

Tennessee Practice Series Tennessee Pattern Jury Instructions - Civil
Current through the Tenth Edition

The Committee on Pattern Jury Instructions (Civil) of the Tennessee Judicial Conference

Chapter
8. Intentional Torts
E. Misrepresentation

T.P.I.—CIVIL 8.35 Introduction

The plaintiff seeks to recover damages for the alleged *[intentional]**[reckless]**[negligent]* misrepresentation of the defendant. To recover damages, the plaintiff must prove each of the following elements:

USE NOTE

This opening instruction is to be immediately followed by the appropriate instruction.

COMMENT

A purchaser who has been the victim of a misrepresentation or who has been induced to contract through a mistake of material fact mutual to him and his vendor, has, both at law and in equity, a number of alternative remedies, including actions for rescission and restitution, for breach of contract and in tort for misrepresentation. Plaintiff need only elect consistently among the remedies. He may not both affirm and disaffirm his contract. [Isaacs v. Bokor, 566 S.W.2d 532 \(Tenn. 1978\)](#).

A court of law may decree rescission and allow restitution as well as a court of equity. [Isaacs v. Bokor, 566 S.W.2d 532 \(Tenn. 1978\)](#).

Defensive fraud, that is fraud set up to defeat a contract or deed, or fraud in the proof of loss in an insurance case may be established by a preponderance of the evidence. An instruction requiring clear and convincing evidence is erroneous. [Hendrix v. Insurance Co. of North America, 675 S.W.2d 476 \(Tenn. App. 1984\)](#).

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TNPRACJIC 8.35

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T.P.I.—CIVIL 8.36 Intentional Misrepresentation

1

The defendant made a representation of a present or past material fact; and

2

The representation was false; and

3

The defendant knew that the representation was false when it was made *[for the defendant made the representation recklessly without knowing whether it was true or false]*; and

4

The defendant intended that the plaintiff rely upon the representation and act or not act in reliance on it; and

5

The plaintiff did not know that the representation was false and was justified in relying upon the truth of the representation; and

6

As a result of plaintiff's reliance upon the truth of the representation, the plaintiff sustained damage.

USE NOTE

Use instruction T.P.I.—Civil 8.35 as a preface to the use of this instruction.

In a business transaction, it should be kept in mind that intentional fraud may lead to treble damages and attorney's fees under [T.C.A. §§ 47-18-101 et seq.](#) not authorized by a verdict under instruction 8.47 and in such a case 8.47 should not replace 8.41. [Brungard v. Caprice Records, Inc.](#), 608 S.W.2d 585 (Tenn. App. 1980). But see [Haverlah v. Memphis Aviation, Inc.](#), 674 S.W.2d 297, 306 (Tenn. App. 1984).

COMMENT

The elements of positive fraud are that the representation must have been to an existing fact which is false and material; knowledge of the falsity (it was made knowingly or without belief in its truth, or recklessly without regard of truth or falsity); and the plaintiff must have reasonably relied upon that representation to his injury. [Williams v. Van Hersh](#), 578 S.W.2d 373 (Tenn. App. 1978); [Hill v. John Banks Buick, Inc.](#), 875 S.W.2d 667 (Tenn. App. 1993). When using this definition one must remember that the representation must be false. The purchaser must have relied on the misrepresentations. [Holt v. American Progressive Life Ins. Co.](#), 731 S.W.2d 923 (Tenn. App. 1987), [Security Fed. S & L v. Riviera, Ltd.](#), 856 S.W.2d 709 (Tenn. App. 1992), and the reliance must have been reasonable under the circumstances. [Security Fed. S & L](#) supra, [Pakrul v. Barnes](#), 631 S.W.2d 436 (Tenn. App. 1981).

See also [Graham v. First Amer. Natl. Bank](#), 594 S.W.2d 723 (Tenn. App. 1979); [Pusser v. Gordon](#), 684 S.W.2d 639 (Tenn. App. 1984); [Lonning v. Jim Walter Homes](#), 725 S.W.2d 682 (Tenn. App. 1986); [Maddux v. Cargill, Inc.](#), 777 S.W.2d 687 (Tenn. App. 1989); [Metropolitan Government of Nashville and Davidson County v. McKinney](#), 852 S.W.2d 233 (Tenn. App. 1992).

