CONTRACTS--ISSUE OF COMMON LAW REMEDY--RESCISSION.[1]

The (*state number*) issue reads:

"Did the plaintiff effectively elect to cancel the contract with the defendant?"

(You will answer this issue only if you have answered the (*state number*) issue "Yes" (and the (*state number(s)*) issue(s) "No") in favor of the plaintiff).

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

First, that the defendant's breach was material, substantial and defeated the purpose of the contract.[2]

(A breach is material and substantial[3] where it involves a term of the contract that is so essential that, if omitted or modified, it would have caused a reasonable person under the same or similar circumstances as the plaintiff to withhold assent or to bargain for a substantially different term. Not

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[1]Rescission is a remedy unto itself. Where the criteria for rescission are met, the injured party may elect to cancel the contract rather than sue for damages resulting from its breach. *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242 (1964).

[2]*Id.*; *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957); *Fletcher v. Fletcher*, 123 N.C. App. 744, 751, 474 S.E.2d 802, 807 (1996).

[3]Materiality and substantially are questions of fact for the jury. *Childress*, 247 N.C. at 157, 100 S.E.2d at 396; *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 64-65, 344 S.E.2d 68, 74 (1986).

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every term in a contract is material and substantial. In determining whether a term is material and substantial, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[*state other factors supported by the evidence*].)

(A breach defeats the purpose of the contract when it effectively deprives the plaintiff of the benefit of *his* bargain.)[4]

Second, that the plaintiff timely elected to cancel the contract. An election to cancel a contract may be made [orally] [in writing] [by conduct] that is sufficient under the

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[4]A breach goes to the very heart of the contract "'where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract'". *Wilson*, 261 N.C. at 43, 134 S.E.2d at 242 (*quoting Steak House, Inc. v. Barnett*, 65 So.2d 736 (1953)). On the other hand, if the breach, though material, does not essentially eliminate the purpose for which the contract was entered into in the first place, only an action for damages will lie. *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 635, 343 S.E.2d 228, 232 (1986).

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circumstances to put the defendant on notice that such election has been made.[5] An election to cancel a contract is timely if it is made within a reasonable time after the breach becomes known to (or, in the exercise of reasonable diligence, should have become known to) the plaintiff.[6] A person looses the right to cancel a contract if, after learning of the breach, he [voluntarily engages in conduct that is consistent with or which recognizes the contract][7] [fails to act to cancel within a reasonable time after the breach was or should have been discovered].[8] (The entirety of the contract must be cancelled. A person may not cancel part of the contract and retain the other.)[9]

Third, the plaintiff has [restored to] [offered to restore to] [credited] the defendant so much of the consideration *he* received from the defendant as would be fair and equitable under

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[5]*McNair v. Southern States Fin. Co.*, 191 N.C. 710, 718, 133 S.E. 85, 89 (1926).

[6]*Bolich v. Prudential Ins. Co. of America*, 206 N.C. 144, 155, 173 S.E. 320, 326-27 (1934).

[7]*Id.* at 156, 173 S.E. at 327; *May v. Loomis*, 140 N.C. 350, 359, 520 S.E. 728, 731 (1905).

[8]*Bolich*, 206 N.C. at 155-56, 173 S.E. at 326-27; *Brown v. Osteen*, 197 N.C. 305, 309, 148 S.E. 434, 436 (1929).

[9]*Parker v. White*, 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952).

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the circumstances.[10] Once a contract is cancelled, both the plaintiff and the defendant must be returned to the same relative positions they occupied immediately preceding the formation of their contract.[11] If the defendant cannot be restored to *his* pre-contract status through no fault of *his* own, the plaintiff cannot cancel the contract.[12] If, however, you find that the reason the defendant cannot be restored to *his* pre-contract status results from the defendant's own inequitable or unreasonable conduct, the plaintiff may cancel if *he* [returns to] [offers to return to] [credits] the defendant so much of the original consideration as the plaintiff can reasonably and

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[10]"[A]s a general rule, a party is not allowed to rescind where he is not in a position to put the other in status quo by restoring the consideration passed." *Bolich*, 206 N.C. at 156, 173 S.E. at 327. This rule, however, is not absolute, *Lumsden v. Lawing*, 117 N.C. App. 514, 519, 451 S.E.2d 659, 662 (1995), and considerations of reasonableness and equity can moderate the rescinding party's obligations. *Id.*

[11]*Brannock v. Fletcher*, 271 N.C. 65, 75, 155 S.E.2d 532, 542 (1967); *Melton v. Family First Mortg. Corp.*, _____ N.C. App. _____, _____, 576 S.E.2d 365, 370-71 (2003).

[12]*Id.; Lumsden*, 117 N.C. App. at 520, 451 S.E.2d at 662-663.

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equitably be expected to return under the circumstances.[13]

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

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 defendant.

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[13]In *Lumsden*, the Court of Appeals upheld the right of the plaintiffs to rescind the purchase of a property even though the property had been foreclosed upon and the plaintiffs were no longer in a position to deed it back to the defendants. The Court of Appeals ruled that the combination of the defendants' wrongdoing in the conveyance when combined with the defendants' lack of effort to rescue the property from foreclosure created "extraordinary circumstances" that relieved the plaintiffs from having to reconvey the property to the defendants as a pre-condition to being able to rescind. Instead, the Court of Appeals equitably adjusted the restitution by providing that as against a refund of the plaintiffs' purchase price, the defendants were entitled to a credit for the value of the property plus the reasonable rental value, with interest, of the property while the plaintiffs occupied it. 117 N.C. App. at 520; 451 S.E.2d at 662-663. The lack of strict restitution of the very property sold was held to cause no harm to the defendants because they would have sold the property anyway.