New and updated instructions in this 2024 edition of
North Carolina Pattern Jury Instructions for Civil Cases

This edition contains a new table of contents for the civil instructions, a number of replacement instructions for civil cases, and a new civil index. To update your printed edition, print and place the instructions listed below in the proper numerical sequence of your previous edition. 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.

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

This 2024 edition contains the following new instructions identified with an asterisk (*), and revised instructions:

102.20	Proximate Cause—Peculiar Susceptibility.
*102.22	Proximate Cause—Activation/Aggravation.
103.30	Agency Issue—Civil Conspiracy (One Defendant).
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*502.00	Contracts—Issue of Breach.
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*800.80	Invasion of Privacy—Use of Unmanned Aircraft System—Surveillance.
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Part IV. MISCELLANEOUS TORTS

102.20 PROXIMATE CAUSE—PECULIAR SUSCEPTIBILITY.

In deciding whether the [injury[1] to the plaintiff] [death of the decedent] was a reasonably foreseeable consequence of the defendant's negligence, you must determine whether such negligent conduct, under the same or similar circumstances, could reasonably have been expected to [injure] [cause the death of] a person of ordinary [physical] [mental] condition.[2] If so, the harmful consequences resulting from the defendant's negligence would be reasonably foreseeable and, therefore, would be a proximate cause of the [plaintiff's injury] [decedent's death]. Otherwise, the harmful consequences resulting from the defendant's negligence would not be reasonably foreseeable and, therefore, would not be a proximate cause of the [plaintiff's injury] [decedent's death].

NOTE WELL: Use the below parenthetical language when prior knowledge of susceptibility to injury is at issue.

(Furthermore, even if a person of ordinary [physical] [mental] condition would not be reasonably expected to [be injured] [die], you must determine whether the defendant had knowledge or a reason to know of the plaintiff's peculiar or abnormal [physical] [mental] condition.[3] If so, the harmful consequences resulting from the defendant's negligence would be reasonably foreseeable and, therefore, would be a proximate cause of the [plaintiff's injury] [decedent's death]. Under such circumstance(s), the defendant would be liable for all the harmful consequences which occur, even though these harmful consequences may be unusually extensive because of the peculiar or abnormal [physical] [mental] condition which [happens] [happened] to be present in the [plaintiff] [decedent].[4]

On the other hand, if you determine that the defendant did not have knowledge or a reason to know of the plaintiff's peculiar or abnormal [physical] [mental] condition, the harmful consequences resulting from the defendant's negligence would not be reasonably foreseeable and, therefore, would not be a proximate cause of the [plaintiff's injury] [decedent's death].)

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1. "Injury" includes all legally recognized forms of personal harm, including activation or reactivation of a disease or aggravation of an existing condition. *See* N.C.P.I.- Civil 102.22 (Proximate Cause – Activation/Aggravation).

2. *Hughes v. Webster*, 175 N.C. App. 726, 625 S.E.2d 177 (2006); *Potts v. Howser*, 274 N.C. 49, 53-54, 161 S.E.2d 737, 741 (1968); *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964); *Wyatt v. Gilmore*, 57 N.C. App. 57, 59-60, 290 S.E.2d 790, 791-92 (1982); *Lee v. Regan*, 47 N.C. App. 544, 550, 267 S.E.2d 909, 912, *cert. denied*, 301 N.C. 92, 273 S.E.2d 299 (1980); *Hinson v. Sparrow*, 25 N.C. App. 571, 573-74, 214 S.E.2d 198, 199-200 (1975); *Redding v. F. W. Woolworth Co.*, 9 N.C. App. 406, 409-10, 176 S.E.2d 383, 385 (1970).

3. The Court of Appeals described the impact of prior knowledge of susceptibility on the foreseeability standard as follows:

> Negligence is the failure to use due care under the circumstances. One of the circumstances in a particular case might be the known susceptibility to injury of a person to whom the duty of due care is owed. Obviously, in the exercise of due care one may not act toward a frail old lady in the same way one could act toward a robust young man. The duty owed, to exercise due care, is the same in each instance, but in fulfilling that duty the difference in circumstances requires a difference in conduct by the actor.

Hinson, 25 N.C. App. at 574, 214 S.E. 2d at 200. In such cases, the following supplement to the above charge may be used: "A negligent person is held responsible for knowing of the peculiar condition when, under the circumstances, [he] [she] should have known or anticipated it."

4. *Potts v. Howser*, 274 N.C. 49, 54, 161 S.E.2d 737, 742 (1968).

