PRODUCTS LIABILITY[1]--SELLER'S[2] AND MANUFACTURER'S[3] DEFENSE OF CLAIMANT'S FAILURE TO EXERCISE REASONABLE CARE AS PROXIMATE CAUSE OF DAMAGE. N.C.G.S. § 99B-4(3).

NOTE WELL: Use this instruction only with causes of action arising before January 1, 1996. For causes of action arising on or after January 1, 1996, use N.C.P.I.--Civil 744.10.

The (*state number*) issue reads:

"Was the plaintiff's [injury] [death] [damage] proximately caused by failure to exercise reasonable care in using the (*name product*) under all the circumstances then existing?"

You will answer this issue only if you have answered the (*state number*) issue in favor of the plaintiff.

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[1]"Product liability action" includes any action "brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product." N.C.G.S. § 99B-1(3) (1995). Thus, this defense applies to all product liability actions, whether they sound in contract or in tort. It should be noted that this particular defense is virtually identical to a contributory negligence defense. Under the language of N.C.G.S. § 99B-4 (1995), however, it applies to "any product liability action," which would include actions for breach of contractual warranties.

[2]"Seller" includes "a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. 'Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product." N.C.G.S. § 99B-1(4) (1995).

[3]"Manufacturer" means "a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part." N.C.G.S. § 99B-1(2) (1995)

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On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, three things:

First, that the plaintiff used the (*name product*).

Second, that under all the circumstances then existing, the plaintiff failed to exercise reasonable care in using the (*name product*). Reasonable care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [death] [damage].[4]

Third, that the plaintiff's failure to exercise reasonable care was a proximate cause of *his* [injury] [death] [damage]. Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [death] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [death] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [a death] [damage]. Therefore, the defendant need not prove that the plaintiff's failure to exercise reasonable care was the sole proximate cause of the [injury]

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[4]This standard is the common law rule for contributory negligence. As explained in *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 773, 488 S.E.2d 240, 244 (1997), "N.C.G.S. § 99B-4(3) does not create a different rule for products liability actions; it clarifies the common law contributory negligence standard with respect to these actions."

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[death] [damage]. The defendant must prove, by the greater weight of the evidence, only that the plaintiff's failure to exercise reasonable care was a proximate cause.

In this case the defendant contends, and the plaintiff denies, that the plaintiff failed to exercise reasonable care in using the (*name product*) in one or more of the following respects:

(*Read all contentions of failure to exercise reasonable care supported by the evidence.*)

The defendant further contends, and the plaintiff denies, that the plaintiff's failure to exercise reasonable care in using the (*name product*) was a proximate cause of the plaintiff's [injury] [death] [damage]. Failure to exercise reasonable care is not to be presumed from the mere fact of [injury] [death] [damage].

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's [injury] [death] [damage] was proximately caused by failure to exercise reasonable care in using the (*name product*) under all the circumstances then existing then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.