102.65 INSULATING/INTERVENING NEGLIGENCE.

> *NOTE WELL: Insulating negligence, also referred to in North Carolina case law as intervening or superseding negligence, Barber v. Constien, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998), is not a separate issue. It is "an elaboration of a phase of proximate cause." Childers v. Seay, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967).*[1]

A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person and causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first person's negligence. Under such circumstances, the negligence of the second person, not reasonably foreseeable by the first person, insulates the negligence of the first person and would be the sole proximate cause of the [injury] [damage].[2]

In this case, the defendant, (state name of defendant),[3] contends that if [he] [she] was negligent, which [he] [she] denies, such negligence was not a proximate cause of the plaintiff's [injury] [damage] because it was insulated by the negligence of (state name of other person who defendant alleges was negligent).

You will consider this matter only if you find that the defendant was negligent. If you find the defendant was negligent, that negligence would be insulated- and the defendant would not be liable to the plaintiff- if the negligence of (state name of other person) was such as to have broken the causal connection or sequence between the defendant's negligence and the plaintiff's [injury] [damage], thereby excluding the defendant's negligence as a proximate cause. The negligence of (state name of other person) would thus become as between the negligence of

the defendant and (state name of other person), the sole proximate cause of the plaintiff's [injury] [damage].[4]

On the other hand, if the causal connection between the negligence of the defendant and the plaintiff's [injury] [damage] was not broken, and the defendant's negligence continued to be a proximate cause of the plaintiff's [injury] [damage] up to the moment of [the collision] [(describe other occurrence)],[5] then the defendant would be liable to the plaintiff.[6]

If, at the time of the defendant's negligent act, the defendant reasonably could have foreseen[7] negligent conduct which was likely to produce [injury] [damage] on the part of one in the position of (state name of other person),[8] the causal connection would not be broken, and the negligence of the defendant would not be prevented from being a proximate cause of the plaintiff's [injury] [damage].

However, if the negligence of the defendant would not have resulted in the plaintiff's [injury] [damage] except for the negligence of (state name of other person), and if negligence and resulting injury on the part of one in the position of (state name of other person) was not reasonably foreseeable to the defendant, then the causal connection would be broken and the negligence of the defendant (state name of defendant) would not be a proximate cause of the plaintiff's [injury] [damage].[9]

The burden is not on the defendant to prove that [his] [her] negligence, if any, was insulated by the negligence of (state name of other person). Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury] [damage].[10]

N.C.P.I.-Motor Vehicle 102.65
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1. Barber v. Constien "The law of intervening negligence provides that under certain circumstances another sufficiently independent act, unassociated with defendant's initial negligence, may insulate defendant from liability." David A. Logan & Wayne A. Logan*, North Carolina Torts* § 7.30, 166 (1996). *See also Strong's North Carolina Index* 4th § 20 (2010):

> *In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party as one of the proximate causes of the injury. (citation omitted).*

"[T]he question of whether the intervening negligence of another tort-feasor will operate to insulate the negligence of the original tort-feasor is ordinarily a question for the jury." *Tabor v. Kaufman*, 196 N.C. App. 745, 748, 675 S.E.2d 701, 703 (2009) (citation omitted). This is "[b]ecause '[p]roximate cause is an inference of fact [and] [i]t is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not.'" *Id*. (citation and emphasis omitted).

"Where proper instructions on proximate cause are given, the court is under no duty to instruct the jury specifically with respect to insulating negligence in the absence of proper request[.]" *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967). But even when the instruction is requested, the burden of proof does not shift to the defendant to prove that *his* negligence, if any, was insulated by the negligence of another party. The burden remains with the plaintiff, because "[s]uperseding or insulating negligence is an extension of plaintiff's burden of proof on proximate cause." *Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015).

The instruction, when given, will often follow the instruction on joint and concurring negligence. See N.C.P.I.-Civil 102.60 ("Concurring Negligence").

2. *See Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301–02 (1906):

> An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. . . . If . . . the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening cause may be culpable, intentional, or merely negligent." (citation omitted).