102.22 PROXIMATE CAUSE—ACTIVATION/AGGRAVATION.

The defendant is not liable for damages attributable solely to the pre-existing [physical] [mental] condition of the plaintiff.[1] Instead, the defendant is liable only to the extent that the defendant's wrongful act proximately and naturally [aggravated] [activated] the plaintiff's pre-existing [physical] [mental] condition.[2]

[When the result of the defendant's negligence is to activate a [physical] [mental] condition of the plaintiff [that was dormant] [to which the plaintiff is predisposed], the defendant is liable for the entire damages which result from the [[physical] [mental]] [[dormant] [pre-disposed]] condition becoming active.][3]

[When the defendant's negligence does not cause a [physical] [mental] condition of the plaintiff, but only aggravates and increases the severity of a condition existing at the time of the plaintiff's injury, the plaintiff's recovery in damages is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing [physical] [mental] condition, running its normal course, would itself have caused if there had been no aggravation by the defendant.][4]

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1. *Potts v. Howser*, 274 N.C. 49, 54, 161 S.E.2d 737, 742 (1968).

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4. *Potts v. Howser*, 274 N.C. 49, 54, 161 S.E.2d 737, 742 (1968).

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

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

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

[You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.][7]

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

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

[The plaintiff contends, and the defendant denies, that the defendant and (*name all alleged co-conspirators*) conspired to do a lawful act in an unlawful way. An act, while lawful in and of itself, may be done with an intent or purpose which makes it unlawful.[8] I instruct you, members of the jury, that (*state act or acts*) [is] [are] not, in and of [itself] [themselves], unlawful. However, if (*state act or acts*) [was] [were] done with the purpose or intent[9]

to (*state object of offense*), then while the act(s) may be lawful in and of [itself] [themselves], this purpose or intent would make [it] [them] unlawful.[10] Thus, if you have answered the (*state number*) issue "Yes" in favor of the plaintiff, you must consider whether the defendant conspired with (*name all alleged co-conspirators*) or any one or more of them to (*state act or acts*) with the purpose or intent to (*state object of offense*).]

On this issue the plaintiff has the burden of proof. This means that the plaintiff must prove, by the greater weight of the evidence,[11] the following [two] [three] things:

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

Second, that one or more of the parties to the agreement committed an overt act in furtherance of the aims of the agreement[12]

> *NOTE WELL: If the issue of whether a defendant has committed a wrongful act has previously been determined, then the third element, as to proximate cause, need not be given. If the issue of whether a defendant has committed a wrongful act has not previously been given, then the jury would be instructed on the third element, as bracketed below.*

[And third, that the act(s) committed in furtherance of the aims of the agreement proximately caused [injury] [damage] to the plaintiff.[13]]

I will now explain each of these requirements.

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

involved. The very word "conspiracy" means "together with someone else." In other words, a conspiracy is a kind of partnership or joint enterprise in which each member becomes the agent of every other member with respect to the common plan, and each member is held responsible for the acts of or statements made by any other member made or done in furtherance of the common plan.[14] The essence of a conspiracy is an unlawful combination to violate or to disregard the law.[15]

[And] Second, the plaintiff must prove that one or more of the parties to the agreement committed an overt act in furtherance of the aims of the agreement. An overt act is an act which could be neutral in its character, but which is evidence of affirmative action showing an intent to accomplish or further the objects of the alleged conspiracy. It is not necessary for the plaintiff to prove that all or any one of the aims of the agreement was accomplished.[16] The plaintiff must show, however, that one or more of the parties to the agreement performed at least one act in furtherance of the agreement.

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

A proximate cause is a real cause—a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result.]

There may be more than one proximate cause of [an injury] [damage]. Therefore, the party seeking damages need not prove that the overt act(s) [was] [were] the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the overt act(s) [was] [were] a proximate cause.

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

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

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

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

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

4. "Accurately speaking, there is no such thing as a civil action for conspiracy." *Reid v. Holden*, 242 N.C. 408, 414, 88 S.E.2d 125, 130 (1995). A cause of action for civil conspiracy "does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts of one may be admissible against all." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984).

5. The terms "overt act" and "wrongful act" are used interchangeably. *Compare Reid v. Holden*, 242 N.C. 408, 415, 88 S.E.2d 125, 130 (1995) ("To create civil liability for conspiracy there must have been an overt act . . . ."), *with Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950) ("To create civil liability for conspiracy, a wrongful act resulting in injury . . . must be done . . . .").

6. "A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963). Damages for which recovery may be sought are limited to those proximately caused by specific overt or wrongful acts done "as a part of and in furtherance of the common object." S*ee Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951) (damages must be those resulting from "acts so done").

7. If the issue of whether a defendant has committed a wrongful act has been earlier submitted to the jury, then this language would be inserted into the instruction.

8. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Valentine*, 357 N.C. 512, 522, 591 S.E.2d 846, 855 (2003) (quoting *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995)). Stated simply, "[t]he plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1904).

9. For an instruction on intent, see N.C.P.I.—Civil 101.46 (Definition of [Intent] [Intentionally]).

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

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

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

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

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

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

15. "If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of guilt of the other." *Newton v. Barth*, 284 N.C. App. 331, 343 788 S.E. 653, 663 (2016) (quoting *Curry v. Staley*, 6 N.C. App. 165, 169, 169 S.E.2d 522, 524 (1969)).

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

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

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

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

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

Direct evidence of an agreement may not be available, and therefore a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together, does not by itself establish the existence of a conspiracy. If they acted similarly but independently of one another, without any agreement among them, then there would not be a conspiracy.

