EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR NEGLIGENCE IN HIRING, SUPERVISION OR RETENTION[1] OF AN EMPLOYEE.

The *(state issue number)* reads: "Was the plaintiff [injured] [damaged] by the negligence[2] of the defendant in [hiring] [supervising] [retaining] *(state name of employee)* as an employee?[3]

[You will answer this issue only if you have answered issue *(state issue number)* "Yes" in favor of the plaintiff?[4]] On this issue the burden of proof is on the plaintiff. This

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1. Case law appears to use the terms "hiring," "supervision," and "retention" interchangeably. Because the tortious act complained of will most likely occur after some period of employment, the claim will generally be most accurately characterized as one of negligent retention.

2. In addition to the general rule that employers or agents of an employer may "both be held liable for the agent's torts committed in the course and scope of the agency relationship under the doctrine of *respondeat superior," Woodson v. Rowland*, 329 N.C. 330, 348, 407 S.E.2d 222, 233 (1991), "North Carolina recognizes a cause of action against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 123 (1986). Furthermore, a claim may be brought "as an independent tort based on the employer's liability to third parties." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998). "[U]nder the doctrine of negligent hiring or retention of incompetent or unfit employees, . . . the theory of liability is that the employer's negligence is a wrong to third persons, entirely independent of the employer's liability under the doctrine of *respondeat superior*." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 182-83, 352 S.E.2d 267, 270-71 (1987).

"To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.'" *Smith* at 494-95, 495 S.E.2d at 398 (quoting *Hogan*, 79 N.C. at 495, 340 S.E.2d at 124); *see also Waddle v. Sparks*, 331 N.C. 73, 89, 414 S.E.2d 22, 30 (1992) (stating that "[a]n essential element of a claim for negligent retention of an employee is that the employee committed a tortious act resulting in plaintiff['s] injuries."), *Hogan*, 79 N.C. App. at 496-97, 340 S.E.2d at 125 (where "the evidence is insufficient to establish that . . . [the plaintiffs have] been injured by actionable tortious conduct of an employee of defendant [employer], neither of them may maintain an action against defendant based upon its negligence in employing or retaining the allegedly incompetent employee"), *Guthrie v. Conroy*, 152 N.C. App. 15, 26, 567 S.E.2d 403, 411 (2002) (noting that "[a]bsent a viable tort claim against [the employee], plaintiff cannot maintain an action against [the employer] for negligent retention and supervision."), and *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (for claims brought under the doctrine of negligent hiring or retention of incompetent or unfit employees, "it must be established . . . that [the plaintiff] has been injured by reason of carelessness or negligence . . . and that the [employer] has been negligent in employing or retaining such incompetent [employee], after knowledge of the fact, either actual or constructive.").

"[T]he theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment. In these cases such application allows the injured person to establish liability on the part of the master where no liability would otherwise exist." *Hogan* at 495-96, 340 S.E.2d at 116 (quoting 53 *Am. Jur.2d Master and Servant* § 422 (1970); *see, e.g., White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004) ("In North Carolina, intentional torts have rarely been considered within the scope of an employee's employment . . . . Nevertheless, '"rarely" does not mean "never."'" (quoting *Borneman v. U.S.*, 213 F.3d 819, 827 (4th Cir. 2000)).

3. If there is a factual dispute as to the named individual defendant-employee's status, then N.C.P.I.—Civil 640.00 ("Employment Relationship—Status of Person as Employee") should be submitted first. A "No" answer to that issue would preclude submission of this issue; however, N.C.P.I.—Civil 640.43 ("Employment Relationship—Liability of Employer for Negligence in Retention of Independent Contractor") may then be appropriate.

4. *NOTE WELL:* n.2 *supra* references the incompetent employee's "tortious" or "negligent" act resulting in injury to the plaintiff as an element of a negligent hiring or retention claim. This element will have been met by an

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means that the plaintiff must prove, by the greater weight of the evidence, that the defendant was negligent in [hiring] [supervising] [retaining] (*state name of employee*) as an employee. Negligence refers to a party's failure to follow a duty of conduct imposed by law. Negligence is not to be presumed from the mere fact of [injury] [damage].

