

WARRANTIES IN SALES OF GOODS--ISSUE OF EXISTENCE OF EXPRESS WARRANTY.

The (*state number*) issue reads:

"Did the defendant expressly warrant to the plaintiff that the (*name good*) would conform to a [promise or representation of fact] [description] [sample or model]?<sup>1</sup>

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, that the defendant expressly warranted that the (*name good*) would conform to a [promise or representation of fact] [description] [sample or model].

To create an express warranty, a seller need not use such formal words such as "warrant" or "guarantee," or even have a specific intention to create a warranty. Moreover, a warranty is not created by a mere statement of the value of a (*name*

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<sup>1</sup>N.C.G.S. §25-2-313(1) (1995). Whether the seller has created an express warranty is a question of fact for the jury. *Mather-Ballenger v. Giffin Elec. Consultants, Inc.*, 100 N.C. App. 505, 397 S.E.2d 247 (1990); *W. A. Davis Realty, Inc. v. Wakelon Agri-Products, Inc.*, 84 N.C. App. 97, 351 S.E.2d 816 (1987); *Warren v. Joseph Harris Co. and Perry v. Joseph Harris Co.*, 67 N.C. App. 686, 313 S.E.2d 901 (1984); *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (1982).

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*good*) or a seller's mere opinion or commendation of a (*name good*).<sup>2</sup>

An express warranty may be created in several ways.

[A seller creates an express warranty by making a promise or representation of fact to the buyer which relates to the (*name good*) being sold and which becomes part of the basis of the bargain between them. An express warranty created this way requires the (*name good*) being sold to conform to the seller's promise or representation of fact.]<sup>3</sup>

[A seller (also) creates an express warranty by making a description of the (*name good*) being sold part of the basis of the bargain with the buyer. An express warranty created this

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<sup>2</sup>N.C.G.S. §25-2-313(2) (1995). Neither formal words nor intent are necessary to create an express warranty. *Pake*, 55 N.C. App. at 552, 286 S.E.2d at 589. However, puffing, opinion or mere trade talk is insufficient to create a warranty. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972) (opinion); *Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 226, 401 S.E.2d 801, 804 (1991) (puffing); *Pake*, 55 N.C. App. at 553, 286 S.E.2d at 589 (puffing); *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 632, 347 S.E.2d 473, 477 (1986) (opinion); *Hall v. T. L. Kemp Jewelry, Inc.*, 71 N.C. App. 101, 105, 322 S.E.2d 7, 10 (1984) (sales talk).

<sup>3</sup>N.C.G.S. §25-2-313(1)(a) (1995).

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way requires the (*name good*) being sold to conform to the seller's description.]<sup>4</sup>

[A seller (also) creates an express warranty by showing or demonstrating to the buyer a sample or model of the (*name good*) being sold. An express warranty created this way requires the (*name good*) being sold to conform to the seller's sample or model.]<sup>5</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 the defendant expressly warranted to the plaintiff that the (*name good*) would conform to a [promise or representation of fact] [description] [sample or model], 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, it would be your duty to answer this issue "No" in favor of the defendant.

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<sup>4</sup>N.C.G.S. §25-2-313(1)(b) (1995).

<sup>5</sup>N.C.G.S. §25-2-313(1)(c) (1995).