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

Id.

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

103.31 AGENCY ISSUE—CIVIL CONSPIRACY (MULTIPLE DEFENDANTS).

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

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

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

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

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

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

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

[You will answer this issue only if you have answered (*state number*) issue "Yes" in favor of the plaintiff.][6]

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

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

[The plaintiff contends, and the defendants deny, that each defendant and (*name all alleged co-conspirators*) conspired to do a lawful act in an unlawful way. An act, while lawful in and of itself, may be done with an intent or purpose which makes it unlawful.[7] I instruct you, members of the jury, that (*state act or acts*) [is] [are] not, in and of [itself] [themselves], unlawful. However, if (*state act or acts*) [was] [were] done with the purpose or intent[8] to (*state object of offense*), then while the act(s) may be lawful in and of [itself] [themselves], this purpose or intent would make [it] [them] unlawful.[9] Thus, if you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then, as to each defendant, you must consider whether the (*name all alleged co-conspirators*) or any one or more of them conspired to (*state act or acts*) with the purpose or intent to (*state object of offense*).]

On this issue the plaintiff has the burden of proof. This means that the plaintiff must prove, by the greater weight of the evidence,[10] the following [two] [three] things:

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

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

NOTE WELL: If the issue of whether a defendant has committed a wrongful act has previously been determined, then the third element, as to proximate cause, need not be given. If the issue of whether a defendant has committed a wrongful act has not previously been given, then the jury would be instructed on the third element, as bracketed below.

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

I will now explain each of these requirements.

First, the plaintiff must prove that the defendant you are considering agreed with (*name all alleged co-conspirators*) or any one or more of them [to do an unlawful act] [to do a lawful act in an unlawful way]. Such an agreement is called a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. There can be no conspiracy unless more than one person is involved. The very word "conspiracy" means "together with someone else." In other words, a conspiracy is a kind of partnership or joint enterprise in which each member becomes the agent of every other member with respect to the common plan, and each member is held responsible for the acts of or statements made by any other member made or done in furtherance of the common plan.[13] The essence of a conspiracy is an unlawful combination to violate or to disregard the law.[14]

[And] Second, the plaintiff must prove that one or more of the parties to the agreement committed an overt act in furtherance of the aims of the agreement. An overt act is an act which could be neutral in its character, but which is evidence of affirmative action showing an intent to accomplish or further the object(s) of the alleged conspiracy. It is not necessary for the

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plaintiff to prove that all or any one of the aims of the agreement was accomplished.[15] Plaintiff must show, however, that one or more of the parties to the agreement performed at least one act in furtherance of the agreement.

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

A proximate cause is a real cause—a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the party seeking damages need not prove that the overt act(s) [was] [were] the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the overt act(s) [was] [were] a proximate cause.]

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

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

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

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

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

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

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

3. "Accurately speaking, there is no such thing as a civil action for conspiracy." *Reid v. Holden*, 242 N.C. 408, 414, 88 S.E.2d 125, 130 (1955). A cause of action for civil conspiracy "does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts of one may be admissible against all." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984).

4. The terms "overt act" and "wrongful act" are used interchangeably. Compare *Reid v. Holden*, 242 N.C. 408, 415, 88 S.E.2d 125, 130 (1995) ("To create civil liability for conspiracy there must have been an overt act . . . ."), with *Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950) ("To create civil liability for conspiracy, a wrongful act resulting in injury . . . must be done . . . .").

5. "A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963). Damages for which recovery may be sought are limited to those proximately caused by specific overt or wrongful acts done "as a part of and in furtherance of the common object." *See Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951) (damages must be those resulting from "acts so done").

6. If the issue of whether a defendant has committed a wrongful act has been earlier submitted to the jury, then this language would be inserted into the instruction.

7. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Valentine*, 357 N.C. 512, 522, 591 S.E.2d 846, 855 (2003) (quoting *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995)). Stated simply, "[t]he plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1904).

8. For an instruction on intent, see N.C.P.I.—Civil 101.46 (Definition of [Intent] [Intentionally]).

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

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

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

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

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

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

14. "If two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of guilt of the other." *Newton v. Barth*, 284 N.C. App. 331, 343 788 S.E. 653, 663 (2016) (quoting *Curry v. Staley*, 6 N.C. App. 165, 169, 169 S.E.2d 522, 524 (1969)).

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

> The basis of a conspiracy is an agreement or understanding between two or more persons. An agreement or understanding between two or more persons exists when they share a commitment to a common scheme. To establish the existence of a conspiracy, the evidence need not show that its members entered into any formal or written agreement. The agreement itself may have been entirely unspoken. A person can become a member without full knowledge

of all of the details of the conspiracy, the identity of all of its members, or the parts such members played in the charged conspiracy. The members of the conspiracy need not necessarily have met together, directly stated what their object or purpose was to one another, or stated the details or the means by which they would accomplish their purpose. To prove a conspiracy existed, the evidence must show that the alleged members of the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose.

