (*state name of affiliated company*), and use of that control, [to act] [to fail to act] in violation of the plaintiff's legal rights proximately caused[12] the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage] and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's conduct was a proximate cause.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant controlled the (*state name of affiliated company*) with respect to the [acts] [omissions] that [injured] [damaged] the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. "There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." *State ex rel Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 439, 666 S.E.2d 107, 113 (2008). Nevertheless, "courts will disregard the corporate form or 'pierce the corporate veil' when 'necessary to prevent fraud or to achieve equity.'" *Id*. (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). The corporate form thus may not be utilized to "shield criminal wrongdoing, defeat the public interest, and circumvent public policy." *Id*. "[T]he instrumentality rule allows for the corporate form to be disregarded if 'the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State . . . [and] 'the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person.'" *Id*. at 441, 666 S.E.2d at 113-14 (citations omitted).

See also Richardson v. Bank of America, N.A., 182 N.C. App. 531, 546-47, 643 S.E.2d 410, 420 (2007), *disc. rev. improvidently allowed*, 362 N.C. 227, 657 S.E.2d 353 (2008) (discussing piercing of the corporate veil).

2. *Green v. Freeman*, 367 N.C. 136, 146, 749 S.E.2d 262, 271 (2013).

3. The jury must first find that the affiliated company is or would be liable to the plaintiff. This is determined by submission of a prior issue dealing with the substantive wrong alleged as the basis for liability. Where two affiliated companies are parties, care should be given to make sure the jury clearly understands which party is referred to as "defendant" in the jury instructions.

4. *See Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985) and *Postell v. B & D Constr. Co.*, 105 N.C. App. 1, 11, 411 S.E.2d 413, 419 (1992).

5. *See State ex rel. Cooper*, 362 N.C. at 441, 666 S.E.2d at 113.

6. *Estate of Hurst v. Moorehead I,* LLC, 228 N.C. App. 571, 577, 748 S.E.2d 568, 574 (2013) (citing *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330); *Henderson v. Security Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) and *Huski-Bilt, Inc. v. First Citizens Bank & Trust Co.*, 271 N.C. 662, 670, 157 S.E.2d 352, 358 (1967). In the *Estate of Hurst* case, the court found that actual fraud or misrepresentation by an individual member of a limited liability company is not necessary to pierce the corporate veil and impose individual liability against the member. *Hurst*, 228 N.C. App. at 579, 748 S.E.2d at 575. "Rather, the requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member used his control over the entity 'to commit fraud *or wrong*, to perpetrate the violation of a statutory or other positive legal duty, *or a dishonest and unjust act in contravention of [the] plaintiffs' legal rights[.]'" *Id.* (emphasis in original) (quoting *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330).

7. The first four factors are the "primary factors" courts consider to determine whether each prong of the instrumentality test is satisfied. *See General Fidelity Ins. Co. v. WFT, Inc.*, __ N.C. App. __, __, 837 S.E.2d 551, 558 (2020) (citing *Hurst*, 228 N.C. App. at 578, 748 S.E.2d at 574.).

8. *NOTE WELL: The term "excessive fragmentation" is not defined in the* Glenn *decision. Although division of the functions of an integrated business operation may serve a legitimate business purpose, the term "excessive fragmentation," as used here, implies division which does not serve a substantial legitimate business purpose.*

9. "Siphoned" likewise is not defined in *Glenn*. As used here, the term means transfer or withdrawal of funds without a substantial legitimate business purpose.

10. The validity of the underlying agency claims must first be established; where agency claims serve as the underlying wrongs that proximately caused the plaintiff's harm, evidence of domination and control alone is insufficient to establish liability. *See Green*, 367 N.C. at 146, 749 S.E.2d at 271.

11. The "control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights." *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31. "Performance under a contract," for example, constitutes a "positive legal duty." *East Mkt. St. Square v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 633, 625 S.E.2d 191, 196 (2006). Further, "a shareholder may not utilize the corporate form to shield criminal wrongdoing, defeat the

public interest, and circumvent public policy." *State ex rel. Cooper*, 362 N.C. at 439, 666 S.E.2d at 113.

12. "The third . . . element required for piercing the corporate veil is that the defendant's 'control and breach of duty must proximately cause the injury or unjust loss complained of.'" *East Mkt. St. Square*, 175 N.C. App. at 639, 625 S.E.2d at 200 (quoting *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330). *See also Hurst*, 228 N.C. App. at 578, 748 S.E.2d at 575 (finding that a jury award of only nominal damages to plaintiffs on their fraud and Section 75-1.1 claims against the individual member of a limited liability company had no bearing on trial court's ability to pierce the corporate veil and hold the individual member liable for the breach of contract damages awarded by the jury against the company).

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

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

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

The (*state number*) issue reads:

"Is the [promise] [covenant] which the plaintiff seeks to enforce against the defendant a (*state nature of promise or covenant alleged to be illegal or unenforceable*)?"[1]

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

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

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the [promise] [covenant] which the plaintiff seeks to enforce against the defendant is a (*state nature of promise or covenant alleged to be illegal or unenforceable*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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

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

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

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

Contracts to improve real property which adopt the laws of another jurisdiction or which select an exclusive forum in another jurisdiction. N.C. Gen. Stat. § 22B-2. But note that N.C. Gen. Stat. § 1G-3 allows the parties to a business contract to agree that North Carolina law shall govern all rights in connection with the contract, irrespective of whether the parties or contract bear a reasonable relation to this State.

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

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

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

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

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

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

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

Contracts that are immoral or iniquitous. "'Where a contract grows out of and is concerned with an illegal or immoral act, a court of justice will not lend its aid to enforce it.'" *Lamm v. Crumpler*, 242 N.C. 438, 442-43, 88 S.E.2d 83, 87 (1955) (quoting *Armstrong v. Toler*, 24 U.S. 258, 268 (1826)). *See also Merrell v. Stuart*, 220 N.C. 326, 331, 17 S.E.2d 458, 461 (1941).

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

> *NOTE WELL: N.C. Gen. Stat. § 22B-1 prohibits any agreement indemnifying architects, engineers and construction contractors against the risk of bodily injury or property damage caused by their own negligence. But, except where prohibited by statute, contractual indemnification against one's own negligence has been expressly recognized as valid and enforceable by North Carolina courts.* See *CSX Transp., Inc. v. City of Fayetteville, 247 N.C. App. 517, 523, 785 S.E.2d 760, 763-64 (2016) (citing* Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 144 S.E.2d 393 (1965)). Legality notwithstanding, contracts which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed.* See Morrell v. Hardin Creek, Inc. *371 N.C. 672, 681, 821 S.E.2d 360, 366 (2018).*

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

Covenants not to compete involving physicians, if enforcement of the covenant would "create a substantial question of potential harm to the public health" by denying the public needed medical care. *Aesthetic Facial & Ocular Plastic Surgery Center, P.A. v. Zaldivar*, __ N.C. App. __, __, 826 S.E.2d 723, 727 (2019) (citing *Iredell Digestive Disease Clinic v.*

Petrozza, 92 N.C. App. 21, 27–28, 373 S.E.2d 449, 453 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989)).

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

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

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

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APPENDICES.

800.10 NEGLIGENT MISREPRESENTATION.[1]

The (state number) issue reads:

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

A person who obtains or communicates information to other persons knowing or intending that it be relied upon has a duty to exercise reasonable care or competence in obtaining or communicating that information.[2] A breach of this duty is a negligent misrepresentation.

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

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

Second, that the defendant

[intended for the plaintiff]

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

[knew that the defendant's client intended for [the plaintiff] [a person within a limited group of which the plaintiff was a member]]

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

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

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

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

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

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

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was financially

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

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

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

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

3. See *Glover v. Dailey*, 254 N.C. App. 46, 53; 802 S.E.2d 136, 141 (2017) (where a question is susceptible to more than one interpretation, selection of a reasonable interpretation is evidence of reasonable care when communicating an answer).

4. The Court should instruct the jury in conformity with the applicable standard of care. In most cases, the standard may be stated in the language of the first alternative. With regard to certain professionals, the standard of care stated in certain charges or cases should be followed: Attorneys (*see* N.C.P.I.-Civil 811.00 ("Legal Negligence: Duty to Client")); Accountants (*see Raritan River Steel Co.*, 322 N.C. at 206, 367 S.E.2d at 612-13); Appraisers (*see Ballance v. Rinehart*, 105 N.C. App. 203, 207-08, 412 S.E.2d 106, 109 (1992); *Alva v. Cloninger*, 51 N.C. App. 602, 611, 277 S.E.2d 535, 540-41 (1981)); Architects (*see Davidson & Jones, Inc.*, 41 N.C. App. at 666-67, 255 S.E.2d at 584); Engineers (*see Stanford v. Owens*, 46 N.C. App. 388, 400, 265 S.E.2d 617, 625 (1980)); Health Care Providers (*see* N.C.P.I.-Civil 809.00 ("Medical Negligence: Direct Evidence of Negligence Only")); Property Inspectors (*see Johnson v. Beverly-Hanks & Assoc., Inc.*, 97 N.C. App. 335, 345, 388 S.E.2d 584, 590 (1990)); Realtors (*see Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 667, 347 S.E.2d 864, 865-66 (1986)); Surveyors (*see Stanford*, 46 N.C. App. at 400, 265 S.E.2d at 625).

