

501.01 CONTRACTS–ISSUE OF FORMATION–COMMON LAW.

*NOTE WELL: Use N.C.P.I. 501.01A for cases in which the Uniform Commercial Code applies.*

The (*state number*) issue reads:

“Did the plaintiff and the defendant enter into a contract?”

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, two<sup>1</sup> things:

First, that the plaintiff and the defendant mutually assented to the same material terms<sup>2</sup> for doing or refraining from doing a particular thing.

And Second, that the mutual assent of the parties was supported by an adequate consideration.<sup>3</sup>

I will now explain to you the meaning of these two requirements.

With regard to the first requirement, for the parties to have mutually assented, each of them must have agreed to the same material terms for doing or refraining from doing a particular thing.<sup>4</sup>

*Select from among the following optional provisions as applicable:*

(Offer and Acceptance. An “offer” is an expression of willingness to do or refrain from doing a particular thing. There is no requirement that the offer be made in any particular form. It may be made orally, in writing or by conduct which reasonably indicates the offering party's intention<sup>5</sup> to be bound if the other party accepts.<sup>6</sup> An “acceptance” is an expression of assent to the offer. [If the [offer does not specify] [the circumstances do not indicate] a particular method, manner or form of acceptance, acceptance can be made in any manner and by any medium reasonable under the circumstances.<sup>7</sup> Acceptance may be oral,<sup>8</sup> in writing<sup>9</sup> or by conduct which reasonably signifies that the accepting party assents to each material term of the offer.] [If the [offer

specifies] [circumstances unambiguously indicate] a particular method, manner or form of acceptance, acceptance must be made in the method, manner or form [specified] [indicated].<sup>10</sup>)

(Mutual Assent. Mutual assent occurs when an offer is communicated by one party to the other, and the other party accepts the offer.<sup>11</sup> Mutual assent must be determined from the [written words] [verbal expressions] [conduct] of the parties. Each party's [written words] [verbal expressions] [conduct]<sup>12</sup> must have such meaning as a reasonable person would give under the same or similar circumstances.<sup>13</sup> 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 [offer] [acceptance].)

(Intended, But Unexpressed Term. One party may intend for a certain term to have a special or a particular meaning but fails to express that meaning in *his* [written words] [verbal expressions] [conduct]. Under such circumstances, you should not consider such unexpressed special or particular meaning. However, if you find, by the greater weight of the evidence, that (*name party*) knew or should have known what (*name other party*) meant by certain [written words] [verbal expression] [conduct], that meaning is deemed assented to by (*name party*) unless (*name other party*) knew or should have known that (*name party*) gave such [written words] [verbal expressions] [conduct] a different meaning.)<sup>14</sup>

(All Material Terms Agreed. For a contract to be complete, each party must assent to all material terms. A material term is one that is essential to the transaction,<sup>15</sup> that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. However, not every detail of the parties' transaction need be agreed upon.<sup>16</sup> It is sufficient that there be mutual assent, express or implied, to all

of the material terms.<sup>17</sup> What constitutes the material terms essential to a given contract depends on the facts and circumstances of each transaction.<sup>18</sup> In determining the material terms, you may consider the following factors:

- [the subject matter and purpose of the proposed contract]
- [the intentions of the parties]
- [the anticipated scope of performance by each party]
- [the prior dealings of the parties under this or similar contracts]
- [any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties know or should have known of its existence]
- [state other factors supported by the evidence].)

(Supplemental Terms. In some instances, [the parties' course of performance]<sup>19</sup> [the parties' course of dealing] [an applicable usage of trade]<sup>20</sup> may give particular meaning to and supplement or qualify one or more terms of the parties' contract.

[A course of performance arises out of prior repeated occasions for one party to perform under the contract. When the other party knows about the nature of such prior instances of performance and has an opportunity to object to them but does not, you may consider such course of performance as some evidence of the meaning of the parties' contract.]

[A course of dealing is a sequence of prior conduct between the parties in transactions the same as or similar to the one at issue here which reasonably establishes a basis for their common understanding of a particular meaning of a term in their contract (or which supplements or qualifies a term in their contract).]

