809.80 MEDICAL NEGLIGENCE - INSTITUTIONAL HEALTH CARE PROVIDER'S LIABILITY FOR AGENTS; EXISTENCE OF AGENCY[1].

The (*state number*) issue reads:

"Was the (*name health care provider*) an agent[2] of the defendant and acting within the course and scope of *his* agency at the time the (*describe health care service*) was performed?"

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 (*describe health care provider*) was an agent of the defendant and acting within the course and scope of *his* agency at the time the (*describe health care service*) was performed.

The (*name health care provider*) would be an agent of the defendant and acting within the course and scope of *his* agency if, at the time the (*describe health care service*) was performed, *he* was employed by the defendant[3] and was performing some act which the general course and scope of *his* employment called for *him* to perform [*describe attributes of other agency relationships in issue*].

If, on the other hand, *he* was not employed by the defendant but was merely given privileges to use its facilities[4] or if at the time the (*describe health care service*) was performed *he* was not performing any act which the general course and scope of *his* employment called for *him* to perform, then *he* would not be an agent acting within the course and scope of *his* agency.

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 (*name health care provider*) was an agent of the defendant and

was acting

within the course and scope of *his* agency at the time of the (*describe health care service*), 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. For direct corporate negligence claims arising on or after 1 October 2011, use N.C.P.I.-Civil 809.06 ("Medical Malpractice-Corporate or Administrative Negligence by Hospital, Nursing Home or Adult Care Home").

2. As used in this instruction, the term "agency" is meant to cover more relationships than the traditional "employer-employee" relationship. Examples of other agencies to which it may be applied include those where a doctor is alleged to be a partner or a joint venture with a hospital, or where one partner is alleged to be the agent for the other. *See, e.g.*, N.C.P.I.-Civil 103.10, 103.15, and 103.50.

3. *Rabon v. Hosp.*, 269 N.C. 1, 21, 152 S.E.2d 485, 499 (1967); *Waynick v. Reardon*, 236 N.C. 116, 120, 72 S.E.2d 4, 7 (1952).

4. *Smith v. Duke*, 219 N.C. 628, 634, 14 S.E.2d 643, 647 (1941), *overruled on other grounds by Rabon v. Hosp.*, 269 N.C. 1, 21, 152 S.E.2d 485, 499 (1967).