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

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

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

6. *See Raritan River Steel Co.*, 322 N.C. at 209, 367 S.E.2d at 614. Note that, because actual reliance may or may not be justified, evidence of actual reliance alone does not satisfy a plaintiff's burden to show justifiable reliance. *See Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 36, 817 S.E.2d 247, 255 (2018).

7. *See Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) ("Reliance is not reasonable if a plaintiff fails to make any independent investigation or fails to demonstrate he was prevented from doing so.") (citations omitted) (internal quotation marks omitted); *see also Ke v. Zhou*, 256 N.C. App. 485, 488, 808 S.E.2d 458, 460 (2017) (standing for the proposition that reliance *may* be reasonable where limited independent investigation is supported by reasonable statements from the defendant to induce reliance).

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

805.25 PRIVATE NUISANCE.

A nuisance is the substantial and unreasonable interference with the use and enjoyment of another's property.

The (*state number*) issue reads:

"Did the defendant substantially and unreasonably interfere with the use and enjoyment of the plaintiff's property?"

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

First, that the defendant substantially[1] interfered with the plaintiff's use and enjoyment of the plaintiff's property. Interference is substantial when it results in significant annoyance, material physical discomfort, or injury to a person's health or property.[2] A slight inconvenience or a petty annoyance is not a substantial interference.

Second, that such substantial interference was unreasonable. Substantial interference is unreasonable if a person of ordinary prudence and discretion would consider it excessive or inappropriate after giving due consideration to the interest of the plaintiff, the interest of the defendant and the interest of the community.[3] In determining whether such substantial interference is unreasonable, you may consider

[the surroundings and conditions under which the defendant's interference occurs]

[the character of the location]

[the nature, utility and social value of the defendant's operation]

[the nature, utility and social value of the plaintiff's use and enjoyment that have been invaded]

[the suitability of the location for the defendant's operation]

[the suitability of the location for the plaintiff's use]

[the extent, nature and frequency of the harm to the plaintiff's interest]

[the priority in time of occupation or conflicting uses between the plaintiff and the defendant][4]

[(*state any other factor arising from the evidence*)].

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 substantially and unreasonably interfered with the plaintiff's use and enjoyment of the plaintiff's property, 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. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). *See also Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977) (citing *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E.2d 121 (1965)).

2. *Pake v. Morris*, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949).

3. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 245 S.E.2d 809, 814 (1962) ("[The] question is *not whether reasonable persons in plaintiff's or defendant's position* would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable") (emphasis added).

4. *Watts*, 256 N.C. at 618, 245 S.E.2d at 814.

805.30 PRIVATE NUISANCE—DAMAGES (REAL PROPERTY).

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for substantially and unreasonably interfering with the plaintiff's use and enjoyment of (*identify real property*)?"

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.[1] Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the plaintiff.[2]

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately[3] caused by the nuisance of the defendant.

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

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

(Direct Damages. *Use where there is competent evidence of direct damages:*[4]

[Direct Damages-Fair Market Value. *Use where the plaintiff relies on the difference in fair market value formula to provide damages:* The plaintiff's actual damages equal the difference between the fair market value of the property immediately before the nuisance occurred and its fair market value immediately after the nuisance was removed.[5] The fair market value of any property 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.[6] (Evidence of [estimates of the cost to repair] (and) [the actual cost of repairing] the damage to the (*name real property*) may be considered by you in determining the difference in fair market value before and after the nuisance occurred.)[7]]

[Direct Damages-Cost of Repair. *Use where damages measured by market value are impractical because there is no market by which the degree of damage to the property can be measured:*[8] The plaintiff's actual property damages are equal to the amount reasonably needed to [repair the damage to the (*identify real property*)][9] [replace the (*identify real property*) damaged][10], less [the salvage value of the [(*identify real property*)] [parts replaced]] [the accumulated depreciation[11] on the property replaced].[12]]

[Direct Damages-Intrinsic Value. *Use where damages measured by market value would not adequately compensate the plaintiff and repair or replacement would be impossible or economically wasteful*:[13] The plaintiff's actual damages equal the actual value of the (*identify real property*) immediately before it was damaged (less the salvage value, if any, that it had after its damage). The actual value of any property is its intrinsic value; that

is, its reasonable value to its owner.[14] In determining the actual value of the (*identify real property*), you may consider:

[the original cost of (*labor and materials used in producing*) the (*identify real property*)]

[the age of the (*identify real property*)]

[the degree to which the (*identify real property*) has been used]

[the condition of the (*identify real property*) just before it was damaged]

[the uniqueness of the (*identify real property*)]

[the practicability of [repairing] [reconstructing] the (*identify real property*)]

[the cost of replacing the (*identify real property*) (taking into account its depreciation; that is, the degree to which it had been used up or worn out with age)]

[the insured value of the (*identify real property*)][15]

[the opinion of the plaintiff as to its value. You should not consider any fanciful, irrational or purely emotional value that (*identify real property*) may have had.[16]]

[the opinion of any experts as to its value]

[*state other appropriate factors supported by the evidence*[17]].)

(Incidental Damages. *Use where there is competent evidence of loss of use of the benefit of the property*: The plaintiff's actual property damages may also

include compensation for the loss of use of (*identify real property*).[18] (Here give the applicable alternative statement (*give only one):)*

[Repairs feasible at reasonable cost in reasonable time. When (*identify real property*) damaged by the nuisance of another can be repaired at a reasonable cost and within a reasonable time, the owner may recover for the loss of its use. The measure of such damages is the cost of renting similar (*identify real property*) for a reasonable repair period (whether or not the owner actually rented such a similar (*identify real property*).]

[Repairs not feasible at reasonable cost in reasonable time. When (*identify real property*) damaged by the nuisance of another cannot be repaired at a reasonable cost and within a reasonable time, and if a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period of time reasonably necessary to acquire a replacement (*identify real property*) and put it into service. The measure of damages is the cost of renting a similar (*identify real property*) during the period of time it takes to locate a replacement (*identify real property*) and put it into service (whether or not the owner actually rents such temporary (*identify real property*).]

[Total destruction. When (*identify real property*) is totally destroyed or damaged by the nuisance of another and a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period reasonably necessary to acquire temporary (*identify real property*). The measure of such damages is the cost of renting a temporary (*identify real property*) for the period of time reasonably necessary to replace the (*identify real property originally destroyed*) (whether or not the owner actually rented such a similar (*identify real property*)].]

[Owner elects to replace repairable property. When a (i*dentify real property*), damaged by the nuisance of another can be repaired at a reasonable cost and within a reasonable time, but the owner elects to replace it by acquiring a substitute (*identify real property*), the owner may recover for loss of use during the time reasonably required to make repairs or to acquire the substitute, whichever is shorter. The measure of such damages is the cost of renting a similar (*identify real property*) during such period].])

(Consequential Damages. *Use where there is competent evidence of consequential damages:*

[Consequential Damages-Lost Net Revenues. *Do not use the following paragraph unless supported by the evidence:* If an owner proves with reasonable certainty the net revenues lost through inability to use the (*identify real property*), the owner may recover such net revenues lost during a reasonable period within which to make repairs.]

[Consequential Damages-Other. *Give such other consequential damage instruction as is supported by the evidence.*])

(Other Damages. *Give such further instruction as may be supported by the evidence*.)

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages proximately caused by the nuisance of the defendant, then it would be your duty to write that amount in the blank space provided.

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

1. *Phillips v. Haynes*, 244 N.C. App. 543, 543, 781 S.E.2d 350, 350 (2015).

2. *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 295, 296, 189 S.E. 772, 773 (1937).

3. In *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 514-15, 23 S.E.3d 894, 895 (1943), 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.'"

4. *Note Well*: Where the defendant's operation is an agricultural or forestry operation, there is a limit on the compensatory damages that may be awarded. *See* N.C. Gen. Stat. § 106-702 (limiting compensatory damages for both permanent and temporary nuisances caused by agricultural or forestry operations).

5. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967).

6. *Huff v. Thornton*, 23 N.C. App. 388, 394, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975).

7. *Huff v. Thornton*, 213 S.E.2d at 205-06.

8. When the property cannot be valued by reference to a market, the measure of damages may properly be gauged by the cost of repair. *See In re Appeal of Amp*, 287 N.C. 547, 570-574, 215 S.E.2d 752, 766-769 (1975). Plaintiff's recovery for repair should be limited by the value of the property damaged. *Carolina Power & Light Co v. Paul*, 261 N.C. 710, 712, 136 S.E.2d 103, 105 (1964). However, where the repair or replacement does not provide a realistic measure of the plaintiff's loss (such as where the property cannot be repaired or replaced, or where it has primarily or exclusively intrinsic value), use the next paragraph.

9. If the property replaced needed repairs at the time it was destroyed, the measure of damages would be replacement cost less the reasonable cost of repairs. *Beaufort & Morehead R. Co. v. The Damyank*, 122 F.Supp. 82 (E.D.N.C. 1954) (railroad bridge over river damaged by ship).