[A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will also be observed in the performance of the contract in question.])<sup>21</sup>

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include<sup>22</sup>] [have left open].<sup>23</sup> In the matter before you,

[Good Faith. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement, and each party is deemed to have agreed to act in good faith in [performing] [enforcing] the contract.<sup>24</sup> "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.<sup>25</sup>]

[Time for Performance. Where the parties did not expressly provide a time for the performance of an act or the doing of a thing, the parties are deemed to have agreed that the act may be performed or the thing may be done within a reasonable time.<sup>26</sup> In determining what constitutes a reasonable time,<sup>27</sup> you may consider [the subject matter and purpose of the proposed contract] [the intentions and circumstances of the parties] [the anticipated scope of performance by each party<sup>28</sup>] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[Termination. Where the parties did not expressly provide a duration for their contractual relationship, the parties are deemed to have agreed that either of them may terminate their contract upon reasonable notice to the other.<sup>29</sup> In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract<sup>30</sup>] [the length of

time the parties should have reasonably expected their contractual relationship to last<sup>31</sup>] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[State other applicable instances in which the law supplies omitted material terms]<sup>32</sup>).

With regard to the second requirement that the mutual agreement of the parties was supported by an adequate consideration, "consideration" means something of value. Such value may consist of some right, interest, profit or benefit accruing to one party or some forbearance, burden, detriment, loss or responsibility given, suffered or undertaken by the other.<sup>33</sup> (An agreement based upon an exchange of mutual promises is supported by adequate consideration<sup>34</sup> if performance of each of the promises would constitute adequate consideration.<sup>35</sup>) In any event, the benefit to one party or the burden on the other party must result from the bargain which causes the parties to enter into their mutual agreement.<sup>36</sup>

(It is not necessary that the benefit flow to or that the burden fall upon a party to the mutual agreement. [The benefit may flow to a third person for whose benefit one of the parties bargained.<sup>37</sup>] [The burden may likewise fall upon a third person who is to perform for the benefit of one of the parties to the mutual agreement.<sup>38</sup>])

(Consideration is adequate unless it is so grossly inadequate<sup>39</sup> that it shocks the conscience. Consideration does not have to be proportional to the benefit conferred or the burden undertaken, and even slight or trifling consideration is adequate to support a mutual agreement otherwise reached by mutual assent.<sup>40</sup>)

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 and the defendant entered into a contract, 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>1</sup> Not all of the essential elements of a contract are set forth in this instruction. In addition to mutual assent and a legally adequate consideration, there must be at least two parties to the contract. *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962); *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N.C. 558, 92 S.E. 706 (1917); *Spruill v. Trader & Trader*, 50 N.C. 39, 42 (1857); *Avery v. Walker*, 8 N.C. 140, 156 (1820). Whether there are enough parties to form a contract would be a jury issue only rarely, so it is omitted as an element of this instruction.

Also, the party against whom enforcement is sought must have had legal capacity to contract. *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the contract was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co.*, 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, a third element would need to be added to this instruction. The court should instruct as follows:

And Third, that the (*party seeking enforcement*) had the capacity to enter into a contract. A party to a contract must have sufficient mental capacity to understand the nature, scope and effect of the act in which *he* is engaged, to understand what *he* is contracting to do or refrain from doing, to know with whom *he* is transacting and to understand the purpose for which *he* is contracting and the nature, scope and consequences of *his* act. A party may have sufficient mental capacity although *he* does not act wisely or discreetly, or drive a good bargain. A party may also have sufficient mental capacity, even if suffering from mental weakness or infirmity.

Legal authority for this instruction and additional information regarding capacity to contract may be found in N.C.P.I.-Civil 501.05 (Contracts-Issue of Formation-Defense of Lack of Mental Capacity) and the endnotes therein.

Finally, the transaction called for by the contract must not be void, illegal or patently contrary to public policy. See *Rose v. Vulcan Materials, Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973) (“Illegality is an affirmative defense and burden of proving illegality is on the party who pleads it.”) (citing N.C. R. Civ. P. 8(c)); see also N.C.P.I.-Civil [502.40](#) (noting that, where no genuine dispute exists regarding a contract’s substance, whether it is an illegal or unenforceable contract is a question of law for the court).

<sup>2</sup> *Richardson v. Greensboro Warehouse and Storage Co.*, 223 N.C. 344, 26 S.E.2d 897 (1943).

3 This second element may be irrelevant if the contract is written and the party against whom enforcement is sought signed under seal. “[A] seal gives to an instrument the same validity at law as if there was a consideration. It amounts to and dispenses with the necessity of the proof of a valuable consideration...” *Woodall v. Prevatt*, 45 N.C. 199, 201 (1853). There are limitations on the use of the seal as a substitute for consideration. First, the seal is operative only in actions at law for damages. *Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 114 S.E.2d 344 (1960); *Coleman v. Whisnant*, 226 N.C. 258, 37 S.E.2d 693 (1946); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925). The seal does not serve as a consideration substitute in equitable proceedings. *Woodall*, 45 N.C. at 201-202; *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E.2d 721 (1978), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963). Second, the General Assembly has eliminated the seal requirement for deeds, N.C. Gen. Stat. § [39-6.5](#) (1999).

