

CONTRACTS--ISSUE OF BREACH--DEFENSE OF RESCISSION.

The (state number) issue reads:

"Did the plaintiff and the defendant mutually assent to cancel their contract?"

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

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff and the defendant mutually assented to cancel their contract.<sup>2</sup> Mutual assent to cancel a contract must be determined from [written words] [verbal expressions] [conduct] of the parties which [are] [is] positive,

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<sup>1</sup>See, 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).

<sup>2</sup>General principles of contract law are used to determine whether the parties mutually agreed to cancel their obligations under the contract. *Baillie Lumber Co v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 352, 167 S.E.2d 85, 92 (1969). Thus, this instruction should be supplemented as necessary from N.C.P.I.--Civil 501.01 (Contracts--Issue of Formation) if there are technical contract formation matters at issue. The agreement to rescind must not only have been formed by mutual assent, but supported by sufficient consideration except where the contract involves the sale of a good governed by Article 2 of the Uniform Commercial Code. N.C.G.S. §25-2-209(1). A mutual agreement to rescind is normally sufficient consideration for the discharge of pre-existing contractual relations where both parties' performance are executory. Thus, a separate element for consideration is omitted here. Where one of the parties has performed, however, a valid rescission requires consideration and the jury should be instructed accordingly. Likewise, this affirmative defense is subject to rebuttal by the plaintiff if the agreement to rescind is void or voidable by reason of, e.g., fraud, undue influence and mistake. See *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 234, 259 S.E.2d 1, 5 (1979). Finally, if the contract involves the sale of a good subject to Article 2 of the Uniform Commercial Code, certain statute of frauds requirements may apply. See N.C.G.S. §25-2-209(2) and (3).

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unequivocal and inconsistent with the continuation of the contract.<sup>3</sup> Each party's [written words] [verbal expressions] [conduct] [are] [is] to be given such meaning as a reasonable person would give under the same or similar circumstances. In determining what meaning a reasonable person would give to the parties' [written words] [verbal expressions] [conduct], you should consider the evidence as to all the circumstances existing at the time of the alleged cancellation. (Where one party positively and unequivocally [abandons] [repudiates] the contract and the other party positively and unequivocally [consents to] [acquiesces in] the [abandonment] [repudiation], the parties have mutually assented to cancel the contract.)<sup>4</sup>

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 and the defendant

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<sup>3</sup>*Bell v. Brown*, 227 N.C. 319, 322, 42 S.E.2d 92, 94 (1947); *Singleton v. Atlantic Coast Line R. Co.*, 203 N.C. 462, 466, 166 S.E. 305, 307 (1932); *Southern Public Utilities Co. v. Town of Bessemer City*, 173 N.C. 482, 485-86, 92 S.E. 331, 333 (1917); *Lancaster v. Lumby Corp.*, 77 N.C. App. 644, 646, 355 S.E.2d 791, 792 (1985), *dis. rev. denied*, 315 N.C. 588, 341, S.E.2d 26 (1986).

<sup>4</sup>*Brannock v. Fletcher*, 271 N.C. 65, 75, 155 S.E.2d 532, 542 (1967); *Top Line Constr. Co. v. J. W. Cook & Sons, Inc.*, 118 N.C. App. 429, 433-34, 455 S.E.2d 463, 466 (1995).

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mutually assented to cancel their 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.

