

N.C.P.I.-Civil. 741.65
EXPRESS AND IMPLIED WARRANTIES - THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL) AGAINST BUYER'S SELLER.
GENERAL CIVIL VOLUME
MAY 1999
N.C. Gen. Stat. § 25-2-318

741.65 EXPRESS AND IMPLIED WARRANTIES - THIRD PARTY RIGHTS OF ACTION (HORIZONTAL)¹ AGAINST BUYER'S SELLER.²

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 *(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 of trade]] extend³ 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 agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest,⁵ or any other legal or commercial entity.⁶)

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].⁷

[A person is in someone's "family" if he or she is a *(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 or implied consent of a lawful occupant.]¹⁰

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 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*).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].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 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.

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, N.C. Gen. Stat. § 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.

3. Except as provided in N.C. Gen. Stat. § 25-2-318 and N.C. Gen. Stat. § 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, 248 S.E.2d 444 (1978). *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E.2d 766, *cert. denied*, 284 N.C. 258, 200 S.E.2d 659 (1973). N.C. Gen. Stat. § 25-2-318 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

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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 N.C. App. 428, 396 S.E.2d 815 (1990).

4. N.C. Gen. Stat. § 25-1-201(30).

5. A 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.

6. N.C. Gen. Stat. § 25-1-201(28).

7. A church is not a "home" or a "household" for the purposes of this provision. *Crews v. W.A. Brown & Son, Inc.*, 106 N.C. App. 324, 416 S.E.2d 924 (1992).

8. "Family" is not defined in the Uniform Commercial Code. To date, the courts have viewed N.C. Gen. Stat. § 25-2-318 as a remedial provision and have given it a liberal interpretation. "Family" has been used to cover distant blood relatives as well as persons related by marriage or affinity. Coming within the family circle, according to the courts, are sons and daughters, *Harris v. Great Atlantic & Pacific Tea Co., Inc.*, 4 U.C.C. Rep. 585, 23 Mass. App. Dec. 169 (Mass. App. Div., 1962), *Hirst v. Elgin Metal Casket Co.*, 23 U.C.C. Rep. 47, 438 F.Supp. 906 (D. Mont., 1977), *Allen v. Savage Arms Corp.*, 2 U.C.C. Rep. 975, 52 Luzerne Leg. Reg. Rep. 159 (Pa. Ct. Com. Pl. 1962); stepchildren, *Johnson v. Fore River Motors, Inc.*, 4 U.C.C. Rep. 696, 26 Mass. App. Dec. 184 (Mass. App. Dec., 1962); parents, *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 11 U.C.C. Rep. 737, 127 Ga. App. 619, 194 S.E.2d 513 (1972), *Milbank Mutual Insurance Co. v. Proksch*, 19 U.C.C. Rep. 774, 309 Minn. 106, 244 N.W.2d 105 (1976); spouses, *McHugh v. Carlton*, 14 U.C.C. Rep. 638, 369 F.Supp. 1271 (D.S.C., 1974); nieces and nephews, *Wolfe v. Ford Motor Company*, 24 U.C.C. Rep. 94, 6 Mass. App. 346, 376 N.E.2d 143 (1978), *Miller v. Preitz*, 3 U.C.C. Rep. 557, 422 Pa. 383, 221 A.2d 320 (1966); and even mother-in-laws, *Browder v. Pettigrew*, 17 U.C.C. Rep. 741, 541 S.W.2d 402 (1976).

9. "Household" is not defined in the Uniform Commercial Code, but there is general agreement that it refers to someone living in the buyer's home, whether or not that person is a member of the "family." *Drayton v. Jiffee Chemical Corp.*, 17 U.C.C. Rep. 966, 395 F.Supp. 1081 (N.D. Ohio, 1975). Like "family," "household" is to be given a liberal interpretation consistent with its remedial objectives. *Miller v. Preitz*, 3 U.C.C. Rep. 557, 422 Pa. 383, 221 A.2d 320 (1966).

10. "Guest" is not defined in the Uniform Commercial Code. Based upon the remedial objectives of N.C. Gen. Stat. § 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).

Despite the liberal interpretation to be given to "guest," the cases are unanimous that "guest" means the buyer's household guest. *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973) (automobile passenger not a household guest), *Bobbin v. Dinger Chevrolet, Inc.*, 7 U.C.C. Rep. 470 (Pa. Ct. Com. Pl. 1970) (automobile passenger not a household guest), *Marcus v. Spada Bros.*

Auto Service, 4 U.C.C. Rep. 390, 41 Pa. D & C 2d 794 (Pa. Ct. Comm. Pl., 1967) (automobile passenger not a household guest), *Wolovitz v. Falco Products Co.*, 1 U.C.C. Rep. 135 (Pa. Ct. Com. Pl., 1963) (warranty does not extend to guest in home of buyer's donee), *Galanek v. Howard Johnson, Inc.*, 4 U.C.C. Rep. 658, 24 Mass. App. Dec. 134 (Mass. App. Div., 1962) (guest in restaurant not a household guest). However, the plaintiff guest need not be injured inside the buyer's home. The "household" includes the immediate premises on which the buyer's home is situated. *Handrigan v. Apex Warwick, Inc.*, 8 U.C.C. Rep. 1247, 108 R.I. 319, 275 A.2d 262 (1971) (neighbor injured when ladder collapsed outside home of buyer but on premises held a guest).

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 F.2d 243 (4th Cir., 1974) (based on North Carolina law).

11. This requirement is substantially identical to a requirement of foreseeability. Combined with the next requirement-causation- N.C. Gen. Stat. § 25-2-318 seems to be establishing a proximate cause requirement.

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. Gen. Stat. § 99B-2(b) where there is no such limitation on recovery.