10. If manufacturing materials with no market value are destroyed, the measure of damages should include the replacement cost of the raw materials. *In re Appeal of AMP*, *Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

11. No deduction for depreciation should be made unless the evidence would justify a finding that the plaintiff will eventually recapture the worth of the depreciation. *Carolina Power & Light Co.*, 261 N.C. at 712, 136 S.E.2d at 105; *In re Appeal of Amp, Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

12. *State v. Maynard*, 79 N.C. App. 451, 339 S.E.2d 666 (1986).

13. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988). Even though an item has no measurable market value when tortuously destroyed, it nonetheless may have intrinsic value to its owner, which is recoverable. *Id*.

14. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183.

15. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365 S.E.2d at 186.

16. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365, S.E.2d at 186; *Thomason*, 159 N.C. at 1024 ("damages which are merely imaginary or have no real or substantial existence, should not be allowed"). *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 36 (1994). *See also Blum v. Worley*, 121 N.C. App. 166, 169-70, 465 S.E.2d 16, 19 (1995).

17. Other factors could include the earnings generated by the property, the capitalized value of those earnings, the market value (where there is a market at some other place) and cost of transportation, the market value where there will be a market at some other time (such as for crops, for which cost of harvesting, etc. would also be a consideration). *See Freeman*, 89 N.C. App. at 77, 365 S.E.2d at 186; *Thomason v. Hackney & Moale Co.*, 159 N.C. 299, 74 S.E. 1022 (1912).

18. *Binder*, 222 N.C. at 514, 23 S.E.2d at 895.

805.55 DUTY OF OWNER TO LAWFUL VISITOR.

The (*state number*) issue reads:

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

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

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

Negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every [owner][3] [person in possession][4] to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner.[5] Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect [himself] [herself] and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

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

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and

prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

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

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

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

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

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

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

[An [owner] [person in possession] is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the [owner] [person in possession] knows or, in the exercise of ordinary care, should have known. (A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person.) However, an [owner] [person in

possession] does not have to warn about concealed conditions of which that person has no knowledge and could not have learned by reasonable inspection and supervision.[6] An [owner] [person in possession] is held responsible for knowing of any condition which a reasonable inspection and supervision of the premises would reveal and is also responsible for knowing of any hidden or concealed dangerous condition which that person's own conduct (or that of agents or employees) has created.][7]

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

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

[The [owner] [person in possession] is not required to warn of obvious dangers or conditions, nor warn of dangerous conditions about which a lawful visitor has equal or superior knowledge.][10]

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

[Usually, the [owner] [person in possession] does not have a duty to protect lawful visitors from the criminal acts of others on the [owner's] [person in possession's] premises.[12] But when, in the exercise of reasonable care, the [owner] [person in possession] would have realized that criminal acts of others on the premises were foreseeable, the [owner] [person in possession] has a duty to provide adequate security measures to protect lawful visitors.[13] A

breach of this duty is negligence. To determine whether criminal acts of others on the [owner's] [person in possession's] premises were foreseeable, you should consider the evidence, if any, of the amount of prior criminal activity, the type of that prior criminal activity and the location of that prior criminal activity with respect to the premises.[14]]

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

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

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1. The North Carolina Supreme Court has eliminated the distinction between invitees and licensees in premises liability cases. *Nelson v. Freeland*, 349 N.C. 615, 633, 507 S.E.2d 882, 893 (1998). Owners and occupiers of land owe a duty "to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id*., 615 N.C. at 625, 507 S.E.2d at 892. The separate classification for trespassers has been retained. *Id*. The change in the common law rule, moreover, is retroactive as well as prospective. *Id*.

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

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

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

5. Note, however, that the common law rule is modified by N.C. Gen. Stat. § 38A-4 as to all causes of action arising after October 1, 1995, in instances where the landowner directly or indirectly invites or permits a person to use land without charge (§ 38A-2(1), (3)) for

education (§ 38A-2(2)) or recreational (§ 38A-2(5)) purposes. This statute does not affect the doctrine of attractive nuisance (*see* N.C.P.I.-Civil 805.65A), nor does it abrogate the landowner's responsibility to inform direct lawful visitors of artificial or unusual hazards of which the owner is aware.

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

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

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

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

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

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

> *Note Well: According to this State's "Baseball Rule," a baseball field operator is shielded from liability related to a "foul ball" injury, "even when a patron is struck in an unusual way by a batted ball, so long as the operator provides a screened section." Hobby v. City of Durham*, 152 N.C. App. 234, 236–37, 569 S.E.2d 1, 2 (2002). "Spectator[s], with ordinary knowledge of the game of baseball . . . accept[] the common hazards incident to the game" and otherwise share an equal awareness of potential injury with the field operator. *Erickson v. Lexington Baseball Club*, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951).

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

12. *See Tise v. Yates Construction Co*., 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997); *Stonjanik ex rel. Estate of Woodring v. R.E.A.C.H*., 193 N.C. App. 585, 589, 668 S.E.2d 786, 789 (2008).

13. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E.2d 36, 40 (1981).

14. *See Connelly v. Family Inns of America, Inc.*, 141 N.C. App. 583, 588, 540 S.E.2d 38, 41 (2000).

807.00 WRONGFUL INTERFERENCE WITH CONTRACT RIGHT

The *(state number)* issue reads:

"Did the defendant wrongfully interfere with a contract right between the plaintiff and *(name other party to contract)*?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, five things:[1]

First, that a valid contract right existed between the plaintiff and *(name other party to contract)*.

Second, that the defendant had knowledge of the facts giving rise to the plaintiff's contract right with *(name other party to contract)*. (It does not matter that the defendant was mistaken as to the legal significance of these facts or that the defendant believed that no contract right existed.[2])

Third, that the defendant intentionally[3] induced *(name other party to contract)* [not to perform] [to alter adversely the performance of][4] [not to renew][5] [to terminate] the contract right to which the plaintiff was entitled.

Fourth, that the defendant acted without justification.[6]

And Fifth, that the defendant's actions resulted in actual damages to the plaintiff.

Finally, as to the *(state number)* issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant wrongfully interfered with a contract right between the plaintiff and *(name other party to contract)*, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992); *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988); *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 649-50 (1988); *Wilson v. McClenny*, 262 N.C. 121, 132, 136 S.E.2d 569, 577-78 (1964); *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954); *Meehan v. Am. Media Int'l, LLC, et al.*, 214 N.C. App. 245, 261-62, 712 S.E.2d 904, 914 (2011).

2. *United Labs., Inc.*, 322 N.C. at 663, 370 S.E.2d at 388.

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

4. *See Lexington Homes, Inc. v. W.E. Tyson Builders, Inc.*, 75 N.C. App. 404, 411, 331 S.E.2d 318, 322 (1985); *see also Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, ___ N.C. App. ___, ___, 831 S.E.2d 395, 405 (2019) (stating that tortious interference with a prospective economic advantage "includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements").

5. *Wilson v. McClenny*, 262 N.C. 121, 133, 136 S.E.2d 569, 578 (1964) (recognizing that wrongful interference with contractual relations can occur when the defendant causes a third party not to renew a contract to which plaintiff was entitled).

6. Whether a defendant acts without justification depends on the unique facts of each case. This element of the instruction may be supplemented to explain the meaning of "without justification" as supported by the evidence. Caution should be exercised in supplementing this element. For example, "[i]nterference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Embree Constr. Group, Inc.*, 330 N.C. at 498, 411 S.E.2d at 924. However, there may be instances where, because the parties are competitors, certain acts of interference would not be justified. *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 185-88, 437 S.E.2d 374, 375-76 (1993).

> *NOTE WELL: The* Noerr-Pennington *doctrine protects businesses from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates §§ 1 and 2 of the Sherman Act. The doctrine also gives businesses immunity from antitrust liability under the First Amendment for concerted efforts to influence public officials regardless of intent or purpose. The doctrine does not, however, grant immunity where the conduct at issue is a "mere sham."* Cheryl Lloyd Humphrey Land Investment Co., LLC v. Resco Products, Inc., ___ *N.C. App. ___, ___, 831 S.E.2d 395, 399 (2019).*

Also note that where the defendant is an insider (e.g., an officer, director, or shareholder of the corporation on which the interference was allegedly practiced), the acts of the insider "in inducing his company to sever contractual relations with a third party are presumed to have been done in the interest of the corporation." *Wilson*, 262 N.C. at 133, 136 S.E.2d at 578. However, this presumption may be overcome by evidence that the interference was performed for the insider's own interest or benefit and adverse to the interests of the company. *Embree Constr. Group*, 330 N.C. at 498-99, 411 S.E.2d at 924-25.

807.10 WRONGFUL INTERFERENCE WITH PROSPECTIVE CONTRACT.

The (*state number*) issue reads:

"Did the defendant wrongfully interfere with a prospective contract between the plaintiff and (*name other party to prospective contract*)?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, five things:[1]

First, that but for the defendant's conduct, the plaintiff and (*name other party to the prospective contract*) would have entered into a valid contract.[2]

Second, that the defendant had knowledge of the facts and circumstances associated with the plaintiff's prospective entry into a contract with (*name other party to prospective contract*).

Third, that the defendant maliciously[3] induced (*name other party to the prospective contract*) not to enter into the prospective contract with the plaintiff.

Fourth, that the defendant acted without justification.[4]

And fifth, the defendant's actions resulted in actual damages to the plaintiff.

