

DEEDS--ACTION TO SET ASIDE--FRAUD.¹

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.² 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).³

(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

¹*Myers & Chapman, Inc. v. 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*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. 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).

³*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.

DEEDS--ACTION TO SET ASIDE--FRAUD. (Continued).

fiduciary]⁴ [he has made a partial or incomplete representation]⁵ [he is specifically questioned about them]⁶ [(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.⁷] [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 intent⁸ to deceive.⁹

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

⁴*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.--850.35 (Deeds--Action to Set Aside--Constructive Fraud).

⁵*Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 501.

⁶*Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

⁷*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).

⁸For an instruction on intent, see N.C.P.I.--Civil 101.46.

⁹*Myers & Chapman, Inc.*, 323 N.C. at 568, 374 S.E.2d at 391.

DEEDS--ACTION TO SET ASIDE--FRAUD. (Continued).

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].¹⁰

And Sixth, that (*name grantor*) [executed] [delivered] the (*identify deed*) as a result of *his* reliance on (*name person's*) [false representation] [concealment].¹¹ In deciding whether (*name grantor*) [executed] [delivered] the [*identify deed*] as a result of *his* reliance on (*name person's*) [false representation] [concealment], you may consider evidence of

[any weakness of mind of (*name grantor*)]¹²

[any inadequacy of the [price] [consideration] paid to (*name grantor*) for entering into the contract]¹³

[*(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.

¹⁰*Fox v. S. 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.

¹¹Inadequacy 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)).

¹²*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).

DEEDS--ACTION TO SET ASIDE--FRAUD. (Continued).

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.

¹³*McPhaul v. Walters*, 167 N.C. 182, 83 S.E. 321 (1914).