

CONTRACTS--ISSUE OF FORMATION--DEFENSE OF FRAUD.<sup>1</sup>

The (state number) issue reads:

"Did the defendant enter into the contract with the plaintiff as a result of fraud?"

(You will answer this issue only if you have answered the (state number)<sup>2</sup> 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 the greater weight of the evidence, six things:

First, that the plaintiff [made a false representation of] [concealed] a material fact.

(A statement of opinion, belief, recommendation, future prospects or a promise ordinarily is not a representation of fact.<sup>3</sup> However, a promise can be a false representation of fact if, at the time it is made, the person making the promise has no intention of carrying it out).<sup>4</sup>

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<sup>1</sup>*Myers & Chapman, Inc. v. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *Massey v. Duke University*, 130 N.C. App. 461, 503 S.E.2d 155 (1998).

<sup>2</sup>See N.C.P.I.--Civil 501.01 (Contracts--Issue of Formation).

<sup>3</sup>*Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 615 (1980), *overruled on other grounds by, Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 392 (1988); *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974); *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962).

<sup>4</sup>*Britt v. Britt*, 320 N.C. 573, 579, 359 S.E.2d 467, 471 (1987), *overruled on other grounds by Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 392; *Johnson*, 300 N.C. at 255, 266 S.E.2d at 616.

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(A concealment occurs when a person fails to disclose that which, under the circumstances, he should disclose. A person has a duty to disclose all facts material to a transaction or event where [he is a fiduciary]<sup>5</sup> [he has made a partial or incomplete representation]<sup>6</sup> [he is specifically questioned about them]<sup>7</sup> [*state any other situation where a duty to disclose is imposed by law*]).

Second, that the [false representation] [concealment] was calculated to deceive. [A representation is calculated to deceive when the person who makes it knows it to be false, or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion.<sup>8</sup>] [A concealment is calculated to deceive when the person who makes it knows there is a duty to disclose, or is recklessly indifferent to a duty to disclose].

Third, that the [false representation was made] [concealment

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<sup>5</sup>*Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). Where there is no dispute as to whether a fiduciary relationship exists, a peremptory instruction may be given here. Otherwise, a separate issue should be submitted. See N.C.P.I.--800.05.

<sup>6</sup>*Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 501.

<sup>7</sup>*Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

<sup>8</sup>*Tarlton v. Keith*, 250 N.C. 298, 304, 108 S.E.2d 621, 624-625 (1959); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950).

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was done] with the intent<sup>9</sup> to deceive.<sup>10</sup>

Fourth, that the defendant was, in fact, deceived by the [false representation] [concealment].

Fifth, that the defendant's reliance was reasonable. The defendant's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his own welfare, [would have relied on the false representation] [would not have discovered the concealment].<sup>11</sup>

And Sixth, that the defendant entered into the contract with

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<sup>9</sup>For an instruction on intent, see N.C.P.I.--Civil 101.46.

<sup>10</sup>*Myers & Chapman, Inc.*, 323 N.C. at 568, 374 S.E.2d at 391.

<sup>11</sup>*Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 271, 141 S.E.2d 522, 526 (1965); *Johnson*, 263 N.C. at 758, 140 S.E.2d at 314.

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the plaintiff as a result of *his* reliance on the plaintiff's [false representation] [concealment].<sup>12</sup> In deciding whether the defendant entered into the contract with the plaintiff as a result of *his* reliance on the plaintiff's [false representation] [concealment], you may consider evidence of

[any weakness of mind of the defendant]<sup>13</sup>

[any inadequacy of the [price] [consideration] paid to the defendant for entering into the contract]<sup>14</sup>

[*state any other factor supported by the evidence*].

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 entered into the contract with the plaintiff as a result of fraud, 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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<sup>12</sup>Inadequacy of consideration alone, if it is shockingly insufficient, will support a finding of fraud without other evidence. *Wall v. Ruffin*, 261 N.C. 720, 723, 136 S.E.2d 116, 118 (1964); *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755 (1957); *Carland v. Allison*, 221 N.C. 120, 122, 19 S.E.2d 245, 246 (1942). See also N.C.P.I.--Civil 501.50 (Contracts--Issue of Formation--Defense of Grossly Inadequate Consideration Intrinsic Fraud).

<sup>13</sup>*Davis v. Davis*, 223 N.C. 36, 38, 25 S.E.2d 181, 182 (1943); *Lamb v. Perry*, 169 N.C. 436, 444, 86 S.E. 179, 183 (1915).

<sup>14</sup>*McPhaul v. Walters*, 167 N.C. 182, 83 S.E. 321 (1914).