

502.35 CONTRACTS-ISSUE OF BREACH-DEFENSE OF IMPOSSIBILITY
(DEATH, DISABILITY OR ILLNESS OF PERSONAL SERVICES PROVIDER).

The (*state number*) issue reads:

"Was the defendant's failure to perform personal services under the contract excused by [death] [disability] [illness]?"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 the services to be rendered by the defendant were strictly personal in nature. Services are strictly personal when they cannot be acceptably performed by someone else because of the defendant's particular [talent] [skill] [taste] [fitness] [personality] [experience] [contacts] [industry] [ability] [name recognition] [physical appearance] [*state other singular attribute*].⁴

Second, that the defendant did not perform the services of a strictly personal nature under the contract because of *his* [death] [disability] [illness].

And Third, that the contract between the plaintiff and the defendant did not allocate the risk that the defendant might [die] [become too disabled to perform] [become too ill to perform]. (If the parties provided that the obligations of the defendant would survive *his* [death] [disability] [illness], the fact that the defendant contracted to render services of a strictly personal nature would not excuse [*him*] [*his* estate] from performing.)⁵

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 personal services under the contract was excused by [death] [disability] [illness], 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 on 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 *Burch v. J.D. Bush & Co.*, 181 N.C. 125, 127, 106 S.E. 489, 490 (1921); *Shutt v. Butner*, 62 N.C. App. 701, 704-705, 303 S.E.2d 399, 401-02, *disc. rev. denied*, 309 N.C. 462, 307 S.E.2d 367 (1983); see also *Peaseley v. Virginia Iron, Coal & Coke Co.*, 5 N.C. App. 713, 721, 169 S.E.2d 243, 247 (1969), *appeal after remand*, 12 N.C. App. 226, 182 S.E.2d 810, *cert. denied*, 279 N.C. 512, 183 S.E.2d 688 (1971).

5 *Shutt*, 62 N.C. App. at 705, 303 S.E.2d at 401 (the agreement provided it would be binding on personal representatives, heirs and assigns).