Torts--Fraud--Misrepresentation by Nondisclosure

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Furthermore, would the absence of subsequent use after the discovery of the defect have been sufficient to induce the Court to take the position that the alleged defect was of such a nature as to make the vehicle absolutely useless for its intended purpose?

While it is perhaps too early to measure the scope of the rule handed down in the *Myers* case, when that case is viewed in the light of the *Culligan* case, the Court appears desirous of limiting the *Myers* case to its facts. What will constitute a complete failure of consideration sufficient to allow the buyer to rescind the contract is obviously more than a breach of an implied warranty of fitness for a particular purpose. Before an article will be considered to be *completely worthless*, the Court will require that there must be convincing proof that the article will not do what it was intended to do. Apparently, the Court's philosophy decidedly favors a strict construction of the term, "absolutely worthless".

Whether the decision in the *Culligan* case is a wise one depends largely upon one's views as to the degree of liability which should be borne by dealers. Recent cases have considerably enlarged the tort liability of automobile dealers. If the Court should give wide application to the *Myers* doctrine, the result would be a serious infringement upon any attempt by sellers to limit their liability on warranties and might eventually lead to such dealers becoming insurers. The Culligan case however, is not a step in that direction.

*Melvin Scott*

**Torts—Fraud—Misrepresentation by Nondisclosure**—The purchaser of a $7100 house and lot sued his vendor in an action for deceit because the vendor failed to disclose a hidden defect in the realty. The defect consisted of abandoned drain tile which underran the property, causing it to be flooded at certain periods. The vendor knew of the existence of the tile but the vendee was ignorant of its presence. The plaintiff failed to prove that the defendant made any affirmative representations with regard to adequate drainage. After a verdict for the plaintiff, the lower court sustained the defendant's motion for summary judgment.

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1 The plaintiff alleged in his complaint that the defendant stated affirmatively that the "natural surface drainage" was similar to surrounding lots. Transcript of Record, p. 8. This allegation was specifically denied in the defendant's answer. Transcript of Record, p. 7. There was no proof or mention of this statement during the trial. Transcript of Evidence, pp. 18, 21, 49, 94, 128, 114. Hence, the fraud alleged in this case is based entirely on the vendor's silence.
and the plaintiff appealed. Held: Reversed. The vendor of realty is guilty of actionable fraud if he fails to disclose to the vendee a hidden material defect. Kaze v. Compton, 283 SW 2d 204 (Ky. 1955).

The general elements of an action in deceit usually include: (1) a false material representation, (2) knowledge that the representation is false, (3) an intention that there be reliance, (4) a reasonable reliance, and (5) damage. The Kaze decision involves the first element, i.e., what constitutes a representation? Where a false representation is effected by an affirmative act, such as an active suppression or concealment of the facts, the majority of courts find no problem in establishing liability even if the acts are unaccompanied by active misrepresentation. A more difficult problem of nonfeasance arises when the alleged fraudulent representation is a mere failure to disclose known facts. Does silence, then, constitute actionable fraud?

It is generally accepted that the action of deceit will not lie for silence or a failure to disclose material facts of which the purchaser is ignorant. However, this general rule of non-liability for silence is subject to so many exceptions that its scope has been greatly reduced. The courts for example, consistently find a duty to disclose all material facts in the exceptional circumstances: (1) confidential or fiduciary relationships, (2) contractual duty, (3) half-truths or partial disclosures, (4) dangerous conditions of land and chattels, and (5) subsequent changes of circumstances. Examination of the preceding categories shows a remarkable similarity in basic policies. Each in-

2 Hicks v. Wallace, 190 Ky. 287, 227 SW 293 (1921); Crescent Grocery v. Vick, 194 Ky. 727, 240 SW 388 (1923); Peak v. Thomas, 222 Ky. 405, 300 SW 885 (1927).
4 Derived originally from the dictum of Lord Cairns in Peek v. Gurney, L.R. 6 H.L. 377 (1875). See, 3 Rest. of Torts 551, com. (a) (1938); 23 Am. Jr. 852 (1939); 37 C.J.S. 242 (1943); Prosser, Torts, 533 (1955); 3 Williston, Sales sec. 631 (1948); 141 A.L.R. 955.
5 3 Rest. of Torts sec. 551 (2) (a) (1938); 23 Am. Jr. 858 (1939).
6 23 Am. Jr. 856 (1939).
7 Hays v. Meyers, 139 Ky. 440, 107 SW 287, 32 Ky. L. Rep. 892 (1908); Adkings v. Stewart, 159 Ky. 218, 166 SW 984 (1914); Dennis v. Thompson, 240 Ky. 727, 43 SW 2d 18 (1931); 3 Rest of Torts sec. 551 (2)(b); 3 Williston, Sales sec. 631a (1948).
8 Weikel v. Sterns, 142 Ky. 513, 134 SW 908, 34 L.R.A. (ns) 1035 (1911) (concealed cesspool); see Prosser, Torts 535 (1955). "Dangerous Conditions" need not cause physical injury or property damage to create liability, but the essence of liability is the fact that the property is made unuseable by the dangerous defect.
stance involves a relationship between parties which tends to lull one party into placing a reasonable reliance and confidence in the other or it involves a dangerous condition. The related positions of the parties are such that the natural suspicions of the usual trade are allayed. Thus, there have been few instances where the vendor-vendee relation has been listed as an exception to the general rule, for, traditionally these have dealt at arms-length.\textsuperscript{10}

