

800.00 FRAUD.<sup>1</sup>

The (*state number*) issue reads:

“Was the plaintiff damaged by the fraud of the defendant?”

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<sup>2</sup>:

First, that the defendant [made a false representation of] [concealed] a material past or existing fact.<sup>3</sup>

(A statement of opinion, belief, recommendation, future prospects or a promise ordinarily is not a representation of fact.<sup>4</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>5</sup>

(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 when [*he* is a fiduciary]<sup>6</sup> [*he* has made a partial or incomplete representation]<sup>7</sup> [*he* is specifically questioned about them]<sup>8</sup> [in an arm’s length transaction, *he* has taken affirmative steps to conceal material facts from the other party]<sup>9</sup> [*state any other situation where a duty to disclose is imposed by law*]).

Second, that the [false representation] [concealment] was reasonably calculated to deceive.<sup>10</sup> [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>11</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 was done] with the intent<sup>12</sup> to deceive<sup>13</sup> and with the intent that it be acted upon.<sup>14</sup>

Fourth, that the plaintiff was, in fact, deceived by the [false representation] [concealment] and acted upon it.<sup>15</sup>

Fifth, that the plaintiff's reliance upon the [false representation] [concealment] was reasonable.<sup>16</sup> The plaintiff'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>17</sup>

And Sixth, that the plaintiff suffered damages proximately caused by the defendant's [false representation] [concealment].<sup>18</sup>

Proximate cause is a cause which in a natural and continuous sequence produces a person's damage, and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result.

There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's [false representation] [concealment] was the sole proximate cause of the plaintiff's damages. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's [false representation] [concealment] was a proximate cause.

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 the defendant [made a false representation of] [concealed] a past or existing material fact, that the [false representation] [concealment] was reasonably calculated to deceive, that the [false representation was made] [concealment was done] with the intent to deceive and with the intent that it be acted upon,

that the plaintiff was deceived by the [false representation] [concealment] and acted upon it, that the plaintiff's reliance upon the [false representation] [concealment] was reasonable, and that the plaintiff suffered damages proximately caused by the [false representation] [concealment], 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.

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1 See generally *Myers & Chapman, Inc. v. Evans, Inc.*, 323 N.C. 559, 568–69, 374 S.E.2d 385, 391 (1988); *Massey v. Duke U.*, 130 N.C. App. 461, 465, 503 S.E.2d 155, 158 (1998).

2 To make out an actionable case of fraud plaintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury. *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91–92, 261 S.E.2d 99, 103 (1980) (citation omitted).

3 "A fact is material 'if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced [its] judgment or decision in making the contract at all.'" *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75–76, 598 S.E.2d 396, 402 (2004) (quoting *Machine Co. v. Bullock*, 161 N.C. 1, 7, 76 S.E. 634, 636 (1912)).

4 See *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980), overruled on other grounds by *Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 391–92; *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).

5 See, e.g., *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 391–92; *Phoenix Mut. Life Ins. Co.*, 300 N.C. at 255, 266 S.E.2d at 616 (citations omitted).

6 See *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984) (citing *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 800.05 ("Constructive Fraud").

7 See *Ragsdale*, 286 N.C. at 139–40, 209 S.E.2d at 500–01; *Freese v. Smith*, 110 N.C. App. 28, 35, 428 S.E.2d 841, 846 (1993) ("[E]ven if there is no duty to disclose

information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses.”(citation omitted)).

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

9 See *Godfrey*, 165 N.C. App. at 75, 598 S.E.2d at 402 (citation omitted).

10 See *Ragsdale*, 286 N.C. at 138, 209 S.E.2d at 500.

11 See *Tarlton v. Keith*, 250 N.C. 298, 304, 108 S.E.2d 621, 624 (1959); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1–2 (1950).

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

13 See *Myers & Chapman, Inc.*, 323 N.C. at 568–69, 374 S.E.2d at 391.

14 See *Odom*, 299 N.C. at 92–93, 261 S.E.2d at 103.

15 See *id.*

16 See *State Props., L.L.C. v. Ray*, 155 N.C. App. 65, 72–73, 574 S.E.2d 180, 186 (2002) (citations omitted); *RD & J Props. v. Lauralea-Dilton Enters., L.L.C.*, 165 N.C. App. 737, 744, 600 S.E.2d 492, 498 (2004). “The reasonableness of a party’s reliance is a question for the jury, unless the facts are so clear that they support only one conclusion.” *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007).

17 Reliance is not reasonable if a plaintiff fails to make any independent investigation, ... or if plaintiff is informed of the true condition of the property ... [T]o support a fraud claim, a plaintiff must demonstrate it was denied the opportunity to investigate the property or could not discover the truth about the property’s condition by exercise of reasonable diligence. A plaintiff also must show that it was induced to forego additional investigation by the defendant’s misrepresentations. *State Properties, L.L.C.* at 73, 574 S.E.2d at 186 (citations omitted).

Although the general rule is that reliance is deemed unreasonable if no independent investigation is made, if “a defendant has resorted to an ‘artifice which was reasonably calculated to induce [plaintiffs] to forego investigation,’ plaintiffs’ failure to conduct an independent investigation is not fatal to a claim for fraud.” *Little v. Stogner*, 162 N.C. App. 25, 30, 592 S.E.2d 5, 10 (2004) (citation omitted); see also *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 271, 141 S.E.2d 522, 526 (1965); *Owens*, 263 N.C. at 758, 140 S.E.2d at 314; *Ke v. Zhou*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 808 S.E.2d 458, 460–61 (2017) (standing for the proposition that reliance may be reasonable where limited independent investigation is supported by reasonable statements from the defendant to induce reliance).

18 See *Jay Group, LTD. v. Glasgow*, 139 N.C. App. 595, 599–601, 534 S.E. 2d 233, 236–37 (2000) (“To establish fraud, a plaintiff must show ... that plaintiff suffered damage resulting from defendant’s misrepresentation or concealment. ... [T]he foregoing claim[] asserted by plaintiff[] requires that plaintiff establish the element of proximate causation.” (citation and emphasis in original omitted)).

Inadequacy of consideration alone, if it is shockingly insufficient, will support a finding of fraud without other evidence. See *Wall v. Ruffin*, 261 N.C. 720, 723, 136 S.E.2d 116, 118 (1964) (citations omitted); *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755–56 (1957); *Carland v. Allison*, 221 N.C. 120, 122, 19 S.E.2d 245, 246 (1942); N.C.P.I.–

Page 5 of 5  
N.C.P.I.–Civil 800.00  
FRAUD.  
GENERAL CIVIL VOLUME  
REPLACEMENT JUNE 2018  
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Civil 501.50 (“Contracts-Issue of Formation-Defense of Grossly Inadequate Consideration (“Intrinsic Fraud”)”).

