CONTRIBUTORY NEGLIGENCE PER SE—GRATUITOUS PASSENGER VOLUNTARILY AND KNOWINGLY RIDING WITH IMPAIRED DRIVER.

NOTE WELL: Use in conjunction with and not in lieu of N.C.P.I.—Civil (MV) 104.20.[1]

Ordinarily, a guest passenger must exercise that degree of care for *his* own safety which a reasonably careful and prudent person would exercise under all of the circumstances then existing. However, when a guest passenger voluntarily rides with an operator who is impaired by [alcohol][2] [(*name impairing substance*)][3] and the guest passenger knew or should have known that the operator was impaired, the conduct of the guest passenger would be negligence within itself.[4]

The mere fact that a person operates a vehicle after consuming [alcohol] [(*name impairing substance*)][5] is not sufficient by itself to establish that such person was driving while impaired. [A person is impaired when *he* is under the influence of an impairing substance. A person is under the influence of an impairing substance when *he* has consumed a sufficient quantity of that impairing substance to cause *him* to lose the normal control of *his* physical or

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1. The general instruction on contributory negligence found in N.C.P.I.—Civil (MV) 104.20 ("Contributory Negligence—Gratuitous Passenger or Guest"), can be used in addition to where the driver has alleged that the passenger rode with him voluntarily and with the knowledge or reason to know that he was under the influence of intoxicants. *See Lee v. Kellenberger*, 28 N.C. App. 56, 58-59, 220 S.E.2d 140, 142-43 (1975).

2. "Alcohol—Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol." N.C. GEN. STAT. § 20-4.01(1a) (2009).

3. An "impairing substance" includes "alcohol," a "controlled substance under Chapter 90 of the General Statutes," or "any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. GEN. STAT. § 20-4.01 (14a).

4. *See Atwood v. Holland*, 267 N.C. 722, 728, 148 S.E.2d 851, 856 (1966); *Southern Nat'l Bank v. Lindsey*, 264 N.C. 585, 588, 142 S.E.2d 357, 360 (1965); *Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E.2d 33, 35 (1964); *Kellenberger*, 28 N.C. App. at 59, 220 S.E.2d at 143; *Wardrick v. Davis*, 15 N.C. App. 261, 264, 189 S.E.2d 746, 748–49 (1972).

5. As to driving when impaired by a narcotic or other type of drug, see N.C. GEN. STAT. § 20-138.1 (2009). The above instruction may be easily adapted to circumstances where the impairing substance is a narcotic or other type of drug rather than alcohol.

CONTRIBUTORY NEGLIGENCE PER SE—GRATUITOUS PASSENGER VOLUNTARILY AND KNOWINGLY RIDING WITH IMPAIRED DRIVER. (*Continued*)

mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. (*Name impairing substance*) is an impairing substance.]

[A person is (also) impaired when *he* has consumed a sufficient quantity of alcohol that at any relevant time after the driving *he* has an alcohol concentration of 0.08 or more grams of alcohol per [210 liters of breath] [100 milliliters of blood].[6] A relevant time is any time after the driving in which the operator still has in *his* body alcohol consumed before or during the driving.][7]

[A person is (also) impaired when *he* has any amount of [a Schedule I controlled substance] [metabolites[8] of a Schedule I controlled substance] in *his* blood or urine].[9] (*State name of substance)* is a [Schedule I controlled substance] [metabolite of a Schedule I controlled substance].

The mere fact that a person rides with an operator who is impaired is not sufficient by itself to establish that *he* knew or had reason to know that the operator was impaired. A person "knows" of a thing when *he* has actual knowledge of it. A person "has reason to know" of a

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6. "The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth." N.C. GEN. STAT. § 20-4.01(1b).

7. It should be noted that a person charged with driving while impaired cannot plead as a defense that he was legally entitled to use the impairing substance (e.g., "my doctor prescribed this medicine"). *See* N.C. GEN. STAT. § 20-138.1(b).

8. "'Metabolites' are defined as a 'product of metabolism.'" *State v. Harris*, 361 N.C. 400, 401, 646 S.E.2d 526, 527 n.1 (2007). In the context of drug usage, urine samples may be used to detect the presence of metabolites of a particular drug. *See id.*

9. Effective December 1, 2006, any person who "drives any vehicle upon any highway, any street, or any public vehicular area within this state . . . [w]ith any amount of a Schedule I controlled substance . . . or its metabolites in his blood or urine" commits "the offense of impaired driving." N.C. GEN. STAT. § 20-138.1(a)(3).

CONTRIBUTORY NEGLIGENCE PER SE—GRATUITOUS PASSENGER VOLUNTARILY AND KNOWINGLY RIDING WITH IMPAIRED DRIVER. (*Continued*)

thing when in the exercise of ordinary care *he* should have acquired knowledge of it under all circumstances existing at the time.[10]

10. *See Kellenberger*, 28 N.C. App. at 59-60, 220 S.E.2d at 142–43; *Wardrick*, 15 N.C. App. at 264–65, 189 S.E.2d at 748–49.