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

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

Direct evidence of an agreement may not be available, and therefore a conspiracy also may be shown through circumstantial evidence. You may infer the existence of a conspiracy from the circumstances, including what you find the alleged members actually did and the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together, does not by itself establish the existence of a conspiracy. If they acted similarly but independently of one another, without any agreement among them, then there would not be a conspiracy.

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

Id.

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

502.00 CONTRACTS—ISSUE OF BREACH.

NOTE WELL: Use this instruction for breach when materiality is not at issue. See *N.C.P.I.—Civil 502.12 (Contracts—Issue of Breach—Materiality) for the issue of breach when materiality is at issue.*

The (*state number*) issue reads:

"Did the defendant breach the contract?"

(You will 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 plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant failed to [perform] [abide by] a term of the contract.[1]

In this case the plaintiff contends, and the defendant denies, that defendant failed to [perform] [abide by] a term of the contract [by] [in one or more of the following ways]:

(*Give the plaintiff's contention(s) by identifying each term which the plaintiff alleges has been breached by the defendant.*)

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract, 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. *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000).

502.03 CONTRACTS—ISSUE OF BREACH BY NON-PERFORMANCE.

The (*state number*) issue reads:

"Did the defendant breach the contract (by non-performance)[1]?"

(You will 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 plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the time had come for the defendant to [perform] [abide by] a material term of the contract. This means that, at the time of the alleged breach (*here select as appropriate*):

[the plaintiff and the defendant were to perform their respective obligations at the same time and the plaintiff was ready, willing and able to perform the plaintiff's obligation(s)][2]

[there were no conditions precedent to the defendant's obligation to perform]

[each condition precedent to the defendant's obligation to perform was satisfied]

[[the defendant] [defendant's agent] had prevented the plaintiff from performing a condition precedent to the defendant's obligation to perform][3]

[A condition precedent is a requirement that some act or event occur or not occur before a party to a contract becomes obligated to perform. A condition precedent may be [written] [oral] [implied from the circumstances]]

[*state any other condition which affects the defendant's obligation to perform as supported by the evidence, e.g., condition subsequent*[4]]

Second, that the defendant failed to [perform] [abide by] a material term of the contract.[5] A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would have caused one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material. A party's failure to [perform] [abide by] a term that is not material is still a breach of the contract, but a non-material breach does not excuse either party from performance of the remaining terms of the contract.[6] In determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[*state other factors supported by the evidence*].

In this case the plaintiff contends, and the defendant denies, that (*here select as appropriate*):

[the plaintiff was ready, willing and able to perform the plaintiff’s obligations]

[there were no conditions precedent to the defendant's obligation to perform]

[[the condition precedent] [each condition precedent] to the defendant's obligation to perform was satisfied] [as follows] [in one or more of the

following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been satisfied*)].

[[the defendant] [defendant's agent] had prevented the plaintiff from performing a condition precedent to the defendant's obligation to perform] [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been thwarted*)].

[[the defendant] [defendant's agent] had it within [his] [her] [its] power or control to perform a condition precedent to the defendant's obligation to perform but failed to do so [without reasonable excuse] [in bad faith] [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each condition which the plaintiff alleges has been sabotaged*)].

[*state contention regarding satisfaction of any other condition to the defendant's obligation to perform, e.g., condition subsequent*].

The plaintiff further contends, and the defendant denies, that the defendant failed to [perform] [abide by] a material term of the contract [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each material term which the plaintiff alleges has been breached*).

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 time had come for the defendant to [perform] [abide by] a material term of the contract, and that the defendant failed to [perform] [abide by] a material term of the contract, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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1. Specify that the basis for breach is non-performance when the jury is also instructed on breach by repudiation (N.C.P.I.—Civil 502.05—Contracts—Issue of Breach by Repudiation) or by prevention (N.C.P.I.—Civil 502.10Contracts—Issue of Breach by Prevention).

2. *Ball v. Maynard*, 184 N.C. App. 99, 106–07, 645 S.E.2d 890, 896 (2007) (quoting *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981)).

3. *Propst Constr. Co. v. N.C. Dep't of Transp.*, 56 N.C. App. 759, 762, 290 S.E.2d 387, 388–89 (1982) ("The doctrine of prevention is that 'one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.'" (quoting *Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906))). *See also Cater v. Baker,* 172 N.C. App. 441, 446, 617 S.E.2d 113, 117 (2005) (applying the "doctrine of prevention").

4. *Henderson & Corbin, Inc. v. West Carteret Water Corp., Inc.*, 107 N.C. App. 740, 743–44, 421 S.E.2d 792, 794 (1992) ("[A] 'condition subsequent is any event the existence of which, by agreement of the parties, operates to discharge a duty of performance that has arisen.'" (quoting John D. Calamari & Joseph M. Perillo, Contracts § 11–7 (3d ed. 1987))). The existence of a condition subsequent depends upon the intention of the parties in light of the circumstances of the case, the nature of the contract, the relation of the parties, and other admissible evidence that aids the court in determining the intention of the parties. *Harris-Teeter Supermarkets, Inc. v. Hampton*, 76 N.C. App. 649, 652, 334 S.E. 2d 81, 83 (1985). Although conditions subsequent do not require technical words, they must be clearly expressed, as they are not favored in law. *Hinton v. Vinson*, 180 N.C. 393, 397, 104 S.E. 897, 899 (1920); *see also Moore v. Tilley*, 15 N.C. App. 378, 381, 190 S.E.2d 243, 246 (1972) ("[C]onditions subsequent are not favored in the law and are strictly construed against forfeiture.").

