

5.40G PRODUCT MISUSE OR ALTERATION¹ (Approved 12/93)

[Use the following if there is an issue of misuse in terms of purpose.]

The next element of the plaintiff's burden of proof is that at the time of the accident the product was being used for an intended or reasonably foreseeable purpose. By a reasonably foreseeable purpose, it is meant that plaintiff was using the product for a purpose for which it was manufactured or for a purpose which a manufacturer could reasonably have foreseen.

[Insert contentions of the parties here.]

If you find that the plaintiff's purpose was not reasonably foreseeable, then the defendant did not breach any duty owed to the plaintiff. If, however, you find that the plaintiff did use the product for a reasonably foreseeable purpose, you must then decide whether the product was defective.²

[Use the following if there is an issue of misuse in terms of manner.]

¹ In many cases, purpose and manner of misuse may not both be in dispute. In such cases, instruct the jury only on the applicable type of misuse, *i.e.*, manner or purpose. Likewise, charge substantial alteration only when in dispute.

² *Jurado v. Western Gear Works*, 131 N.J. 375, 389 (1993).

In determining whether the product was defective, you should first decide if the plaintiff used the product in a reasonably foreseeable manner. By reasonably foreseeable manner, it is meant that the way in which the plaintiff used the product could have been anticipated by a reasonable manufacturer at the time the product left its hands.³ *[Insert contentions of the parties.]* If you find that the plaintiff's manner of using the product was not reasonably foreseeable by the defendant, then the defendant did not breach any duty owed to the plaintiff.⁴

[Use the following if there is an issue of substantial alteration.]

An element of the plaintiff's burden of proof is that the defect existed when the product left the defendant's control. *[Insert contentions of the parties.]* However, if the product was altered after it left the defendant's control, then you must decide if the alteration was substantial. A substantial alteration is a change or modification made to the product after it was manufactured or sold that does two things: (1) it alters the design or function of the product and (2) it has a significant

³ *Id.*

⁴ "In cases in which the product is defective solely because of a foreseeable misuse, the determination of defect predetermines the issue of proximate cause. In other cases, however, where a product is defective for reasons other than the particular misuse, the jury must separately determine proximate cause." *Jurado, supra* 131 N.J. at 389.

or meaningful effect on the product's safety when used.⁵ If you find that the alteration was substantial, you must then decide if the alteration was reasonably foreseeable at the time the product left the control of the defendant.⁶ If the alteration reasonably could have been anticipated, and if as a result of the alteration made the product was not reasonably safe, the defendant may be responsible even if there was a substantial alteration. If alteration was not foreseeable, then the defendant is not responsible for injuries caused by that alteration.

[Use the following wherever misuse or substantial alteration is charged.]

I used the term reasonably foreseeable. Reasonably foreseeable does not mean that the particular misuse or substantial alteration was actually foreseen or could have been actually foreseen by this defendant at the time the product left its

⁵ See *Soler v. Castmaster, Div. of the H.P.M. Corp.*, 98 N.J. 137 (1984); *Brown v. United States Stove Co.*, 98 N.J. 155 (1984). 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 Footnote 4 *supra*).

⁶ "[E]ven a significant subsequent alteration of a manufactured product will not relieve the manufacturer of liability unless the change itself created the defect that constitutes the proximate cause of the injury." *States Steamship Co. v. Stone Manganese Marine Ltd.*, 371 F. Supp. 500, at 505 (D.N.J. 1973). Thus, if the defect which, singly or in combination, caused the injury existed before, as well as after, the change, the manufacturer is not relieved of liability, regardless of how much the product has been changed. *Id.*; *Ortiz v. Farrel Co.* 171 N.J. Super. 109 (Law Div. 1979); *Brown, supra* at 171.

control. It is a test of objective foreseeability. That is, considering the general knowledge and experience within the industry when the product was manufactured, sold or distributed, could the particular misuse or substantial alteration of the product have been anticipated by a reasonably careful manufacturer.⁷ 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.⁸

⁷ Where there is an issue of substantial alteration a jury need not consider the presence of a defect unless it resolves the element of foreseeability against the defendant(s). In such a case, the trial judge might consider altering the charge so that the substantial alteration is charged first.

⁸ *Brown, supra*, 98 N.J. at 169.