

CONTRACTS--ISSUE OF BREACH--DEFENSE OF PREVENTION BY PLAINTIFF.

The (*state number*) issue reads:

"Was the defendant's failure to [perform] [abide by] a material term of the contract caused by the conduct of the plaintiff?"

(You will answer this issue only if you have answered the (*state number*)<sup>1</sup> issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff knowingly and without justification<sup>2</sup> [prevented] [hindered] [made more costly] defendant's [performance of] [ability to abide by] the material term(s) of the contract which the plaintiff contends the defendant has breached. A person does not breach a contract where the reason for his non-compliance with a material term is the other party's [prevention] [hinderance] [cost-enhancing conduct].<sup>3</sup>

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<sup>1</sup>See, as appropriate, N.C.P.I. Civil 502.00 (Contracts--Issue of Breach By Non-Performance) or N.C.P.I.--Civil 502.05 (Contracts--Issue of Breach By Repudiation), or N.C.P.I.--Civil 502.10 (Contracts--Issue of Breach By Prevention).

<sup>2</sup>*Harnett Transfer, Inc. v. Peterson*, 37 N.C. App. 56, 58, 245 S.E.2d 207, 209 (1978).

<sup>3</sup>*Goldston Bros., Inc. v. Newkirk*, 233 N.C. 428, 432, 64 S.E.2d 424, 427 (1951); *Hayman v. Davis*, 182 N.C. 563, 565, 109 S.E. 554, 555 (1921); *McCurry v. Purgason*, 170 N.C. 463, 471, 87 S.E. 244, 247 (1915).

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(Continued.)

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's failure to [perform] [abide by] a material term of the contract was caused by the conduct of the plaintiff, 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.