5. *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987) ("The general rule governing bilateral contracts requires that if either party commits a material breach of the contract, the other party should be excused from the obligation to further perform.").

6. *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987).

502.05 CONTRACTS—ISSUE OF BREACH BY REPUDIATION.

The (*state number*) issue reads:

"Did the defendant breach the contract (by repudiation)?"[1]

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

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

First, that before the time arrived for the defendant to perform, the defendant repudiated [the defendant's entire obligation under the contract][2] [the whole contract][3] [a covenant going to the whole contract].[4] A party to a contract repudiates[5] [his] [her] [its] obligation when that party expresses, by words or conduct,[6] a positive, distinct, unequivocal and absolute [refusal] [inability] to perform.

And second, that at the time of the defendant's repudiation,

[the plaintiff was ready, willing and able to perform the plaintiff's obligations as agreed and would have done so but for the repudiation by the defendant][7]

[the plaintiff had performed the plaintiff's obligations as agreed][8]

[the plaintiff had partially performed the plaintiff's obligations as agreed, and was ready, willing and able to perform the plaintiff's remaining obligations as agreed].[9]

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

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

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

2. An installment contract invokes discrete and separate obligations in an agreement. *See* N.C.G.S. § 25-2-612. Nonetheless, the absolute repudiation of all future obligations in an installment contract triggers the statute of limitations upon the non-breaching party's discovery of future non-performance, rather than when the performance would have become due. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 7, 802 S.E.2d 888, 893 (2017) (citation omitted).

3. "For repudiation to result in a breach of contract, 'the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.'" *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d 232, 236 (2010) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)).

4. "For repudiation to result in a breach of contract, 'the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.'" *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d 232, 236 (2010) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)).

5. *See Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) ("Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises.") (citations omitted); *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 700 S.E.2d 232 (2010). Sometimes this form of breach is referred to as "anticipatory breach," *see Millis*, 86 N.C. App. at 510, 358 S.E.2d at 569, or "breach by renunciation," *see Edwards v. Proctor*, 173 N.C. at 45, 91 S.E. at 585.

6. *See Edwards v. Proctor*, 173 N.C. 41, 46, 91 S.E. 584, 585 (1917); *Gordon v. Howard*, 94 N.C. App. 149, 152, 379 S.E.2d 674, 676 (1989); *see also Phoenix Ltd. P'ship v. Simpson*, 201 N.C. App. 493, 500, 688 S.E.2d 717, 722 (2009) (standing for the proposition that repudiation may be inferred from conduct that naturally leads another person to believe that the repudiating party refuses or is unable to perform on the contract).

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

8. *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987).

9. *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 511, 358 S.E.2d 566, 569 (1987).

502.10 CONTRACTS—ISSUE OF BREACH BY PREVENTION.

The (*state number*) issue reads:

"Did the defendant breach the contract (by preventing the plaintiff from being able to perform the plaintiff's obligations)[1]?"

(You will 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 plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the defendant knowingly [prevented] [hindered] [made more costly] the plaintiff's [performance of] [ability to abide by] a material term of the contract.[2]

(A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would have caused one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material. In determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

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

And Second, that, at the time the defendant engaged in the defendant's conduct, the plaintiff was willing to perform the plaintiff's obligations as agreed and would have done so but for the conduct of the defendant.

In this case the plaintiff contends, and the defendant denies, that the defendant prevented the plaintiff from being able to perform the plaintiff's obligations [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by identifying each material term which the defendant's conduct allegedly prevented the plaintiff from performing.*)

The plaintiff further contends, and the defendant denies, that the plaintiff was willing to perform the plaintiff's obligations as agreed and would have done so but for the conduct of the defendant.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract (by preventing the plaintiff from being able to perform the plaintiff's obligations), 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. Specify that the basis for breach is prevention when the jury is also instructed on breach by non-performance (N.C.P.I.—Civil 502.00) or by repudiation (N.C.P.I.—Civil 502.05).

2. *Bullock v. Tucker*, 262 N.C. App. 511, 523–24, 822 S.E. 2d 654, 662 (2018).

502.12 CONTRACTS—ISSUE OF BREACH—MATERIALITY.[1]

NOTE WELL: Use this instruction for breach when materiality is at issue. See *N.C.P.I.—Civil 502.00 (Contracts—Issue of Breach) for the issue of breach when materiality is not at issue.*

The (*state number*) issue reads:

"Did the defendant breach a material term of the contract?"

