805.55 DUTY OF OWNER TO LAWFUL VISITOR.

The (*state number*) issue reads:

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

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

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

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

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

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

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's

negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

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

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

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

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

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

[An [owner] [person in possession] is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the [owner] [person in possession] knows or, in the exercise of ordinary care, should have known. (A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person.) However, an [owner] [person in possession] does not have to warn about concealed conditions of which that person has no knowledge and could not have learned by reasonable inspection and supervision.[6] An [owner] [person in possession] is held responsible for knowing of any condition which a reasonable inspection and supervision of the premises would reveal and is also responsible for knowing of any hidden or concealed dangerous condition which that person’s own conduct (or that of agents or employees) has created.][7]

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

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

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

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

[Usually, the [owner] [person in possession] does not have a duty to protect lawful visitors from the criminal acts of others on the [owner's] [person in possession's] premises.[12] But when, in the exercise of reasonable care, the [owner] [person in possession] would have realized that criminal acts of others on the premises were foreseeable, the [owner] [person in possession] has a duty to provide adequate security measures to protect lawful visitors.[13] A breach of this duty is negligence. To determine whether criminal acts of others on the [owner's] [person in possession's] premises were foreseeable, you should consider the evidence, if any, of the amount of prior criminal activity, the type of that prior criminal activity and the location of that prior criminal activity with respect to the premises.[13]]

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

plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

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

[2]. Give only where there is a preliminary issue as to whether the plaintiff was a lawful visitor or a trespasser. *See* N.C.P.I.—Civil 805.50 ("Status of Party—Lawful Visitor or Trespasser").

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

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

[5]. Note, however, that the common law rule is modified by N.C.G.S. § 38A-4 as to all causes of action arising after October 1, 1995, in instances where the landowner directly or indirectly invites or permits a person to use land without charge (§ 38A-2(1), (3)) for education (§ 38A-2(2)) or recreational (§ 38A-2(5)) purposes. This statute does not affect the doctrine of attractive nuisance, *see* N.C.P.I.-Civil 805.65A ("Duty of Owner to Child Trespasser—Attractive Nuisance"), nor does it abrogate the landowner's responsibility to inform direct lawful visitors of artificial or unusual hazards of which the owner is aware.

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

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

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

[8]. *Long v. Methodist Home*, 281 N.C. 137, 140, 187 S.E.2d 718, 720 (1972); *Gaskill v. Great Atl. & Pac. Tea Co.*, 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

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

[10]. *Long v. Methodist Home*, 281 N.C. 137, 139, 187 S.E.2d 718, 720 (1972).

NOTE WELL: According to North Carolina's "Baseball Rule," a baseball field operator is shielded from liability related to a "foul ball" injury, "even when a patron is struck in an unusual way by a batted ball, so long as the operator provides a screened section." Hobby v. City of Durham, 152 N.C. App. 234, 236–37, 569 S.E.2d 1, 2 (2002). The rule is predicated upon the notion that "[s]pectator[s], with ordinary knowledge of the game of baseball…accept[] the common hazards incident to the game" and otherwise share an equal awareness of potential injury with the field operator. Erickson v. Lexington Baseball Club, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951). Despite the arguable changes to the American sporting landscape and popular culture, North Carolina courts have preserved the rule. Mills v. The Durham Bulls Baseball Club, Inc., 275 N.C. App. 618, 625, 854 S.E.2d 126, 132 (2020).

[11]. *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

[12]. *See Tise v. Yates Constr. Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997); *Stojanik v. R.E.A.C.H.*, 193 N.C. App. 585, 589, 668 S.E.2d 786, 789 (2008).

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

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