In cases where a seal does serve as a consideration substitute, the court must decide if the party against whom enforcement is sought signed under seal on the face of the contract without ambiguity. If so, the court must hold that, as a matter of law, the contract is under seal. *Central Sys. v. General Heating and Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, *cert. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). However, if the contract is ambiguous as to whether the party signed under seal, it is a question for the jury. *Id.* Under such circumstances, the court should substitute the following for the second element:

Second, that the defendant signed the (*identify alleged contract*) under seal. Whether the defendant signed the (*identify alleged contract*) under seal is to be determined from all the evidence before you. You may consider whether the word “seal” (or L.S.) appears adjacent to the defendant's signature, whether there is a declaration in the document that the defendant is signing under seal and whether there is any other evidence of the parties' intent to enter into a contract under seal. (The fact that a corporate seal is impressed upon the document, without more, does not mean the document was signed under seal).

*Id.*; *Currin v. Currin*, 219 N.C. 815, 15 S.E.2d 279 (1941); *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), *cert. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). See *Square D. Co. v. C. J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

4 *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921); *Charles Holmes Machine Co. v. Chalkley*, 143 N.C. 181, 55 S.E. 524 (1906).

5 *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

6 *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 188 S.E.2d 721 (1972).

7 N.C. Gen. Stat. § [25-2-206](#)(1)(a) which appears to agree with North Carolina common law. *Crook v. Cowan*, 64 N.C. 743 (1870).

8 Certain oral offers and acceptances are not enforceable by reason of the statute of frauds. See, e.g., N.C. Gen. Stat. § [1-26](#) (contracts to pay debt otherwise barred by statute of limitation), § [22-1](#) (suretyship contracts and contracts by executors and administrators), § [22-2](#) (contracts involving interests in real property), § [22-4](#) (contracts to revive debts discharged by bankruptcy), § [22-5](#) (commercial loan commitments over \$50,000) [25-1-20625-2-201](#), § [52-10.1](#) (separation agreements), § [66-99](#) (business opportunity

contracts), § [66-119](#) (prepaid entertainment contracts) and § [66-132](#) (discount buying club contracts).

9 “Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms ... However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and ... the offeree’s acceptance is properly communicated to the offeror.” *Southeast Caissons, LLC v. Choate Construction Co., et al.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 784 S.E.2d 650, 656 (2016) (quoting John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 2-7-1, at 68-69 (2001)).

10 See *MacEachern v. Rockwell Int’l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979) (“It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed.”) (citing *Morrison v. Parks*, 164 N.C. 197, 198, 80 S.E.2d 85, 85 (1913)).

11 *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

12 An implied-in-fact contract may be inferred from the conduct of the parties. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985); *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). An implied-in-fact contract is not the same as a contract implied-in-law. The latter does not require the element of agreement. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

13 A contract is not formed where a material term is left indefinite, vague or patently ambiguous. Mutual assent under such circumstances is lacking. Whether a material term is patently ambiguous (i.e., even competent extrinsic evidence cannot explain the term) is a question of law for the Court. *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E.2d 354 (1984). Thus, omitted from this instruction is optional language dealing with “void for vagueness” situations. If the Court determines that the ambiguity is latent rather than patent, the issue of meaning becomes one for the jury and is considered in conjunction with the issue of breach. N.C.P.I.-502.00 (Contracts–Issue of Breach).

14 *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 31 N.C. App. 490, 229 S.E.2d 697 (1976). But compare *Charles Holmes Machine Co.*, 143 N.C. at 184-85, 55 S.E. at 526. There may be instances where both parties advocate that their unexpressed intentions should have been known to the other and, therefore, become part of the agreement. Where this occurs, the Court should give this component twice, with reciprocal party references. Because of the risk of confusing the jury with reciprocating instructions, the Court should also give the competing contentions of the parties.

15 In a contract for services, compensation is an essential element to the agreement. See *Rider v. Hodges*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 804 S.E.2d 242, 246 (2017) (holding that no enforceable contract exists where the price for services was not included in the agreement).

16 *Sides v. Tidwell*, 216 N.C. 480, 5 S.E.2d 316 (1939).

17 *MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 359 S.E.2d 50 (1987); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

18 In general, “agreements to agree” which leave one or more material terms open for future assent are void. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). To be

enforceable, an agreement to agree “must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.” Croom, 182 N.C. at 220, 108 S.E. at 737. All material terms must be settled or there must be a definite agreement on a method by which the terms may be settled. McMahan, 285 N.C. 730, 208 S.E.2d 692.