A tortious misrepresentation case is analogous to an action for deceptive trade practices and is a distinct and separate cause of action from a breach of warranty case. Therefore, a “as is, where is” disclaimer is not a defense. [Godwin Aircraft, Inc. v. Houston](#), 851 S.W.2d 816 (Tenn. App. 1992). It is also said in [Houston](#) that one who, in the course of his business, profession or employment, or during a transaction in which he had a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon such information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Confidential relationship: Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage. [Security Fed. S & L](#) supra.

Insurance Application: A misrepresentation on an application for insurance voids the policy if it is made with actual intent to deceive. The jury may determine whether the answers were false and, if so, whether there was intent to deceive, but only the trial judge may determine whether the false answers materially increased the risk of loss. [*Spellmeyer v. Tennessee Farmers Mut. Ins. Co.*, 879 S.W.2d 843 \(Tenn. App. 1993\)](#).

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T.P.I.—CIVIL 8.38 Misrepresentation by Concealment

- 1 The defendant concealed or suppressed a material fact;
- 2 The defendant was under a duty to disclose the fact to the plaintiff;
- 3 The defendant intentionally concealed or suppressed the fact with the intent to deceive the plaintiff;
- 4 The plaintiff was not aware of the fact and would have acted differently if the plaintiff knew of the concealed or suppressed fact; and
- 5 As a result of the concealment or suppression of the fact, the plaintiff sustained damage.

USE NOTE

Use instruction T.P.I.—Civil 8.35 as a preface to the use of this instruction.

The following was moved from former T.P.I.—Civil 8.47. It is the thinking of the Committee that former T.P.I.—Civil 8.47 can be covered with the following use note instead of having a separate instruction for these matters.

A party is subject to liability for misrepresentation for intentionally concealing facts within that party's knowledge, such as known defects in a property, or for actively preventing investigation and discovery of material facts by the other party.

If a party who is under no duty to speak does so, that party must speak honestly and may not use misleading half-truths or suppress facts that materially limit or change the facts stated.

COMMENT

There must be something more than mere silence or a mere failure to disclose known facts. There must be concealment consisting of withholding information asked for or making use of some device to mislead, thus involving act and intention. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry or there must be a legal or equitable duty on the party knowing the facts to disclose them. [*Leeper v. Cook*, 688 S.W.2d 94 \(Tenn. App. 1985\)](#).

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T.P.I.—CIVIL 8.39 Nondisclosure of Known Facts

The failure of one party to disclose material facts known by that party and not the other party is not fraud unless there is some relationship between the parties that creates a duty to disclose those facts.

There is a duty to disclose known facts when the party having knowledge of the facts is in a fiduciary or a confidential relationship with the other party. There is a fiduciary or confidential relationship when one person may reasonably trust or have confidence in the integrity and fidelity of another.

[(In the absence of a fiduciary or a confidential relationship) a duty to disclose known facts arises where one party knows of material facts and also knows that those facts are neither known nor readily accessible to the other party.]

USE NOTE

Most decisions enunciating the rule stated in the last paragraph are in cases involving nondisclosure by a seller. Whether the same rule would apply to a buyer is uncertain. In a case involving a fiduciary or confidential relationship there may be a presumption of fraud which the defendant could only defeat by clear and convincing evidence.

COMMENT

A vendor is not required to disclose dangerous conditions, or to remember them, unless the condition is one which an inspection by the vendee would not discover, or, although the condition would be discovered, the vendor realizes the risk involved and has reason to believe the vendee will not realize it. [*Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888 \(Tenn. 1980\)](#).

A physician may owe a duty to a non-patient third party for injuries caused by the physician's negligence, if the injuries suffered and the manner in which they occurred were reasonably foreseeable. [*Wharton Transport Corp. v. Bridges*, 606 S.W.2d 521 \(Tenn. 1980\)](#); [*Bradshaw v. Daniel*, 854 S.W.2d 865 \(Tenn. 1993\)](#). The existence of a physician-patient relationship is sufficient to impose upon a physician an affirmative duty to warn identifiable third persons in the patient's immediate family against foreseeable risks emanating from a patient's illness.

All the instances in which the duty to disclose exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes: 1. Where there is a previous definite fiduciary relationship between the parties. 2. Where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other. 3. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. [*Walker v. First State Bank*, 849 S.W.2d 337 \(Tenn. App. 1992\)](#).

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T.P.I.—CIVIL 8.43 Negligent Misrepresentation

To prove negligent misrepresentation, plaintiff must prove that:

- 1 The defendant was acting in the course of *[his][her][its][business][profession][employment][or in any other transaction in which defendant has a financial interest]*;
- 2 The defendant negligently supplied false information;
- 3 The defendant intended the information to guide plaintiff in plaintiff's business transaction;
- 4 The plaintiff justifiably relied upon the false information; and
- 5 As a result, plaintiff suffered a financial loss.

