

AGENCY--ISSUE OF UNDISCLOSED PRINCIPAL--LIABILITY OF AGENT.

NOTE WELL: *This instruction should be used when the defendant contends that he is not liable because he was merely acting as agent for another in entering the contract. The (state number) issue reads:*

"Did the defendant fail to disclose to the plaintiff that he was acting as the agent of (name principal)?"

On this issue the burden of proof is on the plaintiff.<sup>1</sup> This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant did not disclose to the plaintiff that he was acting as the agent of (name principal) in entering into the (describe transaction), and that the plaintiff did not actually know of the agency, or did not know the identity of the principal.

Members of the jury, an agency is a relationship that arises when a [person] [(name entity)] authorizes [a] [another] [person] [(name entity)] to act on his behalf. The [person] [(name

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<sup>1</sup>See *Howell v. Smith*, 261 N.C. 256, 261, 134 S.E.2d 381, 385 (1964). *Howell* implies that the burden is on the plaintiff once defendant has produced sufficient evidence of agency and disclosure to raise the issue. See also, 3 Am. Jur. 2d, Agency § 342 (explaining that in an action against an agent where the third person is claiming the principal was undisclosed, the third person has the burden of proving he was unaware of the agency-principal relationship). Note that in *Howell* the defendant's evidence was insufficient to require an instruction. There the defendant's account on plaintiff's books was carried under the name "Atlantic Block Company" without the abbreviation "Inc." Also, in most of the correspondence between plaintiff and defendant the company name was used without "Inc." being added. See *id.* at 262, 134 S.E.2d at 386.

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entity)] granting such authority is called the "principal." The [person] [(name entity)] authorized to act on the principal's behalf is called the "agent." Normally, a third person entering into a contract with an agent must enforce the contract against the principal.

However, an agent who fails to disclose that *he* is acting for a principal may be held personally liable, and the third party may enforce the contract against the agent, (unless that party has actual knowledge of the agency relationship and of the principal's identity).<sup>2</sup>

Thus, in order for you to answer this issue "Yes," the plaintiff must prove,<sup>3</sup> by the greater weight of the evidence, that before or at the time of (*describe transaction*), the defendant did not disclose to the plaintiff the existence of the agency or that *he* failed to disclose the identity of the principal<sup>4</sup> (and that the plaintiff did not actually know about the agency or did not know the identity of the principal). (The existence of a means by which the plaintiff might have discovered the agency is not sufficient, since it was the defendant's duty to disclose the agency and not the plaintiff's duty to discover

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<sup>2</sup>*Id.* at 258-59, 134 S.E.2d at 383.

<sup>3</sup>If it is necessary to have the jury determine whether an agency even existed, this charge and the mandate should be modified accordingly.

<sup>4</sup>*See Howell*, 261 N.C. at 259, 134 S.E.2d at 383.

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it.)<sup>5</sup> (And discovery by the plaintiff that (name agent) was the agent of (name principal) after (describe transaction, e.g., "the extension of credit") would not deprive the plaintiff of the right to recover from the defendant.<sup>6</sup>)

Finally, as to this (state number) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that before or at the time of (describe transaction), the defendant failed to disclose that he was acting as an agent or failed to disclose that (name principal) was the person for whom he was acting (and that the plaintiff did not actually know [about the agency] [the identity of the principal]), 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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<sup>5</sup>See *id.* at 259, 134 S.E.2d at 384 (citing 3 Am. Jur. 2d, Agency § 317); *MAS Corp. v. Thompson*, 62 N.C. App. 31, 37, 302 S.E.2d 271, 276 (1983).

<sup>6</sup>See *Howell*, 261 N.C. at 260, 134 S.E.2d at 384.

