1949

Torts--Misrepresentation by Opinion, Promise, and Prediction

Giles J. McCarthy

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Torts Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol37/iss2/6
TORTS—MISREPRESENTATION BY OPINION, PROMISE, AND PREDICTION

To maintain an action for deceit in Kentucky, there must be a false representation of a material fact made with the intention that the plaintiff rely thereon, and on which the plaintiff does justifiably rely to his detriment. Unless all these factors be present, recovery will be denied in all cases. So set out, the rule seems quite simple, but beneath the surface of what constitutes a material representation lies a very perplexing problem.

Courts frequently lay down the rule that a misrepresentation to be actionable must be of a past or existing fact. This seems implied to exclude representations of opinion, promise or prediction, but a brief review of the cases will show that such is not the law.

Judges, grounded in the principles of the common law, have in the past relied heavily on the ancient maxim of caveat emptor. Offhand, it seems very logical to say that no one is entitled to rely on the opinion of another, that each party is supposed to be competent to look after his own interests and to draw his own conclusions. But the fact remains that special circumstances will sometimes arise to drive a wedge into the generalization that an opinion cannot constitute a material representation.

For example, statements of value are generally considered to be embraced in the conception of non-actionable opinions. However, the court in Larue v. Barbee, while conceding the general rule, declared that where the defendant represented that a bond, given as security for a note, was of par value, the representation went to the value of the security; and since the bond was issued by a distant corporation, the plaintiff had neither the knowledge nor the readily available means of ascertaining its value, thus entitling him to rely on the representation. Undoubtedly the superior knowledge of the defendant, coupled with the excusable ignorance of the plaintiff, led the court to reach such decision. The plaintiff was, as a reasonable man, entitled to rely on the defendant's opinion.

To every student of law, mere mention of "trade talk" or "puffing" symbolizes an ancient, non-actionable prerogative of a vendor.  

---

2 Peake v. Thomas, 222 Ky. 405, 300 S.W. 885 (1927).
4 Sacramento Suburban Fruit Lands Co. v. Melin, 36 F. 2d 907 (C.C.A. 9th 1929) Treheway v. Hulett, 52 Minn. 448, 54 N.W. 486 (1883), Derdy v. Low, 94 Okla. 41, 220 Pac. 945 (1923)
5 184 Ky. 354, 212 S.W. 142 (1919).
Through such privilege the seller is permitted to do a certain amount of boasting about his product or his prowess without fear of a resulting lawsuit. Thus a potential employee has been permitted to state that he had been entitled to 40% of the profits on sales made under his former employer, even though he failed to disclose to his prospective employer the further fact that he had also suffered 40% of the losses connected with such sales. However, the court in the case of *McGuffin v. Smith* declared that a statement by a vendor of land to the effect that a certain body of water on such land was a "never-failing pond" constituted a fraudulent representation. Here again the fact that the parties were not on an equal footing determined the court's stand, since evidence showed that the plaintiff did not have a reasonable opportunity of discovering the truth of the statement. Because of this factor there would have been no fair basis for applying the rule of *caveat emptor*, since time alone could test the truthfulness of the vendor's statement.

A favorable result to the plaintiff will also be reached in cases where a relation of trust and confidence exists between the parties. Thus, in a case where an attorney falsely stated in a title opinion that a tract of land contained a certain number of acres, the court said:

"An opinion expressed to a prospective purchaser by his attorney as to the validity of a title which he is about to purchase, which the attorney is bound to render honestly by virtue of his fiduciary relation, is not mere 'trade talk,' but is a representation of fact as to his real opinion upon which the client is entitled to rely and if such opinion be falsely stated, at the instance of the prospective seller and by collusion with him, it is clearly a false statement of fact, to wit, as to the opinion of the attorney and constitutes ground for the rescission of the purchase thereby induced."

In holding for the plaintiff, the court brought out the further point that an opinion is a statement of fact, the fact of one's belief. This view corresponds with the line of reasoning taken by Prosser, when he declares that an opinion is a representation of a fact, on which the law will permit reliance in the presence of special circumstances.

The second point to be discussed by this note deals with the problem presented when the representation consists of a promise. In the leading case of *Edgington v. Fitzmaurice*, the defendants issued

---

7 Crescent Grocery Company v Vick, 194 Ky. 727, 240 S.W. 388 (1922).
8 215 Ky. 606, 286 S.W. 894 (1926).
9 PROSSER, TORTS (1941) 761.
11 PROSSER, TORTS (1941) 754.
a prospectus inviting subscriptions for debenture bonds to be used
for the avowed purpose of repairing buildings and developing trade,
whereas the true purpose was the extinction of company debts. The
plaintiff purchased bonds in reliance on the statements contained in
the prospectus, and the company later became insolvent. In holding
for the plaintiff, Lord Bowen stated: "the state of a man's mind
is as much a fact as the state of his digestion. A misrepresentation
as to the state of a man's mind is, therefore, a misstatement of fact." This decision points out the universally accepted rule that a promise,
which the defendant does not at the time have any intention of carry-
ing out, is actionable. An interesting Kentucky case, antedating
Edgerton v. Fitzmaurice by thirty-six years, involved the same ques-
tion. In that case the plaintiff agreed to sell his negro slave girl to a
Madison County resident provided that the girl would not be re-sold
to south-going slave traders. The selling price to defendant was
$325.00, whereas the slave traders were willing to pay $400.00. In
fact the defendant resold the girl to the traders. Although reversing
the lower court because of erroneous instructions, the court stated
that if in fact the defendant made such promise when at the time he
had no intention of performing, he would be liable.

Generally a prediction as to events to occur in the future is
deemed a statement on which a reasonable man cannot rely.8 But
where the representor has special knowledge, the courts are inclined
to find that an actionable representation is present. Accordingly, in
Kentucky Electric Development Company's Receiver v. Head,9 the
fact that a rather naive old lady and a clever bond salesman were
involved led the court to declare that a representation that certain
bonds "would pay 6% regularly all the time promptly and would not
wait a day" was actionable. Rescission was allowed because the
plaintiff was an old lady inexperienced in commercial transactions
and unable to deal on an equal plane with the "loquacious and astute,
agents."

In summary, recovery may be obtained in Kentucky courts in
an action of misrepresentation even though based on an opinion,
promise or prediction, if: (1) the defendant has access to special
knowledge unavailable to the plaintiff, or (2) a relation of trust and
confidence exists between the parties, or (3) a promise is made
which the promisor at the time has no intention of performing.

GILES J. MCCARTHY.

---

8 Restatement, Torts sec. 544; see also Church v. Sweetland, 243 Fed. 239 (1917); Tauner v. Clark, 13 Ky. L. Rep. 879 (1892).
9 Oldham & Kerr v. Bentley, 45 Ky. (6 B. Mon.) 428 (1846).
10 Collins-Moore & Co. v. Clement, 256 Ky. 731, 77 S.W. 2d 1 (1934), see also Campbell County v. Braun, 295 Ky. 96, 174 S.W. 2d 1
(1943).
11 252 Ky. 656, 68 S.W. 2d 1 (1934).
12 Id. at 662, 68 S.W. 2d at 3-4.