

747.40 WARRANTIES IN SALES OF DWELLINGS - REMEDIES - DAMAGES
UPON RETENTION OF DWELLING.

NOTE WELL: Use this instruction where the plaintiff has elected to retain the dwelling and seeks damages for the breach of warranty. Where the plaintiff has elected rescission, see N.C.P.I.-Civil 747.30, 747.35 and 747.36.

The *(state number)* issue reads:

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

If you have answered the *(state number)* issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage resulting from the breach.

The plaintiff may also be entitled to recover actual damages. 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.

A person damaged by a breach of warranty is entitled to be placed, insofar as this can be done by money, in the same position *he* would have occupied if there had been no breach of the warranty.

In determining the damages, you should:

[(1) first, determine what the reasonable market value of *(identify dwelling)* would have been at the time of [purchase] [possession] if it had been constructed so that it met the standard of

workmanlike quality prevailing at the time and place of construction, and

(2) second, determine what the reasonable market value of (*identify dwelling*) was at the time and place of construction in its actual condition, and

(3) third, subtract the second figure from the first figure, and add to the difference all incidental and consequential damages, if any, sustained by the plaintiff.]¹

[(*Alternatively*), you may award the plaintiff the reasonable cost of repairs necessary to make (*identify dwelling*) meet the standard of workmanlike quality² prevailing at the time and place of construction. To this amount add all incidental and consequential damages, if any, sustained by the plaintiff.]

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 issue upon 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 by reason of the defendant's 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 a nominal amount such as "One Dollar" in the blank space provided.

1. *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974).

2. *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 406 S.E.2d 646 (1991).

3. Such damages may include recovery of mortgage interest, insurance premiums, *ad valorem* taxes and closing costs. *Lumsden v. Lawing*, 107 N.C. App. 493, 503, 421 S.E.2d 594, 600 (1992).