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

In this case the plaintiff contends [and the defendant denies] that (*identify each alleged material term*) was a material term of the contract. The plaintiff[2] bears the burden of proving, by the greater weight of the evidence, that (*identify each alleged material term*) was material to the contract.

A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would have caused one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material.

In determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[*state other factors supported by the evidence*].

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In this case the plaintiff contends, and the defendant denies, that defendant failed to [perform] [abide by] a material term of the contract [by] [in one or more of the following ways]:

(*Read all contention(s) of breach*.)

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

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

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1. The issue of materiality may be raised by either party and, in a multiple breach situation, could affect some breaches but not others. Therefore, in such cases, the judge should consider modifying this instruction to fit the needs of the case.

2. Although the case law is largely silent on who must prove that a contract term is material, it appears that the burden lies with the party who must prove materiality as an essential component of the relief he or she is seeking, either on a claim (plaintiff) or as an affirmative defense (defendant).

503.06 CONTRACTS—ISSUE OF COMMON LAW REMEDY—STATEMENT OF DAMAGES ISSUE.

NOTE WELL: This is the first component of the compensatory damages series which runs through N.C.P.I.—Civil 503.79 (Contracts—Issue of Common Law Remedy—Damages Mandate). Select direct, incidental and consequential damages instructions as appropriate.

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for breach of contract?"

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 damage resulting from the breach.[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 sustained as a result of the breach. Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future][3] economic injury resulting from a breach of contract.

A party damaged by a breach of contract is entitled to be placed, insofar as this can be done by money, in the same position that party would have occupied if there had been no breach of the contract.[4]

In determining the amount, if any, you award the plaintiff, you will consider the evidence you have heard as to (each of the following types of damages):

[Direct damages]

[Incidental damages]

[Consequential damages]

[state any other type of damages supported by the evidence].

The total of all damages are to be awarded in one lump sum.

I will now explain the law of damages as it related to each of these.

[Direct damages are the economic losses that usually or customarily result[5] from a breach of contract and that might accrue to any person similarly injured.[6]]

NOTE WELL: Definitions for each type of damages are provided elsewhere in these Instructions.

- *As to direct damages, consider substituting or supplementing the above definition with a more specific definition based on one or more of the direct damages instructions at N.C.P.I.—Civil 503.12 (Contracts—Issue of Common Law Remedy—Direct Damages—Buyer's Measure of Recovery for a Seller's Breach of Contract to Convey Real Property) through N.C.P.I.—Civil 503.54 (Contracts—Issue of Common Law Remedy—Direct Damages—Employer's Measure of Recovery for Employee's Wrongful Termination of an Employment Contract).*
- *As to incidental damages, see N.C.P.I.—Civil 503.70 (Contracts—Issue of Common Law Remedy—Incidental Damages).*
- *As to consequential damages, see N.C.P.I.—Civil 503.73 (Contracts—Issue of Common Law Remedy—Consequential Damages).*

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

2. Nominal damages consist of some trifling amount and are recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained.

Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation. *Hairston v. Atlantic Greyhound Corporation*, 220 N.C. 642, 644, 18 S.E.2d 166, 168 (1942) (quoting *Hutton & Bourbonnais v. Cook*, 173 N.C. 496, 92 S.E. 355 (1917)).

3. *Wilkinson v. Dunbar*, 149 N.C. 20, 25, 62 S.E. 748, 751 (1908) (recovery for both present and prospective damages is permissible).

4. *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc*., 143 N.C. App. 1, 9, 545 S.E.2d 745, 750 (2001) (quoting *Perfecting Serv. Co. v. Product Dev. & Sales Co*., 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963)).

5. *Maynard v. Crook*, 289 N.C. App. 357, 890 S.E.2d 164 (2023) ("[G]eneral damages are such as might accrue to any person similarly injured." (quoting *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945)).

6. *Stanback v. Stanback*, 297 N.C. 181, 187, 254 S.E.2d 611, 616 (1979) ("In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.").

503.79 CONTRACTS—ISSUE OF COMMON LAW REMEDY—DAMAGES MANDATE.

The plaintiff's damages are to be reasonably determined from the evidence presented.

The plaintiff is not required to prove with mathematical certainty the extent of the financial injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. However, an award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. You may not award any damages based upon mere speculation or conjecture.[1] [Additionally, the plaintiff is not entitled to recover twice for the same element of damages.]

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 the amount of damages sustained by the plaintiff by reason of the defendant's breach of contract, 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 amount such as "One Dollar" in the blank space provided.

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1. "[A] party seeking recovery for losses occasioned by another's breach of contract need not prove the amount of his prospective damages with absolute certainty; a reasonable showing will suffice . . . . Substantial damages may be recovered, though plaintiff can only give his loss proximately." *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (quoting *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 287, 258 S.E.2d 778, 785 (1979)).