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 wrongfully interfered with a prospective contract between the plaintiff and (*name other party to prospective contract*), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

1. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965); *Johnson v. Graye*, 251 N.C. 448, 451, 111 S.E.2d 595, 597 (1959).

2. *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, ___ N.C. App. ___, ___, 831 S.E.2d 395, 405 (2019) (stating that tortious interference with a prospective economic advantage "includes contractual modifications equivalent in effect to terminations of parts of multi-part agreements").

3. In the context of wrongful interference with an existing or prospective contract right, the term "malice" is used in its legal sense, which "denotes the intentional doing of the harmful act without legal justification." *Childress v. Abeles*, 240 N.C. 667, 675, 84 S.E.2d 176, 182 (1954) (citing *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945). For an instruction on intent or intentional, see N.C.P.I.- Civil 101.46.

4. Whether a defendant acts without justification depends on the unique facts of each case. This element of the instruction may be supplemented to explain the meaning of "without justification" as supported by the evidence. Caution should be exercised in supplementing this element. For example, "[i]nterference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992). However, there may be instances where, *because* the parties are competitors, certain acts of interference would not be justified. *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 185-88, 437 S.E.2d 374, 375-76 (1993).

> *NOTE WELL: The* Noerr-Pennington *doctrine protects businesses from antitrust liability when their conduct is aimed at influencing governmental action and their petitioning activity otherwise potentially violates §§ 1 and 2 of the Sherman Act. The doctrine also gives businesses immunity from antitrust liability under the First Amendment for concerted efforts to influence public officials regardless of intent or purpose. The doctrine does not, however, grant immunity where the conduct at issue is a "mere sham."* Cheryl Lloyd Humphrey Land Investment Co., LLC v. Resco Products, Inc., *___ N.C. App. ___, ___, 831 S.E.2d 395, 399 (2019).*

Also note that where the defendant is an insider (e.g., an officer, director, or shareholder of the corporation on which the interference was allegedly practiced), the acts of the insider "in inducing his company to sever contractual relations with a third party are presumed to have been done in the interest of the corporation." *Wilson v. McClenny*, 262 N.C. 121, 133, 136 S.E.2d 569, 578 (1964). However, this presumption may be overcome by evidence that the interference was performed for the insider's own interest or benefit and adverse to the interests of the company. *Embree Constr. Group*, 330 N.C. at 498-99, 411 S.E.2d at 924-25.

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811.00 LEGAL NEGLIGENCE—DUTY TO CLIENT.

The (*state number*) issue reads:

"Was the plaintiff damaged 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, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's damage.[1]

Negligence refers to a person's failure to follow a duty of care imposed by law. The law imposes [a duty] [certain duties] of care[2] upon every attorney who renders legal services to a client:[3]

[An attorney must possess the requisite degree of learning, skill and ability necessary to the practice of the legal profession which other attorneys similarly situated ordinarily possess.]

[An attorney must use [his] [her] best judgment in the handling of matters entrusted to the attorney.]

[An attorney must exercise such reasonable and ordinary care and diligence in the use of skill and in the application of knowledge to the client's matter as would other attorneys in the same or similar localities and under similar circumstances.][4]

[*Give the following where there is evidence the attorney is a certified specialist or has otherwise professed to have special education or experience in one or more areas of practice:* If an attorney professes special knowledge and skill in the type of legal services rendered by virtue of special [certification] [education] [experience], and if a client employs the attorney

to handle a matter for that reason, the attorney must perform the [duty] [duties] of care in accordance with the standard of practice exercised by attorneys with similar [certification] [education] [experience] who are situated in the same or similar localities at the time the legal service is rendered.]

A violation of [this duty] [any one of these duties] of care by an attorney is negligence.[5]

[Mere error of judgment] [A mistake as to a disputed point of law] is not negligence if an attorney otherwise acts with a reasonable and honest belief[6] that the advice given and the acts done are well founded and in the best interest of the client. The law does not require an attorney to be infallible, either in practice or in judgment. Nor does the law require the utmost degree of skill and learning known only to a few in the legal profession. An attorney is only required to render legal services in conformity with the [duty] [duties] I have just described for you.[7]

The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the damage.[8]

Proximate cause is a cause which in a natural and continuous sequence produces a person's damage, and one which a reasonably careful and prudent attorney similarly situated in the same or a similar locality could foresee would probably produce such damage or some similar injurious result.

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

(Furthermore, because the plaintiff in this case contends that a claim was lost because of the defendant's negligence, which the defendant denies, the plaintiff must also prove by the greater weight of the evidence that (1) the original claim was valid, (2) it would have resulted in a judgment in favor of this plaintiff and (3) the judgment would have been collectible).[9]

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

Read all contentions of negligence supported by the evidence.

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

I instruct you that negligence is not to be presumed from the mere fact of 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 (in any one or more of the ways contended by the plaintiff) and that such negligence was a proximate cause of the plaintiff's 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. *NOTE WELL: If the claim is based on a breach of fiduciary duty, see N.C.P.I.—Civil 800.05.*

2. *See Rorrer v. Cooke*, 313 N.C. 338, 341, 329 S.E.2d 355, 358 (1985); *Hodges v. Carter*, 239 N.C. 517, 519-20, 80 S.E.2d 144, 145-46 (1954).

3. In some cases, the attorney-client relationship may have to be proven. "[A]n express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties even in the absence of the payment of

fees or the lack of a formal contract." *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 390, 402 S.E.2d 167, 172, *disc. rev. denied*, 329 N.C. 266, 407 S.E.2d 831, *aff'd*, 330 N.C. 438, 410 S.E.2d 392 (1991). There may be other instances where, absent an attorney-client relationship, an attorney may be held liable for negligence which causes injury to a non-client third party. *See United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980); *see also* N.C.P.I.—Civil 800.10 ("Negligent Misrepresentation").

4. *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. *See also Cheek v. Poole*, 98 N.C. App. 158, 166, 390 S.E.2d 455, 460, *disc. rev. denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). To satisfy the "same or similar" requirement, a plaintiff must produce evidence of what an attorney in the same or similar community *should do*, not merely what attorneys in fact do. *Haas v. Warren*, 112 N.C. App. 574, 579, 436 S.E.2d 259, 262 (1993). This may require expert testimony, although *Rorrer* did not mandate the use of an expert. *See Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987); *see also Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994) (determining on the facts of that case that expert testimony was unnecessary where jury could determine that failure to comply with applicable statute of limitations was a departure from the standard of care).

In a case in which the presiding judge determines that expert testimony is required, the following paragraph should be added after the instruction that "negligence is not to be presumed from the mere fact of damage."

> [With respect to the plaintiff's *(state number)* contention, that the attorney violated the duty to exercise reasonable care and diligence in the use of skill and in the application of knowledge as would other attorneys in the same or similar place and circumstances, 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.]

5. *Rorrer*, 313 N.C. at 341, 329 S.E.2d at 358; *Hodges*, 239 N.C. at 519-20, 80 S.E.2d at 145-46.

6. *Hodges* uses the term "good faith." 239 N.C. at 520, 80 S.E.2d at 146. *Rorrer* interpreted "good faith" to be "an objective, not subjective, standard." 313 N.C. at 358, 329 S.E.2d at 368.

7. "[A] mistake in a point of law which has not been settled by the court of last resort . . . and on which reasonable doubt may be entertained by well-informed lawyers" is not negligence. *Hodges*, 239 N.C. at 520, 80 S.E.2d at 146.

8. *NOTE WELL: In a legal negligence action, the attorney-defendant is entitled to argue the defense of contributory negligence.* See Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 359, 716 S.E. 2d. 29, 31 (2011) ("[C]ontributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action.") (quoting* Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, 211 N.C. App. 343, 351, 712 S.E.2d 328, 334 (2011)). For pattern instructions on contributory negligence, see N.C.P.I.-Civil 104.10 and 104.35.*

9. *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. *See also Bamberger v. Bernholz*, 326 N.C. 589, 589, 391 S.E.2d 192, 193 (1990); *Young v. Gum*, 185 N.C. App. 642, 647, 649

S.E.2d 469, 473-74 (because a plaintiff must forecast success on the underlying claim to support the legal malpractice claim, a court trying a legal malpractice claim must look to the substantive law of the underlying claim to determine the elements of the "case within a case"); *Patrick v. Ronald Williams, P.A.*, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991); *Summer v. Allran*, 100 N.C. App. 182, 184, 394 S.E.2d 689, 690 (1990), *disc. rev. denied*, 328 N.C. 97, 402 S.E.2d 428 (1991).

812.00 ANIMALS—COMMON LAW (STRICT)[1] LIABILITY OF OWNER FOR WRONGFULLY KEEPING VICIOUS DOMESTIC[2] ANIMALS.

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged] by a vicious animal wrongfully [owned] [kept] by 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, five things:[3]

First, that the defendant [owned] [kept] the (*describe animal*).[4]

Second, that the (*describe animal*), because of its nature, size or character, was dangerous, ferocious, mischievous or vicious, or had vicious tendencies. (An animal is vicious if its actions or habits are likely to cause harm.) (An animal has a vicious tendency if it is naturally disposed toward acting viciously.) (An animal can be vicious or have a vicious tendency without ever having inflicted injury in the past or intending to do harm. If an animal's actions, habits or tendencies are likely to cause harm, it does not matter that the animal is playing.[5])

Third, that the defendant knew or, in the exercise of ordinary care, should have known that the (*describe animal*) was dangerous, ferocious, mischievous or vicious, or had vicious tendencies. To "know" is to have actual knowledge of something. A person "should have known" something when, in the exercise of ordinary care, that person should have acquired knowledge of it under the same or similar circumstances. In determining whether the defendant should have known the (*describe animal*) was vicious at the time of the injury[6], you may consider all the circumstances then existing, including the nature, size and character of the (*describe animal*).