19 See *Cole v. Industrial Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931).

20 See *T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922); *Cohoun v. Hanell*, 180 N.C. 39, 103 S.E. 906 (1920) and *McKinney v. Matthews*, 166 N.C. 576, 82 S.E. 1036 (1914).

21 A usage of trade is ordinarily an issue of fact for the jury. However, if the usage of trade is embodied in a written code or some similar writing, its interpretation becomes a question of law for the court. *Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

22 *Kidd v. Early*, 289 N.C. 343, 357-358, 222 S.E.2d 392, 403 (1976). The Court should be careful, however, not to instruct the jury on terms implied-in-law where there is evidence from which the jury could find from the writings, conversations or conduct of the parties that they actually reached agreement on a material term. See, e.g., *Rhyme v. Rhyme*, 151 N.C. 400, 66 S.E. 348 (1909); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

23 A contract with an open term will not cause the contract to fail for indefiniteness if there are external, objective commercial standards which supply a reasonably certain basis for enforcing the contract by appropriate remedy. N.C. Gen. Stat. § [25-2-204](#)(3). While “open terms” are more readily identified with the Uniform Commercial Code, some North Carolina common law decisions have supplied certain terms left open by the parties. See *North Carolina Comment to N.C. Gen. Stat. § 25-2-204(3).*

24 *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governor’s Club, Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002), *aff’d per curiam*, [357 N.C. 46](#), 577 S.E.2d 620 (2003); *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996). See also *Lord of Shatford v. Shelley’s Jewelry, Inc.*, 124 F.Supp.2d 779, 787 (W.D.N.C. 2000).

25 See *Blondell v. Ahmed*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 786 S.E.2d 405, 407 (2016), *aff’d per curiam*, \_\_\_ N.C. \_\_\_, 804 S.E.2d 183 (2017) (citing *Weyerhaeuser Co. v. Godwin Building Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) for the basic principle of contract law “that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement.”). Good faith extends to reasonableness in enforcing agreements as well. See *Jaudon v. Swink*, 51 N.C. App. 433, 435, 276 S.E.2d 511, 513 (1981) (“‘Good Faith’ means an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law ...

26 *International Minerals and Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E.2d 472 (1952); *Graves v. O’Connor*, 199 N.C. 231, 154 S.E.37 (1930); *Winders v. Hill*, 141 N.C. 694, 704, 54 S.E. 440, 443 (1906); *Hardee’s Food System, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969).

27 The terminability of certain contracts are legislatively restricted. See, e.g., N.C. Gen. Stat. § [18B-1205](#) (wine distribution agreements), § [18B-1305](#) and § [18B-1306](#) (beer distributor franchises) and § [20-305](#)(6) (motor vehicle franchises).

28 *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965); *Lambeth v. Thomasville*, 179 N.C. 452, 102 S.E. 775 (1920).

29 *Fulghum v. Town of Selma*, 238 N.C. 100, 104, 76 S.E.2d 368, 371 (1953).

30 *City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E.2d 27, *disc. rev. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973).

31 *General Tire and Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960), *appeal after remand*, 256 N.C. 561, 124 S.E.2d 508 (1962); *East Coast Dev. Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E.2d 72 (1976).

32 At common law, *see, e.g.*, reasonable time to repay a loan, *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E.2d 516 (1981), payments to be in cash, *Kidd*, 289 N.C. at 358, 222 S.E.2d at 403, contracts of employment terminable at will, *Rosby v. General Baptist State Convention of North Carolina, Inc.*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), and uncompleted blanks left in the contract document, *Rhyne*, 151 N.C. 400, 66 S.E. 348.

33 *Cherokee County v. Meroney*, 173 N.C. 653, 654, 92 S.E. 616, 616-17 (1917).

34 *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985); *American Aluminum Products Inc. v. Pollard*, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

35 Restatement (Second) of Contracts § 75 (1981).

36 Restatement (Second) of Contracts § 71 and comment b. (1981).

37 *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *East Carolina Realty. v. Ziegler Bros.*, 200 N.C. 396, 157 S.E. 57 (1931); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *First Peoples Savings and Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 261 S.E.2d 259 (1980)

38 *See Craig and Wilson v. Stewart and Jones*, 163 N.C. 531, 79 S.E. 1100 (1913); *Brem v. Covington*, 104 N.C. 589, 10 S.E. 706 (1889). *See also* Restatement (Second) of Contracts § 71(4) and comment e (1981).

39 *Williams v. Chaffin*, 13 N.C. 333, 335 (1830).

40 *Young v. Board of Commissioners of Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925); *Gurvin v. Cromartie*, 33 N.C. 174, 178-179 (1850).