**5.40D-4 DESIGN DEFECT — DEFENSES** (Approved 4/99; Revised 10/01)

***[When there is a jury question dealing with a statutory defense and/or affirmative defense the following law and questions are applicable.]***

## 1. Statutory Defenses

### a. State-of-the-Art Defense, *N.J.S.A.* 2A:58C-3a(1)[1]

***NOTE TO JUDGE***

This defense is inapplicable, pursuant to *N.J.S.A.* 2A:58C-3b, if the court, by clear and convincing evidence, finds all of the following:

(1) The product is egregiously unsafe or ultra-hazardous;

(2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and

(3) The product has little or no usefulness.

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[1] *N.J.S.A.* 2A:58C-3. Exemptions from liability.

a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product(.)

The "State-of-the-Art" defense must be pled by the defendant as an affirmative defense. *R.* 4:5-3 and -4; *Cavanaugh v. Skil Corp*., 164 *N.J.* 1, 7 (2000). The defense is not raised if the manufacturer challenges only the practicality of an alternative design or device, and not its technological availability or feasibility at the time the product left the manufacturer's control. In such case, the jury should not be instructed on the state-of-the-art defense. A defendant who pleads and asserts a true "state of the art" defense, has the burden of proof to establish that the technological state of the art at the time the product left its control did not permit any reasonably safer alternative design. Once it has done so, the plaintiff must prove that the product did not conform to whatever may have been the feasible technology. *N.J.S.A.* 2A:58C-3a(1) does not alter the plaintiff's initial burden to show the existence of a reasonable alternative design. *Cavanaugh, supra*.

Where the defendant has introduced evidence to establish the statutory "state of the art defense," the jury may be asked to consider the defense first, before it goes on to consider the other risk/utility factors. The other factors may be relevant only if the defendant fails to establish its defense that "(a)t the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product(.)"

**CHARGE TO JURY** ***(No practical or feasible alternative design - state of the art defense)***: The *[defendant manufacturer/seller]* cannot be held liable to the *[plaintiff]* if at the time the *[product]* left the defendant's control, there was no practical and technically feasible alternative design that would have prevented the

*plaintiff's]* injury (illness, death)[2] without substantially impairing the reasonably anticipated or intended functions of the product.[3]

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[2] In design defect cases the issue is often whether an alternative design should have been developed. *See*, for example, in a warning defect setting, *Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 455-456 (1984):

> In strict liability warning cases, unlike negligence cases, however, the defendant should properly bear the burden of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 *N.Y.U.L.* Rev. 734, 745 (1983) at 760-61; *see* Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey*, 2 *Seton Hall L.Rev.* 47, 60 (1970) ("burden of proof that hepatitis is not detectable and unremovable should rest on the defendant" blood bank or hospital). The defendant is in a superior position to know the technological material or data in the particular field or specialty. The defendant is the expert, often performing self-testing. It is the defendant that injected the product in the stream of commerce for its economic gain. As a matter of policy the burden of proving the status of knowledge in the field at the time of distribution is properly placed on the defendant.

[3] In *Roberts v. Rich Foods*, 139 *N.J.* 365 (1995), discussing the phrase "impairing the usefulness of the product" in *N.J.S.A.* 2A:58C-3a(2) the Court observes:

> The Act's legislative history suggests that "without impairing the usefulness" implicates the product's inherent characteristics and intended use. The Senate Judiciary Committee Statement refers to dangers 'that can feasibly be eliminated without impairing the usefulness of the product, because such dangers are not "inherent."' Hence, dangers that are not inherent can be eliminated without impairing usefulness. Conversely, dangers that are inherent cannot be eliminated without impairing usefulness...(A)n inherent danger arises from an aspect of the product that is indispensable to its intended use. The danger of exposed, sharp blades is indispensable to knives, but not to lawn mowers.

**Jury Interrogatory on Statutory Defense of Absence of Safer Alternative Design**

Has the defendant proven that at the time the *[product]* left the control of the *[defendant]* no practical and technically feasible alternative design existed that would have prevented the plaintiff's injury without substantially impairing the reasonably anticipated or intended, essential functions of the *[product]*?

