

810.96 PUNITIVE DAMAGES - LIABILITY OF DEFENDANT.

*NOTE WELL: Use this instruction in conjunction with claims for relief arising on or after January 1, 1996.<sup>1</sup> For claims for relief arising prior to January 1, 1996, use N.C.P.I. —Civil 810.90.*

The (*state number*) issue reads:

"Is the defendant liable to the plaintiff for punitive damages?"

(You are to answer this issue only if you have awarded the plaintiff relief in conjunction with (*state number(s) of plaintiff's issue(s)*).<sup>2</sup>

On this issue the burden of proof is on the plaintiff to prove three things. The plaintiff must prove the first thing by clear and convincing evidence.<sup>3</sup> Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.

Thus, the first thing the plaintiff must prove, by clear and convincing evidence, is the existence of [fraud] [malice] [willful or wanton conduct].<sup>4</sup>

[Fraud means a false representation of material fact made by the defendant with intent to deceive which was reasonably calculated to deceive and which did, in fact, deceive and damage the plaintiff because of *his* reasonable reliance on it.]<sup>5</sup>

[Malice means a sense of personal ill will toward the plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff.]<sup>6</sup>

[Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury,

damage or other harm. Willful or wanton conduct means more than gross negligence.]<sup>7</sup>

The plaintiff must prove the second and third things by the greater weight of the evidence. The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist. These second and third things are:

Second, that the [fraud] [malice] [willful or wanton conduct] was related to the injury to the plaintiff for which you have already awarded relief.<sup>8</sup>

And Third, that the [defendant participated in] [the defendant's officers, directors or managers participated in or condoned] the [fraud] [malice] [willful or wanton conduct].<sup>9</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the standards herein explained that the defendant is liable to the plaintiff for punitive damages, 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 "No" in favor of the defendant.

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<sup>1</sup> N.C. Gen. Stat. § 1D became effective January 1, 1996, displacing common law punitive damages. It applies to all "claims for relief arising on or after the date." 1995 N.C. Sess. Laws 514, § 5. Pursuant to N.C. Gen. Stat. § 1D-30, upon the motion of the defendant, the issues of liability for and amount of punitive damages shall be tried separately from the issues of liability for and amount of compensatory damages.

<sup>2</sup> This admonition should be omitted in the event of a bifurcated procedure pursuant to N.C. Gen. Stat. § 1D-30. See *Watson v. Dixon*, 132 N.C. App. 329, 331-332, 511 S.E.2d 37, 38 (1999) cert. den. 351 N.C. 191, 541 S.E.2d 727(1999).

<sup>3</sup> N.C. Gen. Stat. § 1D-15(b). Note that the statute omits any reference to "strong."

<sup>4</sup> N.C. Gen. Stat. § 1D-15(a).

<sup>5</sup> See N.C.P.I.—Civil 800.90. Note that this summary definition must be adapted in

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MARCH 2016  
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"concealment" cases. In an appropriate case, the five elements of fraud set out in greater detail in N.C.P.I.—Civil 800.00 can be given. "Constructive fraud" can also qualify as "fraud" for the purposes of N.C. Gen. Stat. § 1D-15(a) if "an element of intent is present." N.C. Gen. Stat. § 1D-5(4). Thus, an intentional breach of fiduciary duty would be sufficient. In such instances, the jury could be instructed that, "Fraud occurs when a person who is a fiduciary for another intentionally fails to act in good faith and with due regard for such other person." See N.C.P.I. —Civil 800.96.

6 N.C. Gen. Stat. § 1D-5(5).

7 N.C. Gen. Stat. § 1D-5(7).

8 N.C. Gen. Stat. § 1D-15(a). Note, however, that *Mehovic v. Mehovic*, 133 N.C. App. 131, 136, 514 S.E.2d 730, 734 (1999) holds that punitive damages are appropriate where the plaintiff elects rescission rather than compensatory damages.

9 Punitive damages may not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. N.C. Gen. Stat. § 1D-15(c).