

EXPRESS AND IMPLIED WARRANTIES--THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL)¹ AGAINST BUYER'S SELLER.² N.C.G.S. §25-2-318.

NOTE WELL: *This instruction should be used where the plaintiff's right to sue is being challenged on the ground of lack of privity with the defendant.*

The (state number) issue reads:

"Did the defendant's [express warranty] [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage

¹"Horizontal" rights of action by third parties typically refer to circumstances where a seller has sold a defective product to a buyer, and that product has caused injury to someone other than the buyer (or the buyer's vendee). Seller and buyer are in "vertical" privity. The term comes from the fact that seller and buyer are in the "vertical" chain of distribution of products. The injured party, however, is not in the vertical chain since he is not a buyer. Thus, he is described as a third party who is "horizontally" related to the buyer. While outside the vertical chain, the third party does, in some cases, have a sufficient "horizontal" relationship with someone in the vertical chain to permit a right of action. This instruction should be used to determine which relationships are sufficient and which are not.

²The Products Liability Act of 1979, G.S. §99B-1, et seq., has extended the rights of some third party plaintiffs to include suits against persons more remote than their buyer's seller.

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of trade]] extend³ to the plaintiff?"

You will answer this issue only if you have answered the
(state number) issue "Yes" 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, four things:

First, the plaintiff must [be] [have been] a natural person.

This means an individual.⁴ (The following are not natural
persons: a corporation, government or governmental subdivision or

³Except as provided in N.C.G.S. §25-2-318 and N.C.G.S. §99B-2(b), the
general rule is that only a person in privity with the warrantor may recover on
the warranty. *McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472,
248 S.E.2d 444 (1978). *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198
S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973). §25-2-318
provides "A seller's warranty whether express or implied extends to any natural
person who is in the family ... of his buyer, in the household of his buyer, a
guest in his buyer's home if it is reasonable to expect that such person may
use, consume or be affected by the goods and who is injured in person by breach
of the warranty." This provision excuses the "horizontal privity" requirement
in certain limited circumstances. Thus, it is proper to ask whether the
seller's warranty "extends" to a stranger to the contract between seller and
buyer, i.e., to someone in the buyer's family or household, or a guest in the
buyer's home. Before this issue can be answered, however, it must be
determined that the seller gave his buyer a warranty, whether express or
implied. Nonetheless, the privity requirement may also be modified by
decisional law pronounced by the appellate courts. *Bernick v. Jurden*, 306 N.C.
435, 293 S.E.2d 405 (1982); *Sharrard, McGee & Co. v. Suz's Software, Inc.*, 100
N.C. App. 428, 396 S.E.2d 815 (1990).

⁴N.C.G.S. §25-1-201(30).

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agency, business trust, estate, trust, partnership or association,
two or more persons having a joint or common interest,⁵ or any
other legal or commercial entity.⁶)

Second, at the time of *his* [injury] [death], the plaintiff
must have been [in (*name buyer*)'s family] [in (*name buyer*)'s
household] [a guest in (*name buyer*)'s home].⁷

[A person is in someone's "family" if he or she is a

⁵A partner in a partnership that purchased an allegedly defective good has direct contractual privity and need not satisfy this section. *Barnes v. Campbell Chain Co.*, 47 N.C. App. 488, 267 S.E.2d 388 (1980). There may be other instances where joint ownership means that privity is satisfied under the theory of this case.

⁶N.C.G.S. §25-1-201(28).

⁷A church is not a "home" or a "household" for the purposes of this provision. *Crews v. W.A. Brown & Son, Inc.*, 106 N.C. App. 324, 416 S.E.2d 924 (1992).

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(describe family relationship).]⁸

[A person is in someone's "household" if he or she lives
there.]⁹

[A person is a "guest" in someone's home when he or she is
present (in the home) (on the immediate premises) with the express

⁸"Family" is not defined in the Uniform Commercial Code. To date, the courts have viewed 2-318 as a remedial provision and have given it a liberal interpretation. "Family" has been used to cover distant blood relatives as well as persons related by marriage or affinity. Coming within the family circle, according to the courts, are sons and daughters, *Harris v. Great Atlantic & Pacific Tea Co., Inc.*, 4 U.C.C. Rep. 585, 23 Mass. App. Dec. 169 (Mass. App. Div., 1962), *Hirst v. Elgin Metal Casket Co.*, 23 U.C.C. Rep. 47, 438 F.Supp. 906 (D. Mont., 1977), *Allen v. Savage Arms Corp.*, 2 U.C.C. Rep. 975, 52 Luzerne Leg. Reg. Rep. 159 (Pa. Ct. Com. Pl. 1962); stepchildren, *Johnson v. Fore River Motors, Inc.*, 4 U.C.C. Rep. 696, 26 Mass. App. Dec. 184 (Mass. App. Dec., 1962); parents, *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 11 U.C.C. Rep. 737, 127 Ga. App. 619, 194 S.E.2d 513 (1972), *Milbank Mutual Insurance Co. v. Proksch*, 19 U.C.C. Rep. 774, 309 Minn. 106, 244 N.W.2d 105 (1976); spouses, *McHugh v. Carlton*, 14 U.C.C. Rep. 638, 369 F.Supp. 1271 (D.S.C., 1974); nieces and nephews, *Wolfe v. Ford Motor Company*, 24 U.C.C. Rep. 94, 6 Mass. App. 346, 376 N.E.2d 143 (1978), *Miller v. Preitz*, 3 U.C.C. Rep. 557, 422 Pa. 383, 221 A.2d 320 (1966); and even mother-in-laws, *Browder v. Pettigrew*, 17 U.C.C. Rep. 741, 541 S.W.2d 402 (1976).

