

2403 MISREPRESENTATION: NEGLIGENCE

To constitute negligent misrepresentation in this case, there are four 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; or where there is a relationship of trust or confidence between the parties].

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. However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support (his) (her) opinion, may in your discretion, be determined by you to be a representation of fact. In making your determination, you may consider the form and manner of expression [or the disparity of knowledge between the parties of the underlying facts; or the existence of a trust or confidence relationship between the parties].

Second, that the representation of fact was untrue.

Third, that (defendant) was negligent in making this representation. The word

“negligence” has the same meaning as the phrase, “failure to exercise ordinary care.” A person fails to exercise ordinary care when, without intending to do any wrong, (he) (she) makes a misrepresentation under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such misrepresentation will subject the interests of another person to an unreasonable risk of damage. [A person in a particular business or profession owes a duty to exercise the care that is usually exercised by persons of ordinary intelligence and prudence engaged in a like kind of business or profession.]

The making of a misrepresentation, even though made with an honest belief in its truth, is negligence if there was a lack of reasonable care in ascertaining the facts [or if it was made without the skill or competence required in a particular business or profession].

Fourth, (plaintiff) believed the representation to be true and relied on the representation to (his) (her) damage. The question is whether the representation actually misled (plaintiff) and materially affected (his) (her) conduct. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation. 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.

If you are called upon to answer the question as to whether (plaintiff) was negligent, then the question presented to you is whether (plaintiff) failed to exercise that care and caution which a person of ordinary intelligence and prudence usually exercised in a like or

similar situation. In other words, (plaintiff) was negligent if (he) (she) failed to exercise that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances to ascertain the truth or untruth of the representation. [You are cautioned that the definition of “negligence” is different than the instruction on reliance previously given to you. The test here is the effect of the representation upon a person of ordinary intelligence and prudence and not the test of how the representation affected (plaintiff).]

The last question is the comparative negligence question. By your answer to this question you will determine how much or to what extent each party is to blame for the damages, if any, that (plaintiff) suffered. You will weigh the respective contributions of these parties to such damages, if any, and considering the conduct of the parties named in the question, considered as a whole, determine whether one made the same or a larger contribution than the other, and, if so, to that extent it exceeds that of the other. (Plaintiff) has the burden of proving the percentage attributable to (defendant). (Defendant) has the burden of proving the percentage attributable to (plaintiff).

SUGGESTED SPECIAL VERDICTS

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 answered “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:

Was (defendant) negligent in making the representation?

ANSWER: _____
Yes or No

Question 4: If you answered “yes” to question 3, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it?

ANSWER: _____
Yes or No

Question 5: If you answered “yes” to question 4, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 6: If you answered “yes” to both questions 3 and 5, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

_____ 100 _____%

Question 7: If you answered “yes” to question 4, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff)
for (his) (her) out-of-pocket loss?

ANSWER: \$ _____

COMBINED VERDICT: DECEIT OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact, knowing it was untrue, or recklessly without caring whether it was untrue, and with the intent to deceive and induce (plaintiff) to act upon it?

ANSWER: _____
Yes or No

Question 2: If you answered “yes” to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)’s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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

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

ANSWER: \$ _____

If you answered “no” to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to (plaintiff)?

ANSWER: _____

Yes or No

Question 5: If you answered “yes” to question 4, then answer this question:

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

ANSWER: _____

Yes or No

Question 6: If you answered “yes” to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____

Yes or No

Question 7: If you answered “yes” to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%,
what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

_____100_____%

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER:\$_____

COMBINED VERDICT: STRICT RESPONSIBILITY OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact as based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the facts?

ANSWER:_____

Yes or No

Question 2: If you answered “yes” to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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

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

ANSWER: \$ _____

If you answered “no” to either or both questions 1 and 2, then answer
the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to
the (plaintiff)?

ANSWER: _____
Yes or No

Question 5: If you answered “yes” to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to

(his) (her) financial damage?

ANSWER: _____
Yes or No

Question 6: If you answered “yes” to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 7: If you answered “yes” to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%,
what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____ %

(b) (Plaintiff)?

ANSWER: _____ %

_____ 100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: \$_____

COMMENT

This instruction and comment were approved by the Committee in 1969. The instruction was revised in 2018. The comment was revised in 2014, 2017, and 2018. This revision was approved by the Committee in September 2022; it added to the comment.

For burden of proof, see Wis JI-Civil 200

See Grube v. Daun, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992).

For a discussion of puffery as a question of fact, see United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

For a discussion of the effect of “as is” provisions, see Grube v. Daun, *supra*.

Circumstantial evidence used to establish actual reliance. Wisconsin law does not require direct evidence to prove elements of every cause of action. See WIS JI—CIVIL 230. Furthermore, Wisconsin law permits the use of circumstantial evidence to establish actual reliance upon the representation as required by element five. See Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237. The burden of proof on summary judgment “...can also be met by reasonable inferences drawn from circumstantial evidence.” Techworks, LLC v. Wille, 2009 WI App 101, 318 Wis. 2d 488, ¶2, 770 N.W.2d 727.