102.13 NEGLIGENCE OF MINOR BETWEEN SEVEN AND FOURTEEN YEARS OF AGE.[1]

The (*state number*) issue reads:

Was the plaintiff [injured] [damaged] by the negligence of the minor defendant?

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, three things:

First, that the minor defendant was capable of negligence. The law presumes that a child who is between seven and fourteen years of age is not capable of negligence. However, this presumption may be overcome by evidence that a child of the minor defendant's age ordinarily would have the discretion, judgment and mental capacity to discern and appreciate circumstances of danger.[2] It is your duty to consider all of the evidence in the case and determine whether the plaintiff has proven, by the greater weight of the evidence, that a child of the minor defendant's age ordinarily would have the discretion, judgment and mental capacity to use ordinary care to protect *himself* and others from [injury] [damage].[3]

Second, that the minor defendant was negligent. "Negligence" refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect *himself* and others from [injury] [damage]. Ordinary 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] [damage]. A person's failure to use ordinary care is negligence.

Even if a child who is between seven and fourteen years of age is capable of negligence, the child is not required to exercise the same degree

of care for the safety of others that is required of an adult.[4] The law imposes a duty upon a child to exercise only that degree of care for the safety of others that a reasonably careful child of the same age, discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances.[5] A child's failure to exercise the required degree of care would be negligence.

<u>And Third</u>, that the minor defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and one which a reasonable and prudent child of the same age, discretion, knowledge, experience and capacity could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the minor defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the minor defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the minor defendant denies, that the minor defendant was capable of negligence and was negligent in one or more of the following respects:

Read all contentions of negligence supported by the evidence.

The plaintiff further contends, and the minor defendant denies, that the minor defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

Give law as to each contention of negligence included above.

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 minor defendant was capable of negligence, was negligent (in any one or more of the ways contended by the plaintiff) and that such negligence was a proximate cause of the plaintiff's [injury] [damage], 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 minor defendant.

---

1 Contributory negligence is merely primary negligence committed by the plaintiff, *see Meinck v. City of Gastonia*, ___ N.C. App. ___, ___, 798 S.E.2d 417, 423 (2017); therefore, the general principles and presumptions discussed in this instruction regarding contributory negligence apply to primary negligence as well. A child under seven is conclusively presumed to be incapable of contributory negligence. *Walston v. Greene*, 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958). A child who has reached his fourteenth birthday is "presumed to have sufficient capacity to be sensible of danger and to have power to avoid it," *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 767 (1967), "and he is chargeable with contributory negligence as a matter of law if he fails to do so," *Burgess v. Mattox*, 260 N.C. 305, 307, 132 S.E.2d 577, 578 (1963).

There is a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Hoots v. Beeson*, 272 N.C. 644, 650, 159 S.E.2d 16, 21 (1968); *see also Caudle v. Seaboard Air Line R.R.*, 202 N.C. 404, 407, 163 S.E. 122, 124 (1932) (citations omitted) ("Prima facie presumption exists that infant between ages of seven and fourteen is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.").

2 *See Walston*, 247 N.C. at 696, 102 S.E.2d at 126. Failure to instruct on the rebuttable presumption is prejudicial error. *Hoots v. Beeson*, 272 N.C. at 650, 159 S.E.2d at 21.

3 *Blue v. Canela*, 139 N.C. App. 191, 193-194, 532 S.E.2d 830, 832 (2000).

4 *Morris v. Sprott*, 207 N.C. 358, 359, 177 S.E. 13, 14 (1934).

---

5 *Boykin v. Atlantic Coast Line R.R. Co.*, 211 N.C. 113, 115, 189 S.E. 177, 178 (1937).