

747.35 WARRANTIES IN SALES OF DWELLINGS - REMEDIES - SPECIAL
DAMAGES FOLLOWING RESCISSION.

NOTE WELL: Use this instruction where the plaintiff has elected to rescind the purchase or the contract to purchase the dwelling and contends he is entitled to special damages. Where the plaintiff has elected to retain the dwelling and seek damages, see N.C.P.I.-Civil 747.40.

The *(state number)* issue reads:

"What amount of money damages, if any, is the plaintiff entitled to recover from the defendant for breach of warranty?"

You will answer this issue only if you have answered the *(state number)* issue(s) "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, the amount of damages sustained as a result of the breach of warranty.

Where a buyer of a dwelling has (justifiably)¹ rescinded *his* purchase of a dwelling because of the builder's breach of the implied warranty of workmanlike quality, the buyer may recover²

- (a) so much of the purchase price as has been paid, and
- (b) incidental damages and consequential damages proximately resulting from the seller's breach.

Incidental and consequential damages include

[expenditures reasonably made by the plaintiff in preparing to perform the contract]³

[expenditures reasonably made by the plaintiff in response to the defendant's breach]

[expenditures reasonably made by the plaintiff for the purpose of minimizing the injury resulting from the defendant's breach]

[any other loss resulting from the plaintiff's circumstances of which the defendant knew or should have known at the time of the contracting, and which the plaintiff could not reasonably have prevented].

The plaintiff's damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of the financial injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. However, an award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. You may not award any damages based upon mere speculation or conjecture.

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 the amount of damages sustained by the plaintiff for breach of warranty, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write "Zero" in the blank space provided.

1. Use if N.C.P.I.-Civil 747.30 is given as a prior issue.

N.C.P.I.-Civil. 747.35
WARRANTIES IN SALES OF DWELLINGS-REMEDIES - SPECIAL DAMAGES
FOLLOWING RESCISSION.
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2. *Lumsden v. Lawing*, 107 N.C. App. 493, 421 S.E.2d 594 (1992)

3. Such damages may include recovery of mortgage interest, insurance premiums, *ad valorem* taxes and closing costs. *Id.* at 503, 421 S.E.2d at 600.