

CONTRACTS--ISSUE OF BREACH--DEFENSE OF WAIVER.

The (*state number*) issue reads:

"Did the plaintiff waive the defendant's breach of contract?"

(You will answer this issue only if you have answered the (*state number*)¹ issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.² This means that the defendant must prove, by the greater weight of the evidence, three things:³

First, that the defendant's breach of the contract was not a total one, and, notwithstanding the defendant's breach, the plaintiff continued to receive some of the consideration for which he bargained.

¹See, as appropriate, N.C.P.I. Civil 502.00 (Contracts--Issue of Breach By Non-Performance) or N.C.P.I.--Civil 502.05 (Contracts--Issue of Breach By Repudiation), or N.C.P.I.--Civil 502.10 (Contracts--Issue of Breach By Prevention).

²*Culler v. Watts*, 67 N.C. App. 735, 737, 313 S.E.2d 917, 918 (1984).

³*Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 425-26, 293 S.E. 749, 755 (1982); *Wheeler v. Wheeler*, 299 N.C. 633, 639, 263 S.E.2d 763, 766-67 (1980); *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 118-119, 123 S.E.2d 590, 596 (1962); *G.E.B., Inc. v. QVC, Inc.*, 129 F.Supp.2d 856, 862-63 (M.D.N.C. 2000). The relevant cases list four criteria for determining when a waiver is valid. Omitted from the elements above is the requirement that "the waiving party is the innocent, or nonbreaching party." *Wachovia Bank & Trust Co., N.A.*, 306 N.C. at 425, 293 S.E.2d at 755. Since this instruction is given only when the plaintiff has won on the issue of breach by the defendant (or breach is conceded by the defendant), it would be redundant in all but the rarest of fact situations to require the jury to find that the plaintiff is the innocent party.

CONTRACTS--ISSUE OF BREACH--DEFENSE OF WAIVER. (Continued).

Second, that the plaintiff was aware of the breach by the defendant.

And Third, that the plaintiff intentionally⁴ (and voluntarily)⁵ waived *his* right to suspend *his* own performance and declare a breach of contract by the defendant. A waiver may be communicated [in writing] [orally] [by conduct].⁶ If the plaintiff [continued to perform *his* obligations under the contract] [accepted partial, deficient or non-conforming performance from the defendant] without protest or reservation, you may infer, but you are not compelled to find, that the plaintiff waived *his* right to hold the defendant responsible for *his* breach of contract. (A person does not waive his right to declare a breach of contract where the contract provides that a failure to declare a breach or to invoke remedies for breach in one instance does not constitute a waiver of the right to do so in subsequent instances).

⁴For an instruction on intent, see N.C.P.I.--Civil 101.46.

⁵The waiver must not be induced by duress, undue influence or fraud. *Wheeler*, 299 N.C. at 640, 263 S.E. at 767; *Altman v. Munns*, 82 N.C. App. 102, 106, 345 S.E.2d 419, 422-23 (1986).

⁶Waiver of a contract provision is a question of intent which may be inferred from the parties' conduct. *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 118-119, 123 S.E.2d 590, 596 (1962).

CONTRACTS--ISSUE OF BREACH--DEFENSE OF WAIVER. (Continued).

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff waived the defendant's breach of contract, then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

