

3.30E FRAUD — DECEIT (Approved 2/92)

Plaintiff seeks to recover damages which he/she claims he/she sustained as a result of a misrepresentation made to him/her by the defendant. One who represents as true that which is false with the intent to deceive the person to whom the representation is made is liable to that person if he/she, believing the representation to be true (acts, refrains from acting) in justifiable reliance upon it and suffers damage as a result.

The burden of proof is on the plaintiff to establish by clear and convincing evidence each of the following elements. First, that defendant made a false representation of fact to him/her. Second, that defendant knew or believed it to be false. Third, that defendant intended to deceive plaintiff. Fourth, that plaintiff believed and justifiably relied upon the statement and was induced by it to (action taken or omitted). Fifth, that as a result of plaintiff's reliance upon the statement, he/she sustained damage.

The first question for you to determine is what defendant said to the plaintiff. If it was a statement of opinion rather than a statement of fact, defendant cannot be held responsible, for opinions are matters of judgment for which under the circumstances of this case, the law does not impose liability and your verdict will be for the defendant. If on the other hand you find that defendant stated in

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words or substance that (recite the representations claimed) your finding will be that defendant made a representation of fact.

If you find that defendant made a representation of fact, you will next consider whether that representation was true or false. If you find it was true, your verdict will be for the defendant. If you find it was false, you will then determine whether defendant knew or believed it was false and made the representation with intent to deceive the plaintiff. A false statement is made with intent to deceive if it is made with knowledge that it is false.

Whether the plaintiff was justified in relying on the representation depends upon whether the fact represented is one that a reasonable man would consider important in reaching a decision in the transaction in question. Even though it is not such an important fact, reliance may be justified if the defendant in making the representation knew that the plaintiff considered it important and would rely upon it.

If you ultimately conclude that there was no justifiable reliance by the plaintiff or even if there was not a substantial factor in plaintiff's decision to enter into the transaction, your verdict will be for the defendant.

If you find that a reasonable person would have considered the representation important in deciding whether to proceed with the transaction or that defendant knew that plaintiff considered the fact important and would rely on it, and you find that plaintiff's belief of the representation was a substantial factor in his/her decision to engage in the transaction, your verdict would be for the plaintiff and your attention would then turn to the nature and extent of plaintiff's damage.

NOTE TO JUDGE

Prosser, *Law of Torts*, p. 700 (3rd ed. 1964), *Louis Schlesinger Co. v. Wilson*, 22 N.J. 576, 585-586 (1956), *Fischetto Paper Mill Supply Inc. v. Quigley Co., Inc.*, 3 N.J. 149, 152-153 (1949), *Ocean Cape Hotel Corp. v. Masefield Corp.*, 63 N.J. Super. 369, 379-380 (1960).

There is much debate about the proper charge as to the burden of proof in cases involving claims of fraud — common law — equitable or legal. Early case law would indicate that the burden of proof if equitable relief is sought is “clear and convincing.” If money damages are sought the burden of proof is “preponderance.” *Armel v. Crewick*, 71 N.J. Super. 213 (App. Div. 1961); *Batka v. Liberty Mutual Fire Ins. Co.*, 704 F.2d 684 (3rd Cir. 1983). However, recent case law may have departed from this distinction, and applied the higher “clear and convincing” standard to all actions, legal or equitable. *Albright v. Burns*, 206 N.J. Super. 625 (App. Div. 1986); *Intile Realty v. Raho*, 259 N.J. Super., 438 (Law Div. 1992); *Stochastic Decisions v. DiDominico* 236 N.J. Super. 388 (App. Div. 1988). A review of the cited cases is recommended.