

PRODUCTS LIABILITY¹--SELLER'S² AND MANUFACTURER'S³ DEFENSE OF OPEN AND OBVIOUS RISK. N.C.G.S. § 99B-5(b).

NOTE WELL: Use this instruction only with causes of action arising on or after January 1, 1996.

The (state number) issue reads:

"Was the plaintiff's [injury] [death] [damage] caused by [an open and obvious risk] [a risk that was a matter of common knowledge] associated with the (name product)?"⁴

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 defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff's [injury] [death] [damage] was caused by [an open and obvious risk] [a risk that was a matter of

¹"Products 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, instruction, marketing, selling, advertising, packaging or labeling of any product." N.C.G.S. § 99B-1(3)(1994).

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). "Seller" may also include consignors and consignees. See N.C.P.I.--Civil 744.05, n. 6.

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).

⁴N.C.G.S. § 99B-5(b).

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common knowledge] associated with the (*name product*). (A risk is open and obvious when it would be apparent to a reasonable and prudent person under the same or similar circumstances.) (A risk is a matter of common knowledge when it is known by most reasonable and prudent persons in the community).

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 caused by [an open and obvious risk] [a risk that was a matter of common knowledge] associated with the (*name product*), 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.