___Yes ___No

**b. Consumer Expectations/Obvious Danger Defense: *N.J.S.A.* 2A:58C-3(a)(2)**

***NOTE TO JUDGE***

This defense is unavailable if the case involves industrial machinery or other equipment used in the workplace. Nor does the defense apply to dangers from machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product.[4]

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[4] *N.J.S.A.* 2A:58C-3a(2) provides:

> (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product(.)

The *[defendant manufacturer/seller]* cannot be held liable to the *[plaintiff]* if (1) the characteristics *[dangers]* of the *[product]* are known to the ordinary consumer or user and (2) the injury (illness, death) was caused by an unsafe aspect of the *[product]* that is an inherent, essential characteristic of the *[product]*.

The elimination of an essential characteristic might not render the *[product]* totally useless, but it would measurably reduce the *[product's]* appropriateness for its central function. The defense is established if eliminating the danger would require eliminating an inherent characteristic of the *[product]* that would be recognized by the ordinary person using the product with the ordinary knowledge common to that class of consumer.[5]

**Jury Interrogatories on Inherent, Essential Dangers**

(1) Has the defendant proven that the dangers of the *[product]* are known to the ordinary consumer or user?

___Yes ___No

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*See Hurst by Hurst v. Glock, Inc.*, 295 *N.J. Super* 165 (A.D. 1996); *cf. McWilliams v. Yamaha Motor Corp., USA*, 780 *F. Supp.* 251 (D. N.J. 1991), *rev'd*, 987 *F.2d* 200 (3d Cir. 1993), and *Roberts v. Rich Foods*, *supra*, 139 *N.J.* at 382 (1995).

[5] *Roberts v. Rich Foods*, *supra*, 139 *N.J.* at 382 (1995).

(2) Has the defendant proven that the plaintiff's injury was caused by an unsafe aspect of the *[product]* that is an inherent, essential characteristic of the *[product]*?

___Yes ___No

### c. Unavoidably Unsafe Product and Danger Was Warned About, *N.J.S.A.* 2A:58C-3a.(3)

The *[defendant manufacturer/seller]* cannot be held liable to the *[plaintiff]* if the injury (illness, death) was caused by an unavoidably unsafe aspect of the *[product]* and the *[product]* carried an adequate warning.[6] An adequate warning

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[6] *N.J.S.A.* 2A:58C-3b (3) provides:

> The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.

*N.J.S.A.* 2A:58C-4 provides:

> In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the federal Food and Drug Administration under the

or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the *[product]*, taking into account the characteristics of the product, and the ordinary knowledge common to its intended users.[7]

**Jury Interrogatories on Unavoidably Unsafe Product Where Danger Was Warned About**

(1) Has the defendant proven that plaintiff's injury was caused by an unavoidably unsafe aspect of the *[product]*?

___Yes ___No

(2) Has the defendant proven that the *[product]* carried an adequate warning or instruction?

___Yes ___No

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"Federal Food, Drug, and Cosmetic Act," 52 *Stat.* 1040, 21 *U.S.C.* 301 *et seq.* or the "Public Health Service Act," 58 *Stat.* 682, 42 *U.S.C.* 201 *et seq.*, a rebuttable presumption shall arise that the warning or instruction is adequate. For purposes of this section, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

[7] In a prescription drug product case the person whose knowledge is relevant is usually the prescribing physician. *N.J.S.A.* 2A:58C-4.

## 2. Existence of F.D.A. Approved Warning or Instruction

### *NOTE TO JUDGE*

An F.D.A. - approved warning carries a rebuttable presumption of adequacy. *N.J.S.A.* 2A:58C-4. Thus, if there is no evidence of inadequate warnings, the plaintiff's case fails. The phrase "rebuttable presumption" should not be used in the charge to the jury. *Evidence Rule* 13, comment 6; *Evidence Rule* 14. *See, Feldman, supra*, 97 *N.J.* at 458-461.