Plaintiff may prove that defendant negligently supplied false information by proving that (a) defendant failed to exercise reasonable care or competence in obtaining information about the business transaction or that (b) defendant failed to exercise reasonable care or competence in communicating that information.

USE NOTE

This instruction must be re-worded when the plaintiff is not a direct client or customer of the defendant. The trial judge and the parties should look to § 552(2) of the *Restatement (Second) of Torts* for guidance in drafting an instruction in claims brought by third parties.

COMMENT

This instruction was re-drafted after release of the opinion in [*Robinson v. Omer*, 952 S.W.2d 423 \(Tenn. 1997\)](#).

This decision re-affirmed that Tennessee follows § 552(2) of the *Restatement (Second) of Torts* and that a necessary element for recovery for the tort of negligent misrepresentation is proof that the advice or information negligently supplied was for the guidance of others in their business transactions.

This section has been applied against lawyers (*Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988); *Stinson v. Brand*, 738 S.W.2d 186 (Tenn. 1987)); accountants (*Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991)); land surveyors (*Tartera v. Palumbo*, 224 Tenn. 262, 453 S.W.2d 780 (1970)); and construction managers (*John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 429 (Tenn. 1991)).

A defendant may be held liable not only to defendant's client or customer but also to third persons. For example, in *Bethlehem Steel Corp.*, a national accounting firm which negligently prepared an audit report regarding customer of plaintiff manufacturer was held liable to manufacturer when it relied upon the audit report in extending credit to customer who in fact was uncreditworthy.

The *Robinson* opinion makes it clear that an action for negligent misrepresentation can be brought if it arises out of a business transaction. *Robinson v. Omer*, 952 S.W.2d 423 (Tenn. 1997).

In order for liability to attach for a negligent misrepresentation, some statement or representation must have been made. A nebulous statement of opinion by a real estate agent that a firm would be “a much better builder” with “better house plans” was held to be nothing more than a statement of opinion and insufficient to form the basis for cause of action for misrepresentation. *Harrison v. Avalon Properties, LLC*, 246 S.W.3d 387 (Tenn. App. 2007).

Although the Tennessee Supreme Court has not yet spoken on the subject, several appellate court decisions conclude that comparative fault may be raised as a defense in negligent misrepresentation cases. *York v. Brannell College of Memphis, Inc.*, 1993 WL 484203, at *7, 18 TAM 51-7 (Tenn. App. 1993); *Glanton v. Beckley*, 1996 WL 709373, at *9, 22 TAM 1-11 (Tenn. App. 1996) (concurring opinion). See also *Penn-America Ins. Co. v. CLT Partnership*, 106 F.3d 401 (6th Cir. Tenn. 1997) (the court suggests, but does not hold, that it would not be error to charge comparative fault in a negligent misrepresentation case).

One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Bennett v. Trevecca Nazarene University*, 216 S.W.3d 293 (Tenn. 2007).

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T.P.I.—CIVIL 8.44 Liability to Third Persons for Negligent Misrepresentation

To recover in this case, the plaintiff must be the person or a member of a limited group of persons that the defendant intended to benefit or guide with the information the defendant supplied, and the plaintiff must have relied on the information in a transaction the defendant intended to influence [*or in a substantially similar transaction*].

The plaintiff may also recover if the plaintiff received the information from another person whom the defendant knew intended to transmit the information to a similar group of persons, and if the plaintiff relied on the information in a transaction the defendant intended to influence.

USE NOTE

This instruction is intended to be used with T.P.I.—Civil 8.43 in appropriate cases and is intended to comply with § 552 (2) of the *Restatement (Second) of Torts* adopted in [Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592 \(Tenn. 1991\)](#). That section states as follows:

Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:

- (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
- (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

COMMENT

Comment (h), cited by the Supreme Court at 822 S.W.2d 595, provides as follows:

Under this section, as in the case of the fraudulent misrepresentation (see § 531), it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, on the part of anyone to whom it may be repeated.

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T.P.I.—CIVIL 8.45 Persons to Whom Representations Made

[A person is subject to liability only to those persons to whom the person making the representation intends to induce to act in reliance upon the representation. If others become aware of the representation and act upon it, there is no liability even though the party who made the representation should reasonably have foreseen such a possibility.]

