

N.C.P.I.-Civil. 744.09

PRODUCTS LIABILITY - SELLER'S AND MANUFACTURER'S DEFENSE OF UNREASONABLE USE IN LIGHT OF KNOWLEDGE OF UNREASONABLY DANGEROUS CONDITION OF PRODUCT.

GENERAL CIVIL VOLUME

MAY 1999

N.C. Gen. Stat. § 99B-4(2)

744.09 PRODUCTS LIABILITY¹ - SELLER'S² AND MANUFACTURER'S³ DEFENSE OF UNREASONABLE USE IN LIGHT OF KNOWLEDGE OF UNREASONABLY DANGEROUS CONDITION OF PRODUCT.

NOTE WELL: Use this instruction only with causes of action arising on or after January 1, 1996. For causes of action arising before January 1, 1996, use N.C.P.I.-Civil 743.09.

The *(state number)* issue reads:

"Was the plaintiff's [injury] [death] [damage] caused by *(name product)* after the [plaintiff] [*name user*]⁴ knew of or discovered a [defect] [dangerous condition] of the *(name product)* that was inconsistent with its safe use and then unreasonably and voluntarily exposed [*himself*] [the plaintiff] to the [defect] [dangerous condition]?"

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, three things:

First, that [the plaintiff] [*name user*] knew of or discovered a [defect] [dangerous condition] of the *(name product)* that was inconsistent with its safe use.

Second, that [the plaintiff] [*name user*] unreasonably and voluntarily exposed [*himself*] [the plaintiff] to the [defect] [dangerous condition]. (A person acts unreasonably when, under the same or similar circumstances, a reasonable and prudent person would not have done so. A person acts voluntarily when *he* does so of *his* own free will and not

under compulsion.)

Third, 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].⁵ 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 the (*name product*) after the [plaintiff] [(*name user*)] knew of or discovered a [defect] [dangerous condition] of the (*name product*) that was inconsistent with its safe use and then unreasonably and voluntarily exposed [*himself*] [the plaintiff] to the [defect] [dangerous condition], 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.

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)(1994).

2. "Seller" includes "a retailer, wholesaler, or distributor, and means any individual or

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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). See N.C.P.I.-Civil 744.05, 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. Gen. Stat. § 99B-1(2).

4. In most cases, the "user" and the "plaintiff" will be the same persons. As N.C. Gen. Stat. § 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).

5. N.C. Gen. Stat. § 99B-4(2) does not appear to adopt a proximate cause requirement. Cause-in-fact is sufficient. *Compare* N.C. Gen. Stat. § 99B-4(3); N.C.P.I.-Civil 744.10.