Fourth, that the (describe animal) [injured] [damaged] the plaintiff.

Fifth, that such [injury] [damage] was of a type likely to result from the (*describe animal's*) dangerousness, ferocity, mischievousness, viciousness or vicious tendencies.[7]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was [injured] [damaged] by a vicious animal wrongfully [owned] [kept] by the defendant, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. North Carolina decisions treat the liability of owners and keepers of domestic animals with known or reasonably suspected vicious propensities as a strict liability matter. *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967). "The gravamen of the cause of action is not negligence but the wrongful keeping of an animal with knowledge of its viciousness . . . ." *Id.* (quoting *Barber v. Hochstrasser*, 136 N.J. 75, 79, 54 A.2d 458, 460 (1947)). However, knowledge is not essential to a recovery; an action will also lie for negligence if, in the ownership or keeping of a domestic animal, the defendant otherwise fails to use ordinary care. *See Williams v. Tysinger*, 328 N.C. 55, 59, 399 S.E.2d 108, 111 (1991); *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915); *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979).

2. "Certain animals *ferae naturae* may be domesticated to such an extent as to be classed in respect of liability of the owner for injuries they commit, with tame or domestic animals." *Swain*, 269 N.C. at 51, 152 S.E.2d at 301 (quoting 4 Am.Jr.2d Animals § 91 (1955)).

3. *Swain*, 269 N.C. at 51, 152 S.E.2d at 301; *Sink v. Moore*, 267 N.C. 344, 349, 148 S.E.2d 265, 269 (1966); *Miller v. Snipes*, 12 N.C. App. 342, 343, 183 S.E.2d 270, 271, *cert. denied*, 279 N.C. 619, 184 S.E.2d 883 (1971); *Patterson v. Reid*, 10 N.C. App. 22, 28–29, 178 S.E.2d 1, 5 (1970).

4. "The owner of the animal is the person to whom the animal belongs. The keeper is one who, with or without the owner's permission undertakes to manage, control, or care for the animal as owners are accustomed to do." *Swain*, 269 N.C. at 51, 152 S.E.2d at 302. *See also Parker v. Colson*, __ N.C. App. __, __, 831 S.E.2d 102, 106 (2019) (stating that one whose property was used to store food and water for dogs, as well as owner of neighboring property where dogs' home was kept are "keepers" of a vicious domestic animal).

5. *Hill v. Mosely*, 220 N.C. 485, 489, 17 S.E.2d 676, 678 (1941); *Sink*, 267 N.C. at 350, 148 S.E.2d at 269-70. Evidence of viciousness must be unequivocal. *Hill*, 220 N.C. at 489, 17 S.E.2d at 678. The general rules as to the competency and relevancy of evidence apply in determining the admissibility of evidence concerning the character of the animal causing the injury. Evidence of specific instances of viciousness is admissible as is evidence of the disposition and temperament of the animal both before and after the occurrence in question. Evidence that the animal subsequently manifested a similar disposition is competent to prove that its previous conduct was not accidental or unusual but the result of a fixed habit, provided such evidence is not too remote in point of time. *Pharo v. Pearson*, 28 N.C. App. 171, 173, 220 S.E.2d 359, 360 (1975). Evidence of the animal's reputation is competent to show knowledge by its owner but is not sufficient alone to establish a vicious propensity. *Hill*, 220 N.C. at 488, 17 S.E.2d at 678. "Canine courage is a contest for the championship of the neighborhood, together with determination to remain in possession of the field of battle 'whence all but him had fled' is not evidence of a vicious character. . . ." *Sink*, 267 N.C. at 348, 148 S.E.2d at 269.

6. *Sink*, 267 N.C. at 350, 148 S.E.2d at 270; *Griner*, 43 N.C. App. at 405, 259 S.E.2d at 387; *Sanders v. Davis*, 25 N.C. App. 186, 188, 212 S.E.2d 544, 556 (1975). The knowledge of one joint keeper is imputed to all other joint keepers. *Swain*, 269 N.C. at 52, 152 S.E.2d at 303. The knowledge of a spouse or other responsible family member is also imputable to one who is the owner or keeper of the animal. *Id*.; *Hunt v. Hunt*, 86 N.C. App. 323, 326, 357 S.E.2d 444, 446, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987). Similarly, the knowledge of an agent of the owner or keeper is also imputable if it is acquired in the course and scope of such agency. *Swain*, 269 N.C. at 53, 152 S.E.2d at 303.

7. *Cokerham v. Nixon*, 33 N.C. 269, 271 (1850).

813.21 TRADE REGULATION—VIOLATION—ISSUE OF UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES.[1]

NOTE WELL: Determining what constitutes an unfair[2] or deceptive[3] trade practice is an issue of law for the judge.[4] The only question of fact to be determined by the jury in connection with this issue is whether the defendant actually did what is alleged to have been done.[5] Good faith and lack of willfulness are irrelevant.[6]

Special interrogatories should be submitted to the jury on each of these questions of fact.[7] Examples of special interrogatories may be found in the Model Instruction, N.C.P.I.-Civil 813.05.

The (*state number*) issue reads:

"Did the defendant do (*at least one of*) the following: (*here state in special interrogatories the acts of the defendant which allegedly violate N.C. Gen. Stat. § 75-1.1*)?"

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, that the defendant did (at least one of) the act(s) as contended by the plaintiff. In this case the plaintiff contends, and the defendant denies, that the defendant: (*State the alleged acts of the defendant which plaintiff contends violate N.C. Gen. Stat. § 75-1.1*).[8]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant did (at least one of) the act(s) contended by the plaintiff, then you would answer "Yes" in the space beside each act so found.

If, on the other hand, you fail to so find, then you would answer "No" in the space provided.

1. N.C. Gen. Stat. § 75-1.1(a) reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Four significant N.C. Supreme Court cases construing this statute are *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), *Johnson v. Insurance Co*., 300 N.C. 247, 266 S.E.2d 610 (1980), *State ex. rel. Edmisten v. J. C. Penny Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977) and *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). All these cases note the similarity between the language of N.C. Gen. Stat. § 75-1.1 and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and have opined that the General Assembly intended for the federal law to provide guidance in interpreting the state statute. "The similarity in language was apparently not accidental. . . . Consequently, we have said that the federal decisions construing the FTC Act may furnish some guidance as to the meaning of N.C. Gen. Stat. § 75-1.1." *State ex. rel. Edmisten*, 292 N.C. at 314, 233 S.E.2d at 898 (citing *Hardy*, 288 N.C. at 308, 218 S.E.2d at 346).

For the North Carolina common law definition of unfair competition, *see Extract Co. v. Ray*, 221 N.C. 269, 272, 20 S.E.2d 59 (1942).

2. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. *Accord Johnson*, 300 N.C. at 263, 266 S.E.2d at 621; *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 98, 718 S.E.2d. 408, 412 (2011) ("A practice is unfair if it is unethical or unscrupulous . . . .") (citing *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

3. "[A] practice is deceptive if it has the capacity or tendency to deceive . . . the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail . . . ." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. *See also Johnson,* 300 N.C. at 265–66, 266 S.E.2d at 622.

4. Unfairness and deception are to be "gauged by consideration of the effect of the practice on the marketplace . . . ." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. As a result, the "intent of the actor is irrelevant," and "good faith is equally irrelevant." *Id.* Thus, neither a lack of willfulness nor good faith is a defense to an action under N.C. Gen. Stat. § 75-1.1. "What is relevant is the effect of the actor's conduct on the consuming public," and that is a matter for the trial judge to decide as a matter of law. *NOTE WELL: Private actions under N.C. Gen. Stat. § 75-16 brought upon alleged violations of N.C. Gen. Stat. § 75-1.1 should be distinguished from actions brought under other sections of Chapter 75 or other sections of other chapters, e.g., N.C. Gen. Stat. § 25A-44(4), where good faith or willfullness may be material.*

5. *NOTE WELL: Because the scope of jury inquiry is limited to this narrow issue of fact, in charging the jury under N.C. Gen. Stat. § 75-1.1 the words "unfair" and "deceptive" should never be mentioned.*

6. *See* note 4, *supra*.

7. It is recommended that each special interrogatory be structured to constitute a violation in itself. *See* the Model Instruction N.C.P.I.-Civil 813.05.