N.C.P.I.—Civil 800.80
INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—SURVEILLANCE
GENERAL CIVIL VOLUME
MARCH 2024
N.C.G.S. § 15A-300.1

800.80 INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—SURVEILLANCE.

The (*state number*) issue reads:

"Did the defendant use an unmanned aircraft system to conduct surveillance of the [plaintiff] [a dwelling occupied by the plaintiff and the dwelling's curtilage] [the private real property of the plaintiff] without the plaintiff's consent?"

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

First, that the defendant used an unmanned aircraft system. [An unmanned aircraft system is an aircraft that is operated without the possibility of human intervention from within or on the aircraft as well as its associated elements. These elements include communication links and components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.][1] [A drone is an unmanned aircraft system].

Second, that the defendant used an unmanned aircraft system to conduct surveillance[2] of [the plaintiff] [a dwelling occupied by the plaintiff and the dwelling's curtilage] [the private real property of the plaintiff].

Third, that the surveillance by the defendant was without the consent of [the plaintiff] [the owner of the real property] [the easement holder of the real property] [the lessee of the real property].

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 used an unmanned aircraft system to conduct surveillance of the [plaintiff] [a dwelling occupied by the plaintiff and the dwelling's curtilage]

[the private real property of the plaintiff] without the consent of [the plaintiff] [the owner of the real property] [the easement holder of the real property] [the lessee of the real 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. N.C.G.S. § 15A-300.1(4) (defining unmanned aircraft and unmanned aircraft system).

2. N.C.G.S. § 15A-300.1 does not define surveillance.

800.81 INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—PHOTOGRAPHS.

The (*state number*) issue reads:

"Did the defendant use an unmanned aircraft system to photograph the plaintiff without the plaintiff's consent for the purpose of publishing or otherwise publicly disseminating the photograph(s)?"

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

First, that the defendant used an unmanned aircraft system. [An unmanned aircraft system is an aircraft that is operated without the possibility of human intervention from within or on the aircraft as well as its associated elements. These elements include communication links and components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.][1] [A drone is an unmanned aircraft system].

Second, that the defendant used an unmanned aircraft system to take [a] photograph(s) of the plaintiff.

Third, that the photograph(s) taken of the plaintiff [was] [were] without the plaintiff's consent.

Fourth, that the defendant's purpose in taking the photograph(s) was for publishing or otherwise publicly disseminating the photograph(s).[2]

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 used an unmanned aircraft system to photograph the plaintiff without the plaintiff's consent for the purpose of publishing or otherwise

disseminating the photograph(s), 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. N.C.G.S. § 15A-300.1(4) (defining unmanned aircraft and unmanned aircraft system).

2. N.C.G.S. § 15A-300.1(b)(2) does not apply to photographs taken for newsgathering, for newsworthy events, or in events or places to which the general public is invited. If facts supporting any of these situations are pled and evidence supporting these situations is presented at trial, then there may be an additional component to the fourth element for the jury to consider, or if the trial judge determines this is an affirmative defense, an additional issue for jury to consider upon which the defendant has the burden of proof.

800.82 INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—NUMBER OF PHOTOGRAPHS.

The (*state number*) issue reads:

"How many photographs[1] of the plaintiff were published or otherwise publicly disseminated?"[2]

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then you must determine how many photographs of the plaintiff taken by the defendant with an unmanned aircraft system without the plaintiff's consent were published or otherwise publicly disseminated. 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 number of photographs of the plaintiff that were published or otherwise publicly disseminated. These photographs must be photographs that were taken by the defendant, with an unmanned aircraft system, without the plaintiff's consent, and for the purpose of publication or other public dissemination.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, it would be your duty to determine the number of photographs of the plaintiff that were published or otherwise publicly disseminated and write that number in the blank space provided.

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1. N.C.G.S. § 15A-300.1(e) encapsulates videos, in addition to photographs, for the first time within this claim for relief. As the circumstances may require, revise this instruction accordingly.

2. This issue is meant to aid the trial judge in calculating liquidated damages as set forth in N.C.G.S. § 15A-300.1(e).

N.C.P.I.—Civil 800.83
INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—ACTUAL DAMAGES.
GENERAL CIVIL VOLUME
MAY 2024
N.C.G.S. § 15A-300.1

800.83 INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—ACTUAL DAMAGES.

NOTE WELL: If the plaintiff brings a claim based on surveillance (section 15A-300.1(b)(1)) and publishing or otherwise publicly disseminating photographs or videos (section 15A-300.1(b)(2)), the judge may consider a special interrogatory to have the jury separate damages for each basis.

NOTE WELL: If, prior to submission to the jury, the plaintiff elects to recover five thousand dollars ($5,000) for each photograph that is published or otherwise disseminated pursuant to this statute, then this instruction need not be given. However, the plaintiff may seek both liquidated damages and actual damages, and defer election until after the jury's verdict. The jury should not be instructed on the amount of liquidated damages.[1]

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for the unauthorized use of an unmanned aircraft system to [surveil] [photograph] the plaintiff?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff.

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 caused by the wrongful conduct 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 other 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.

