EXPRESS AND IMPLIED WARRANTIES--THIRD PARTY RIGHTS OF ACTION (HORIZONTAL)\(^1\) AGAINST BUYER'S SELLER.\(^2\) N.C.G.S. §25-2-318.

NOTE WELL: This instruction should be used where the plaintiff's right to sue is being challenged on the ground of lack of privity with the defendant.

The \((\text{state number})\) issue reads:

"Did the defendant's [express warranty] [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage

---

\(^1\)"Horizontal" rights of action by third parties typically refer to circumstances where a seller has sold a defective product to a buyer, and that product has caused injury to someone other than the buyer (or the buyer's vendee). Seller and buyer are in "vertical" privity. The term comes from the fact that seller and buyer are in the "vertical" chain of distribution of products. The injured party, however, is not in the vertical chain since he is not a buyer. Thus, he is described as a third party who is "horizontally" related to the buyer. While outside the vertical chain, the third party does, in some cases, have a sufficient "horizontal" relationship with someone in the vertical chain to permit a right of action. This instruction should be used to determine which relationships are sufficient and which are not.

\(^2\)The Products Liability Act of 1979, G.S. §99B-1, et seq., has extended the rights of some third party plaintiffs to include suits against persons more remote than their buyer's seller.

Replacement May 1999
EXPRESS AND IMPLIED WARRANTIES--THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL) AGAINST BUYER'S SELLER. N.C.G.S. §25-2-318.
(Continued).

of trade]) extend' to the plaintiff?"

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 plaintiff. This
means that the plaintiff must prove, by the greater weight of the
evidence, four things:

First, the plaintiff must [be] [have been] a natural person.

This means an individual.4 (The following are not natural
persons: a corporation, government or governmental subdivision or

---

3Except as provided in N.C.G.S. §25-2-318 and N.C.G.S. §99B-2(b), the
general rule is that only a person in privity with the warrantor may recover on
the warranty. McKinney Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472,
provides "A seller's warranty whether express or implied extends to any natural
person who is in the family . . . of his buyer, in the household of his buyer, a
guest in his buyer's home if it is reasonable to expect that such person may
use, consume or be affected by the goods and who is injured in person by breach
of the warranty." This provision excuses the "horizontal privity" requirement
in certain limited circumstances. Thus, it is proper to ask whether the
seller's warranty "extends" to a stranger to the contract between seller and
buyer, i.e., to someone in the buyer's family or household, or a guest in the
buyer's home. Before this issue can be answered, however, it must be
determined that the seller gave his buyer a warranty, whether express or
implied. Nonetheless, the privity requirement may also be modified by
decisional law pronounced by the appellate courts. Bernick v. Jurden, 306 N.C.
435, 293 S.E.2d 405 (1982); Sharrard, McGee & Co. v. Suz's Software, Inc., 100

4N.C.G.S. §25-1-201(30).

Replacement May 1999
EXPRESS AND IMPLIED WARRANTIES—THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL) AGAINST BUYER'S SELLER. N.C.G.S. §25-2-318.
(Continued).

government, business trust, estate, trust, partnership or association,
two or more persons having a joint or common interest, or any
other legal or commercial entity.

Second, at the time of his [injury] [death], the plaintiff
must have been [in (name buyer)'s family] [in (name buyer)'s
household] [a guest in (name buyer)'s home].

[A person is in someone's "family" if he or she is a

---

5A partner in a partnership that purchased an allegedly defective good
has direct contractual privity and need not satisfy this section. Barnes v.
Campbell Chain Co., 47 N.C. App. 488, 267 S.E.2d 388 (1980). There may be
other instances where joint ownership means that privity is satisfied under the
theory of this case.

6N.C.G.S. §25-1-201(2).

7A church is not a "home" or a "household" for the purposes of this

Replacement May 1999
EXPRESS AND IMPLIED WARRANTIES—THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL) AGAINST BUYER'S SELLER. N.C.G.S. §25-2-318.
(Continued).

(describe family relationship).[8]

[A person is in someone's "household" if he or she lives there.] [9]

[A person is a "guest" in someone's home when he or she is present (in the home) (on the immediate premises) with the express

---


Replacement May 1999
or implied consent of a lawful occupant.]

Third, that the defendant should reasonably have expected that a person like the plaintiff might use, consume or be affected by the (name good). Whether the defendant should have had such a reasonable expectation will depend on factors such as (the closeness of family ties between the plaintiff and (name buyer)) (the distance between (name buyer)'s home and where the plaintiff

\textsuperscript{19}“Guest” is not defined in the Uniform Commercial Code. Based upon the remedial objectives of N.C.G.S. §25-2-318, however, it would seem that the term is to be given a liberal interpretation. Accordingly, the definition appearing above is broad enough to cover lawful guests. See Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).


It should be noted that while a buyer's employee is working within the scope of his employment, he is considered neither in the family or household, nor a guest. Brendle v. General Tire & Rubber Co., 15 U.C.C. Rep. 615, 505 P.2d 243 (4th Cir., 1974) (based on North Carolina law).

Replacement May 1999
EXPRESS AND IMPLIED WARRANTIES--THIRD PARTY RIGHTS OF ACTION 
(HORIZONTAL) AGAINST BUYER'S SELLER. N.C.G.S. §25-2-318.
(Continued).

lived) (the nature of the product, that is, whether the (name 
good) was of a type which the defendant could foresee that (name 
buyer) would use around the plaintiff, or pass on to the plaintiff 
for his use or consumption, or which would otherwise affect 
plaintiff) (describe other relevant factors).\textsuperscript{11}

Fourth, the breach of [express warranty] [implied warranty of 
merchantability] [implied warranty of fitness for a particular 
purpose] [implied warranty created by [course of dealing] [usage 
of trade]] caused the plaintiff's [injury] [death].\textsuperscript{12} Cause means 
real cause--a cause without which the claimed [injury] [death] 
would not have occurred. (There may be more than one cause of [an 
injury] [a death]. Therefore, the plaintiff must prove, by the 
greater weight of the evidence, that the defendant's breach of 
[express warranty] [implied warranty of merchantability] [implied

\textsuperscript{11}This requirement is substantially identical to a requirement of 
foreseeability. Combined with the next requirement--causation--N.C.G.S. §25-2-
318 seems to be establishing a proximate cause requirement.

\textsuperscript{12}Note Well: It should be noted that third party rights of action exist 
only for those who are "injured in person." This would include personal injury 
and death, but would exclude property damage and economic loss. This situation 
should be compared with those that arise under N.C.G.S. §99B-2(b) where there 
is no such limitation on recovery.

Replacement May 1999
EXPRESS AND IMPLIED WARRANTIES--THIRD PARTY RIGHTS OF ACTION (HORIZONTAL) AGAINST BUYER’S SELLER. N.C.G.S. §25-2-318.

(Continued).

warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] was a cause of the plaintiff's [injury] [death].)

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 defendant's [express warranty] [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] extends to the plaintiff, 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 defendant.