8. There are a variety of statutory and judicial exemptions to the applicability of N.C. Gen. Stat. § 75-1.1. The statutory exemptions include one for those in a "learned profession" (N.C. Gen. Stat. § 75-1.1(b)), one for media coverage (N.C. Gen. Stat. § 75-1.1(c)), one for properly organized agricultural cooperatives (N.C. Gen. Stat. §§ 54-129 *et. seq*.), one for cooperative development and production of oil and gas (N.C. Gen. Stat. § 113-393(c)), one for certain conduct of soft drink bottlers (15 U.S.C. § 3501), one for local government actions (15 U.S.C. §§ 34-36) and one for certain cooperative agreements among hospitals and other persons (N.C. Gen. Stat. § 131E-192.1, *et. seq*.). The judicially created exemptions include one for securities and commodities transactions, *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991); *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 337 S.E.2d 236 (1985); *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978), *rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979), employment relationships, *HAJMM Co. v. House of Raeford Farms, Inc.*, *supra*, *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 443 S.E.2d 887, 891 (1994); *American Marble Corp. v. Crawford*, 84 N.C. App. 86, 351 S.E.2d 848, *disc. rev. denied*, 319 N.C. 464, 356 S.E.2d 1 (1987); *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982), the private sale of residential homes, *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989) *rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *cf.*, *Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994) and certain charity fund raising activities, *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994). There are other judicial limitations on the scope of N.C. Gen. Stat. § 75-1.1, with examples including the following: the doctrines of exclusive and primary jurisdiction; the "*Noerr-Pennington*" doctrine; the "state action" doctrine, *see Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985) ("[C]onsumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity exists."); and the doctrine of preemption.

813.62 TRADE REGULATION—COMMERCE—UNFAIR AND DECEPTIVE METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES.

NOTE WELL: Use this instruction only in connection with N.C.P.I.-Civil 813.21, "Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices," which must be given prior to this issue on commerce.

The (*state number*) issue reads:

"Was the defendant's conduct in commerce or did it affect commerce?"[1]

You will answer this issue only if you have found in the plaintiff's favor on the preceding issue. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant's conduct was either "in commerce" or that it "affected commerce."[2]

Conduct is "in commerce" when it involves a business activity.[3]

Conduct "affects commerce" whenever a business activity is adversely and substantially affected.[4]

(A "business activity" is the way a business conducts its regular, day-to-day activities or affairs (such as the purchase or sale of goods), or whatever other activities the business regularly engages in and for which it is organized.)[5]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant's conduct was "in commerce" or that it "affected commerce," 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 sufficient facts are admitted or stipulated to permit the court to find that the defendant's conduct was "in commerce" or "affected commerce," the court may find that this issue is proven as a matter of law. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). *See Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 56 n.4, 714 S.E.2d 162, 167 n.4 (2011) (noting that, although whether an act is an unfair or deceptive trade practice is a question of law for the court, it was not inappropriate to submit to the jury the issue of whether a defendant's acts were "in or affecting commerce"); *see also Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300 (1986) ("The only such 'issue' answered by the jury was whether defendant's misrepresentations to plaintiff were conduct in commerce or affecting commerce, which was appropriate.").

2. N.C. Gen. Stat. § 75-1.1(b) specifically excludes "professional services rendered by a member of a learned profession" from the definition of "commerce." The burden of establishing the applicability of this exclusion is upon the party seeking it. N.C. Gen. Stat. § 75-1.1(d). For the "learned profession" exclusion to apply, "a two-part inquiry must be conducted: '[f]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.'" *Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 587, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000)) *cited with approval in Sykes v. Health Network*, 372 N.C. 326, 334, 828 S.E.2d 467, 472 (2019). Although the legislature has not defined what professions are "learned," *Reid,* 138 N.C. App. at 266, 531 S.E.2d at 235, the Supreme Court of North Carolina has recognized three learned professions: law, medicine and the clergy. *Patronelli v. Patronelli*, 360 N.C. 628, 630, 636 S.E.2d 559, 561 (2006). The exception for medicine has been interpreted broadly to include "medical professionals." *See Sykes v. Health Network*, 237 N.C. at 334, 828 S.E.2d at 472. Furthermore, an opinion of the North Carolina Attorney General's Office that the exception applies to related professions "characterized by need of unusual learning, existence of confidential relations, [and] adherence to a standard of ethics higher than that of the marketplace," 47 N.C. Op. Att'y Gen. 118, 119-20, *citing Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939), has been cited as authority in North Carolina appellate decisions. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

Where the conduct alleged to be an UDTP is too far removed from the defendant professional's practice, the claim will not be exempted from N.C.G.S. § 75-1.1. *Sykes*, 828 S.E.2d at 473 (noting that the learned profession exception does not apply to every contract in which a party is of a learned profession). Exemption occurs only when the claim is sufficiently related to the professional service being rendered. *Id.*

Depending on the relationship between the parties, applicability of N.C. Gen. Stat. § 75-1.1 may be precluded. Because it has been determined that the General Assembly did not intend the Unfair and Deceptive Trade Practices statute to apply to a business' internal operations, the Supreme Court of North Carolina has held that N.C. Gen. Stat. § 75-1.1 does not apply to the conduct of a partner within a partnership. *See White v. Thompson*, 364 N.C. 47, 47-51, 691 S.E.2d 676, 676-680 (2010). Likewise, a defendant's status as an employee

will normally preclude application of the act in a suit brought by the defendant's employer, but an employee may be held liable where the activity in question is better characterized as a business activity outside of the employer-employee relationship. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999). An independent contractor may be held liable as well. *Weaver Inv. Co. v. Pressly Dev. Assocs.,* 234 N.C. App. 645, 656, 760 S.E.2d 755, 762 (2014).

In addition, the courts have held that certain types of conduct are not business activities "in commerce" or do not "affect commerce" for Chapter 75 purposes. These include the following: the private sale of residential homes, *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989) *rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *c.f., Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994); certain charity fund raising activities, *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994);and the issuance and redemption of securities for the purpose of raising capital, *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).

3. N.C. Gen. Stat. § 75-1.1(b).

4. *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 743 (1976).

5. *HAJMM Co.*, 328 N.C. at 594, 403 S.E.2d at 493; *Malone*, 113 N.C. App. at 502, 439 S.E.2d at 194.

813.98 MISAPPROPRIATION OF TRADE SECRET—ISSUE OF DAMAGES.

The (*state number*) issue reads:

"In what amount has the plaintiff been damaged by the misappropriation of the plaintiff's trade secret?"

If you have answered all the preceding issues in favor of the plaintiff, the plaintiff is entitled to recover actual damages in the amount proved.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages sustained as a result of the misappropriation of the plaintiff's trade secret.

The plaintiff may recover actual damages in the amount of [the plaintiff's economic loss] [the amount by which the defendant was unjustly enriched by the misappropriation] (whichever is greater).[1]

[Economic loss may include:

[any loss in net revenues suffered (or to be suffered) by the plaintiff;]

[any loss in the value of the plaintiff's business as a going concern;] [and]

[the value of the plaintiff's business as a going concern just before it was destroyed. That is, the amount a willing buyer would pay for the business, and a willing seller would accept, neither being in need of an immediate purchase or sale]; [and]

[state any other measure of economic loss supported by the evidence].]

[Unjust enrichment may include:

[any net revenues realized (or to be realized) by the defendant from the trade secret;]

[any increase in the value of the defendant's business as a going concern resulting from the trade secret;] [and]

[the value of any benefit from the trade secret received and retained by the defendant;] [and]

[state any other measure of unjust enrichment supported by the evidence].]

The plaintiff's actual damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of [the plaintiff's economic loss] [the defendant's unjust enrichment] in order to recover actual damages. Thus, the plaintiff should not be denied actual damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. An award of actual damages must be based on evidence which shows the amount of the plaintiff's actual damages with reasonable certainty.[2] However, you may not award any actual damages based upon mere speculation or conjecture.[3]

Finally, as to this issue on which the plaintiff has the burden of proof, when you find by the greater weight of the evidence the amount of actual damages sustained by the plaintiff by reason of [the plaintiff's economic loss] [the defendant's unjust enrichment], then it will be your duty to write [that amount] [the greater of those two amounts] in the blank space provided.

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1. N.C. Gen. Stat. § 66-154(b) provides that "actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, *whichever is greater*" (emphasis added). In addition, N.C. Gen. Stat. § 66-154(c) provides that "[i]f willful and malicious misappropriation exists, the trier of fact also

may award punitive damages in its discretion." Since this provision was adopted in 1981, its application is now governed by the provisions of N.C. Gen. Stat. § 1D-1 (Punitive Damages) which became effective January 1, 1996. In particular, if the court instructs the jury on punitive damages arising out of misappropriation of a trade secret, the burden of proving the misappropriation was "willful and malicious" is by clear, strong and convincing evidence. N.C. Gen. Stat. § 1D-15(b).

2. *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 660, 670 S.E.2d 321, 330 (2009) (holding that the amount of damages for misappropriation of trade secret must be proven with reasonable certainty).

3. The "party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty," *Olivetti v. Ames Business Sys.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987), and "[d]amages for lost profits will not be awarded upon hypothetical or speculative forecasts of losses." *Castle McCulloch v. Freedman*, 169 N.C. App. 497, 501, 610 S.E.2d 416, 420 (2005), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005)); *see also Medical Staffing Network*, 194 N.C. App. at 660-61, 670 S.E.2d at 330 (holding that use of the defendant's total revenue as the basis for calculating the plaintiff's lost profits allegedly suffered by defendant hiring ten nurses previously employed by plaintiff was too speculative to constitute a proper measure of damages). However, "[w]hile difficult to determine, damages may be established with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises," *Iron Steamer v. Trinity Restaurant*, 110 N.C. App. 843, 849, 431 S.E.2d 767, 771 (1993) (citations omitted). "Sales figures from businesses which are similar in size, location and type of product sold are important sources of" such evidence. *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 411, 466 S.E.2d 324, 331 (1996).

