CHAPTER 1

DECEPTION—THE RESPONSE OF THE COMMON LAW

Advertising and salesmanship are the primary devices for inducing consumers to enter exchange transactions. When the seller engages in false or misleading statements or practices, the consumer may enter a transaction very different from the one he or she contemplated. The common law deals with problems of deception in the formation of agreements under both tort and contract theories. In tort there are several closely related theories, each of which is subsumed under the broad category of fraud. They include deceit, concealment, innocent misrepresentation, and nondisclosure. Since tort law seeks to redress injury by placing the injured party back where he or she was before the injury, the measure of damages is the price paid by the consumer less the actual value of what the consumer received. The contract theories for dealing with deception are misrepresentation and breach of warranty. Since contract law seeks to redress injury by placing the injured party where he or she would have been had there been no deception, the measure of damages is the value that the product would have had if it had been as represented less the value that the product actually had.[1]

The tort and contract theories for dealing with deception have a common origin. Deceit first became available in the thirteenth century, when the distinctions between tort and contract had not yet developed. Through most of the eighteenth century, deceit was available only if there was a contractual relationship (known as ''privity'') between the plaintiff and the defendant. When in 1789 courts began to recognize deceit even in the absence of privity of contract, they continued to require privity as an element of breach of warranty. Tort liability thus existed whether or not there was privity of contract, but warranty liability existed only when privity was present. Another major difference between tort and contract liability was the necessity, for tort liability, of an intent to deceive. Recent decades have seen the erosion of both the requirement of privity (for warranty liability) and the requirement of intent to deceive (for tort liability). The result is that, while they still are not identical, tort and contract theories overlap to an ever-increasing extent.

1. Uniform Commercial Code (UCC) § 2–714(2). Alternatively, misrepresentation enables the consumer to rescind the contract and return the parties to their pre-contract positions. Id. § 2–711(1).

Under the law of contracts, an express warranty exists when a seller of goods makes an affirmation of fact or a promise relating to the goods if that affirmation or promise becomes part of the basis of the bargain.[2] Under the law of torts, on the other hand, a seller of goods is liable for deceit only if he or she 1) makes a representation 2) of present fact that is 3) material and 4) false, 5) if the seller knew it was false or made the representation in reckless disregard of the facts, 6) if the seller made it for the purpose of inducing the buyer, and the buyer 7) relied on the representation, 8) was justified in relying on it, and 9) sustained injury as a result of the misrepresentation. The tort theories of misrepresentation, concealment, and nondisclosure evolved from the remedy of deceit, primarily by virtue of a relaxation of one or another of the elements of deceit.

Jones v. West Side Buick Auto Co.

Court of Appeals of Missouri, 1936.
231 Mo.App. 187, 93 S.W.2d 1083.

BENNICK, COMMISSIONER

[Plaintiff purchased a three-year-old car from defendant dealer. When defendant acquired the car from its previous owner, the odometer registered 48,800 miles. Defendant reconditioned the car, turned the odometer back to read 22,400 miles, and sold the car to plaintiff for $825. Defendant's service manager testified that rolling back the odometer ''was not an unusual practice on defendant's part, and that in some cases he turned the speedometer back on his own accord, while in other cases he would be ordered to do so either by one of the salesmen or else by the sales manager.'' When plaintiff discovered the true mileage of the car, he sued and recovered actual damages of $150 and punitive damages of $2000. Defendant appealed.]

Plaintiff had evidence to show that the resale value of a used automobile is materially affected in the eyes of the general public by the number of miles the automobile has been driven; that the greater the mileage of a car may be, the greater has been the wear and tear upon it; that a car which has been driven 48,000 miles, even after being reconditioned, is not as valuable as a car that has been driven only 22,000 miles; and that the difference in value of the particular car in question, if driven only 22,000 miles, or if driven 48,000 miles, was approximately $300.

Other evidence tended to show, though not very conclusively, that it is a sort of general practice among dealers of used automobiles to turn the speedometers back for purposes of resale, the theory apparently being that the dealer, after the reconditioning process is completed, is entitled to set the speedometer back to such a figure as the general condition of the repaired car might warrant.

Defendant argues as a matter of first insistence that no case was made by plaintiff for submission to the jury.

2. UCC § 2–313(1)(a).

The case concededly turns upon the question of the legal consequences to be ascribed to defendant's admitted act in turning back the speedometer before offering the car for sale to plaintiff. In other words, the decisive issue in the case is that of whether such act may be said to have constituted a representation on defendant's part, and, if so, of whether such act was fraudulent and malicious.

Defendant first argues that the mere turning back of the speedometer could not have constituted a representation; that in the first instance it was but a compliance on defendant's part with a custom of the trade; and that in any event speedometer readings in their very nature are or may be so inaccurate that they are not to be taken as a guide in buying a used car.

