

NEGLIGENT MISREPRESENTATION: DAMAGES

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant as damages for negligent misrepresentation?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then 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 a technical injury to the plaintiff.

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 actual damages proximately¹ caused by the negligent misrepresentation of the defendant.

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 negligent misrepresentation of the defendant was the *sole* proximate cause of the damage. The plaintiff must prove, by the greater weight of the evidence, only that the negligent misrepresentation of the defendant was *a* proximate cause.

¹NOTE WELL: Fraud includes the elements of "false representation" and "intent to deceive," see N.C.P.I. Civil--800.00, not included in a claim of negligent misrepresentation, see N.C.P.I.--Civil 800.10. Hence an instruction on proximate cause is appropriate here, but is not included in N.C.P.I.--Civil 800.07, "Fraud: Damages." Cf. N.C.P.I.--Civil 800.00, "Personal Injury Damages," NOTE WELL and Fn1 (Negligence cases require an instruction on *proximate* cause. Intentional tort cases generally do not require proximate cause and an instruction solely on cause should be given.)

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The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for *his* pecuniary loss proximately caused by the misrepresentation of the defendant.² Pecuniary loss is a financial or monetary loss suffered by the plaintiff. [Pecuniary loss may include [the difference between the value of what the plaintiff has received in the transaction and its purchase price or other value given for it]³ [and] [financial or monetary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation⁴].]⁵

The plaintiff's damages are to be reasonably determined from the evidence presented. Your award must be fair and just. You may not award any damages based upon speculation or conjecture.⁶

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 the amount of actual damages proximately caused by the negligent misrepresentation of the defendant, then it would be your duty to write that amount in the blank space provided.

²*Middleton v. Russell Group*, 126 N.C. App. 1, 29, 483 S.E.2d 727, 743 (1997)(quoting Restatement (Second) of Torts § 552B (1977)).

³*Id.*; see also *Piedmont Inst. Of Pain Mgmt. v. Staton Found.*, 157 N.C. App. 577, 595-96, 581 S.E.2d 68, 80 (2003) (summary judgment properly granted where plaintiffs alleged "loss of funding" damages rather than an "individual pecuniary loss measured by the difference between the benefit promised and the benefit received").

⁴*Middleton at id.*

⁵See Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, 2d ed., § 27.50, p. 585 (Court of Appeals's reliance in *Middleton* on Restatement language "appears to mean that damages [for negligent misrepresentation] are limited to out-of-pocket loss" (defined at § 27.36 as "the difference between the value the plaintiff received and the value given") "and consequential damages" (defined at § 27.36 as "expense, time, trouble, or delay as a result of the misrepresentation"), but does not include benefit of bargain expectation damages" (defined at § 27.36 as "the difference between value as represented and value received").

⁶See *Godfrey*, 165 N.C. App. at 79, 598 S.E.2d at 404; *State Properties v. Ray*, 155 N.C. App. 65, 76-77, 574 S.E.2d 180, 188 (2002).

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If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as one dollar in the blank space provided.

