

**GEORGIA JURY INSTRUCTIONS FOR PRODUCT
LIABILITY CLAIMS AND DEFENSES**

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Introductory Note:

The Council of Superior Court Judges of Georgia (CSCJG) issues the *Suggested Pattern Jury Instructions*, available in print and electronic format, and encourages attorneys to submit jury instructions to judges by reproducing the specific charges within the volumes or by directly citing pages therein. The authors of this section have found that Georgia trial court judges often vary on their adherence to the *Suggested Pattern Jury Instructions*. Generally, Georgia trial court judges seem to follow the suggested instructions precisely, at times allowing some "tweaking" of the language. Many judges are known to accept parties' proposed charges, particularly where a suggested pattern instruction does not exist.

To that end, where a suggested pattern instruction issued by the CSCJG is available, the authors have included the suggested instruction verbatim—adjusted only to conform to the formatting of this publication—unless otherwise indicated by an explanatory "Author's Note." A note that accompanies any CSCJG pattern instruction as it appears in the *Suggestion Pattern Jury Instructions* is indicated simply as "Note." Where there is no CSCJG suggested pattern instruction on a particular area of interest, the authors offer a proposed instruction based on case law and trusted secondary sources and indicate accordingly.

As noted below in the section entitled "Negligence," a 2005 Tort Reform law (Senate Bill 3) in Georgia has made the state of the law on the areas of apportionment of liability, contribution, and concurrent negligence somewhat unclear. The authors have indicated this in the Author's Notes and have offered alternative instructions where appropriate.

STRICT PRODUCT LIABILITY

Strict Product Liability

Issue Instruction—General Explanation

The Plaintiff contends that [he/she] was injured because of a [defective product/defective condition in product] manufactured by the Defendant, [Defendant company's name],

The manufacturer of a product that is sold as new may be liable or responsible to any person who is injured because of a defect in the product that existed at the time the manufacturer sold the product. However, a manufacturer of a product is not an insurer, and the fact that a product may cause an injury does not necessarily make the manufacturer liable.

The type(s) of product defect(s) alleged by the Plaintiff is/are a [manufacturing defect, a design defect, and/or a defect because of inadequate warning]. There is no single general way to define what constitutes a defect in a product. Whether a product is defective is a question of fact to be determined by you, in each case, based on the instruction that I will give you.

Authorities: 11th Circuit Pattern Jury Instructions - Civil, § 2.1 (Products Liability); Official Code of Georgia Annotated (hereinafter "O.C.G.A.") § 51-1-11; *Center Chemical Co. v. Parzini*, 234 Ga. 868 (1975); *Banks v. ICI Americas Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994); *S KHand Tool Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103 (1996).

Author's Note: This instruction, modified from the 11th Circuit Pattern Jury Instructions, is suggested as a general overview instruction.

Strict Product Liability

Burden of Proof—Specific Defect

The Plaintiff has the burden of proof, which means that the Plaintiff must prove whatever it takes to establish [his/her] case, except for any admissions by the Defendant. In this case, the Plaintiff claims damages for personal injuries alleged to have been caused by a defective condition in the [product name].

To recover damages on these claims, a person injured by an allegedly defective product must establish the following elements by a preponderance of the evidence:

- [1] The Defendant manufactured and sold the product being used by the Plaintiff at the time of the accident involved in this case;
- [2] The product was defective at the time of such manufacture and sale;
- [3] The defect existed at the time the product left the manufacturer's control, and was thereafter operated up to the time of the accident without substantial change in its condition as of the time the Defendant sold it; and
- [4] The defect in the product was the proximate cause of the injury the Plaintiff claims.

(Choose appropriate defect(s) the jury will be charged on.)

If you find by a preponderance of the evidence that the product was defective when it left the manufacturer's control and that the Plaintiffs injury was proximately caused by that defect, then you should return a verdict for the Plaintiff, unless the Plaintiff should be denied recovery under some other principle of law given to you in these charges.

If you do not find by a preponderance of the evidence that the product was defective when it left the manufacturer's control or that the product was not the proximate cause of the Plaintiffs injury, then the Plaintiff is not entitled to recover and you should return a verdict for the Defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 02.020 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 62.720 (5th ed. 2006); 11th Circuit Pattern Jury Instructions - Civil, § 2.1 (Products Liability).

Author's Note: This instruction, modified from the 11 Circuit Pattern Jury Instructions and the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Strict Product Liability
Burden of Proof—Assumption of Risk

The Defendant asserts that the Plaintiff assumed the risk of injury from the dangers that the Plaintiff contends caused [his/her] injury. In order to establish this defense, the Defendant must prove:

- [1] That the [dangerous situation/condition/defective product] was open and obvious, or that the Plaintiff knew and appreciated the risk of the [dangerous situation/condition/defective product]; and
- [2] That the Plaintiff voluntarily assumed the risk of the danger and was injured thereby.

If you find that the Defendant has proved these elements, then the Plaintiff is not entitled to recover for the resulting injury and you should return a verdict for the Defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.710 (5th ed. 2006); 11th Circuit Pattern Jury Instructions - Civil, § 2.1 (Products Liability).

Author's Note: This instruction, modified from the 11th Circuit Pattern Jury Instructions and the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Strict Product Liability
Definition of "Unreasonably Dangerous"

Strict liability cannot be imposed merely because a product may be dangerous. Many products cannot be made completely safe for use, and some products cannot be made safe at all. Thus, if a product is properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions, it cannot be said to be defective. Under Georgia law, there is no liability for an "unreasonably dangerous product" absent some defect or defective condition.

Authorities: O.C.G.A. § 51-1-11; *Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351 (N.D. Ga. 1999).