The Kaze decision definitely marks Kentucky as a jurisdiction which places a duty on the vendor of realty to disclose all material facts\textsuperscript{11} to his vendee. Superficially, this might indicate that Kentucky has merely added a new category to the long list of exceptions to the general rule of non-liability—and this is a possible explanation. But why should there be a special rule governing the specific relation between vendor and vendee of realty? Do confidential circumstances exist per se? Is there any inherent physical danger from which the law will protect the vendee? The obviously negative answer to these questions presents the possibility that the Court of Appeals has opened the entire field of fraudulent representation to the rule of the instant case.

The broad possibilities of the principal case makes it necessary to determine the basis of this decision in Kentucky law. The Court summarily passed over the problems of nonfeasance in one sentence and without citation of authority. Indeed, the Lose case,\textsuperscript{12} cited for a later proposition, seems to be contra to the instant decision. Such a treatment suggests a well established principle of law which is not in dispute, but this is hardly the case.

Three earlier cases, although not cited by the Court, afford some authority for the proposition that silence, in ordinary business transactions, constitutes fraud. One of the cases which lends the best support for the instant decision is Hughes v. Robertson\textsuperscript{13} decided in 1824. Hughes, without making any affirmative representations as to soundness, sold Robertson a blind horse. The Court found for the plaintiff because of a moral duty to tell the whole truth where there is a "latent" defect. Unless the courts of the 1820's held higher standards for horse-traders than for most commercial traders,\textsuperscript{14} this old case gives

\textsuperscript{10} 14 Tex. L. R. 556 (1935-36).
\textsuperscript{11} Those facts which, if known, would affect the progress of the transaction, in that the purchaser would probably not have given the purchase price paid.
\textsuperscript{12} Lose v. Salesberg Realty Co., 223 Ky. 370, 25 SW 2d 1032 (1930). This case involved the lessor-lessee relationship, but there is no good reason why this should be distinguished from vendor-vendee.
\textsuperscript{13} 17 Ky. 215, 13 Am. Dec. 265 (1 T.B.Mon. 1824). The case involved a chattel and not realty but this probably makes no difference.
\textsuperscript{14} Some states have by statute made misrepresentation with intent to defraud involving diseased horses a criminal offense. 37 C.J.S. 501.
some support for the *Kaze* decision. It does indicate that the seed of liability for nonfeasance existed in those early days.

A better known case of nonfeasance is *Weikel v. Sterns* which was decided in 1911. Weikel constructed a cesspool on his property and covered it with a few inches of clay. He then built a house over it and sold the house to Sterns without informing him of its presence, but no active representations were made. Sterns could not live in the house or lease it because of the odor. The Court found in favor of the plaintiff on the basis that Weikel's silence constituted fraud. The case, as support for the *Kaze* decision, is somewhat weakened because of two facts: (1) it would fit the established category of dangerous conditions (to health); (2) the act in covering the cesspool makes a valid basis for finding fraud through active concealment.

Some support may be given to the principal case by a 1934 decision, *Fields v. Cornett.* The defendant executed a deed of general warranty conveying a Perry County tract of land. The purchaser entered into possession but found to his dismay that the mineral rights had already been conveyed. The land was mountainous and of little fertility but it was situated in the coal fields. The Court found for the purchaser even though the vendor had made no statement concerning minerals. This judgment, as support for the proposition that silence may be fraud, is seriously weakened by certain aspects: (1) there were only 125 acres but the deed had *affirmatively* called for 200 acres, making out the basis for active fraud; (2) the Court relied on the contract doctrine of mutual mistake in the rescission of a contract; (3) the Court found that the defendant's statement of "general warranty" mislead the purchaser—an indication that the Court believed an affirmative representation, rather than silence, was necessary as a basis for fraud.

Another interesting case which apparently is authority for the instant adjudication is *Highland Motor Transfer Co. v. Heyburn Building Co.* The defendant contracted with a subcontractor to construct a building on defendant's lot. No representation was made concerning the underlying soil but the plaintiff made his bid on the assumption that it was similar to surrounding land. However, the defendant failed to disclose to him that an abandoned tile swimming pool had been filled and covered by dirt. The plaintiff's excavation ran into this obstruction and the work was greatly hindered. The plaintiff sued for the increased cost and the Court decided in his favor because it placed

15 149 Ky. 513, 134 SW 908, 34 L.R.A. (ns) 1035 (1911).
16 254 Ky. 35, 70 SW 2d 954 (1934).
17 237 Ky. 337, 35 SW 2d 521 (1931).
a duty on the owner to inform the contractor of this "latent" condition.\textsuperscript{18}

The preceding cases\textsuperscript{19} give considerable support for the Court's position in the principal decision although there are no cases factually in point. These cases do indicate, at least, that liability for nonfeasance has existed in the past.