⁹"Household" is not defined in the Uniform Commercial Code, but there is general agreement that it refers to someone living in the buyer's home, whether or not that person is a member of the "family." *Drayton v. Jiffee Chemical Corp.*, 17 U.C.C. Rep. 966, 395 F.Supp. 1081 (N.D. Ohio, 1975). Like "family," "household" is to be given a liberal interpretation consistent with its remedial objectives. *Miller v. Preitz*, 3 U.C.C. Rep. 557, 422 Pa. 383, 221 A.2d 320 (1966).

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or implied consent of a lawful occupant.]¹⁰

Third, that the defendant should reasonably have expected that a person like the plaintiff might use, consume or be affected by the (*name good*). Whether the defendant should have had such a reasonable expectation will depend on factors such as (the closeness of family ties between the plaintiff and (*name buyer*)) (the distance between (*name buyer*)'s home and where the plaintiff

¹⁰"Guest" is not defined in the Uniform Commercial Code. Based upon the remedial objectives of N.C.G.S. §25-2-318, however, it would seem that the term is to be given a liberal interpretation. Accordingly, the definition appearing above is broad enough to cover lawful guests. See *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

Despite the liberal interpretation to be given to "guest," the cases are unanimous that "guest" means the *buyer's household guest*. *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973) (automobile passenger not a household guest), *Bobbin v. Dinger Chevrolet, Inc.*, 7 U.C.C. Rep. 470 (Pa. Ct. Com. Pl. 1970) (automobile passenger not a household guest), *Marcus v. Spada Bros. Auto Service*, 4 U.C.C. Rep. 390, 41 Pa. D & C 2d 794 (Pa. Ct. Comm. Pl., 1967) (automobile passenger not a household guest), *Wolovitz v. Falco Products Co.*, 1 U.C.C. Rep. 135 (Pa. Ct. Com. Pl., 1963) (warranty does not extend to guest in home of buyer's donee), *Galanek v. Howard Johnson, Inc.*, 4 U.C.C. Rep. 658, 24 Mass. App. Dec. 134 (Mass. App. Div., 1962) (guest in restaurant not a household guest). However, the plaintiff guest need not be injured inside the buyer's home. The "household" includes the immediate premises on which the buyer's home is situated. *Handrigan v. Apex Warwick, Inc.*, 8 U.C.C. Rep. 1247, 108 R.I. 319, 275 A.2d 262 (1971) (neighbor injured when ladder collapsed outside home of buyer but on premises held a guest).

It should be noted that while a buyer's employee is working within the scope of his employment, he is considered neither in the family or household, nor a guest. *Brendle v. General Tire & Rubber Co.*, 15 U.C.C. Rep. 615, 505 F.2d 243 (4th Cir., 1974) (based on North Carolina law).

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lived) (the nature of the product, that is, whether the (name
good) was of a type which the defendant could foresee that (name
buyer) would use around the plaintiff, or pass on to the plaintiff
for his use or consumption, or which would otherwise affect
plaintiff) (describe other relevant factors).¹¹

Fourth, the breach of [express warranty] [implied warranty of
merchantability] [implied warranty of fitness for a particular
purpose] [implied warranty created by [course of dealing] [usage
of trade]] caused the plaintiff's [injury] [death].¹² Cause means
real cause--a cause without which the claimed [injury] [death]
would not have occurred. (There may be more than one cause of [an
injury] [a death]. Therefore, the plaintiff must prove, by the
greater weight of the evidence, that the defendant's breach of
[express warranty] [implied warranty of merchantability] [implied

¹¹This requirement is substantially identical to a requirement of
foreseeability. Combined with the next requirement--causation--N.C.G.S. §25-2-
318 seems to be establishing a proximate cause requirement.

¹²Note Well: It should be noted that third party rights of action exist
only for those who are "injured in person." This would include personal injury
and death, but would exclude property damage and economic loss. This situation
should be compared with those that arise under N.C.G.S. §99B-2(b) where there
is no such limitation on recovery.

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warranty of fitness for a particular purpose] [implied warranty
created by [course of dealing] [usage of trade]] was a cause of
the plaintiff's [injury] [death].)

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's [express warranty]
[implied warranty of merchantability] [implied warranty of fitness
for a particular purpose] [implied warranty created by [course of
dealing] [usage of trade]] extends to the plaintiff, 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.