To establish negligence on the part of the defendant in [hiring] [supervising] [retaining] (*state name of employee*), the plaintiff must prove, by the greater weight of the evidence, four things:[5] 1) that the defendant owed the plaintiff a legal duty[6] of care, 2) that *(state name of employee)* was incompetent[7], 3) that, prior[8] to the act of (*state name of*

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affirmative answer to the issue addressing the named individual defendant-employee's tortious act and need not be resubmitted here.

If for some reason the issue of the individual employee's negligence has not been submitted to the jury, this statement referencing the jury's verdict on an earlier issue should not be read. *See, e.g., Little v. Omega Meats,* 171 N.C. App. 583, 585, 615 S.E.2d 45, 47 (2005) (stating that "[t]he plaintiffs' claims against [the employer and the owner] were severed from the claims against [the independent contractor] and only the claims against [employer and owner] were tried before [the trial judge]."). Moreover, an initial element, "that the plaintiff was injured as a proximate result of the negligence of (*state name of employee*)," should then be included here and this instruction should be supplemented to include the elements of a negligence claim against the employee.

5. *See* n.2 *supra; see also Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (In a claim for negligent employment or retention, a plaintiff must prove: "(1) the specific negligent act on which the action is founded . . . ; (2) incompetency, by inherent unfitness or previous acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the [employer] of such unfitness or bad habits, or constructive notice . . . by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . ; and (4) that the injury complained of resulted from the incompetency proved" (citations omitted) (emphasis in original omitted)), *Smith*, 128 N.C. App. at 494-95, 495 S.E.2d at 398 ("To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that 'the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency."), *Hogan*, 79 N.C. App. at 495, 340 S.E.2d at 124 (stating that "the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency."), and *Little*, 171 N.C. App. at 86, 615 S.E.2d at 48 (The plaintiff must first establish "a legal duty owed by the employer to the injured party," and then "must prove four additional elements . . . '(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence.'" (citations omitted)).

6. *See* n.11 *infra*; *see also Little*, 171 N.C. App. at 586-87, 615 S.E.2d at 48 ("Because plaintiffs' claim against [the entity which hired the independent contractor] is a direct claim, there must be a legal duty owed by the employer to the injured party in order to establish the claim for negligent hiring.").

7. *See* nn.16-17 *infra.*

8. *See* n.5 *supra.*

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employee) resulting in [injury] [damage] to the plaintiff, the defendant had either actual or constructive notice[9] of this incompetence, and 4) that this incompetence was [the] [a] [10] proximate cause of the plaintiff's [injury] [damage].

I will now discuss these things one at a time and explain the terms used.

First, the plaintiff must prove that the defendant owed the plaintiff a legal duty of care.[11] This means that the plaintiff must prove[12] that *(state name of employee)* and the

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9. *See* n.5 *supra*; *see also Pleasants v. Barnes,* 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) ("[I]t must be established . . . that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the [incompetency], either actual or constructive."), and *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (The third element of a "negligent hiring" claim is that "the employer had notice, either actual or constructive, of [the employee's] incompetence.").

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

Appellate case law is not definitive on the precise language which should be employed. *Little* and *Kinsey* both specifically delineate the final element of a "negligent hiring and retention," *Little,* 171 N.C. App. at 587, 615 S.E.2d at 48, or "negligent selection," *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 493, claim as being that "the plaintiff's injury was *the* proximate result of this incompetence." However, the Court in *Medlin* describes the fourth element of a "claim for negligent employment or retention" in less exclusive language as "that the injury complained of *resulted* from the incompetency proved." *Medlin*, 327 N.C. at 590, 398 S.E.2d at 462 (emphasis added); *see also White v. Consolidated Planning*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004) (citing *Medlin* and stating that the fourth element of a "negligent hiring claim" is "injury resulting from the employee's incompetency or unfitness"), *Little*, 171 N.C. App. at 592 (Geer, J., dissenting) (third element of a "claim of negligent hiring of an independent contractor" under "*Woodson, Page and Deitz"* is that "the plaintiff was harmed as *a* proximate cause of the lack of qualification or incompetence" of the independent contractor)(emphasis added), *Deitz v. Jackson*, 57 N.C. App. 275, 278, 291 S.E.2d 282, 285 (1982) (complaint including allegations that "defendants . . . negligently hired an incompetent construction company and that as *a* proximate result thereof, plaintiff was injured," held to adequately allege "negligent hiring of an independent contractor" claim) (emphasis added), and *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942) (to hold master liable, servant must establish, *inter alia*, "that he has been injured by reason of carelessness or negligence due to the incompetency of the fellow servant.").

