5.40B MANUFACTURING DEFECT (Approved 10/1998; Revised 8/2011)

Let me give you some applicable concepts which deal with the claim of manufacturing defect, and then I will explain what the plaintiff must prove in order to win in a manufacturing defect case.

A manufacturing defect may be established by proof that, as a result of a defect or flaw which happened during production or while in defendant's control, the product was unsafe and that unsafe aspect of the product was a substantial factor in causing plaintiff's accident/injury/harm.[1]

To establish his/her claim for a manufacturing defect, the plaintiff must prove all of the following elements by a preponderance (greater weight) of the credible evidence:

1. The *[product]* contained a manufacturing defect which made the product not reasonably safe. To determine if the *[product]* had a manufacturing defect, you must decide what the condition of the *[product]* as planned should have been according to defendant's design specifications or performance standards and

---

[1] The Products Liability Act defines harm as "physical damage to property, other than to the product itself" and certain personal injuries. *N.J.S.A.* 2A:58C-1(b)(2). Where the claim is for damage to the product itself, the economic loss rule bars tort remedies in strict liability or negligence. *See Dean v. Barrett Homes, 204 N.J. 286, 305 (2010)* (economic loss rule bars plaintiffs from recovery under the PLA for damage that the Exterior Insulation and Finish System (EIFS) caused to itself, but not to damage caused by the EIFS to the house's structure or its immediate environs).

what its condition was as it was made. If you find there is no difference between the two conditions, then there was no manufacturing defect. If there was a difference, you must decide if that difference made the *[product]* not reasonably safe for its intended or reasonably foreseeable uses. If the answer is "yes," then you have found the *[product]* to be defective. Plaintiff need not prove that defendant knew of the defect nor that defendant caused the defect to occur.

Whether there was a manufacturing defect in the *[product]* may be shown to you by the *[plaintiff]* in one of three ways.[2] First of all, it may be demonstrated by direct evidence, such as a defective part. Second, you may infer that there was a defect by reasoning from the circumstances and facts shown. Third, if you find from the evidence that there is no other cause for the accident other than a manufacturing defect, you may find a defect existed.[3]

---

[2] *Suter v. San Angelo Foundry & Machine Co.,* 81 *N.J.* 150, 170 (1979).

[3] Compare *Scanlon v. Gen. Motors Corp.,* 65 *N.J.* 582 (1974), with *Moraca v. Ford Motor Co.,* 66 *N.J.* 454 (1975). This section of the charge should be expanded by relating those principles to the facts of your case. *See also Consalo v. General Motors,* 258 *N.J. Super*. 60 (App. Div. 1992) and *Sabloff v. Yamaha Motor Co.,* 113 *N.J. Super* 279 (App. Div. 1970), *aff'd*, 59 *N.J.* 365 (1971).

In *Myrlak v. Port Authority of New York, et al.,* 157 *N.J.* 84 (1999), the Supreme Court held that a *res ipsa loquitur* charge ordinarily should not be given in a strict product liability action such as a manufacturing defect case. The Court found that the present charge language "adequately informed the jury that it could rely on circumstantial evidence to 'infer that there was a defect by reasoning from circumstances and the facts shown'". *Id.* at 107. The Court went on to adopt the "indeterminate product defect test" established in *Section 3 of the Restatement (Third) of Torts: Product Liability* as the more appropriate jury instructions in product liability

[Plaintiff] says that the *[product]* was defective because [insert short factual description of plaintiff's contention why the product was defective]. *[Defendant* says that the *[product]* was not defective because [insert factual description].

This element may be established by proof that the *[product]* deviated from the maker's own design specifications or performance standards.

2. That the defect existed before the *[product]* left the control of the *[defendant]*.

3. *[Use only when misuse or intentional alteration is an issue and use only applicable portion]*. That when the accident happened the product was not being misused, or it had not been substantially altered in a way that was not reasonably foreseeable.

[Plaintiff] must prove that at the time of the accident the *[product]* was being used properly for its intended purposes and for an intended or reasonably foreseeable purpose. To prove this, plaintiff must show that the product was not being misused in a way that was neither intended nor was reasonably foreseeable.

---

cases which do not involve a shifting of the burden of persuasion. It provides:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
> (a) was of a kind that ordinarily occurs as a result of a product defect; and
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

In this case the *[defendant]* contends that at the time of the accident the *[product]* was being misused. *[Set forth a brief factual description of this dispute]*.

Plaintiff must also show that when he/she used the product, it had not been substantially altered since it left defendant's control. A substantial alteration is a change or modification made to the product after it was manufactured or sold which both alters the design or function of the product and has a significant or meaningful effect on the product's safety when used.[4] In this case the defendant contends that the *[product)* was substantially altered. *[Set forth a brief factual description of this dispute].* In considering this issue, you must determine whether there has been a subsequent misuse/abnormal use or substantial alteration to the product. If you find such to exist, you must determine whether such misuse/abnormal use or substantial alteration was reasonably foreseeable at the time the product left the control of the defendant(s).

Reasonably foreseeable does not mean that the particular misuse/abnormal use or substantial alteration was actually foreseen or could have been actually foreseen by *[defendant]* at the time the *[product]* left his/her control.