We cannot agree with any of such suggestions. That defendant may have been following a trade custom in turning back the speedometer could not have served to make its act any the less a representation. The sole purpose of manufacturers in equipping automobiles with speedometers which register total mileage is to show at all times the total number of miles that the particular car has gone. In fact, speedometers are so built and constructed that the average person would not know how or have the power to change the mileage reading upon them if he wished. In ordinary usage, when one looks at a speedometer reading, he feels that he is rightfully entitled to rely upon that reading and to believe that the car has gone the number of miles shown by the speedometer and no more. Of course, we appreciate the fact that speedometers, being mere mechanical devices, are not infallible, and that there are instances where a speedometer breaks and is out of operation until such time as it may be repaired, but these instances are the exception and not the rule. It is significant, however, that in this instance the speedometer was shown by defendant's own shop foreman to have been a ''good, reliable'' type, and there is not the least claim by any one that it had ever been out of operation or that its reading was inaccurate at the time Smith traded the car in to defendant.

The only possible reason defendant could have had in turning the speedometer back was to make it appear that the car had been run only the number of miles which the speedometer was made to indicate. We grant that the record discloses no statement by defendant either oral or written regarding the mileage of the car. However, a representation is not confined to words or positive assertions; it may consist as well of deeds, acts, or artifices of a nature calculated to mislead another and thereby to allow the fraudfeasor to obtain an undue advantage over him. Both reason and precedent tell us, and we so rule, that a representation with reference to the mileage of an automobile is a representation with reference to a material fact, and that it is none the less a representation of such a material character if made through the medium of turning back the speedometer than if made by word of mouth or written guarantee.

But defendant says that even though the mere turning back of the speedometer is to be regarded as a representation, it was nevertheless not a fraudulent representation, but was to be justified on the ground of the trade custom heretofore referred to permitting a dealer in used cars, having

reconditioned a particular car, to set the speedometer back to such a figure as would reflect and give credit to the dealer for the value of the repairs and improvements made upon the car.

There are two prime reasons which at once suggest themselves why defendant may not justify its act upon the ground of a custom of the trade to turn speedometers back before offering used cars for sale to the unsuspecting public. In the first place, there is no showing or contention that plaintiff was himself in anywise engaged in the used car business or familiar with the custom in question if such custom exists, and consequently he could not be bound by it, absent any proof either of his actual knowledge of it or that the custom was itself so widespread and well-known as to require that knowledge of it be imputed to him.

Furthermore, regardless of any lack of notoriety of the custom in question, it is one designed only to deceive and allow the sellers of used cars to obtain an unfair and undue advantage over their customers, and for such reason would in no event be recognized or countenanced by the law. The reasonableness of a particular custom for which legal effect is sought is always a subject of inquiry by the court, and when it is ascertained that the custom is contrary to the public good and is prejudicial to the many and beneficial only to the favored few, it will find itself repugnant to the principles of fair dealing which otherwise entitle a custom to be recognized in a court of justice.

It could hardly be questioned but that the custom of setting back speedometers on used cars to some odd number of miles before offering the cars for sale to the public is patently designed to serve the interests of the few at the expense of the many. If the customer were told that the speedometer upon the car he was about to purchase had been set back so as to reflect the value of the car after being repaired, by which we mean that if he were frankly advised that the reconditioned car had been put in a state of mechanical perfection the equivalent of a car which had been run the approximate number of miles shown by the speedometer but without repairs upon it, our conclusion would be entirely different. However, the only legitimate inference from the evidence is, not that the customer is induced to buy a car upon which the speedometer reading has been admittedly lowered so as to represent the value of the improvements put upon the car, but instead that he is given or left to believe that he is buying a car which has been repaired and reconditioned after having been run only the number of miles shown on the speedometer. The evidence shows, and defendant unquestionably knew, not only that the mileage shown upon a car is a very material factor affecting its resale for the simple reason that the greater is the mileage, the greater has been the corresponding wear and tear upon the car, but also that no amount of reconditioning save a complete replacement of parts can compensate for the wear and tear to which a car has been subjected over a long period of use. The act of defendant complained of was therefore a fraud upon plaintiff, and the evidence in the case would fairly warrant no other conclusion.

As a further reason why in its opinion the evidence was insufficient to have warranted the submission of the case to the jury, defendant makes the point that plaintiff wholly failed to prove one of the essential elements of his cause of action, which was that he had relied upon defendant's representation regarding the mileage of the car and would have acted differently if he had known the truth.

It is a fact, just as defendant suggests, that plaintiff did not testify directly to any such reliance on his part. This, however, does not necessarily militate against the sufficiency of the evidence to have made the case one for the jury to determine.

The rule is that while the plaintiff who complains of the defendant's fraud must show that the false representations made to him by the defendant induced him to act to his prejudice, the fact of his reliance upon such false representations need not invariably be established by direct evidence to that effect, but may be inferred from all the facts and circumstances in the case.

. . .

