

640.40 EMPLOYMENT RELATIONSHIP - VICARIOUS LIABILITY OF
EMPLOYER FOR CO-WORKER TORTS.¹

This issue reads:

"[Was] [Were] the act(s) of (*name co-worker(s)*) [expressly authorized by the defendant employer] [committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business] [ratified by the defendant employer]?"²

You are to answer this issue only if you answer the (*state number*) issue 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, [the following] [one of the following]

[That the act(s) of (*name co-worker(s)*) [was] [were] expressly authorized by the defendant employer. (An act is expressly authorized when it has been approved orally or in writing.)]

[That the act(s) of (*name co-worker(s)*) [was] [were] committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business. (An employer is not responsible for the acts of an employee who departs from *his* duties to accomplish a purpose of *his* own which is not incidental to the work *he* is employed to do.)³]

[That the act(s) of (*name co-worker(s)*) [was] [were] ratified by the defendant employer. (An employer ratifies an act when all material facts and circumstances concerning the act become known to a [manager] [person with authority to act on behalf of the employer] who, by words or conduct, indicates approval of or acquiescence in such act.)⁴]

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 act(s) of (*name co-worker(s)*) [was] [were] expressly authorized by the defendant

employer] [the act(s) of (*name co-worker(s)*) [was] [were] committed within the scope of [*his*] [their] employment and in furtherance of the defendant employer's business] [the act(s) of (*name co-worker(s)*) [was] [were] ratified by the defendant employer], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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

¹ This instruction is intended to cover an employer's respondeat superior liability for a non-physical tort (most often intentional infliction of emotional distress) committed by one co-worker against another. The essence of a non-physical tort is that the injury caused is non-physical in nature. See *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 489, 340 S.E.2d 116, 120, cert. denied, 317 N.C. 334, 346 S.E.2d 140 (1986); *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987) and *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989).

² *Hogan, supra*, 79 N.C. App. at 491, 340 S.E.2d at 122.

³ *Wegner v. Delicatessen*, 270 N.C. 62, 66-67, 153 S.E.2d 804, 808 (1967).

⁴ *Hogan, supra*, 79 N.C. App. at 491, 340 S.E.2d at 122.