

CONTRACTS--ISSUE OF COMMON LAW REMEDY--DEFENSE (OFFSET) FOR
FAILURE TO MITIGATE.

The (*state number*) issue reads:

"Is the defendant entitled to a credit against the damages owed to the plaintiff as a result of the plaintiff's failure to use ordinary care to mitigate the consequences¹ of the defendant's breach?"

(You will answer this issue only if you have answered the (*state number*) issue 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, two things:

First, that the plaintiff failed to use ordinary care to mitigate the damages sustained by *him* as a result of the defendant's breach of contract. Upon the occurrence of a breach of contract, the law imposes upon the non-breaching party a duty to use ordinary care to [reduce] [minimize] [avoid] the damages

¹"The doctrine of mitigation affects the *consequences* of defendants' breach...". *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 552, 392 S.E.2d 128, 133, review denied, 327 N.C. 144, 393 S.E.2d 909 (1990) (emphasis in original).

²The burden of proving entitlement to a credit by reason of the plaintiff's failure to mitigate falls on the defendant. *But see Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 284, 258 S.E.2d 778, 783 (1979) (which suggests that the burden is on the plaintiff to show his reasonable mitigation efforts as part of his proof of *Hadley v. Baxendale* causation).

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resulting from such breach.³ Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to mitigate the adverse consequences of the breach.⁴ Once the breach of contract becomes definite and known to a party, he must take such steps as fair and reasonable (business) prudence would require to reduce the damage.⁵

(However, the non-breaching party may rely on assurances of [cure] [remedy] by the breaching party and be justified in not taking steps to mitigate damages for so long as such reliance is reasonable.)⁶

And Second, that, as a result of the plaintiff's failure to use ordinary care to mitigate, certain damages that the

³*Little v. Rose*, 285 N.C. 724, 728, 208 S.E.2d 666, 669 (1974); *Harris and Harris Constr. Co., Inc. v. Crain and Denbo, Inc.*, 256 N.C. 110, 121, 123 S.E.2d 590, 598 (1962); *Chapel Hill Cinemas, Inc. v. Robbins*, 143 N.C. App. 571, 582, 547 S.E.2d 462, 470 (2001) (dissent); *Turner Halsey Co., Inc. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 572, 248 S.E.2d 342, 344-45 (1978).

⁴"Generally, the reasonableness of mitigation efforts depends upon the facts and circumstances of the particular case and is a jury question except in the clearest of cases." *Smith v. Martin*, 124 N.C. App. 592, 600, 478 S.E.2d 228, 233 (1996).

⁵*Little*, 285 N.C. at 728, 208 S.E.2d at 669.

⁶"...[T]he repeated assurances of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform." *Id.* (quoting 22 Am.Jur.2d Damages §32).

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plaintiff could have [reduced] [minimized] [avoided] were not [reduced] [minimized] [avoided].⁷ The opportunity to mitigate damages must be a reasonable one. The non-breaching party is not required to make more than a reasonable exertion or to undertake more than a reasonable expense.⁸ (Nor is the breaching party entitled to a credit where reasonable efforts to mitigate would be futile.)⁹

(The non-breaching party is not required to incur [undue risk] [unreasonable expense] [humiliation] in order to mitigate damages.¹⁰ It is only necessary that the non-breaching party acts with such care and diligence as a person of ordinary prudence would act under the circumstances, and *his* efforts to mitigate damages are determined by the rules of common sense, good faith and fair dealing.¹¹)

⁷*Harris and Harris Constr. Co., Inc.*, 256 N.C. at 121, 123 S.E.2d at 598; *Troitino v. Goodman*, 225 N.C. 406, 416 35 S.E.2d 277, 284 (1945).

⁸*Id.*

⁹For example, where the rental market is exceptionally soft and the non-breaching landlord's most diligent efforts are highly unlikely to generate a replacement lessor.

¹⁰*George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 712, 279 S.E.2d 858, 866 (1981).

¹¹*Marine Ecology Systems, Inc. v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 729, 253 S.E.2d 613, 616 (1979).

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In this case, the defendant contends, and the plaintiff denies, that the plaintiff failed to use ordinary care to mitigate damages in one or more of the following ways:

(Read all contentions of failure to use ordinary care supported by the evidence.)

The defendant further contends, and the plaintiff denies, that, as a result of the plaintiff's failure to use ordinary care, certain damages the plaintiff could have [reduced] [minimized] [avoided] were not [reduced] [minimized] [avoided].

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 defendant is entitled to a credit against the damages owed to the plaintiff as a result of the plaintiff's failure to use ordinary care to mitigate the consequences of the defendant's breach, 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.