

800.05 CONSTRUCTIVE FRAUD.

The (*state number*) issue reads:

“Did the defendant engage in constructive fraud to bring about (*identify transaction*)?”

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, three things:¹

First, that a relationship of trust and confidence existed between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff’s interests.

[(*Use where a fiduciary relationship exists as a matter of law; for a list of such relationships, see N.C.P.I.—Civil 800.03—Definition of Fiduciary Duty; Explanation of Fiduciary.*) In this case, members of the jury, the plaintiff and the defendant had a relationship of (*name fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc.*). You are instructed that, under such circumstances, (*name fiduciary relationship*) is a relationship of trust and confidence.]

[(*Use for other relationships where it is alleged that a fiduciary relationship² exists.*) Such a relationship may exist in a variety of circumstances. It is not necessary that this relationship be a technical or legal relationship and it may be created by the parties’ conduct. Such a relationship exists between the plaintiff and the defendant when the defendant undertakes to act for the benefit of the plaintiff, thus causing the plaintiff to place special faith, confidence, and trust in the defendant undertaking to act in the plaintiff’s best interest.]

Second, that the defendant breached this duty by using this position of trust and confidence to bring about (*identify transaction*) to the detriment of the plaintiff.³

And Third, that the defendant sought to benefit [himself] [herself] [itself] in (*identify transaction*).⁴

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 there was a relationship of trust and confidence between the plaintiff and the defendant such that the defendant had a duty to act in good faith and with due regard for the plaintiff's interests, that the defendant breached this duty by bringing about (*identify transaction*) to the detriment of the plaintiff, and that the defendant sought to benefit [himself] [herself] [itself], 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.

1. *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 274 (2022) ("In order to prove constructive fraud, Plaintiff must allege and prove: '(1) that the defendant owes the plaintiff a fiduciary duty; (2) that the defendant breached that duty; and (3) that the defendant sought to benefit himself in the transaction.'" (quoting *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019))).

2. Some appellate decisions have phrased this first element as requiring the defendant to owe the plaintiff a fiduciary duty, *see, e.g., Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 274 (2022), while other appellate decisions have phrased this element as requiring that there be a confidential or fiduciary relationship between the parties, *see, e.g., Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018). Regardless of how it is phrased, this first element has been generally "described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. A fiduciary relationship may exist in law or in fact. For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the legal relations between two parties, it may yet exist as a matter of fact in such instances when there is confidence reposed on one side, and the resulting superiority and influence on the other." *Fox v. Fox*, 283 N.C. App. 336, 345, 873 S.E.2d 653, 661 (2022).

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3. *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 637, 870 S.E.2d 269, 275 (2022).

4. "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty. This element requires a plaintiff to allege and prove that the defendant took advantage of his position of trust to the hurt of plaintiff and sought his own advantage in the transaction." *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019). In *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997), the Supreme Court wrote that "implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction." Since *Barger*, North Carolina appellate courts have "continued to require a showing of benefit for constructive fraud." *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 638, 870 S.E.2d 269, 275 (2022).

In establishing this third element, a plaintiff must show "that the benefit sought was 'more than a continued relationship with the plaintiff' or 'payment of a fee to a defendant for work' it actually performed." *Ironman Med. Properties, LLC v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019) (quoting *Sterner v. Penn*, 159 N.C. App. 626, 631-32, 583 S.E.2d 670, 674 (2003)).