Strict Product Liability
Proximate Cause—Definition

With regard to the issue of "legal cause," a defective condition is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes to producing such injury, so that it can reasonably be said that, except for the defective condition, the injury complained of would not have occurred. A defective condition may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the defective condition and if the defective condition contributes to producing the injury. **Authorities:** 11th Circuit Pattern Jury Instructions — Civil, § 2.1 (Products Liability).

Author's Note: The selected portion of the 11th Circuit Pattern Jury Instruction on proximate cause provided above has been altered to indicate that a plaintiff is no longer required to prove that a defective condition *substantially* contributes to producing the injury. See *John Crane, Inc. v. Jones*, 278 Ga. 747, 604 S.E.2d 822 (2004).

Strict Product Liability
Duty to Warn—Defect Due to Inadequate Warning

A manufacturer has a duty to give an adequate warning of known or reasonably foreseeable dangers arising from the use of a product. The manufacturer owes this duty to warn to all persons to whom the manufacturer should reasonably foresee may use or be affected by the product. A manufacturer's duty to warn may be breached by:

- [1] Failing to provide an adequate warning of the product's potential dangers; or
- [2] Failing to adequately communicate to the ultimate user the warning provided.

A product, however well or carefully made, that is sold without an adequate warning of such danger may be said to be in a defective condition. If you find by a preponderance of the evidence that the manufacturer did not warn or did not adequately warn when a warning should

have been given, then you may find the product to be defective for that reason, and the Plaintiff is entitled to recover.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.680 (5th ed. 2006).

Author's Note: O.C.G.A. § 51-1-11; *Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580(1975).

Strict Product Liability

Duty to Warn—Foreseeable and Unforeseeable Uses

A product that is safe if used in a normal manner is not ordinarily a defective product. If a person uses a product in an abnormal manner and is injured because of such abnormal use, the manufacturer is not liable for such injury. However, if the manufacturer had reason to anticipate or foresee that the product might be used in this abnormal manner and that such use might result in injury and, knowing these facts, failed to give adequate warning against using the product in this manner, then the manufacturer may be held liable for the resulting injury. **Authorities:** Georgia Suggested Pattern Jury Instructions - Civil, § 62.681 (5th ed. 2006).

Strict Product Liability

Duty to Warn—Open and Obvious Danger

However, a manufacturer is not required to warn of danger that should be known, obvious, or apparent to the user of the product.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.682 (5th ed. 2006).

Note: This charge should not be given in conjunction with the design defect risk-utility test charge. *See Ogletree v. Navistar Int'l Trans. Corp.*, 269 Ga. 443 (1998).

Strict Product Liability

Duty to Warn—Continuing Duty to Warn

A manufacturer's duty to warn arises when the manufacturer knows or reasonably should know of the danger presented by the use of a product. Therefore, a manufacturer has a

continuing duty to adequately warn the public of defects in a product even after that product has left the control of the manufacturer to be sold or distributed to the consumer. **Authorities:**

Georgia Suggested Pattern Jury Instructions - Civil, § 62.683 (5th ed. 2006).

Strict Product Liability

Duty to Warn— Learned Intermediary Doctrine

The product [prescription drug/medical device/commodity] at issue in this case is vended only to a particular group or profession [i.e., doctor, knowledgeable distributor]. For this reason, the Defendant [manufacturer] is not normally required to directly warn the [patient/ultimate consumer/user] of a known risk since there is an intermediary between the Defendant [manufacturer] and the ultimate consumer who is in a better position to warn the [patient/ultimate consumer/user] of any dangers associated with the product. The Defendant's warning must be adequate and reasonable under the circumstances, but the Defendant has no duty to warn members of the particular group or profession of dangers generally known to the particular group or profession.

Authorities: *Eyster v. Borg-Warner Corp.*, 131 Ga. App. 702, 206 S.E.2d 668 (1974); *Dozier Crane & Machinery, Inc. v. Gibson*, 284 Ga. App. 496, 644 S.E.2d 333 (2007); *Carter v. E.I. DuPont de Nemours & Co., Inc.*, 211 Ga. App. 139, 456 S.E.2d 661 (1995); *McCombs v. Synthes (U.S.A.)*, 277 Ga. 252, 587 S.E.2d 594 (2003); *Wells v. Vi-Mac, Inc.*, 266 Ga. App. 261, 486 S.E.2d 400 (1997).

Strict Product Liability

Personal Injury—Liability of Non-Manufacturer

The Defendant [seller/retailer] who purchases a product from a reputable distributor shall have a defense if you find:

- [1] That the Defendant, [seller/retailer], did not create the condition which rendered the product unreasonably dangerous;
- [2] That the product was commonly used and is ordinarily of a safe character;
- [3] That the product was contained in a closed or sealed package; and
- [4] That the Defendant [seller/retailer] had no knowledge of any defects in the product.

On the other hand, a [seller/retailer] who knows of a defect in a product or knows of a latent danger in the normal use of the product, of which the [user/purchaser] is not aware, owes a duty to exercise reasonable care to warn of the defect or danger. A [seller/retailer] owes a duty to exercise ordinary care not to sell or supply a product or instrumentality which is so defectively constructed or conditioned as to be imminently dangerous to the person to whom it is supplied.

Authorities: Charles R. Adams III, *Georgia Law on Torts* § 25-4 (2007-2008 ed.); *Segal v. Carroll Furniture Co.*, 51 Ga. App. 164, 179 S.E. 775 (1935); *Higdon v. Georgia Winn-Dixie, Inc.*, 112 Ga. App. 500, 145 S.E.2d 808 (1965).