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

12. *See id.* (noting that "[o]ne commentator . . . [has] noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.").

The *Little* court did not expressly hold that all three elements must be proved; the requirement set out here has been derived from the court's observation that "[c]ourts in other jurisdictions have generally, though not

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plaintiff were in places where each had a right to be when the wrongful act occurred,[13] that the plaintiff encountered *(state name of employee)* as a direct result of *his* employment by the defendant,[14] and that the defendant must reasonably have expected to receive some benefit, even if only potential or indirect, from the encounter between *(state name of employee)* and the plaintiff.[15]

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

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exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* (emphasis in original).

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

14. According to the *Little* court, "[w]hat is required . . . is a nexus between the employment relationship and the injury." *Little* at 589, 615 S.E.2d at 52. Further, the court "refuse[d] to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment." *Id.* at 588-59, 615 S.E.2d at 49.

15. *Id.* at 588, 615 S.E.2d at 49.

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

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

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[Incompetence may also be inferred [from previous specific acts of careless or negligent conduct by (*state name of employee*)][18] [[or] from prior habits of carelessness or inattention on the part of (*state name of employee*) in a kind of work where careless or inattentive conduct is likely to result in injury.[19] However, evidence, if any, tending to show that (*state name of employee*) may have been careless or negligent in the past may not be considered by you in any way on the question of whether (*state name of employee*) was negligent on the occasion in question, but may only be considered in your determination of whether (*state name of employee*) was incompetent, and whether such incompetence was known or should have been known to the defendant.[20]]

Third, the plaintiff must prove that the defendant had either actual or constructive notice of (*state name of employee*)'s incompetence.[21] Actual notice means that prior[22] to the alleged act of (*state name of employee*) resulting in [injury] [damage] to the plaintiff, the defendant actually knew of (*state name of employee*)'s incompetence.

Constructive notice means that the defendant, in the exercise of reasonable care, should have known of (*state name of employee)*'s incompetence prior to the alleged act of

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

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

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

21. *See* n.9 *supra*.

22. *See* n.5 *supra.*

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(*state name of* employee) resulting in [injury] [damage] to the plaintiff.[23] Reasonable care is that degree of care in the [hiring] [supervision and oversight] of *(state name of employee))* that a reasonably careful and prudent employer in the same or similar circumstances as the defendant would have exercised.[24]

Fourth, the plaintiff must prove that (*state name of employee*)'s incompetence was [the] [a][25] proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause without which the [injury] [damage] would not have occurred and one which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.[26]

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

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23. *See Hogan*, 79 N.C. App. at 495, 340 S.E.2d at 124 (noting that "[t]he theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances."), and *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817, *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1971) (stating that "if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the [employee was incompetent], [the employer] may be held liable for the negligent acts of the [employee].").

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

25. *See* n.10 *supra.* This language must be modified accordingly if one of the alternatives cited in n.10 is selected.

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

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proximate cause of the plaintiff's [injury] [damage]. The plaintiff must prove only that (*state name of employee*)'s incompetence was a proximate cause.][27]

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 owed the plaintiff a duty of care, that *(state name of employee)* was incompetent, that, prior to the (*state name of employee*)'s act resulting in [injury] [damage] to the plaintiff, the defendant had either actual or constructive notice of this incompetence, and that this incompetence was [the] [a][28] proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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27. This language may be included depending upon the alternative instruction selected for the fourth element.

28. *See* n.10 *supra.* This language must be modified accordingly if one of the alternatives cited in n.10 is selected.

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