805.67 DUTY OF CITY OR COUNTY TO USERS OF PUBLIC WAYS.

This issue reads:

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

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

The law requires [cities] [counties] to keep their [streets] [sidewalks] [alleys] [bridges] [public ways] in proper repair, open for travel, and free from unnecessary obstructions.[1] This means that every [city] [county] has a duty to exercise ordinary care to maintain its [streets] [sidewalks] [alleys] [bridges] [(*name other public ways*)] in a reasonably safe condition for all who use them in a proper manner.[2] A breach of this duty is negligence.

In order to prevail on this issue, the plaintiff must prove, by the greater weight of the evidence, the following six things:

First, that (*name street, sidewalk, alley, bridge or other public way*) is a [street] [sidewalk] [alley] [bridge] [public way] which the [city] [county] is responsible for maintaining.

Second, that there was a dangerous condition on the [street] [sidewalk] [alley] [bridge] [public way]. The law does not require a [city] [county] to maintain the surfaces of its public ways in a perfectly smooth, even condition and free from every possible obstruction to mere convenient travel.[3] Slight unevenness, depressions, differences in grade, deviations in elevations and other immaterial obstructions or trivial defects which are not naturally dangerous will not render a [city] [county] liable for [injury] [damage] caused by these conditions.[4] The condition

must be material or dangerous enough that injury to travelers using its public way in a proper manner is reasonably foreseeable.[5]

Third, that the [city] [county] knew or, in the exercise of ordinary care, should have known of the existence of the dangerous condition.[6] Actual knowledge is not required. It is sufficient if the [city] [county], in the exercise of ordinary care, should have discovered the existence of the dangerous condition.

Fourth, that the [city] [county] knew or, in the exercise of ordinary care, should have known of the existence of the dangerous condition sufficiently in advance of the occurrence of plaintiff's [injury] [damage] to give the [city] [county] a reasonable opportunity to remedy it or to guard against [injury] [damage] from it.[7]

Fifth, that under the circumstances known or which, in the exercise of ordinary care, should have been known to it, the [city] [county] did not use ordinary care to repair the dangerous condition or to guard against [injury] [damage] from it.

Sixth, that the [city's] [county's] failure to use ordinary care under the circumstances was a proximate cause of plaintiff's [injury] [damage].[8] 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 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 respects:

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

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

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

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a 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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1. "City" is interchangeable with the terms "town" and "village." *See* N.C.G.S. § 160A-1(2). The term public way includes all "public streets, sidewalks, alleys, bridges and other ways of public passage." N.C.G.S. § 160A-296(a). Thus, the duty of a municipality extends to places where public ingress and egress is permitted, such as certain public buildings. It does not include, however, any streets or bridges under the authority and control of the Board of Transportation. N.C.G.S. § 160A-297(a). *Matternes v. City of Winston-Salem*, 286 N.C. 1, 10, 209 S.E.2d 481, 486 (1974); *Shapiro v. Motor Co.*, 38 N.C. App. 658, 662, 248 S.E.2d 868, 870 (1978). *See generally*, Ferrell, *Civil Liability of North Carolina Cities and Towns for Personal Injury and Property Damage Arising from the Construction, Maintenance, and Repair of Public Streets*, 7 *Wake Forest L. Rev.* 143 (1971). Furthermore, the liability of community colleges and public school systems is curtailed by the doctrine of governmental immunity. *See* N.C.G.S. § 115D-24 and § 115C-524 regarding waiver of immunity. *See also*, Patti O. Harper, *Statutory Waiver of Municipal Immunity Upon Purchase of Liability Issuance in North Carolina and the Municipal Liability Crisis*, 4 *Campbell L. Rev.* 41 (1981) (discussing waiver of municipal immunity).

Unless immune from suit, the same standard may be applicable to county facilities. "The liability of a county for injuries sustained by a pedestrian, falling upon a public walk within its courthouse grounds, would be no more extensive than that of a city to a pedestrian falling under similar circumstances upon a public sidewalk owned and maintained by the city." *Cook v. County of Burke*, 272 N.C. 94, 96, 157 S.E.2d 611, 613(1967) (*per curiam*).

2. This is a positive duty. *Hunt v. High Point*, 226 N.C. 74, 76, 36 S.E.2d 694, 695 (1946); *Stancill v. Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976). Liability is imposed upon a municipality, therefore, when it fails to exercise "ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who use them in

a proper manner." *Mosseller v. Asheville*, 267 N.C. 104, 108, 147 S.E.2d 558, 561 (1966) (quoting *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960)).

3. *Gower v. Raleigh*, 270 N.C. 149, 151, 153 S.E.2d 857, 859 (1967) (*per curiam*); *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960); *Joyce v. High Point*, 30 N.C. App. 346, 350, 226 S.E.2d 856, 858 (1976). "A municipality is not an insurer of the safety of travellers on its streets and sidewalks." *Smith*, 252 N.C. at 318, 113 S.E.2d at 559. "The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets [or sidewalks]." *Smith*, 252 N.C. at 318, 113 S.E.2d at 559.

4. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Watkins v. Raleigh*, 214 N.C. 644, 647, 200 S.E. 424, 426 (1939); *Houston v. Monroe*, 213 N.C. 788, 790-91, 197 S.E. 571, 572 (1938).

5. *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960); *Rogers v. Asheville*, 14 N.C. App. 514, 517-18, 188 S.E.2d 656, 657-58 (1972).

6. It is not enough that the plaintiff shows a defect in the street or sidewalk and that the plaintiff was injured. The complaining party "must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care." *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960). Actual notice is notice that "brings the knowledge of a fact directly home to the party." *Phillips v. N.C. DOT*, 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (quoting *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004)). Knowledge through constructive notice is established by either "direct evidence of the duration of the dangerous condition" or "circumstantial evidence . . . that the dangerous condition existed for some time." *Hicks v. KMD Inv. Sols., LLC*, 276 N.C. App. 78, 85, 855 S.E.2d 514, 520 (2021) (quoting *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000)).

7. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787–88 (1967); *Rogers v. Asheville*, 14 N.C. App. 514, 518, 188 S.E.2d 656, 658 (1972) (quoting *Waters*, 270 N.C. at 48, 153 S.E.2d at 787).

8. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Mosseller v. Asheville*, 267 N.C. 104, 108, 147 S.E.2d 558, 561 (1966); *Rogers v. Asheville*, 14 N.C. App. 514, 518, 188 S.E.2d 656, 658 (1972) (quoting *Waters*, 270 N.C. at 48, 153 S.E.2d at 787).