

WARRANTIES IN SALES OF DWELLINGS--REMEDIES--RESCISSION.

The (state number) issue reads:

"Did the plaintiff justifiably rescind¹ the [purchase of] [contract to purchase] (identify dwelling)?"

You will answer this issue only if you have answered the (state number) issue "Yes" in favor of the plaintiff.

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 things:

First, that the plaintiff by his words or conduct² elected to rescind the [purchase of] [contract to purchase] the (name dwelling).

Second, that the defendant's breach of warranty substantially deprived the plaintiff of the material benefit of the [purchase] [contract to purchase].³ In making this determination, you may consider

¹*Lumsden v. Lawing*, 107 N.C. App. 493, 421 S.E.2d 594 (1992).

²Rescission may be shown parol declaration, *Bell v. Brown*, 227 N.C. 319, 322, 42 S.E.2d 92, 94 (1947), or by conduct that is positive, unequivocal and inconsistent with the continuation of the contract. *Stegall v. Stegall*, 100 N.C. App. 398, 411, 397 S.E.2d 306, 313, rev. denied, 328 N.C. 274, 400 S.E.2d 461 (1990); *Lancaster v. Lumby Corp.*, 77 N.C. App. 644, 646, 335 S.E.2d 791, 792, rev. denied, 315 N.C. 588, 341 S.E.2d 26 (1985).

³*Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964); *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957); *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802, rev. denied, 345 N.C. 640, 483 S.E.2d 706 (1996); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 358 S.E.2d 566 (1987); *Southeastern Drywall, Inc. v. Yeargin Constr. Co., Inc.*, 25 N.C. App. 538, 214 S.E.2d 303 (1975).

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(Continued).

[the legitimate expectations of the plaintiff under the
contract of purchase]

[whether a reasonable person in the same or similar
circumstances would consider the breach to be a substantial
deprivation of the material benefit of the [purchase]
[contract to purchase]]

[whether the condition creating the breach could be repaired
or corrected in a timely manner]

[whether the plaintiff gave the defendant notice of the
breach and an opportunity to repair or correct it]

[whether the defendant [agreed] [attempted] to repair or
correct the breach in a reasonable and timely manner].

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 plaintiff justifiably rescinded
the [purchase of] [contract to purchase] (*name dwelling*), 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.