PRODUCTS LIABILITY[1]--SELLER'S[2] AND MANUFACTURER'S[3] DEFENSE OF UNREASONABLE USE IN LIGHT OF KNOWLEDGE OF UNREASONABLY DANGEROUS CONDITION OF PRODUCT. N.C.G.S. § 99B-4(2).

NOTE WELL: Use this instruction only with causes of action arising before January 1, 1996. For causes of action arising after January 1, 1996, use N.C.P.I.--Civil 744.09.

The (*state number*) issue reads:

"Was the plaintiff's [injury] [death] [damage] caused by [*his*] [*name user's*][4] proceeding unreasonably to use the (*name product*) after discovering its [defective] [unreasonably dangerous] condition and becoming aware of the danger?"

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[1]"Product 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, instructing, 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). *See* N.C.P.I.--Civil 743.05, n. 6, as to whether "seller" also includes consignors and consignees.

[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).

[4]In most cases, the "user" and the "plaintiff" will be the same persons. As N.C.G.S. 99B-4(2) is worded, however, it is possible that the "user" and the "claimant" may not be one and the same. For example, if a defective product is put into the possession of a person who, knowing of its defective state and aware of the danger, nonetheless unreasonably proceeds to use it, and that product then causes injury *to a third party*, then the user and the "claimant" (or plaintiff) will be different persons. That is why elements two, three and four require a designation of the "user" and why element five requires a designation of the "claimant" (or plaintiff).

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You will answer this issue only if you have answered the (*state number*) issue 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, five things:

First, that the (*name product*) was [defective] [in an unreasonably dangerous condition]. A product is [defective when it is not reasonably fit for its intended use, or is in a condition different from that contemplated by an ordinary and reasonable user[5]] [(in an unreasonably dangerous condition when its dangerousness goes beyond what an ordinary and reasonable user would expect from such a product[6]) (in an unreasonably dangerous condition when a reasonable manufacturer or seller would not make the product or would discontinue selling it[7])].

Second, that [the plaintiff] [*name user*] discovered the [defect] [unreasonably dangerous condition]. A person "discovers" something when he acquires actual knowledge of it. Third, that [the plaintiff] [*name user*] was aware of the danger

[5]72 C.J.S. *Products Liability* § 12 (Supp. 1975). *See also* Restatement (Second) of Torts § 402A, cmts. g, h (1965); 63 Am. Jur. 2d *Products Liability* §§ 129-130 (1984).

[6]72 C.J.S. *Products Liability* § 13 (Supp. 1975). *See also* Restatement (Second) of Torts § 402A, cmt. g (1965). *See generally* 63 Am. Jur. 2d *Products Liability* §§ 129, 132 (1984).

[7]72 C.J.S. *Products Liability* § 13 (Supp. 1975). *See generally* 63 Am. Jur. 2d *Products Liability* §§ 129, 132 (1984).

presented by the [defect] [unreasonably dangerous condition].[8]

Fourth, that [the plaintiff] [*name user*] proceeded unreasonably to use the (*name product*). A person proceeds unreasonably when, under the same or similar circumstances, a reasonable and prudent person would not have done so.

Fifth, that the plaintiff's [injury] [death] [damage] was caused by the (*name product*). Cause is a real cause--a cause which in a natural and continuous sequence produces a person's [injury] [death] [damage].[9] There may be more than one cause of [an injury] [a death] [damage]. Therefore, the defendant need not prove that [the plaintiff's] [*name user's*] use of the (*name product*) was the sole cause of the [injury] [death] [damage]. The defendant must prove, by the greater weight of the evidence, only that [the plaintiff's] [*name user's*] use of the (*name product*) was a cause.

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 [*his*] [*name user's*] proceeding unreasonably to use the (*name product*) after discovering its [defective] [unreasonably

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[8] A person is "aware" of a danger when he knows of surrounding facts and circumstances which point to the danger and from them develops a strong impression that danger exists.

[9] N.C.G.S. 99B-4(2) does not appear to adopt a proximate cause requirement. Cause-in-fact is sufficient. *Compare* N.C.G.S. § 99B-4(3); N.C.P.I.--Civil 743.10.

dangerous] condition and becoming aware of the danger, 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.