Strict Product Liability

Assumption of Risk—Complete Bar to Recovery

If a person knows of a product's defect and is aware of the danger but nevertheless proceeds unreasonably to make use of the product, [he/she] cannot later hold another person

responsible for any injury suffered due to taking such a risk. If you find by a preponderance of the evidence that:

[1] The Plaintiff knew of the danger posed by the defective product;

[2] The Plaintiff understood and appreciated the risks of that defect; and

[3] The Plaintiff knowingly and voluntarily exposed himself/herself to such a risk, then the plaintiff would not be entitled to recover for the resulting injury or damages, and you would return a verdict for the defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.710 (5th ed. 2006);

Note: Revised—Omits references to ordinary care.

Author's Note: Under Georgia law, the Plaintiffs assumption of the risk is a complete bar to the Plaintiffs recovery, rather than just a factor that reduces the Plaintiffs recovery. This practice is contrary to that of most states that have either abolished the concept of assumption of risk completely or have treated the assumption of the risk doctrine as simply a form of comparative negligence. *See Muldovan v. McEachern*, 271 Ga. 805, 523 S.E.2d 566 (1999); O.C.G.A. § 51-11-2.

Strict Product Liability

Design Defect—General Explanation

A product may be found to be defective because of its particular design. Although a manufacturer is not required to ensure that a product design is incapable of producing injury, the manufacturer has a duty to exercise reasonable care in choosing the design for a product.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.640 (5th ed. 2006).

Strict Product Liability

Design Defect—Risk-Utility Test and Factors—One Plaintiff and One Defendant

To determine whether a product suffers from a design defect, you must balance the inherent risk of harm in a product design against the utility or benefits of that product design.

You must decide whether the manufacturer acted reasonably in choosing a particular product design by considering the following factors:

- [I] The usefulness of the product;
- [2] The severity of the danger posed by the design;
- [3] The likelihood of that danger;
- [4] The avoidability of the danger, considering the user's knowledge of the product, publicity surrounding the danger, the effectiveness of the warnings, and common knowledge or the expectation of danger;
- [5] The user's ability to avoid the danger;
- [6] The technology available when the product was manufactured; [7] The ability to eliminate the danger without impairing the product's usefulness or making it too expensive; [8] The feasibility of spreading any increased cost through the product's price or by purchasing insurance; [9] The appearance and aesthetic attractiveness of the product; [10] The product's utility for multiple uses;
- [II] The convenience and durability of the product;
- [12] Alternative designs for the product available to the manufacturer; and
- [13] The manufacturer's compliance with industry standards or government regulations.

If you decide that the risk of harm in the product's design outweighs the utility of that particular design, then the manufacturer exposed the consumer to greater risk of danger than the manufacturer should have in using that product design, and the product is defective. If after

balancing the risks and utility of the product, you find by a preponderance of the evidence that the product suffered from a design defect, then the Plaintiff is entitled to recover. **Authorities:** Georgia Suggested Pattern Jury Instructions - Civil, § 62.650 (5th ed. 2006).

Strict Product Liability
Feasible Alternative Design

In determining whether a product was defective, you may consider evidence of alternative designs that would have made the product safer and could have prevented or minimized the Plaintiffs injury. In determining the reasonableness of the manufacturer's choice of product design, you should consider:

- [1] The availability of an alternative design at the time the manufacturer designed this product;
- [2] The level of safety from an alternative design compared to the actual design;
- [3] The feasibility of an alternative design, considering the market and technology at the time the product was designed;
- [4] The economic feasibility of an alternative design;
- [5] The effect an alternative design would have on the product's appearance and utility for multiple purposes; and
- [6] Any adverse effects on the manufacturer or the product from using an alternative design.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.660 (5th ed. 2006);

Author's Note: State of the art is not a defense, but is a factor to be considered when determining whether a design defect exists. *Product Liability Desk Reference: A Fifty-State Compendium* 175 (Morton F. Daller ed., Aspen Publishers 2009 ed.).

Strict Product Liability
Misuse of Product

The Defendant contends that the Plaintiffs injury occurred as the result of a "misuse" of the product. A product that is safe if used in a normal manner is not ordinarily a defective product since a manufacturer is entitled to expect a normal use of the manufactured product. If the Plaintiffs injury occurred because of the Plaintiffs use of the product in a way or manner for which the product was not made or adapted, and the manufacturer had no reason to anticipate or foresee that the product might be used in this abnormal manner and that injury might result, then the Plaintiff cannot recover. If the manufacturer, however, had reason to anticipate this "misuse," had reason to know that the misuse might result in injury, and failed to give adequate warning against such use of the product in this manner, then the manufacturer may be held liable for the injury that resulted.

If you find that the Defendant has established this by a preponderance of the evidence, then your verdict will be for the Defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.681 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 62.720 (5th ed. 2006); 11th Circuit Pattern Jury Instructions - Civil, § 2.1 (Products Liability); *Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Hunter v. Werner Co.*, 258 Ga. App. 379, 574 S.E.2d 426 (2002).

Author's Note: This instruction, modified from the 11* Circuit Pattern Jury Instructions and the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Strict Liability
Compliance with Industry Standards or Government Regulations

In determining whether a product was defective, you may consider proof of a manufacturer's compliance with federal or state safety standards or regulations and industrywide customs, practices, or design standards. Compliance with such standards or regulations is a factor to consider in deciding whether the product design selected was reasonable considering

the feasible choices of which the manufacturer knew or should have known. However, a product may comply with such standards or regulations and still contain a design defect.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 62.670 (5th ed. 2006);

Author's Note: *See also Banks v. ICIAmericas Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994); *Doyle v. VolkswagenwerkArtiengesellschaft*, 267 Ga. 574, 481 S.E.2d 518 (1997).

