

CONTRIBUTORY NEGLIGENCE--GRATUITOUS PASSENGER OR GUEST.

A guest passenger in a motor vehicle has the right to assume that the driver will exercise proper care and caution, unless the driver's fault or incompetence is so obvious as to demand effort on the passenger's part to avoid danger. The passenger must exercise that care for *his* own safety which a reasonably careful and prudent person would exercise under all the circumstances then existing.

If the passenger sees, or in the exercise of such care should see, that the driver is acting in a negligent manner and fails to warn or caution the driver, or to attempt to persuade the driver to stop *his* negligent conduct, such failure, if it proximately causes or contributes to the passenger's injury,¹ may be contributory negligence. However, such failure is not negligence within itself, but the evidence with respect to it is to be considered with all the other facts in evidence. The test as to whether it is negligence is whether a reasonably careful and prudent person, under all the circumstances then existing, would have warned, cautioned, or attempted so to persuade the driver.

(If the passenger warns, cautions or attempts so to persuade the driver, but the driver continues his negligent conduct, the passenger's failure to request that the driver stop the vehicle and let the passenger out, if it proximately causes or contributes to the passenger's injury,¹ may be contributory negligence. However, such failure is not negligence itself, but the evidence with respect to it is to be considered with all other facts in

¹It is error to charge that the conduct of the passenger contributed to the collision, unless the evidence supports such charge. See *Kuykendall v. Coach Line*, 196 N.C. 423 (1930); *Childs v. Dowdy*, 14 N.C. App. 535 (1972).

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evidence. The test as to whether it is negligence is whether a reasonably careful and prudent person, under all the circumstances then existing, would have made such a request.)^{2,3}

²Where the driver's contributory negligence allegations set forth that the passenger rode with him voluntarily and with the knowledge or reason to know that he was under the influence of intoxicants, the court must instruct the jury on the issue of contributory negligence per se as specified in N.C.P.I.--Civil 104.21, *infra*. This instruction on contributory negligence per se is in addition to rather than in lieu of the general instruction set forth above in 104.20. See, *Lee v. Kellenberger*, 28 N.C. App. 56, 58-59 (1975).

³Contributory negligence is not a good defense where the driver's injurious conduct is willful or wanton. *Harrington v. Collins*, 40 N.C. App. 530, 534-535 (1979) (racing). However, if the passenger's conduct is also willful or wanton and a proximate cause of his injuries, the passenger cannot recover against the driver. *Id.* at 536.