

502.25 CONTRACTS-ISSUE OF BREACH-DEFENSE OF FRUSTRATION OF PURPOSE.

The (*state number*) issue reads:

"Was the defendant's failure to [perform] [abide by] a material term of the contract excused by an event which was not reasonably foreseeable?"¹

(You will answer this issue only if you have answered the (*state number*)² issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.³ This means that the defendant must prove, by the greater weight of the evidence, three things:

First, that an event occurred which, as a practical matter, destroyed the value of the contract to the defendant.⁴ (The defendant's purpose in entering into the contract must be so frustrated by the event that the value which defendant reasonably expected to obtain from the contract cannot be realized.)

Second, that at the time the contract was entered into, the event which destroyed the value of the contract to the defendant would not have been foreseeable to reasonable persons in the positions of the plaintiff and the defendant under the same or similar circumstances.⁵

Third, that the contract between the plaintiff and the defendant did not allocate the risk that such an event would occur.⁶

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 excused by an event which was not reasonably foreseeable, 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.

1 NOTE WELL: *Restitution is an appropriate remedy following discharge of a contract by the defenses of either frustration of purpose or impossibility.* Holmes v. Solon Automated Servs., ___ N.C. App. ___, ___, 752 S.E.2d 179, 182 (2013), citing Restatement (Second) of Contracts § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer of a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance."). Where the defendant asserts impossibility or frustration of purpose as a defense to a breach of contract claim, the Court still may instruct the jury on restitution as a proper remedy for the plaintiff under N.C.P.I.-Civil 503.01. See *id.* at ___, 179 S.E.2d at 183.

2 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).

3 The burden of proof is on the "person charged" to show "some valid reason which may excuse the non-performance, and the burden of doing so rests upon him." *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 217, 141 S.E.2d 292, 294 (1965) (*quoting Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 488, 119 S.E.2d 225, 228 (1961)).

4 *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981).

5 "If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense." *Id.*

6 ". . . [I]f the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations." *Id.*; see also *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 69 N.C. App. 733, 738, 318 S.E.2d 340, 343, *disc. review denied*, 312 N.C. 492, 322 S.E.2d 555 (1984).