Strict Product Liability Manufacturer Not Insurer

A manufacturer is not an insurer or a guarantor of its products, instead a manufacturer may only be liable if the Plaintiff proves that the product in question was defective, and the defect was a proximate cause of the injury. Georgia law does not impose a duty on the manufacturer to make a machine which is accident-proof or foolproof.

Every person owes a duty to exercise ordinary care not to supply by sale a product or instrumentality which is so defectively constructed or conditioned as to be imminently dangerous to the person to whom supplied.

Authorities: O.C.G.A. § 51-1-11; *Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Hunt v. Harley-Davidson Motor Co.*, 147 Ga. App. 44, 248 S.E.2d 15 (1978).

NEGLIGENCE

Negligence

Issues Made by the Pleadings/Burden of Proof on the Issues—Negligence—One or More Defendants—No Contributory Negligence

The case before you is a tort case, one in which the Plaintiff must prove by a preponderance of the evidence that the negligence of the Defendant(s), if any, was a proximate cause of the injuries to the Plaintiff. The term "preponderance" means "greater weight," and as it is used here, "preponderance of the evidence" means "the greater weight of evidence upon the issues involved,"

The Plaintiff claims that [he/she] was injured and sustained damages and that the Defendant(s) were negligent in the following respect(s): [Set forth facts here]

The Plaintiff must prove the following elements to state a cause of action for negligence in Georgia:

- [1] A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm;
- [2] A breach of this standard;
- [3] A legally attributable causa) connection between the conduct and the resulting injury; and
- [4] Some loss or damage flowing to the Plaintiff as a result of the alleged breach of duty.

If you find that the Plaintiff has proven these elements from your consideration of the evidence in this case, then your verdict should be in favor of the Plaintiff. If you find that the Plaintiff has not proven each element to state a cause of action for negligence, then your verdict should be for the Defendant(s).

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.001 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 00.100 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 00.040 (4th ed. 2004); *Anneewakee, Inc. v. Hall*, 196 Ga. App. 365,396S.E.2d9(1990).

Author's Note: This instruction, modified from the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Negligence

Issues Made by the Pleadings/Burden of Proof on the Issues—Negligence—One or More Defendants—Contributory Negligence an Issue

The case before you is a tort case, one in which the Plaintiff must prove by a preponderance of the evidence that the negligence of the Defendant(s), if any, was a proximate cause of the injuries to the Plaintiff. The term "preponderance" means "greater weight," and as it is used here, "preponderance of the evidence" means "the greater weight of evidence upon the issues involved."

The Plaintiff claims that [he/she] was injured and sustained damages and that the Defendant(s) were negligent in the following respect(s): [Set forth facts here] The Plaintiff must prove the following elements to state a cause of action for negligence in Georgia:

- [1] A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; [2] A breach of this standard; [3] A legally attributable causal connection between the conduct and the resulting injury; and [4] Some loss or damage flowing to the Plaintiff as a result of the alleged breach of duty.

If you find that Plaintiff has not proven each element, then your verdict should be for the Defendant(s). If you find that the Plaintiff has proven these elements from your consideration of the evidence in this case, then you must also consider the Defendant's claim that Plaintiff was contributorily negligent.

The Defendant has the affirmative burden to prove that the Plaintiff failed to exercise ordinary care for [his/her] safety.

If you find that the Defendant was negligent and that the Plaintiff was also guilty of negligence that contributed to the Plaintiffs injury or damages, and that the Plaintiffs negligence was equal to or greater than that of the Defendant, then the Plaintiff cannot recover.

If you find that the Plaintiffs negligence was less than the Defendant's negligence, then the negligence of the Plaintiff would not prevent the Plaintiffs recovery of damages but would require that you reduce the amount of damages otherwise awarded to the Plaintiff in proportion to the negligence of the Plaintiff compared to that of the Defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.001 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 00.100 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 00.040 (4th ed. 2004); Georgia Suggested Pattern Jury Instructions - Civil, § 60.141 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 60.140 (5th ed. 2006); *Browning v. Kahle*, 106 Ga. App. 353, 126 S.E.2d 892 (1962); Charles R. Adams III, *Georgia Law on Torts* § 16-1 (2007-2008 ed.).

Note: The jury should be instructed that the burden shifts to the Defendant to prove any asserted defenses regarding the Plaintiffs own lack of due care. *See* Georgia Suggested Pattern Jury Instructions - Civil, § 60.141 (5th ed. 2006).

Author's Note: This instruction, modified from the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Negligence
Negligence—Adult—Definition

Ordinary negligence means the absence of or the failure to use that degree of care that is used by ordinarily careful persons under the same or similar circumstances. Before a Plaintiff

can recover damages from a Defendant in a case such as this, there must be injury to the Plaintiff resulting from the Defendant's negligence.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.010 (5th ed. 2006).

Author's Note: The following addition is suggested based on case law—Negligence means the failure to do something which a reasonable person, guided by the considerations of ordinarily careful persons, would do under the same or similar circumstances. *See Johnson v. Landing*, 157 Ga. App. 313, 277 S.E.2d 307 (1981).

Negligence

Ordinary Care—Adult Definition

Ordinary diligence is the degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.010 (5th ed. 2006).

Author's Note: The above instruction is suggested based on the cited pattern jury instruction.

