CONTRACTS--ISSUE OF BREACH--DEFENSE OF NOVATION.[1]

The (*state number*) issue reads:

"Did the plaintiff and the defendant mutually agree to substitute a new and different contract for (*identify contract on which the plaintiff has sued*)?"

(You will answer this issue only if you have answered the (*state number*)[2] issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.[3] This means that the defendant must prove, by the greater weight of the evidence,[4] that the plaintiff and the defendant mutually agreed to substitute a new and different contract for (*identify*

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[1]"A novation is the substitution of a new contract for an old one which is thereby extinguished." *Carolina Equipment & Parts Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965).

[2]*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).

[3]*Carolina Equipment & Parts Co.*, 265 N.C. at 399, 144 S.E.2d at 257.

[4]*But see Zinn v. Walker*, 87 N.C. App. 325, 337, 361 S.E.2d 314, 320-21 (1987), *disc. rev. denied*, 321 N.C. 747, 366 S.E.2d 871 (1988), which holds that the applicable burden of proof is by clear and convincing evidence. This holding is not based on any explicit holding of the North Carolina Supreme Court, and the analogous cases involving rescission and abandonment appear to require only proof of "conduct clearly indicating" such purpose. *See, e.g., Miles F. Bixler Co. v. Britton*, 192 N.C. 199, 201, 134 S.E. 488, 489 (1926).

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contract on which the plaintiff has sued).[5] Mutual agreement to substitute a new and different contract for a prior one must be determined from [written words] [verbal expressions] [conduct] of the parties which [are] [is] positive, unequivocal and inconsistent with continuation of the prior contract.[6] 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 substitution.

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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[5]The new and different contract must have been formed by mutual assent and be supported by sufficient consideration. See N.C.P.I.--Civil 501.01 (Contracts--Issue of Formation). Mutual assent to substitute a new and different contract for the prior one is normally sufficient consideration for the discharge of the pre-existing contractual relations where both parties' performances are executory. Thus, a separate element for consideration is omitted here. Where one of the parties has performed, however, a valid novation requires a consideration and the jury should be instructed accordingly. *See Carolina Equipment & Parts Co.*, 265 N.C. at 400, 144 S.E.2d at 257.

[6]*Turner v. Turner*, 242 N.C. 533, 538-39, 89 S.E.2d 245, 249 (1955); *Miles F. Bixler Co.*, 192 N.C. at 201, 134 S.E. at 489; *Adams v.* Nelsen, 67 N.C. App. 284, 287, 312 S.E.2d 896, 899 (1984), aff'd, 313 N.C. 442, 329 S.E. 2d 322 (1985); Campbell *v. Blount*, 24 N.C. App. 368, 371, 210 S.E.2d 513, 516 (1975); *Corbin v. Langdon*, 23 N.C. App. 21, 26, 208 S.E.2d 251, 255 (1974).

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mutually agreed to substitute a new and different contract for (*identify contract on which the plaintiff has sued*), 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.