805.56 DUTY OF OWNER TO LAWFUL VISITOR – DEFENSE OF CONTRIBUTORY NEGLIGENCE.

This (state number) issue reads:

"Did the plaintiff, by his own negligence, contribute to his [injury] [damage]?"[1]

You will answer this (state number) issue only if you have answered the (state number) issue as to the defendant's negligence "Yes" in favor of the plaintiff.[2]

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, that the plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's own [injury] [damage].

As was the case with the plaintiff, negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every lawful visitor to use ordinary care while on the premises of another. Ordinary care means that degree of care which a reasonable and prudent lawful visitor would use under the same or similar circumstances to protect himself and others from [injury] [damage] while [on] [using] the premises of another.[3] A lawful visitor's failure to use ordinary care is negligence.

If the plaintiff's negligence joins with the negligence of the defendant in proximately causing the plaintiff's own [injury] [damage], it is called contributory negligence, and the plaintiff cannot recover.[4]

As to this issue, the defendant contends,[5] and the plaintiff denies, that the plaintiff was negligent in one or more of the following ways:

(Read all contentions of contributory negligence supported by the evidence.)

The defendant further contends, and the plaintiff denies, that the plaintiff's negligence was a proximate cause of and contributed to the plaintiff's own [injury] [damage].

I instruct you that contributory negligence is not to be presumed from the mere fact of [injury] [damage].

(Give law as to each contention of contributory negligence included above.)

Finally, as to this (state number) issue of contributory negligence on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was negligent (in any one or more ways contended by the defendant) and that such negligence was a proximate cause of the plaintiff's own [injury] [damage], 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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1 If the contention of the defendant is that plaintiff's agent was negligent, the issue as stated above should be replaced by an issue as to the agent's negligence and a separate issue of agency submitted.

2 This sentence will be accurate only when there is a single defendant and there is no issue as to the negligence of an agent of the defendant. In more complex situations, the judge must instruct the jury precisely as to what answers to what prior issues will call for an answer to this issue.

3 *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 896 (2002).

4 Omit the phrase, "and the plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to 105.15 MV.

5 Whether the lawful visitor exercised a proper lookout will be the most frequent contributory negligence contention. In "slip-n'-fall" cases, the "question is not whether a reasonably prudent person would have seen the [hazard] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

However, the trial judge should be aware that there are a number of circumstances where a lawful visitor's contributory negligence may arise for reasons other than a failure to maintain a proper lookout; for example, a failure to use proper footwear on ice or other slick surfaces. Not every so-called "slip-n'-fall case" involves the classic crash on a sidewalk or grocery store aisle. In the cases which do not involve lookout, the trial judge may rely upon the general duty imposed on lawful visitors as stated or give a more specific instruction (comparable to the "lookout" instruction) where appropriate. *See Enns v. Zayre Corp., Inc.*, 119 N.C. App. 687, 692-93, 449 S.E.2d 478, 482-83 (1994).