Negligence

Duty to Use Ordinary Care —Adult-Plaintiff—Definition of Comparative Negligence— Negligence

Comparative negligence applies only when the negligence of the Defendant and the negligence of the Plaintiff combined form the proximate cause of the Plaintiffs injury. A Plaintiff can recover on a comparative negligence basis when his negligence precedes the Defendant's negligence, or if it follows the Defendant's negligence, only if the Plaintiffs negligence is not the proximate cause of his injury and he could not have avoided the injury by exercising ordinary care,

If you find that the Plaintiffs negligence was more than the Defendant's negligence, you should find for the Defendant.

Authorities: *Product Liability Desk Reference: A Fifty-State Compendium* 179 (Morton F. Daller ed., Aspen Publishers 2009 ed.); Charles R. Adams III, *Georgia Law on Torts* § 16-3 (2007-2008 ed.); *Jenkins v. Burns*, 202 Ga. App. 579, 415 S.E.2d 30 (1992); *Happy Valley*

Farms v. Wilson, 192 Ga. 830, 16 S.E. 2d 720 (1941); *Fairburn & A. Ry. & Electric Co. v. Latham*, 26 Ga. App. 698, 107 S.E. 88 (1921).

Author's Note: In a case where there is absolutely no evidence presented from which a jury could find the Plaintiff was negligent, it is reversible error for the trial court to instruct the jury on comparative negligence.

Negligence

Duty to Use Ordinary Care and Product Liability—Negligent Design

A manufacturer has a duty to use ordinary care in the manufacture of its products so that it is reasonably safe for the purposes for which it is intended and for misuses of the product which are reasonably foreseeable. A manufacturer can be found liable for the injuries proximately caused by the negligent design of its product.

Authorities: Charles R. Adams III, *Georgia Law on Torts* § 25-3 (2007-2008 ed.); *Friend v. General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968).

Negligence

Due Care—Minor—Definition

The term due care, when used in reference to a child of tender years, is such care as the child's mental and physical capabilities enable the child to exercise in the actual circumstances of the occasion and situation under investigation. **Authorities:** Georgia Suggested Pattern Jury Instructions - Civil, § 60.040 (5th ed. 2006).

Author's Note: Children are not held to the same standard as adults; a child is expected to exercise care according to [his/her] age and capacity. See O.C.G.A. § 51-1-5; *Ashbaugh v. Trotter*, 237 Ga. 46, 226 S.E.2d 736 (1976).

Negligence

Proximate Cause—Definition

Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event and without which the event would not have occurred. Proximate

cause is that which is nearest in the order of responsible causes, as distinguished from remote, that which stands last in causation, not necessarily in time or place, but in causal relation.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.200 (5th ed. 2006).

Author's Note: The following addition is suggested based on case law—Proximate cause is considered to be the last wrongful act. *See* Charles R. Adams III, *Georgia Law on Torts* § 15-4 (2007-2008 ed.).

Negligence

Proximate Cause—Last Clear Chance

People are under an obligation to use ordinary care to avoid injuring others after finding [themselves] in a dangerous place, regardless of how they got there, and are liable for the failure to do so. This rule is known as the Last Clear Chance Doctrine. The Last Clear Chance Doctrine only applies when it is proved by a preponderance of the evidence that the Plaintiff(s) placed [himself/herself/themselves] in danger because of [his/her/their] own negligence, the Defendant actually knew of the Plaintiff(s)'s danger, and the Defendant had opportunity to take action to avoid the injury to the Plaintiff(s) by the use of ordinary care under the conditions and circumstances that existed at that time but failed to do so. If you find such to be proved, then the failure of the Defendant to use ordinary care under such circumstances to avoid the injury to the Plaintiff(s) would be considered the proximate cause of the Plaintiff(s)'s injuries.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.210 (5th ed. 2006).

Author's Note: The following addition is suggested based on case law—On the other hand, if the Plaintiff by ordinary care could have avoided the consequences to himself caused by the Defendant's negligence, he is not entitled to recover since he had the last clear chance to avoid injury. *See* O.C.G.A. § 51-11-7; *United Parcel Service, Inc. v. Colt Sec. Agency, Inc.*, 296 Ga. App. 815(2009).

Negligence
Proximate Cause—One Act Sufficient

The Plaintiff must prove that the Defendant was negligent in one or more ways alleged in order to recover. It is not necessary for the Plaintiff to prove that the Defendant was negligent in every way the Plaintiff claims. If you find no negligence at all on the part of the Defendant, then the Plaintiffs case against the Defendant ends.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.060 (5th ed. 2006).

Negligence
Contributory Negligence—Adult—Definition

The Defendant who raises the defense of contributory negligence has the affirmative burden to establish that Plaintiffs negligence was the sole proximate cause of Plaintiffs injury. The Defendant must show:

[1] The Plaintiff failed to exercise ordinary care for his own safety and this failure was the sole proximate cause of the Plaintiffs injuries; [2] The Plaintiff failed to exercise ordinary care to avoid the consequences of the Defendant's negligence once the Plaintiff knew or should have known of the Defendant's negligence. If you find that the Defendant was negligent and that the Plaintiff was also guilty of negligence that contributed to the Plaintiffs injury or damages, and that the Plaintiffs negligence was equal to or greater than that of the Defendant, then the Plaintiff cannot recover.

If you find that the Plaintiffs negligence was less than the Defendant's negligence, then the negligence of the Plaintiff would not prevent the Plaintiffs recovery of damages but would require that you reduce the amount of damages otherwise awarded to the Plaintiff in proportion to the negligence of the Plaintiff compared to that of the Defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.110 (5th ed. 2006); Georgia Suggested Pattern Jury Instructions - Civil, § 60.120 (5th ed. 2006); Charles R. Adams III, *Georgia Law on Torts* § 16-1 (2007-2008 ed.); *Product Liability Desk Reference: A Fifty-State Compendium* 179 (Morton F. Daller ed., Aspen Publishers 2009 ed.).