Several Kentucky cases indicate, by a result contrary to the foregoing decisions, that the Court in the \textit{Kaze} decision was apparently in error in its assumption that the law was well settled that silence by a vendor as to a material fact may be fraudulent conduct toward the vendee. \textit{Smith v. Fisher}\textsuperscript{20} held the defendants to have made \textit{no representation} when they remained silent as to the poor quality of iron ore deposits on the land they sold to plaintiff. The Court stated, "We think that [defendant] was not legally culpable, we say nothing as to its morality, in remaining silent. . . . We again repeat that it was the concern of [plaintiff] to look to the prospect of supplies."\textsuperscript{21} Certainly, this decision of 1830 shows that the issue of nonfeasance is not as well settled as the present Court had supposed.

The Court of Appeals in \textit{Lose v. Salesberg Realty Co.}\textsuperscript{22} met squarely the question of silence as fraud in a lessor-lessee situation. The lessee leased property for two years. A provision in the lease provided that if the lessors should sell or build on the property, the lessees, upon sixty days notice, would relinquish their interest. The lessor gave the notice, remaining silent as to plans to build or sell. The lessees relinquished their claim only to find the condition precedent to giving notice never existed. The Court found for the defendants, saying, "It is true that if the deception is accomplished, the form of the deceit is immaterial, but mere silence does not of itself constitute fraud."\textsuperscript{23}

The dictum of \textit{Akers v. Martin} also lends support to the general rule that silence is not a representation which will support actionable fraud. It stated,

\begin{quote}
The law is well settled that the purchaser of property does not commit fraud by failing to communicate to the seller the knowledge of existing facts of which the seller is ignorant, and the purchaser informed, although such facts, if known, would operate directly to enhance the value of the property. . . . a party may keep absolutely silent and violate no rule of law or equity. . . .
\end{quote}

\textsuperscript{18} No reason is seen why a contractor-owner relationship is not analogous to the vendor-vendee relationship.

\textsuperscript{19} There is dictum in several Kentucky cases to the effect that silence is fraud. Two of these are: Adkins v. Stewart, 159 Ky. 218, 166 SW 994 (1914) (half-truth); Chamberlin v. National Life and Accident Insurance Co., 256 Ky. 548, 76 SW 2d 628 (1934).

\textsuperscript{20} 28 Ky. 188 (5 J. J. Marsh. 1830).

\textsuperscript{21} Id. at 194, 195.

\textsuperscript{22} 233 Ky. 370, 25 SW 2d 1032 (1930). No effort is herein made to distinguish between lessor-lessee and vendor-vendee.

\textsuperscript{23} Id. at 372.

\textsuperscript{24} 110 Ky. 335, 340, 61 SW 465, 466 (1901) (a case of active fraud).
Such language, again, weakens any argument which might be made that the law in Kentucky was well settled that liability may be imposed for a failure to disclose material facts.

The foregoing cases indicate that prior to the *Kaze* decision the position of Kentucky in regard to silence as a representation was not certain. The opinions in the principal case and the subsequent case of *Bryant v. Troutman* Apparently establish Kentucky as a jurisdiction which demands that a vendor disclose all latent material defects to the vendee or be subject to an action in deceit. The wisdom of this policy is subject to question for two reasons: (1) The decision may be used as a springboard for broader applications of the liability for nonfeasance rule. The narrow holding of the case, of course, only applies to vendors. However, as has been stated, this decision has little similarity to the many established exceptions to the rule that fraud can not be committed by silence. The established exceptions involve dangers to the vendee or are of such a nature that the vendee is not on guard against hidden flaws, but the vendor-vendee situation involves none of these. (2) The result of the *Kaze* holding is to protect the vendee from his own carelessness. The vendee can always avoid any problem of nonfeasance by merely asking if any defects exist. If they do exist, then the vendor, on being asked, must disclose them. The duty of asking, thus placed on the vendee, is small and his natural self-interest will prompt him, in most instances, to ask sufficient questions to render the vendor liable in event of an inadequate reply. On the other hand, the burden placed on the vendor by the decision of the principal case is onerous and unreasonable. It requires him, in effect, to "run down" to the prospective buyer the very property he is trying to sell. This could well place the vendor in an impossible position, since such self-depreciation by vendors is not ordinarily anticipated by buyers and would doubtless be interpreted by them as indicating conditions far worse than those actually present.

Thus, the broad implications and duties established by the instant decision, raises many problems for the future. The precedent established by this case could eventually culminate in a rule requiring full disclosure for all type transactions or subject all vendors to an action in deceit based upon their silence.

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25. 287 SW 2d 918 at 920 (Ky. 1956).

"Where there is a latent defect known to the seller and he remains silent with the knowledge that the buyer is acting on the assumption that no defect exists, the buyer has a course of action against the seller for an intentional omission to disclose such latent defect." (citing the *Kaze* decision as authority).

26. Latent defects as used here refer to those defects not discoverable by common observation or reasonable diligence.