In *Hairston v. Alexander Tank*, 310 N.C. 227, 237, 311 S.E.2d 559, 567 (1984), the Supreme Court of North Carolina characterized the *Harton* analysis of the doctrine of intervening negligence as "determinative with respect to this issue." Applying it, the court reversed a grant of judgment *nov* to an automobile dealership, whose employee had failed to tighten the lug nuts on a wheel, causing the wheel to come off and forcing the car to pull over 3.5 miles from the dealership. The driver of the car was killed when a second vehicle (van), which stopped to provide assistance, was struck by a third vehicle (truck), causing the van to crush the car owner against the car. Whether the negligence of the truck driver was or was reasonably foreseeable by the automobile dealer's employee, could not be resolved as a matter of law. *Hairston*, 310 N.C. at 233, 311 S.E.2d at 565.

3. If the plaintiff is claiming insulating negligence, this instruction should be adapted

accordingly.

4. *See Strong's*, *supra* note 1 ("Intervening negligence of an outside agency or responsible third person will insulate prior negligence only if the intervening negligence is the sole proximate cause of the injury."(footnote omitted)); *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 44, 493 S.E.2d 460, 465 (1997) ("Insulating negligence 'is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.'" (citation omitted)).

5. *See Strong's*, *supra* note 1 ("If the negligence of the first party continues to be a proximate cause up to the moment of injury, it cannot be insulated by the negligence of a second party." (footnote omitted)).

6. *See Batts v. Faggart*, 260 N.C. 641, 645, 133 S.E.2d 504, 507 (1963) (quoting *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U.S. 469, 475 (1876):

> The question always is, [w]as there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application.)).

7. *See Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) ("The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur."); *cf. Barber*, 130 N.C. App. at 385–89, 502 S.E. 2d at 915-19 (rejecting an earlier version of this pattern instruction for its failure to include a charge on "reasonable foreseeability").

8. *See Tabor*, 196 N.C. App. at 748, 675 S.E.2d at 703 ("The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury."(citation and internal quotations omitted)); *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) ("[I]n order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.").

9. For illustrative cases, *see Tabor*, 196 N.C. App. at 749-750, 675 S.E.2d at 704:

> Defendant [Kaufman] was traveling on the highway in front of Plaintiff when Defendant came to a sudden stop and turned left without using his turn signal. As a result, Plaintiff and the driver of a vehicle behind her (vehicle two) slammed on their brakes and were able to come to a complete stop on the highway. However, a third vehicle driven by [2nd Defendant] Thibodeaux was unable to stop and collided with the rear of vehicle two, causing vehicle two to collide with Plaintiff's vehicle . . . . [T]here [is] a genuine issue of material fact as to whether the collision caused by Thibodeaux's negligence was a foreseeable result of Defendant's negligent actions.

See also Hillman v. United States Liability Ins. Co., 59 N.C. App. 145, 151–52, 296 S.E.2d 302, 307 (1982), where the defendant braked suddenly and was struck from the rear by the plaintiff who was unable to stop and slid into the defendant. A third vehicle behind the plaintiff came to a complete stop, but a fourth vehicle was unable to stop and collided with the third vehicle pushing it into the rear of the plaintiff's vehicle. *See id*. at 152, 296 S.E.2d at 307:

> In terms of proximate causation[,] it is not unforeseeable that one or more, if not all, of the following cars will not be able to stop in time to avoid a "chain reaction" collision. The probable consequences reasonably to be anticipated from suddenly stopping on a highway are exactly those outlined here, a line of cars undergoing a series of impacts in an unbroken sequence.

See also Hester, 41 N.C. App. at 510-14, 255 S.E.2d at 320–21, where the defendant abruptly slowed and turned off the road without using a turn signal. The plaintiff braked and came to a complete stop, but a third vehicle traveling behind the plaintiff failed to stop and crashed into the rear of the plaintiff's vehicle. The Court held that the facts did "not establish intervening negligence as a matter of law and that the negligence of the defendant[ ] might have set in motion a chain of circumstances leading up to plaintiff's injuries."

10. *See Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015) ("Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause."); *see also Hampton v. Hearn*, ___ N.C. App. ___, ___, 838 S.E.2d 650, 657-59 (2020) (considering and rejecting contention that the party asserting subsequent medical care amounted to insulating negligence in a medical malpractice case must make *prima facie* evidentiary showing of the applicable standard of care and breach of that standard of care).