

2402 MISREPRESENTATION: STRICT RESPONSIBILITY

To constitute strict responsibility misrepresentation in this case, there are five elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant) [, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing;¹ or where there is a relationship of trust or confidence between the parties²].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact.³ However, a statement of opinion may, in your discretion, be determined by you to be a representation of fact.⁴ In making your determination, you may consider the form and manner of expression⁵ [or the disparity of knowledge between the parties of the underlying facts;⁶ or the existence of a trust or confidence relationship between the parties⁷].

Second, that the representation of fact was untrue.

Third, that (defendant) made the representation as a fact based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of the statement. (Plaintiff) must prove that (defendant) represented the fact from (his) (her) personal knowledge, or was so situated that (he) (she) either had particular means of ascertaining the pertinent facts, or (his) (her) position made possible complete knowledge and (his) (her) statements fairly implied that (he) (she) had it.⁸

Fourth, that (defendant) had an economic interest in the transaction, or, in other words, that (defendant) stood to make a financial gain if (plaintiff) entered into the transaction.⁹ It is immaterial whether (defendant) in good faith believed such representation to be true.¹⁰ Likewise, it is immaterial whether (defendant) had any intent to deceive (plaintiff).¹¹

Fifth, that (plaintiff) believed such representation to be true and relied on it.¹² [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.¹³] Representations are to be tested by their actual influence on the person to whom made, [not upon the probable effect of such representation upon some other person¹⁴]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation.¹⁵ It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.¹⁶

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be false, then there can be no justifiable reliance as no one has the right to rely upon a representation that he or she knew was untrue.¹⁷

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (he) (she) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.¹⁸

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.¹⁹

SUGGESTED SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?
(State the ultimate facts alleged to be relied on.)

ANSWER: _____

Yes or No

Question 2: If you answer "yes" to question 1, then answer this question:
Was the representation untrue?

ANSWER: _____

Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

Did (defendant) make the representation as a statement based on (his) (her) personal knowledge or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of such a representation?

ANSWER: _____

Yes or No

Question 4: If you answered "yes" to both questions 1, 2, and 3, then answer this question:

Did (defendant) have an economic interest in the transaction?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to questions 1, 2, 3 and 4, then answer this question:

Did (plaintiff) believe the representation to be true and justifiably rely on it to (his)(her) financial damage?

ANSWER: _____
Yes or No

Question 6: If you answered all the preceding questions "yes," then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: \$ _____

COMMENT

See Law Note Wis JI-Civil 2400 for a discussion of the economic loss doctrine.

This instruction and comment were approved by the Committee in 1969 and revised in 2018.

For burden of proof, see Wis JI-Civil 205.

NOTES:

1. Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am. Jur. Fraud and Deceit §§ 144-147 (1941).
2. Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).
3. Bentley v. Foyas, 260 Wis. 177, 50 N.W.2d 404 (1952).
4. 37 Am. Jur. Fraud and Deceit § 77 (1941). Prosser, Law of Torts (3d) § 104 at 742 (1964).
5. J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).
6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934).
7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).
8. Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983); Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988); Fowler and Harper, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 987-88 (1938).
9. Gauerke v. Rozga, *supra* note 8; Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Malzewski v. Rapkin, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156.
10. Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 69 (1921).
11. Haentz v. Toehr, 233 Wis. 583, 390 N.W. 163 (1940).
12. Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Malzewski v. Rapkin, *supra* note 9.
13. Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).
14. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960).
15. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

16. Household Finance Corp. v. Christian, *supra* note 12.
17. Malzewski v. Rapkin, *supra* note 9; First National Bank in Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1961).
18. Prosser, *supra* § 103 at 731.
19. Restatement, Second, Torts, §§ 540,541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W.2d 543 (1944); 152 A.L.R. 459 (1944).