(Here give appropriate instructions as to the type of damage claimed if supported by the evidence, e.g.*,*

N.C.P.I.—Civil—810.04 ("Personal Injury Damages—Medical Expenses"),

N.C.P.I.—Civil—810.06 ("Personal Injury Damages—Loss of Earnings"),

N.C.P.I.—Civil—810.08 ("Personal Injury Damages—Pain and Suffering"), etc.)

I instruct you that if you reach this issue, your decision must be based on the evidence and the rules of law I have given you with respect to the measure of damages. You are not required to accept the amount of damages suggested by the parties or their attorneys. Your award must be fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

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 wrongful conduct 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.

N.C.P.I.—Civil 800.83
INVASION OF PRIVACY—USE OF UNMANNED AIRCRAFT SYSTEM—ACTUAL DAMAGES.
GENERAL CIVIL VOLUME
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N.C.G.S. § 15A-300.1
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1. N.C.G.S. § 15A-300.1(e) provides that a plaintiff may elect, in lieu of actual damages, to recover five thousand dollars ($5,000) for each photograph or video that is published or otherwise disseminated pursuant to this statute, as well as reasonable costs and attorneys' fees and injunctive or other relief as determined by the court. For the instruction used to calculate liquidated damages, see N.C.P.I.—Civil 800.82 (Invasion of Privacy—Use of Unmanned Aircraft System—Number of Photographs).

840.15 EASEMENT BY PLAT.

The (state number) issue reads:

"Does the [plaintiff] [defendant] have an easement [on] [over] [across] [under] the land of the [defendant] [plaintiff] as shown on the plat recorded in Book (*state book number*) Page (*state page number*) of the (*state county*) Registry?"

(An easement is a right to make (a) specific use(s) of land owned by another.[1] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[2] The owner of land burdened by an easement continues to have all of the rights of a landowner which are not inconsistent with the easement.[3])

In this case, the (*party attempting to prove the easement by plat*) claims the right to an easement arising from (*describe recording*) in Book (*state book number*) Page (*state page number*). An easement created in such manner is called an easement by plat.[4]

On this issue the burden of proof is on the (*party attempting to prove the easement by plat*). This means that the (*party attempting to prove the easement by plat*) must prove, by the greater weight of the evidence, two things:

First, that [developer] [one or more previous owners in the chain of title] had the intent to share use of the land in certain specific respects with owners of other property shown on the plat.[5] Such intention may be shown by deed, by words, or by acts.[6] The evidence in support of the intent of a [developer] [and] [or] [one or more previous owners in the chain of title] to create an easement by plat should be clear and unmistakable in purpose and decisive in character to have that effect.[7]

Second, that a deed in the (*party attempting to prove the easement by plat*)'s chain of title must include reference to the recorded plat claimed to have given rise to the easement[8] and the easement areas must be sufficiently identified on the recorded plat.[9]

Finally, as to the (*state number*) issue on which the (*party attempting to prove the easement by plat*) has the burden of proof, if you find by the greater weight of the evidence that the [developer] [one or more previous owners in the chain of title] had the intent to share use of the land in certain specific respects with owners of other property shown on the plat, such intention shown by clear and unmistakable evidence to that effect, and that the recorded plat claimed to have been an expression of that intent was referenced by sufficient identification in a deed within the (*party attempting to prove the easement by plat*)'s chain of title, then it would be your duty to answer this issue "Yes" in favor of the (*party attempting to prove the easement by plat*).

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 (*party refuting easement by plat*).

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1. *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972).

2. *Thomas v. Morris*, 190 N.C. 244, 244, 249–50, 129 S.E. 623, 626 (1925).

3. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960); *see also Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 57, 16 S.E.2d 453, 454 (1941); *Duke Power Co. v. Rogers*, 271 N.C. 318, 320, 156 S.E.2d 244, 246 (1967).

4. *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35–36 (1964) (noting North Carolina's recognition of appurtenant easements by use of a plat map); *see also Cape Homeowners Ass'n, Inc. v. S. Destiny, LLC,* 284 N.C. App. 237, 248, 876 S.E.2d 568, 575 (2022); *Home Realty Co. & Insurance Agency v. Red Fox Country Club Owners Ass'n*, 274 N.C. App. 258, 277–78, 852 S.E.2d 413, 426–27 (2020); *Sauls v. Barbour*, 273 N.C. App. 325, 333, 848 S.E.2d 292, 299 (2020); *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 392, 802 S.E.2d 908, 914 (2017); *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 162, 418 S.E.2d 841, 846 (1992).

5. *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 392, 802 S.E.2d 908, 914 (2017); *Harry v. Crescent Res., Inc*., 136 N.C. App. 71, 81, 523 S.E.2d 118, 124 (1999).

6. *See Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007).

7. *See Hovey v. Sand Dollar Shores Homeowner's Ass'n, Inc*., 276 N.C. App. 281, 287, 857 S.E.2d 358, 363 (2021).

8. *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 393, 802 S.E.2d 908, 914 (2017).

9. *Cape Homeowners Ass'n, Inc. v. S. Destiny, LLC,* 284 N.C. App. 237, 248, 876 S.E.2d 568, 575 (2022).