Defendant has offered evidence that the warnings and instructions were approved or prescribed by the Federal Food and Drug Administration. Plaintiff *[disputes that and further]* contends that even if so approved, the warnings were still inadequate. Compliance with F.D.A. warnings and instructions does not mean necessarily that the warnings were adequate, but such compliance, along with the other evidence in this case, may satisfy you that they were. Defendant has the burden of proving that the warnings and instructions were approved by the F.D.A. If there has been compliance with the F.D.A. action, than *[plaintiff]* has the burden of proving that the approved warnings or instructions were, nevertheless, inadequate. You may find that the warnings or instructions were inadequate despite the F.D.A. approval.

***NOTE TO JUDGE***

The warning issue may also bear on proximate cause and contributory negligence.[8]

### 3. Comparative or Contributory Negligence, *N.J.S.A.* 2A:15-5.1

Did the plaintiff voluntarily and unreasonably proceed in the face of a known danger (limited comparative negligence)?

***NOTE TO JUDGE***

Our statute provides generally that damages sustained shall be diminished by the percentage of negligence attributable to the person recovering. However there are important exceptions. In workplaces comparative negligence is generally not charged.[9] If plaintiff and

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[8] *See Coffman v. Keene Corp.*, 133 *N.J.* 581, 604-605 (1993):

> Evidence that a plaintiff would have disregarded an adequate warning would tend to demonstrate that the plaintiff's conduct, rather than the absence of a warning, was the cause in fact of the resultant injury. The relevance of the plaintiff's conduct on the issue of proximate causation necessarily implicates the issue of contributory negligence. *See Johansen v. Makita, supra*, 128 *N.J.* at 94. Ordinarily, the defense of contributory negligence, in a strict product-liability case, is available when the plaintiff's conduct amounted to "voluntarily and unreasonably proceeding to encounter a known danger." *Ibid*. (quoting comment m, *Restatement (Second) of Torts* at 402A); *Suter v. San Angelo Machine, supra*, 81 *N.J.* at 167. That standard of contributory or comparative negligence is applicable in a failure-to-warn case... The question arises, however, whether evidence of conventional or ordinary contributory negligence would be sufficient to overcome the heeding presumption in a failure-to-warn case in the workplace context...We have consistently emphasized that a plaintiff injured in the workplace as a result of a known dangerous product cannot and should not be characterized as someone who has voluntarily and unreasonably encountered a known danger.

[9] *See*, for example, *Tobia v. Cooper Hospital University Medical Center*, 136 *N.J.* 335, 341-342 (1994):

> defendant are found to be at fault which fault is a proximate cause of the [accident/injury], the jury must compare their fault in terms of percentages, and the jury must be instructed on the effect on the ultimate outcome of its allocations. *See* Model Civil Charges 7.30, 7.31, 7.32.

### a. Was the plaintiff negligent?[10]

*[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]*

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> In a long series of cases, we have held that when a tortfeasor's duty includes exercise of reasonable care to prevent a party from engaging in self-damaging conduct, contributory negligence is barred as a defense... "As one writer . . . has said, 'once it is established that the defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct.'" *Green v. Sterling Extruder Corp.*, 95 *N.J.* 263 (1984) at 272 (quoting Patricia Marshall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous products*, 48 *N.Y.U.L. Rev.* 1065, 1088 (1973)).

[10] 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, 478 (App. Div. l992); *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 (l992).

is 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.

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

***NOTE TO JUDGE***

*See* section on causation above. *See also* Chapter 7 which deals with Proximate Cause.

**c. Comparative Fault; Apportionment of Fault; Ultimate Outcome**

***NOTE TO JUDGE***

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* Charge 7.31.

**4. State of the Art/Common Standards**

There has been evidence presented of the common practice and standards in the industry. That evidence bears upon the risk/utility or reasonable alternative design or reasonable alternative design analysis that you are being asked to make

here in order to measure the reasonableness of the defendant's(s') conduct, assuming knowledge of the harms the *[product]* could cause.[11] Compliance with common practice or industry standards does not mean the *[product]* is safe. It may still be found to be defective in design; however, that compliance along with all the other evidence in this case may satisfy you that the *[product]* was properly made.

[11] *Feldman, supra*, 97 *N.J.* at 451.