N.C.P.I.-Civil. 502.47
CONTRACTS - ISSUE OF BREACH - DEFENSE OF ORAL MODIFICATION OF WRITTEN CONTRACT.
GENERAL CIVIL VOLUME
MAY 2003

502.47 CONTRACTS - ISSUE OF BREACH - DEFENSE OF ORAL MODIFICATION OF WRITTEN CONTRACT.

> *NOTE WELL: Use this instruction only where the contention of the defendant is that the parties orally modified a written contract and, as modified, the defendant did not breach its terms. For oral modification of oral contracts, written modifications of oral contracts and written modifications of written contracts, see N.C.P.I. Civil-502.48 (Common Law Contract-Issue of Breach-Defense of Modification of Contract).*

The (*state number*) issue reads:

"Did the plaintiff and the defendant orally modify that term of their written contract which the plaintiff contends was breached?"

(You will answer this issue only if you have answered the (*state number*)[1] 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 clear and convincing[2] evidence that the plaintiff and the defendant mutually assented to an oral modification of their written contract.[3] Mutual assent to modify a written contract must be determined from the [verbal expressions] [conduct] of the parties which [are] [is] positive, unequivocal and inconsistent with the original term(s) of the written contract.[4] Each party's [verbal expressions] [conduct] [are] [is] to be given such meaning as a reasonable person would give under the same or similar circumstances. In determining what meaning a reasonable person would give to the parties' [verbal expressions] [conduct], you should consider the evidence as to all the circumstances existing at the time of the alleged oral modification. (Where one party positively and unequivocally [abandons] [repudiates] [changes] a term in a contract and the other party positively

and unequivocally [consents to] [acquiesces in] such [abandonment] [repudiation] [change], the parties have mutually assented to a modification of the contract.)[5]

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by clear and convincing evidence that the plaintiff and the defendant orally modified that term of their written contract which the plaintiff contends was breached, 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.

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1. *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).

2. A line of Court of Appeals decisions holds that "proof of an oral agreement that modifies a written contract should be by clear and convincing evidence." *Lambe-Young, Inc. v. Cook*, 70 N.C. App. 588, 591, 320 S.E.2d 699, 702 (1984); *Anthony Tile & Marble Co., Inc. v. H. L. Coble Construction Co.*, 16 N.C. App. 740, 742, 193 S.E.2d 338, 340 (1972); *Ford Motor Credit Co. v. Jordan*, 5 N.C. App. 249, 253, 168 S.E.2d 229, 232 (1969). *See also Zinn v. Walker*, 87 N.C. App. 325, 336-37, 361 S.E.2d 314, 320-21 (1987).

3. General principles of contract law are used to determine whether the parties mutually agreed to cancel their obligations under the contract. *Baillie Lumber Co v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 352, 167 S.E.2d 85, 92 (1969). Thus, this instruction should be supplemented as necessary from N.C.P.I.-Civil 501.01 (Contracts-Issue of Formation) if there are technical contract formation matters at issue. The agreement to modify must not only have been formed by mutual assent, but supported by sufficient consideration except where the contract involves the sale of a good governed by Article 2 of the Uniform Commercial Code. N.C. Gen. Stat. § 25-2-209(1). A mutual agreement to modify is normally sufficient consideration for the discharge of pre-existing contractual relations where both parties' performance are executory. Thus, a separate element for consideration is omitted here. Where one of the parties has performed, however, a valid modification requires consideration and the jury should be instructed accordingly. Likewise, this affirmative defense is subject to rebuttal by the plaintiff if the agreement of modification is void or voidable by reason of, *e.g.*, fraud, undue influence and mistake. *See Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 234, 259 S.E.2d 1, 5 (1979). Finally, if the contract involves the sale of a good subject to Article 2 of the Uniform Commercial

Code, certain statute of frauds requirements may apply. *See* N.C. Gen. Stat. § 25-2-209(2) and (3).

4. *Bell v. Brown*, 227 N.C. 319, 322, 42 S.E.2d 92, 94 (1947); *Singleton v. Atlantic Coast Line R. Co.*, 203 N.C. 462, 466, 166 S.E. 305, 307 (1932); *Southern Public Utilities Co. v. Town of Bessemer City*, 173 N.C. 482, 485-86, 92 S.E. 331, 333 (1917); *Lancaster v. Lumby Corp.*, 77 N.C. App. 644, 646, 355 S.E.2d 791, 792 (1985), *disc. rev. denied*, 315 N.C. 588, 341, S.E.2d 26 (1986).

5. *Brannock v. Fletcher*, 271 N.C. 65, 75, 155 S.E.2d 532, 542 (1967); *Top Line Constr. Co. v. J. W. Cook & Sons, Inc.*, 118 N.C. App. 429, 433-34, 455 S.E.2d 463, 466 (1995).