
805.74 DUTY OF LANDLORD TO NON RESIDENTIAL TENANT CONTROLLED OR COMMON AREAS DEFENSE OF CONTRIBUTORY NEGLIGENCE.

The (*state number*) issue reads:

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

You will answer this issue only if you have answered the issue as to the defendant's negligence "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, that plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's own [injury] [damage].

The law imposes upon a person the duty to exercise ordinary care to protect *himself* from [injury] [damage] and to avoid a known danger. When a person knows or, in the exercise of ordinary care, should know of a danger, and where such person has a reasonable choice or option to avoid that danger, the failure to do so is negligence.[1]

When the plaintiff's negligence concurs 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.[2]

In this case, the defendant contends, 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 plaintiff's negligence was a proximate cause of and contributed to plaintiff's [injury] [damage].

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GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2018

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

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 was negligent, and that such negligence was a proximate cause of plaintiff's [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 *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 707-08 (1982), *disc. rev. denied* 305 N.C. 300 (1982).

2 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 N.C.P.I.-MV 105.15.