Authors Note: This instruction, modified from the Georgia Suggested Pattern Jury Instructions, is suggested as a general overview instruction.

Negligence

Negligence of Child Under Thirteen Years Can be Considered for Purposes of Comparative or Contributory Negligence

The negligence of a Plaintiff under the age of thirteen may be considered for the purposes of comparative or contributory negligence. The Plaintiff under the age of thirteen is not allowed to ignore his or her lack of due care and recover damages from a Defendant whose negligence is less than that of the Plaintiff.

Authorities: Charles R. Adams III, *Georgia Law on Torts* § 21-2 (2007-2008 ed.); *Ashbaugh v. Trotter*, 237 Ga. 46, 226 S.E.2d 736 (1976); *Barrett v. Carter*, 248 Ga. 389, 283 S.E.2d 609 (1981).

Negligence

Immunity from Suit—Children Under Thirteen Years

By statute, any Defendant child under the age of thirteen is immune from suit for a tort if the tort occurred during the time period when the child was under the age of thirteen which is the period of "infancy" defined by statute. Age thirteen is considered the age of discretion proscribed for criminal accountability and tort liability, and therefore infancy is no defense to a tort action so long as the Defendant has reached the age of discretion defined by statute.

Authorities: Charles R. Adams III, *Georgia Law on Torts* § 21-2 (2007-2008 ed.); *Hatch v. O'Neill*, 231 Ga. 446, 202 S.E.2d44 (1973); O.C.G.A. § 16-3-1; O.C.G.A. § 51-11-6.

Negligence
Negligence of Parents Not Imputed

In an action by an infant, the fault of the parents or of custodians selected by the parents is not allowed to be placed upon the child. **Authorities:** Georgia Suggested Pattern Jury Instructions - Civil, § 60.172 (5th ed. 2006).

Negligence
Intoxication as Negligence

By statute, the actual consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.

Authorities: Charles R. Adams **III**, *Georgia Law on Torts* § 6-2 (2007-2008 ed.); O.C.G.A. § 51-1_40 (a); *Delta Airlines, Inc. v. Townsend*, 279 Ga. 511, 614 S.E.2d745 (2005).

Author's Note: There are limited exceptions for the general rule of non-liability (i.e., furnishing alcohol to a minor or a person who is noticeably intoxicated).

Negligence
Concurrent Negligence—Two or More Negligent Defendants

When two or more causes operate directly or happen together in bringing about an injury, there can be a recovery against one or all of the responsible parties. The mere fact that an injury would not have been sustained if only one of the acts of negligence had occurred does not of itself prevent (or limit) the other act from constituting the proximate cause. If all acts of negligence contributed directly and concurrently or together in bringing about the injury, they together constitute the proximate cause.

The proximate cause of an injury may be two separate and distinct acts of negligence of different persons. When two concurrent acts of negligence operate together in bringing about an injury, the person injured may recover compensation for the entire loss from either or both of the persons responsible. If you find that the Defendant (or the defendant's agent) was negligent in at

least one

respect and that this negligence, joined together with the negligence of a third person, proximately caused the injury, then it is not necessary for you to determine whether the Defendant (or the agent) or a third person was more at fault because the Plaintiff would be entitled to recover against either for full damages.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.201 (5th ed. 2006).

Note: The following charge applies where there are two or more negligent defendants.

Author's Note: See also Charles R. Adams III, *Georgia Law on Torts* § 15-5 (2007-2008 ed.); O.C.G.A. § 51-12-31; O.C.G.A. § 51-12-33.

Author's Note: Since there is a single, indivisible injury for which there is no basis for apportionment, there is a strong argument that each joint tortfeasor continues to be individually liable to the Plaintiff for the entire amount of the injury. However, this should be considered an alternative instruction as this issue is not completely settled under Georgia law due to Georgia's recent Tort Reform legislation which purports to abolish or limit certain types of joint liability. See Apportionment of Responsibility instruction below.

Negligence

Negligence—Intervention of Outside Agency

If you decide that the Defendant was negligent and that [his/her] negligence was the proximate cause of injury to the Plaintiff, it is not a defense that something else may also have been a cause of the injury.

If you find that the intervening act of another has occurred such that the intervening act is sufficient to cause the Plaintiffs injury, cuts off any liability of the Defendant, and was not caused by the Defendant, then your verdict should be in favor of the Defendant.

If you decide that the sole proximate cause of injury to the Plaintiff was something other than the conduct of the Defendant, then you should find for the Defendant.

Authorities: *Blakley v. Johnson*, 220 Ga. 572, 140 S.E.2d 857 (1965); *Meiners v. Fortson & White*, 210 Ga. App. 612, 436 S.E.2d 780 (1993).

Negligence

Apportionment of Responsibility—General Statement of Law

Where an action is brought against one or more defendants for injury to a person, you must determine whether the Plaintiff is responsible to some degree for the injury and the percentage of fault attributable to the Plaintiff in determining the total amount of damages to be awarded. If you find that the Plaintiff is 50 percent or more responsible for the injury or damages claimed, then the Plaintiff will not be entitled to any damages. You must also apportion any award of damages based on the fault that you assign to each person or entity that contributed to the alleged injury or damages, including nonparties. Damages shall be the responsibility of the person or persons against whom they are awarded only and shall not be a joint liability among the persons liable and shall not be subject to any right of contribution from another defendant.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 66.810 (5th ed. 2006); O.C.G.A. §51-12-33.

Author's Note: The above instruction is suggested based on the cited pattern jury instruction.

