

850.25 DEEDS—ACTION TO SET ASIDE—FRAUD.^{1, 2}

The (*state number*) issue reads:

“Was the [execution] [delivery] of (*identify deed*) by (*name grantor*) procured by fraud?”

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, six things:

First, that (*name grantor*) [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.³ 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).⁴

(A concealment occurs when a person fails to disclose that which, under the circumstances, should be disclosed. A person has a duty to disclose all facts material to a transaction or event where that person [is a fiduciary]⁵ [has made a partial or incomplete representation]⁶ [is specifically questioned about them]⁷ [(*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.⁸] [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 was done] with the intent⁹ to deceive.¹⁰

Fourth, that (*name grantor*) was, in fact, deceived by the [false representation] [concealment].

Fifth, that (*name grantor's*) reliance was reasonable. (*Name grantor's*) reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his or her own welfare, [would have relied on the false representation] [would not have discovered the concealment].¹¹

And Sixth, that (*name grantor*) [executed] [delivered] the (*identify deed*) as a result of (*name grantor's*) reliance on (*name person's*) [false representation] [concealment].¹² In deciding whether (*name grantor*) [executed] [delivered] the [identify deed] as a result of (*name grantor's*) reliance on (*name person's*) [false representation] [concealment], you may consider evidence of

[any weakness of mind of (*name grantor*)]¹³

[any inadequacy of the [price][consideration] paid to (*name grantor*) for entering into the contract]¹⁴

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

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name grantor's*) [execution] [delivery] of [*identify deed*] was procured by fraud, then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

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 defendant.

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

2. A decree setting aside the deed is not the only remedy, as fraud is one of the “three circumstances under which reformation could be available.” *Janice D. Willis Revocable Trust*

v. Willis, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (citing *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926)).

3. *Johnson v. Phoenix Mut. 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. 559, 569, 374 S.E.2d 385, 392; *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).

4. *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 v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616.

5. *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. Civil—850.35 (“Deeds—Action to Set Aside—Constructive Fraud”).

6. *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974)

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

8. *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).

9. For an instruction on intent, see N.C.P.I.-Civil 101.46 (“Definition of [Intent][Intentionally]”).

10. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988).

11. *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 271, 141 S.E.2d 522, 526 (1965); *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

12. 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 850.30 (“Deeds-Action to Set Aside-Grossly Inadequate Consideration (Intrinsic Fraud)”).

13. *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).

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

