

416.28 AFFIRMATIVE DEFENSE – FRAUD IN THE INDUCEMENT

To establish the defense of fraud in the inducement, (defendant) must prove all of the following:

1. (Claimant) **represented that** (insert alleged fraudulent statement) **and that representation was material to ~~the transaction~~this contract**;
2. (Claimant) **knew that the representation was false when [he] [she] [it] made it or made the statement knowing [he] [she] [it] did not know whether it was true or false**;
3. (Claimant) **made the representation to ~~persuade~~induce (defendant) to ~~agree to the~~enter into this contract; **and****
4. (Defendant) **~~relied on the representation; and~~entered into this contract in reliance on the representation**.
5. ~~(Defendant) would not have agreed to the contract if [he] [she] [it] had known that the representation was false.~~

On this defense, (defendant) may rely on a false statement, even though its falsity could have been discovered if (defendant) had made an investigation. However, (defendant) may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it]. In making this determination, you should consider the totality of the circumstances surrounding the type of information transmitted, the nature of the communication between the parties, and the relative positions of the parties.

SOURCES AND AUTHORITIES FOR 416.28

1. Fraud must be pled as an affirmative defense or it is waived. *Cocoves v. Campbell*, 819 So.2d 910, 912 (Fla. 4th DCA 2002); *Peninsular Fla. Dist. Council of Assemblies of God v. Pan Am. Inv. & Dev. Corp.*, 450 So.2d 1231, 1232 (Fla. 4th DCA 1984); *Ash Chem., Inc. v. Dep't of Env'tl. Regulation*, 706 So.2d 362, 363 (Fla. 5th DCA 1998).
2. In order to raise an affirmative defense of fraud, the “pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated.” *Zikofsky v. Robby Vapor Systems, Inc.*, 846 So.2d 684, 684 (Fla. 4th DCA 2003) (citation omitted).
3. The party seeking to use the defense of fraud must specifically identify misrepresentations or omissions of fact. *Cocoves v. Campbell*, 819 So.2d 910, 912-13 (Fla. 4th DCA 2002).
4. Fraud must be pled with particularity. *Cocoves v. Campbell*, 819 So.2d 910, 913 (Fla. 4th DCA 2002); *Thompson v. Bank of New York*, 862 So.2d 768 (Fla. 4th DCA 2003).

5. Mere statements of opinion are insufficient to constitute the defense of fraud. *Thompson v. Bank of New York*, 862 So.2d 768, 769 (Fla. 4th DCA 2003); *Carefree Vills. Inc. v. Keating Props., Inc.*, 489 So.2d 99, 102 (Fla. 2d DCA 1986).

6. The elements of fraudulent misrepresentation are: “(1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.” *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010).

7. “Justifiable reliance is not a necessary element of fraudulent misrepresentation.” *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010).

NOTE ON USE

This instruction is to be used when fraud in the inducement is to be considered by the jury. There may be other types of fraud alleged in other affirmative defenses to which this instruction will not apply.

This instruction is to be used in cases in which there is an alleged misrepresentation inducing the contract. Cases involving omissions or concealment require modification to the instruction and verdict form.

In *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), the Florida Supreme Court held that defendant’s reliance need not be “justifiable.” See also, Restatement (Second) of Torts section 541; *Specialty Marine & Industrial Supplies, Inc. v. Venus*, 66 So.3d 306 (Fla. 1st DCA 2011).

**FORM 416.28 MODEL FORM OF VERDICT FOR AFFIRMATIVE DEFENSE ON
FRAUD IN THE INDUCEMENT**

1. **Did (plaintiff) make a false statement of material fact?**

YES NO

If your answer to question 1 is NO, then your verdict is for the plaintiff on this defense, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 YES, please answer question 2.

2. **Did (plaintiff) know that the representation was false [or make the representation knowing that [he] [she] [it] did not know whether it was true or false]?**

YES NO

If your answer to question 2 is NO, then your verdict is for the plaintiff on this defense, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 2 is YES, please answer question 3.

3. **Did (plaintiff) make the representation to induce (defendant) to enter into the contract?**

YES NO

If your answer to question 3 is NO, then your verdict is for the plaintiff on this defense, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 3 is YES, please answer question 4.