Author's Note: The verdict form must list all parties and non-parties whom, pursuant to O.C.G.A. § 51-12-33, fault is apportioned, and provide for the jury to list the percentages of fault for each such party to be listed. The total of these percentages must add up to 100%.

Author's Note: This is an alternative instruction to the Concurrent Negligence instruction above as this issue is not completely settled under Georgia law due to Georgia's recent Tort Reform legislation which purports to abolish or limit certain types of joint liability. See complete statute immediately below:

O.C.G.A. §51-12-33—

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

Negligence
Independent Contractor Liability—Negligence

The employer generally is not responsible for torts committed by the employee when the employee exercises an independent business and is not subject to the immediate direction and control of the employer. [O.C.G.A. § 51-2-4]

(The following exceptions should not be charged except as they may apply to the facts.)

An employer is liable for the negligence of the contractor:

[1] When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance; [2] If, according to the employer's previous knowledge and experience, the work to

be done is in its nature dangerous to others, however carefully performed; [3]

If the wrongful act is the violation of a duty imposed by express contract upon the

employer; [4] If the wrongful act is the violation of a duty imposed by statute;

[5] If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of employer and employee or so that an injury results that is traceable to the

employer's interference; or [6] If the employer ratifies or approves the

unauthorized wrong of the independent

contractor. [O.C.G.A. § 51-12-5] The real test by which to determine whether a person was acting as the employee of another at the time of injuring someone is to determine whether at that particular time that person was subject to the other person's orders and control and was liable

to be discharged from the particular employment for disobedience of orders or misconduct.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.350 (4th ed. 2004); O.C.G.A. § 51-2-4; O.C.G.A. § 51-2-5.

Negligence
Assumption of the Risk—Negligence

Every person has the duty to exercise ordinary care for [his/her] own safety. If a person discovers a product's defect and is aware of the danger but nevertheless proceeds unreasonably to make use of the product, thereby taking a risk which in and of itself amounts to a failure to exercise ordinary care for [his/her] safety, [he/she] cannot later hold another person responsible for any injury suffered due to taking such a risk. If you find by a preponderance of the evidence that:

[1] The Plaintiff knew of the danger posed by the defective product; [2] The Plaintiff understood and appreciated the risk of that defect; and [3] The Plaintiff knowingly and voluntarily exposed [himself/herself] to such a risk, then the Plaintiff would not be entitled to recover, and you would return a verdict for the Defendant. **Authorities:** Georgia Suggested Pattern Jury Instructions - Civil, § 62.700 (5th ed. 2006).

Negligence
Negligence—Counterclaims

The Defendant has filed what is known as a counterclaim; that is, the Defendant claims that the Plaintiff has negligently caused the Defendant damage and that the Plaintiff should pay for the Defendant's damage instead of the Defendant paying for the Plaintiffs damage.

If both the Plaintiff and the Defendant were equally negligent, then neither should recover damages from the other, and you should find in favor of the Defendant, but without any damages.

Authorities: Georgia Suggested Pattern Jury Instructions - Civil, § 60.220 (5th ed. 2006).

Note: The same rules as to comparative negligence, proximate cause, and damages apply to the counterclaim that apply to the Plaintiffs claim. The pertinent charges on these subjects should be given and applied to the defendant, emphasizing that he/she is a plaintiff for the purpose of the counterclaim.

BREACH OF IMPLIED WARRANTY

Breach of Implied Warranty
Implied Warranty of Merchantability

Plaintiff claims Defendant breached an implied warranty of merchantability regarding the performance of the [describe the product]. A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Goods to be merchantable must:

- [1] Pass without objection in the trade under the contract description; and
- [2] In the case of fungible goods, be of fair average quality within the description; and [3] Be fit for the ordinary purposes for which such goods are used; and
- [4] Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and [5] Be adequately contained, packaged, and labeled as the agreement may require;
- and [6] Conform to the promises or affirmations of fact made on the container or label if

any. Plaintiff further claims one or more of the foregoing was a legal cause of [his/her] injuries. Defendant denies [he/she/it] made the warranty that Plaintiff claims [he/she/it] made. Defendant also denies that any warranty Plaintiff claims [he/she/it] made was a legal cause of Plaintiff's injuries. **Authorities:** O.C.G.A. § 11-2-314.

Breach of Implied Warranty

Implied Warranty of Fitness for Particular Purpose

Plaintiff claims Defendant breached an implied warranty of fitness for a particular purpose regarding the performance of the [describe the product] in that Defendant had reason to know the particular purpose for which [Plaintiff/the buyer of the product] was purchasing the [product] and [Plaintiff/the buyer of the product] was relying on Defendant's skill or judgment to select or furnish suitable products, and the [product] did not satisfy that purpose.

Plaintiff further claims one or more of the foregoing was a legal cause of [his/her/its] injuries.

Defendant denies [he/she/it] made the warranty that Plaintiff claims [he/she/it] made.

Defendant also denies it breached any implied warranty of fitness as claimed by Plaintiff.

Defendant also denies that any warranty Plaintiff claims [he/she/it] made was a legal cause of Plaintiff's injuries. **Authorities:** O.C.G.A. § 11-2-315.

Breach of Implied Warranty

Definition of a Merchant

To find Defendant is a merchant of products like [describe the product], you must find Defendant is a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. **Authorities:** O.C.G.A. § 11-2-104(1).

Breach of Implied Warranty

Persons to Whom Warranties Extend

Any express or implied warranty made by the Defendant to the person who purchased the [describe the product] also extends to any natural person who is in the family or household of the buyer or who is a guest in the 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 by breach of the warranty. **Authorities:** O.C.G.A. § 11-2-318.