---

[4] *See Soler v. Casemaster, Div. of the H.P.M. Corp.,* 98 *N.J.* 137 (l984); *Brown v. United States Stove Co.,* 98 *N.J.* 155 (l984). Note that an issue of alteration arises only if the particular facts indicate a substantial change relating to the safety of the product. *Soler,* 98 *N.J.* at 148. Note further that the issue of misuse/abnormal use or substantial alteration, if present in a case, presents considerations bearing upon proximate cause. *Id.* at 149 *Brown, supra,* 98 *N.J.* at 171-174. *See also Fabian v. Minster Mach. Co., Inc.,* 258 *N.J. Super.* 261 (App. Div. 1992).

This is a test of objective foreseeability. You may consider the general experience within the industry as to what was known or could have been known with exercise of reasonable diligence when the *[product]* was manufactured, sold or distributed. Then decide whether a reasonably careful manufacturer, seller or distributor could have anticipated the misuse/ abnormal use or substantial alteration of the *[product]*. If the alteration reasonably could have been anticipated, and if the alteration made the product not reasonably safe, the defendant is still responsible. *[Plaintiff]* has the burden to show that a typical manufacturer or seller of the product could foresee that the product would be altered or that despite the alteration the original defect was nonetheless a cause of the injury.[5]

4. That the *[plaintiff]* was a direct or reasonably foreseeable user, or a person who might reasonably be expected to come in contact with the *[product]*.[6]

5. That the manufacturing defect was a proximate cause of the accident/injury.

Proximate cause means that the manufacturing defect was a substantial factor which singly, or in combination with another cause or causes brought about the accident. [*Plaintiff*] need not prove that this same accident could have

---

[5] *Brown, supra,* 98 *N.J.* at 169.

[6] This may be omitted if not in dispute.

been anticipated so long as it was foreseeable that some significant harm could result from the manufacturing defect. If the manufacturing defect does not add to the risk of the occurrence of this accident [*or if there was an independent intervening cause of the accident*] and therefore is not a contributing factor to the happening of the accident, then plaintiff has failed to establish that the manufacturing defect was a proximate cause of the accident.

An intervening cause is the act of an independent agency which destroys the causal connection between the effect of the defect in the product and the accident. To be an intervening cause the independent act must be the immediate and sole cause of the accident. In that event, liability will not be established because the manufacturing defect is not a proximate cause of the injury. However, the defendant would not be relieved from liability for its defective product by the intervention of acts of third persons, if those acts were reasonably foreseeable. Where the intervention of third parties is reasonably foreseeable, then there is a substantial causal connection between the product defect and the accident.[7] You must determine whether the *[alleged intervening cause]* was an intervening cause that destroyed the causal connection between the defective

---

[7] *Navarro v. George Koch & Sons, Inc.,* 211 *N.J. Super.* 588, 573 (App. Div. 1986), and *Butler v. PPG Industries, Inc.,* 201 *N.J. Super.* 558, 564 (App. Div. 1985), may be understood as discussions of a burden of production rather than persuasion. So construed they clearly conform to *Brown v. U.S. Stove,* 98 *N.J.* 155 (1984) and prior law. *See Fabian v. Minster Mach. Co., Inc.,* 258 *N.J. Super* 261 (at 277 footnote 5) and *Johansen v. Mikita USA Inc.,* 128 *N.J.* 86 (1992).

product and the accident. If it did, then the manufacturing defect was not a proximate cause of the accident.

If *[plaintiff]* has proven each element by a preponderance of the credible evidence, then you must find for *[plaintiff]*.

If, on the other hand *[plaintiff]* has failed to prove any of the elements, then you must find for the *[defendant]*.

[When there is a jury question dealing with defendant's affirmative defense or contributory/comparative negligence, the next three questions are applicable.]

6. Was the plaintiff negligent.[8]

[Defendant] contends that *[plaintiff]* was at fault for the happening of the accident. (Briefly describe contention.)

To win on this defense, *[defendant]* must prove that *[plaintiff]* voluntarily and unreasonably proceeded to encounter a known danger and that *[plaintiff's]* action was a proximate cause of the accident. The failure of *[plaintiff]* to discover a defect in the product or to guard against the possibility of a defective product is

---

[8] This defense is not applicable to workplace injuries where the plaintiff, a worker, has performed a task reasonably assumed to be part of the assigned duties. *Ramos v. Silent Hoist and Crane Co.,* 256 *N.J. Super.* 467 (App. Div. 1992) at 478, *Suter, supra,* 81 *N.J.* at 167-168; *Tirrell v. Navistar, Int'l.,* 248 *N.J. Super*. at 401-402. In other than a workplace setting, in a product liability case, plaintiff's comparative fault is limited to unreasonably and intentionally proceeding in the face of a known danger. *Cepeda v. Cumberland Engineering Company, Inc., supra,* 76 *N.J.* at 186. *Johansen v. Makita USA, Inc.,* 128 *N.J.* 86 (1992).

not a defense. Rather, to win on this defense *[defendant]* must prove that *[plaintiff]* had actual knowledge of the particular danger presented by the *[product]* and that *[plaintiff]* knowingly and voluntarily encountered the risk.

7. Was plaintiff's negligence a proximate cause of the injury?

[See Chapter 6 which deals with Proximate Cause.]

8. Comparative Fault; Apportionment of Fault; Ultimate Outcome.

If plaintiff and defendant both are found to be at fault which is a proximate cause of the accident/injury, the jury must compare their fault in terms of percentages. ***[See Model Civil Charge 7.31.]***