825.00 PROCESSIONING ACTION.

The (*state number*) issue reads:

"What is the location of the true boundary between the plaintiff's land and the defendant's land?"[1]

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, the location of the true boundary between the land of the plaintiff and the land of the defendant.

In this case, the plaintiff contends, and the defendant denies, that the true boundary between their lands is (*describe alleged boundary*) as shown on (*identify map, survey or exhibit*).[3] (On the other hand, the defendant contends, and the plaintiff denies, that the true boundary between their lands is (*describe alleged boundary*) as shown on (*identify map, survey or exhibit*).)

Members of the jury, in cases such as this it is a function of the Court to determine from the evidence presented a description of the boundary. After I give you the description of the boundary, it is your duty to use this description to locate the true boundary between the lands of the plaintiff and the defendant.

I now instruct you that the description of the boundary is as follows: (*here give the boundary description*).

Your duty in this case is to locate the true boundary by following the description I have given you. The law provides rules to assist you in fixing the location of a boundary. I will now instruct you as to those rules.

(*Select the appropriate paragraph(s).*)[4]

[If a conflict exists between a call[5] running to a natural or permanent monument and a call for a [course][6] [distance], the call running to the monument will control.[7] (Natural or permanent monuments are objects on the land relatively permanent in their character.) (A call for a monument will run to its center, unless a different point on the monument is described.)[8] I instruct you that in this case the call(s) for (*name natural or permanent monument(s)*) [is] [are] (a) call(s) for (a) natural or permanent monument(s).][9]

[If there is a conflict between the actual distance between two monuments and the distance called for in the deed, the actual distance will control.][10]

[If there is a conflict between the course and the distance stated in the description, the course will control.][11]

[If the true boundary cannot be located by following the calls in the description in the order I have given them, it is permissible for you to begin your determination by starting with an established point and following the calls of the description in reverse order.][12]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff has proved that the location of the boundary between the land of plaintiff and the land of the defendant is the line shown as (*describe line, e.g., A, B, C*) on the [map] [survey] [(*name other exhibit*)], then it would be your duty to answer this issue in accordance with plaintiff's contentions by designating that line as the location of the boundary.

If, on the other hand, you fail to so find, then it would be your duty to establish the location of the boundary between the plaintiff's land and the defendant's land by fixing the line wherever the evidence, fully considered, justifies.[13] This line may be as contended by the defendant, that is: (*describe line, e.g., 1, 2 3*) on the [map] [survey] [(*name other exhibit, if necessary*)], or as you find it from the evidence.

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1. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945); *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964); *McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943); *Combs v. Woody*, 53 N.C. App. 789, 281 S.E.2d 705 (1981) (indicating that the jury may locate the boundary wherever the evidence suggests).

2. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187, 835 S.E.2d 411, 415 (2019) (citing *Day v. Godwin*, 235 N.C. 465, 469, 128 S.E.2d 814, 816–17 (1963). In a processioning action the burden of proof remains on the plaintiff whether or not the defendant submits a contention that another line is the true boundary. *Garris v. Harrington*, 167 N.C. 86, 83 S.E. 253 (1914). Moreover, dismissal is improper so long as it appears that a bona fide dispute exists as to the location of the boundary, regardless of the nature of the evidence presented. A boundary must be located. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E.2d 74 (1949); *see also Rice v. Rice*, 259 N.C. 171, 130 S.E.2d 41 (1963).

The question of title is not in issue in a processioning proceeding. If title becomes an issue, the proceeding is converted to an action to quiet title under N.C. Gen. Stat. § 41-10. *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961); *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

3. According to *Norwood v. Crawford*, 114 N.C. 513, 514, 19 S.E. 349, 351 (1894), the duty of the surveyor is to do the following: "He is required to survey the lines according to the contention of each of the parties, and to make a map, in which shall be designated, by lines and letters or figures, the boundaries as claimed by each. His report should show by what deed or deeds he surveyed, at the request of either, and the successive calls surveyed, with detailed accounts of the measurement by course and distance; also of the marked trees or corners claimed as such, and what was the nature and appearance of the marks, whether course and distance were disregarded in running any given line, whether any steps were taken to ascertain the age of the marks on line trees and corners, and all other facts developed by such survey as would tend to enlighten a court or jury in the trial of a controversy as to boundary." The parties, however, may also provide their own maps and surveys. *Nichols v. Wilson*, 116 N.C. App. 286, 293, 448 S.E.2d 119, 123 (1994).

4. For references to other rules of construction that might be relevant, *see* Webster, *Real Estate Law In North Carolina* (4th Ed), §§ 10-36 through 39.

5. In some cases it may be appropriate to define the word "call" if the word has not been defined in course of the trial: *A call is defined as a statement in a description which defines a line between two points by reference to a direction, distance and/or*

monument. *See*, *e.g.*, *Green v. Barker*, 254 N.C. 603, 605, 119 S.E.2d 456, 457 (1961). *Brown v. Hodges*, 233 N.C. 617, 119 S.E.2d 456 (1951).

6. In some cases it may be appropriate to define the word "course" if the word has not been defined during the trial: *A course is defined as the direction in which a line runs based upon its correspondence with a certain point on the compass*. Webster, *Real Estate Law in North Carolina* (4th Ed), 10-35. *See also Jones v. Arehart*, 125 N.C. App. 89, 479 S.E.2d 254 (1997).

7. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); *Brown*, *supra*.

8. Webster, *Real Estate Law in North Carolina* (4th Ed), § 10-39. *See also Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Candy v. Cliff*, 93 N.C. App. 50, 376 S.E.2d 5405 (1989).

9. It is the function of the court to determine which objects are monuments. The court must designate the termini of the boundary. The sole duty of the jury is to locate the termini specified and establish the line on the ground. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187, 835 S.E.2d 411, 416 (2019).

A monument may be any natural or artificial object which is fixed in position. Watercourses, rocks, trees or anything immovable that may be identified may serve as a monument. Moveable things may become boundaries of land when they become immovable, such as a wall or pillar of stones or any other fixed, stable substance. *Allen v. Cates*, 262 N.C. 268, 136 S.E.2d 579 (1964); a wall, *Bostic v. Blanton*, 232 N.C. 441, 61 S.E.2d 443 (1950); a highway, *Franklin*, *supra* 248 N.C. 656, 104 S.E.2d 841 (1958); a ditch, *Franklin v. Faulkner* (dictum); and established line of an adjacent tract, *Cutts*, *supra*, an established corner of an adjoining tract, *Allen v. Cates*; and a marked tree, *Smothers v. Schlosser*, 2 N.C. App. 272, 163 S.E.2d 127 (1968) have been held to constitute monuments within the meaning of the rule.

A call to a stone, without additional description of distinguishing features, is insufficient to constitute a call to a permanent monument. *Allen v. Cates*. Similarly, a call to a stake is considered to lack the stability and permanence essential to monuments. *See also Webster*, *supra* note 7, § 10-35. *Brown v. Hodges*, *supra*, note 8.

10. *North Carolina State Highway Comm'n v. Gamble*, 9 N.C. App. 618, 177 S.E.2d 434 (1970).

11. *Tice v. Winchester*, 225 N.C. 673, 36 S.E.2d 257 (1945).

12. *Cutts*, *supra*.

13. The jury is not compelled to agree with the plaintiff or the defendant, but may fix the line in accordance with the evidence. *Combs*, *supra*, 53 N.C. App. at 792, 281 S.E.2d at 707; *Combs v. Woody*, 53 N.C. App. 789, 281 S.E.2d 705 (1981) (indicating that the jury may locate the boundary wherever the evidence suggests). *See also Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 44 (1960).

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.") As personal property is not part of the realty condemned, a lessee is not entitled to compensation for the value of the personal property itself. *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 110, 804 S.E.2d 486, 494 (2017) (citing *Lyerly v. N.C. State Highway Comm'n*, 264 N.C. 649, 649-50, 142 S.E.2d 658, 658 (1965) (per curiam)). However, "revenue derived directly from the condemned property itself . . . is a proper consideration in determining the fair market value of condemned property." *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 123, 804 S.E.2d 486, 502 (2017) (quoting *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 7, 637 S.E.2d 885, 890 (2006). Therefore, although a highway billboard has been held to be the personal property of the lessee and no compensation is allowed for it, "the value that the billboard's presence adds to the value of the leasehold interest" may be considered in determining appropriate compensation for the taking of the leasehold interest." *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 110, 804 S.E.2d 486, 494 (2017).

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).

835.15a 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.*, 260 N.C. App. 325, 343, 817 S.E.2d 874, 888 (2018) (citing 4 *Nichols on Eminent Domain* § 12E.01[4] (rev. 3d ed. (2006))), *aff'd per curiam*, 828 S.E.2d 154 (2019); *see also City of Charlotte v. Combs*, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011) ("Generally, the measure of damages for a temporary taking is the 'rental value of the land actually occupied' by the condemnor.") (quoting *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 10, 43 S.E. 632, 633 (1903)); *accord Kimball Laundry Co. v. United States*, 3338 U.S. 1, 7, 69 S. Ct. 1434, 1438 (1949) ("[T]he proper measure of compensation" for a temporary taking "is the rental that probably could have been obtained.").