Breach of Implied Warranty

Burden of Proof—Implied Warranty of Merchantability

In order for Plaintiff to recover for a breach of implied warranty of merchantability claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

- [1] Defendant sold [product] to [Plaintiff/a member of Plaintiffs family/a member or guest of Plaintiff s household];
- [2] At the time of the sale, Defendant was a merchant of products like the [product];
- [3] The [product] was not fit for its ordinary purposes or uses intended or reasonably foreseeable by Defendant;
- [4] Plaintiff used [product] for such a purpose;
- [5] [Plaintiff notified Defendant that [product] was not fit for such a purpose within a reasonable time after Plaintiff knew or had reason to know the [product] was not fit for such purpose]; and
- [6] Plaintiff was damaged as a direct result of [product] being unfit for such purpose.

If you find from your consideration of the evidence that each of these propositions has been proved, then your verdict should be for Plaintiff. But if, on the other hand, you find from your consideration of the evidence that any one of these propositions has not been proved, then your verdict should be for Defendant. **Authorities:** O.C.G.A. § 11-2-314; O.C.G.A. § 11-2-318; O.C.G.A. § 11-2-607(3)(a) **Author's Note:** By its terms O.C.G.A. § 11-2-607's notice requirement applies only to the buyer and not to a third-party beneficiary such as the plaintiff.

See Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574, 1582 (N.D.Ga. 1988); *Chaffln v. Atlanta Coca Cola Bottling Co.*, Ill Ga.App. 619,620(1972).

Breach of Implied Warranty

Burden of Proof—Implied Warranty of Fitness for a Particular Purpose

In order for Plaintiff to recover for a breach of implied warranty claim against Defendant,

Plaintiff has the burden of proving each of the following propositions:

- [1] Defendant sold [product] to [Plaintiff/a member of Plaintiff s family/a member or guest of Plaintiff s household];
- [2] At the time of the sale, Defendant had reason to know of the particular purpose for which the [product] was required;
- [3] Plaintiff reasonably relied on Defendant's skill or judgment that [product] was suitable for that purpose;
- [4] The [product] was not suitable for that particular purpose when sold by Defendant;
- [5] [Plaintiff gave Defendant notice that [product] was not suitable for such purpose within a reasonable time after Plaintiff knew or had reason to know [product] was not suitable for such purpose;] and
- [6] Plaintiff was damaged as a direct result of [product] being unfit for such purpose.

If you find from your consideration of the evidence that each of these propositions has been proved, then your verdict should be for Plaintiff. But if, on the other hand, you find from your consideration of the evidence that any one of these propositions has not been proved, then your verdict should be for Defendant.

Authorities: O.C.G.A. § 11-2-315; O.C.G.A. § 11-2-318; O.C.G.A. § 11-2-607(3)(a); *Fiat Auto U.S.A., Inc. v. Hollums*, 185 Ga. App. 113 (1987); *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790(1975).

Author's Note: By its terms O.C.G.A. § 11-2-607's notice requirement applies only to the buyer and not to a third-party beneficiary such as the plaintiff. *See Morgan v. Sears, Roebuck & Co.*, 700 F. Supp. 1574, 1582 (N.D.Ga. 1988); *Chaffln v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619,620(1972).

Breach of Implied Warranty
Exclusion or Modification of Warranties

To exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." All implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

Authorities: O.C.G.A. § 11-2-316; *Hutchinson Homes v. Guerdon Indus.*, 143 Ga. App. 664 (1977).

Breach of Implied Warranty
Damages

Where the buyer has accepted goods and given notification (O.C.G.A. § 11-2-607(3)), the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value the goods would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

In a proper case any incidental and consequential damages under the next section may also be recovered.

Authorities: Georgia Pattern Jury Instructions: Civil Cases § 18.052 (5th ed. 2006); O.C.G.A. § 11-2-714; O.C.G.A. § 11-2-715.

CONSUMER FRAUD

Consumer Fraud

Violation of Fair Business Practices Act

Plaintiff has alleged that Defendant participated in "unfair or deceptive acts or practices in the conduct of consumer transactions." Plaintiff only has a right to damages if Defendant offered the product for sale to the general public and there was an impact on the general consuming public. Private transactions are not recoverable under FBPA. If you determine the Defendant offered this product for sale to the general public and there was a negative impact on the general consuming public, then you must determine if Plaintiff has also proved three things: a violation of the act, proximate cause, and injury.

To recover under the FBPA, Plaintiff must show that Defendant made some deceptive representation that actually deceived the consuming public. The Plaintiff must also show that he reasonably relied on the Defendant's statements. This means you must consider whether a reasonable person, like you, would have relied on Defendant's statements. Even if a reasonable person would have relied on the Defendant's statements, Plaintiff is not entitled to recover if he had the opportunity to discover the truth but failed to exercise proper diligence to discovery the truth.

Authorities: O.C.G.A. § 10-1-393(a); *Marrale v. Gwinnett Place Ford*, 271 Ga. App. 303, 307 (2005); *Davis v. Rich's Dept's Stores, Inc.*, 248 Ga. App. 116 (2001); *Moore-Davis Motors v. Joyner*, 252 Ga. App. 617 (2001); *Nims v. Otter*, 188 Ga. App. 516 (1988).

Consumer Fraud

Definition of "Proximate Cause"

You must also determine whether any deceptive act on the part of the Defendant was the proximate cause of Plaintiffs injury. Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event and without which the event would not have occurred. Proximate cause is that which is nearest in the order of responsible causes, as distinguished from remote, that which stands last in causation, not necessarily in time or place, but in causal relation.

Authorities: Georgia Pattern Jury Instructions: Civil Cases § 60.200 (5th ed. 2006).