[A person does not need to make a representation directly to the person whom the defendant intends will act upon it. The defendant may make the representation to a third person intending that the third person communicate the representation to the person whom the defendant intends will act upon it.]

[A person who makes a representation intending to defraud the public or a particular class of persons, is considered in law to have intended to defraud every individual in the same category who was actually misled by the representation.]

USE NOTE

Select one or more paragraphs as the case may require.

COMMENT

The right to recover for fraud or deceit is not restricted to the parties to a transaction, but extends to third persons injured thereby, at least where such third persons are intended to rely and act upon false representations and they do so rely and act thereon, to their damage. [Arcata Graphics v. Heidelberg Harris, 874 S.W.2d 15 \(Tenn. App. 1993\)](#).

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T.P.I.—CIVIL 8.46 Reliance

A party seeking recovery for *[intentional][negligent]* misrepresentation must have relied upon the representation. In other words, the plaintiff would not have entered into the transaction without the representation. You must determine whether reliance upon the representation substantially influenced the party's action, even though other influences operated as well.

Reliance upon a representation may be shown by direct evidence or may be inferred from the circumstances.

COMMENT

An essential element of any action for fraud, deceit, failure to disclose, or negligent or innocent misrepresentation is detrimental reliance on a false premise. Fraud involves deception and if one knows the truth and is not deceived, he is not defrauded. [Earley v. Clayton, 928 S.W.2d 931 \(Tenn. App. 1996\)](#).

When determining the reasonableness of an investor's reliance on a broker's representations, the fact trier should consider: (1) the investor's sophistication and experience in financial and security matters, (2) the business or personal relationship between the parties, (3) the availability of relevant information, (4) the existence of a fiduciary relationship, (5) the concealment of any fraud, (6) the opportunity to discover fraud, (7) which party initiated the transaction, and (8) the specificity of the misrepresentations. [City State Bank v. Dean Witter Reynolds, Inc., 948 S.W.2d 729 \(Tenn. App. 1996\)](#).

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T.P.I.—CIVIL 8.47 Right to Rely

A person claiming to have been damaged by a false representation must not only have acted in reliance on the representation but must have been justified in that reliance. That is, it must be reasonable for the person, in the light of the circumstances and that person's intelligence, experience, and knowledge, to accept the representation without making an independent inquiry or investigation.

USE NOTE

In using this instruction, note the case of [Allied Sound, Inc. v. Neely, 58 S.W.3d 119 \(Tenn. App. 2001\)](#), which illustrates the point that there is no reasonable reliance when a party is provided information, invited to inquire and does not make full inquiry.

COMMENT

Comparative fault applies to negligent misrepresentation. [Staggs v. Wells, 86 S.W.3d 219, 224 \(Tenn. Ct. App. 2001\)](#). Where the plaintiff reasonably relied on false information provided by the defendant but the plaintiff was negligent in performing reasonable inspections and inquiries, the plaintiff may recover so long as the plaintiff's negligence remains less than the defendant's negligence. *Id.* "It is axiomatic that a plaintiff could commit negligence which might have contributed to the amount of damage suffered, but still have justifiably relied in the defendant's representations." *Id.*

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T.P.I.—CIVIL 8.49 Damages—Benefit of the Bargain Rule

If you find that plaintiff is entitled to a verdict against the defendant, you must then award damages in an amount that will reasonably compensate the plaintiff for all the loss suffered by the plaintiff that was legally caused by the misrepresentation upon which you base your finding of liability.

You will award the plaintiff the "benefit of the bargain." The "benefit of the bargain" is the difference between the value of what the plaintiff would have received if the misrepresentation had been true and the actual value of what the plaintiff received.

Actual value means market value. Market value is the highest selling price that real or personal property would bring on the open market. In making your finding of market value, you will assume that the seller has a reasonable time to sell and that the seller is willing to sell but not forced to do so. You will also assume that the buyer is ready, willing, and able to buy but is not forced to do so, and that the buyer has a reasonable time and full opportunity to investigate the property and to determine its condition, suitability for use, and all of the things about the property that would naturally and reasonably affect its market value.

USE NOTE

Actual value means market value. Market value is the highest selling price that real or personal property would bring on the open market. In making your finding of market value, you will assume that the seller has a reasonable time to sell and that the seller is willing to sell but not forced to do so. You will also assume that the buyer is ready, willing, and able to buy but is not forced to do so, and that the buyer has a reasonable time and full opportunity to investigate the property and to determine its condition, suitability for use, and all of the things about the property that would naturally and reasonably affect its market value.

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