PRODUCTS LIABILITY[1]—SELLER'S[2] AND MANUFACTURER'S[3] DEFENSE OF USE CONTRARY TO INSTRUCTIONS OR WARNINGS. N.C. GEN. STAT. § 99B-4(1).

The (*state number*) issue reads:

"Was the plaintiff's [injury] [death] [damage] caused by *his* using the (*state name of product*) in a manner contrary to any express and adequate instructions or warnings which *he* knew or should have known were [delivered with] [appearing on] [attached to] [on the original container or wrapping of] the (*state name of product*)?"

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

First, that the plaintiff used the (*state name of product*) contrary to instructions or warnings [delivered with][4] [appearing on] [attached to] [on the original container or wrapping of] the (*name product*).

Second, that such instructions or warnings were express and adequate. Instructions or

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. GEN. STAT. § 99B-1(3)(2009).

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. GEN. STAT. § 99B-1(4). "Seller" may also include consignors and consignees. *See* N.C.P.I.—Civil 744.05 ("Product Liability (Other Than Express Warranty)—Seller's Defense Of Sealed Container Or Lack Of Opportunity To Inspect Product"), n.6.

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. GEN. STAT. § 99B-1(2).

4. The language of the statute does not seem to exclude the possibility that instructions or warnings can be given orally by a defendant, i.e., *orally* "delivered with" the product. *See* N.C. GEN. STAT. § 99B-4(1)(emphasis added).

warnings are "express" if they are stated[5] affirmatively and definitely. Instructions or warnings are "adequate"

1) if they are sufficient in content to inform foreseeable users how to use the (*name product*) safely, and

2) if they are communicated so that they are reasonably likely to reach such users and be understood by them.[6]

<u>Third</u>, that the plaintiff knew, or in the exercise of ordinary care should have known, of the existence of such instructions or warnings. A person "knows" something when he has actual knowledge of it. However, it is not necessary for a person to have read the instructions or warnings to be responsible for knowing of their existence. A person "should have known" of something when, in the exercise of reasonable and diligent[7] care, he should have acquired knowledge of it under all the circumstances existing at the time.

<u>Fourth</u>, that the plaintiff's [injury] [death] [damage] was caused by *his* use of the (*state name of product*) contrary to the instructions or warnings. Cause is a real cause--a cause which

5. *Id.*

6. *See* 72A C.J.S. *Products Liability* § 27 (2009); *see also* 63 AM. JUR. 2D *Products Liability* § 53 (2010).

7. N.C. GEN. STAT. § 99B-4(1) describes the standard of user knowledge (other than actual knowledge) as follows: "with the exercise of reasonable and *diligent* care should have known . . ." *Id.* (emphasis added). Diligence requires more of a user than reasonableness. Thus, where a user's "diligence" is at issue rather than his "reasonableness", this instruction should be modified to make the distinction between "reasonable" and "diligent" clear. If the jury finds that the warning is express and adequate, then "diligent" means that the user has an affirmative duty to read it.

in a natural and continuous sequence produces a person's [injury] [death] [damage].[8] There may be more than one cause of [an injury] [a death] [damage]. Therefore, the defendant need not prove that the plaintiff's contrary use of the (*state name of 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 contrary use of the (*state name of 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* using the (*state name of product*) in a manner contrary to any express and adequate instructions or warnings which *he* knew or should have known were [delivered with] [appearing on] [attached to] [on the original container or wrapping of] the (*state name of product*), 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.

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8. N.C. GEN. STAT. § 99B-4(1) does not appear to adopt a proximate cause requirement. Cause-in-fact is sufficient. *Id*.