4. **Did (defendant) enter into the contract in reliance on the representation?**

YES NO

If your answer to question 4 is NO, then your verdict is for the plaintiff on this defense, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 4 is YES, then your verdict is for the defendant on this defense, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.

NOTES ON USE

1. This verdict form is for use in cases in which there is an alleged misrepresentation. Cases involving omissions or concealment require modification to the instruction and verdict form.
2. In many instances not all of the questions will be put to the jury because the matters therein will never have been in issue or will have been resolved before trial or on directed verdict.

504.5 OWNER'S DAMAGES FOR BREACH OF CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY

The amount of damages recoverable for breach of a contract to construct improvements on real property is:

a. In cases where the defendant does not contend that the damages claimed by the claimant constitute unreasonable economic waste:

The reasonable cost to (claimant) of completing the work in accordance with the contract less the balance due under the contract.

b. In cases where the defendant contends that the damages claimed by the claimant constitute unreasonable economic waste:

If construction and completion in accordance with the contract would not involve unreasonable economic waste, the reasonable cost to (claimant) of completing the work in accordance with the contract less the balance due under the contract;

or

If construction and completion in accordance with the contract would involve unreasonable economic waste, the difference between the fair market value of (claimant's) real property as improved and its fair market value if (defendant) had constructed the improvements in accordance with the contract, measured at the time of the breach.

Unreasonable economic waste occurs when the corrections involve an unreasonable destruction of the structure and cost which is grossly disproportionate to the results to be obtained.

SOURCES AND AUTHORITIES FOR 504.5

1. In *Grossman Holdings Ltd. v. Hourihan*, 414 So.2d 1037, 1039 (Fla. 1982), the Florida Supreme Court adopted Section 346 of the Restatement (First) of Contracts (1932), which provides, in relevant part:

For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:

(a) For defective or unfinished construction he can get judgment for either

- (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
- (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

2. *Heine v. Parent Construction, Inc.*, 4 So.3d 790, 792 (Fla. 4th DCA 2009) (“The [Florida] [S]upreme [C]ourt ... adopted section 346(1)(a) of the Restatement (First) of Contracts (1932), as the law for the measure of damages in a claim for breach of a construction contract.”).

3. *Centex-Rooney Construction Co. v. Martin Cnty.*, 706 So.2d 20, 27 (Fla. 4th DCA 1997) (“In a case involving the breach of a construction contract, a recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract’s requirements.”).

4. *Kritikos v. Anderson*, 125 So. 3d 885 (Fla. 4th DCA 2013), defines economic waste. See also *Temple Beth Sholom & Jewish Center, Inc. v. Thyne Construction Corp.*, 399 So. 2d 525 (Fla. 2d DCA 1981).

**FORM 504.5(A) MODEL FORM OF VERDICT FOR OWNER'S DAMAGES FOR BREACH OF
CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY WHERE NO
UNREASONABLE ECONOMIC WASTE IS CLAIMED**

VERDICT

**What is the amount of damages (claimant) proved were reasonable to complete the work in
accordance with the contract, minus the balance remaining under the contract?**

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NOTES ON USE

1. This model verdict form should be used in conjunction with Standard Jury Instruction--
Contract and Business 504.5 (Owner's Damages for Breach of Contract to Construct Improvements on
Real Property).

**FORM 504.5(B) MODEL FORM OF VERDICT FOR OWNER'S DAMAGES FOR BREACH OF
CONTRACT TO CONSTRUCT IMPROVEMENTS ON REAL PROPERTY WHERE
UNREASONABLE ECONOMIC WASTE IS CLAIMED**

VERDICT

1. Did (defendant) prove that any part of the damages claimed by (claimant) constitute unreasonable economic waste?

YES _____ **NO** _____

2. For that part of the damages that constitute unreasonable economic waste: What is the difference between the fair market value of (claimant's) real property as improved and its fair market value if (defendant) had constructed the improvements in accordance with the contract measured at the time of the breach.

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NOTES ON USE

**1. This model verdict form should be used in conjunction with Standard Jury Instruction--
Contract and Business 504.5 (Owner's Damages for Breach of Contract to Construct Improvements on
Real Property).**