5. *See Dep't of Transp. v. Jay Butmataji, LLC*, 260 N.C. App. 516, 522 , 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).

850.45 DEEDS—ACTION TO SET ASIDE—DEFENSE OF INNOCENT PURCHASER.[1]

The (*state number*) issue reads:

"Did the [defendant] [defendant's predecessor in title][2] acquire (*name property*) for value and without public record notice of (*state transaction rendering title voidable*)?" You are to answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant.[3] This means that the defendant must prove, by the greater weight of the evidence, two things:

First, that the [defendant] [defendant's predecessor in title] was a purchaser for value. A "purchaser for value" acquires title to property by exchanging something valuable for it.[4] (A person who acquires property by [gift] [inheritance] is not a purchaser for value.)[5] (A person who acquires property for only a nominal consideration is not a purchaser for value.)[6] (A person who lends money and takes back a deed of trust on land is a purchaser for value.)[7]

And Second, that at the time the [defendant] [defendant's predecessor in title] acquired (*name property*), there was no public record notice of the (*state transaction rendering title voidable*).[8] "Public record notice" means that the public records which affect the title to real property are sufficient to put a careful title examiner on notice that the (*state transaction rendering title voidable*) has occurred.[9] (Members of the jury, I instruct you that (*state type of record, e.g., grantor's index*) is a public record affecting title to real property.) It does not matter that the purchaser did not examine the record title. The purchaser will be held responsible for what the purchaser would

have learned had the purchaser carefully examined the public records which affect title.[10]

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the [defendant] [defendant's predecessor in title] acquired (*name property*) for value and without public record notice of (*state transaction rendering title voidable*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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

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1. This defense is not applicable where the deed is void rather than voidable. *Swan Quarter Farms, Inc. v. Spencer*, 133 N.C. App. 106, 112, 514 S.E.2d 735, 739 (1999). In addition, this defense would not apply where the alleged purchaser participated in or had such complicity in the fraud as to raise an estoppel. *Bourne v. Lay & Co.*, 264 N.C. 33, 37, 140 S.E.2d 769, 772 (1965). However, where the deed is merely voidable, a purchaser for value without notice prevails over the party who seeks to set aside the deed on the basis of fraud, duress or the like. *Id*.; *Johnson v. Brown*, 71 N.C. App. 660, 668, 323 S.E.2d 389, 395 (1984); N.C. Gen. Stat. § 47-18.

2. Even if the defendant is not a purchaser for value without notice, if the predecessor-in-title was, the defendant is nonetheless "protected by the former's want of notice and takes free of the equities." *Swan Quarter Farms, Inc.*, 133 N.C. App. at 112, 514 S.E.2d at 739, citing *Morehead v. Harris*, 262 N.C. 330, 342, 137 S.E.2d 174, 185 (1964).

3. *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981); *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974); *Waters v. Pittman*, 254 N.C. 191, 118 S.E.2d 395 (1961).

4. *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915). The Supreme Court defined a purchaser for value as someone who acquires title through "a fair and reasonable price according to the common mode of dealing between buyers and sellers." *Id*. (following *Fullenwider v. Roberts*, 20 N.C. 420 (1839) (internal quotes omitted).

5. *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979). A bankruptcy trustee, however, is deemed to be a purchaser for value. *Lynch v. Johnson*, 171 N.C. 611, 616, 89 S.E. 61, 63 (1916).

6. *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939). Something more than nominal consideration is "[a] fair and reasonable price according to the common mode of dealing between buyers and sellers." *King v. McRackan*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) (quoting *Fullenwider v. Roberts*, 20 N.C. 420 (1839)). "The party assuming to

be a purchaser for a valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise. . . ." *Id*. (quoting *Worthy v. Caddell*, 76 N.C. 82 (1877)).

7. *Brem v. Lockhart*, 93 N.C. 191 (1885).

8. "Record title" includes a reference in a recorded instrument to an unrecorded instrument which, by its language, unambiguously indicates that the conveyance is subject to the unrecorded instrument. *Hardy v. Fryer*, 194 N.C. 420, 139 S.E. 1927; *Terry v. Brothers Inv. Co.*, 77 N.C. App. 1, 6, 334 S.E.2d 469, 472 (1985). "Record title" also includes such public records as would be appropriate for a competent examination, including the index to *lis pendens*. *Hill v. Pinelawn Memorial Park*, 304 N.C. 159, 282 S.E.2d 779 (1981) (actual notice of pending litigation involving a *lis pendens* is notice for purposes of defeating a party's claim).

9. "The law contemplates that a purchaser of land will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose." *Waters v. N.C. Phosphate Corp.*, 310 N.C. 438, 441-42, 312 S.E.2d 428, 432 (1984); *Randle v. Grady*, 224 N.C. 651, 32 S.E.2d 20 (1944); *Mass. Bond & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436 (1942); *see also Stegall v. Robinson*, 81 N.C. App. 617, 344 S.E.2d 803 (1986) (holding that title examiner should read the prior conveyances to determine that they do not contain restrictions on the property).

10. An equitable exception to the innocent purchaser for value doctrine holds that "[a]s between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior." *Wilmington Savings Fund Society, FSB v. Mortgage Electronic Registration Systems, Inc.*, __ N.C. App. ___, ___, 829 S.E.2d 235, 238 (2019) (quoting *Union Central Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927)).

900.10 DEFINITION OF FIDUCIARY; EXPLANATION OF FIDUCIARY RELATIONSHIP.

A fiduciary[1] is a person who is required to act honestly, in good faith and in the best interests of another person because a fiduciary relationship exists between them.[2]

NOTE WELL: Where the relationship is such that a fiduciary duty arises as a matter of law, use the following bracketed paragraph.

[By law, a fiduciary relationship exists between

[attorneys and their clients][3]

[principal and agent, including, e.g., principal operating under power of attorney][4]

[trustee and beneficiary][5].]

[Less frequently encountered fiduciary relationships are listed in end note 6.][6]

NOTE WELL: For other relationships where it is alleged that a fiduciary relationship exists, use the following bracketed paragraphs.

[A fiduciary relationship may exist in a variety of circumstances.[7] It is not necessary that a fiduciary relationship be a technical or legal relationship,[8] and even where a fiduciary relationship does not normally exist, one may be created by conduct.[9]

A fiduciary relationship exists when a person undertakes to act for the benefit of another, thus causing the other to place special faith, confidence and trust in the person undertaking to act in the other's best interest.[10]]

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1. May be of particular use with charges on fraud (N.C.P.I.—Civil 800.00 *et seq*.) and parol trusts (N.C.P.I.—Civil 850.00 *et seq*.). *Compare* N.C.P.I.—Civil 800.15.

2. *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971); *Vail v. Vail*, 233 N.C. 109, 25 S.E.2d 407 (1950); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931).

3. "A fiduciary relationship can exist as a matter of fact in those circumstances 'in which there is confidence reposed on one side, and resulting domination and influence on the

other.'" *Hewitt v. Hewitt*, 252 N.C. App. 437, 442, 798 S.E.2d 796, 800 (2017) (citing *Abbitt*, 201 N.C. at 598, 160 S.E. at 906).

4. *Abbitt*, 201 N.C. at 598, 160 S.E. at 906.

5. *Id.*

6. A fiduciary relationship exists as a matter of law between

- executor or administrator and heir, *Abbitt*, 201 N.C. at 598, 160 S.E. at 906;
- legatee or devisee, *id.*;
- guardians and their wards, *id.*;
- broker and principal, *id.*;
- physician and patient, *Hewitt v. Hewitt,* 252 N.C. App. 437, 442, 798 S.E.2d 796, 800 (2017) (citing *King v. Bryant*, 369 N.C. 451, 464, 795 S.E.2d 340, 349 (2017));
- partners to a partnership, *id.*;
- spouses, *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968); and
- officers and board members of condominium associations and condominium unit owners, *Ironman Medical Properties, LLC v. Chodri*, __ N.C. App. __, __, 836 S.E.2d 682, 690 (2019).

7. Where the existence of a fiduciary relationship is not established by the evidence as a matter of law, it is proper for the trial court to define "fiduciary relationship" but leave to the jury to determine as a matter of fact whether such a relationship has arisen. *Will of Baitschora*, 207 N.C. App. 174, 189-91, 700 S.E. 2d 50, 60-62 (2010); *see also Abbitt,* 201 N.C. at 598, 160 S.E. at 906.

8. *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971).

9. *See Dallaire v. Bank of Am.*, 376 N.C. 363, 368, 760 S.E.2d 263, 267 (2014) (citing *Branch Bank & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992), for the principle that "given the proper circumstances" even a bank-customer transaction could give rise to fiduciary relationship); *see also Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (citing 86 C.J.S., Tenancy in Common, § 17, p. 377 for the same regarding the duty of a tenant who undertakes to manage property on behalf of a tenancy in common).

10. *See Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (tenant occupied a fiduciary relationship with his co-tenants where he "undertook to manage" land for their benefit, "causing them to repose special faith, confidence and trust in him to represent their best interest . . .").

DESCRIPTIVE WORD INDEX

(All references are to N.C.P.I.–Civil Instruction numbers)