

850.35 DEEDS - ACTION TO SET ASIDE<sup>1</sup> - CONSTRUCTIVE FRAUD.

The (*state number*) issue reads:

"Did the defendant take advantage of a position of trust and confidence to procure (*name grantor's*) [execution] [delivery] of (*identify deed*)?"

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, two things:<sup>2</sup>

First, that a relationship of trust and confidence existed between (*name grantor*) and the defendant. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person's interests.<sup>3</sup> (*Use where a presumptive fiduciary relationship is shown by the evidence: In this case, members of the jury, (name grantor) and the defendant had a relationship of (name presumptive fiduciary relationship, e.g., attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc.) You are instructed that, under such circumstances, a relationship of trust and confidence existed.*)

And Second, that the defendant used *his* position of trust and confidence to bring about the [execution] [delivery] of (*name deed*) to the detriment of (*name grantor*)<sup>4</sup> and for the benefit of the defendant.<sup>5</sup>

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 the defendant took advantage of a position of trust and confidence to procure (*name grantor's*) [execution] [delivery] of (*identify deed*), 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.

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1. A deed may be set aside if it is procured as a result of constructive fraud. *Stephenson v. Warren*, 136 N.C. App. 768, 771, 525 S.E.2d 809, 811 (2000), *rev. denied*, 351 N.C. 646, 543 S.E.2d 883 (2000).

2. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950): "It is necessary for plaintiff to allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."). See also *Sidden v. Mailman*, 137 N.C. App. 669, 677, 529 S.E.2d 266, 272 (2000).

3. *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

4. *Terry*, 302 N.C. at 83, 273 S.E.2d at 677; *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987).

5. 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." The Court then stated that "[t]he requirement of a benefit to defendant follows logically from the *requirement* that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence." *Id.* (emphasis supplied). The Court of Appeals has followed this holding that an essential element of constructive fraud is that the "defendant sought to benefit himself." *NationsBank of North Carolina, N.A. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 246 (2000); *Ridenhour v. International Business Machines Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777, *disc. rev. denied*, 350 N.C. 595, 537 S.E.2d 481 (1999); *Sharp v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999); *State ex rel Long v. Petree Stockton, LLP*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998). *Barger's* influence appears to have reshaped prior law on the presumption of fraud that normally follows from proof of the existence of a fiduciary relationship. See, e.g., *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943). After *Barger*, at least one Court of Appeals decision requires the plaintiff not only to prove the existence of a confidential relationship to survive a directed verdict, but also that the defendant used his position of trust to "take advantage" for his "own benefit." *Ridenhour*, 132 N.C. App. at 566, 512 S.E.2d at 777 (absence of evidence of benefit to defendant grounds for directed verdict). See also *Estate of Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813 (1997) (directed verdict properly granted where plaintiff failed to prove second element of constructive fraud). *But see Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000) (presumption of fraud raised when an agent self-deals); *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E.2d 329, 331 (1984) (constructive fraud proven by showing that confidential relationship existed at the time the property was transferred to the fiduciary).