In this case the evidence shows that before going through with the bargain plaintiff looked at the speedometer reading and observed the odd number of miles it showed. He must have done this to obtain the information which the speedometer was designed to disclose. He had a right to rely upon that reading, and he had no reason to suspect and no means of knowing that the speedometer had been deliberately set back by defendant. It is useless to say, as defendant does, that plaintiff made his purchase primarily upon the strength of the car's apparently good condition, for this is to disregard his positive testimony that he did take occasion to notice the speedometer reading. With plaintiff ignorant of the true facts and without ready means of information concerning them other than from what was represented to him by defendant, and with the fact of the car's mileage being a highly material factor upon the question of its desirability as we have already pointed out, we would be in accord with authority if we held as a matter of law that plaintiff relied upon what the speedometer showed. To say the least the question was one for the jury upon the inferences fairly deducible from all the facts and circumstances in the case, and the demurrer to all the evidence was therefore properly overruled.

. . .

Regardless of what the rule may be in other jurisdictions or of the refinements and limitations with which textwriters may see fit to state it, the courts of this state seem now to be committed to the proposition that in cases of fraud and deceit punitive damages may be awarded where legal malice is present. Moreover, by legal malice the courts have in mind simply the accepted theory of the intentional doing of a wrongful act without just cause or excuse, and not the necessity for the showing of any spite or ill will, or that the particular act was willfully or wantonly done.

We have already determined upon both reason and precedent that defendant's act in setting back the speedometer so as to deceive plaintiff in regard to the mileage of the car was wrongful, and there is no claim that it was not intentionally done. The only excuse claimed is the alleged custom of the trade, and, of course, that custom, being itself wrongful, could furnish no just cause or excuse for any one to follow it. Moreover, defendant must have known its act was wrongful since it was careful not to inform plaintiff of what had been done. The issue of punitive damages was therefore one for the jury along with the other issues in the case, and the court's refusal of the instruction designed to withdraw that issue from the consideration of the jury was entirely proper.

For its final point, defendant insists that the jury's allowance of punitive damages in the sum of $2,000 was not only excessive but so grossly so as to indicate that the allowance was the result of sympathy on the part of the jury for plaintiff and passion and prejudice against the defendant.

The ground upon which defendant puts its point evinces its appreciation of the true measure of our responsibility in such matters, which is to interfere with the jury's verdict upon the issue of punitive damages only where it plainly appears that the verdict was so out of all proper proportions as to reveal improper motives and an absence of honest exercise of judgment by the jury in its rendition. . . .

Punitive damages are, of course, allowed not only to punish the defendant for the particular offense he has committed against the plaintiff, but also to serve as a warning and example to deter the defendant and others from committing like wrongs in the future. It obviously follows, therefore, that while the punitive damages allowed in a given case should bear some reasonable proportion to the actual damages sustained by the plaintiff, it is not so much a mathematical proportion which the jury are to have in mind as it is a due regard for the character of the injury which has been inflicted.

The case at hand is unique in that it does not present an isolated wrong on the part of some person, attributable perhaps to passing anger or passion and unlikely to occur again, but instead it discloses the perpetration of a fraud purposely and deliberately done and sought to be justified on the ground of conformity by defendant with what is said to be a common trade practice followed by dealers in used automobiles at the expense of the general buying public. Undoubtedly the jury had all this in mind, and properly so, in fixing the amount of its allowance, and the refusal of the lower court to interfere on motion for new trial evinces its belief that the jury were actuated by no improper motives.

Under such circumstances, we think there is no warrant for our interference with the amount of the verdict, and all of defendant's insistence to the contrary stands for disapproval.

The judgment rendered by the circuit court should, therefore, be affirmed. . . .

QUESTIONS AND NOTES

1. What elements of the cause of action are in issue?

2. In *Jones* the court holds that a misrepresentation may be actionable even though it is nonverbal. In King v. Towns, 118 S.E.2d 121 (Ga.App. 1960), defendant made an unsolicited appearance at plaintiff's home for the purpose of demonstrating (and selling) a set of stainless steel cookware, to replace plaintiff's aluminum cookware. Plaintiff testified,

> And so he said, ''Give me one of your boilers, and I'm going to take one of mine.'' That's what he said. I said, ''Yes, sir.'' And so he put the water in his and then he put some in mine. He said, ''I'm just going to show you how this material you've got here is going to cause you to have cancer, you and your children, before the year's out.'' I said, ''Mister, you don't mean it.'' He said, ''It really is. You and your children probably will come down with cancer before the year's out.'' He said, ''All that material you've got there is no good to you.'' And he opened up a big book had a whole lot of pictures of aluminum ware he said was what they collected from homes and it wasn't no good. I said, ''What you going to do with it?'' He said, ''Might as well take it and throw it away; it's no good. I'm telling you what's the truth, you better throw this away; it's no good to you.'' I said, ''Mister, you don't mean to tell me that's what's causing people to have cancer.'' He said, ''That's what's causing it.'' So he had this big book about this thick, looked like. He said, ''If you don't believe it, call these doctors here''—and he was going through that book—''and they can tell you.'' I said, ''Lord have mercy, I don't want my children to have cancer, and I don't want to have it, either.'' So he taken my boiler and his boiler and put water in both of them. He said, ''I'm going to show you what come out of your boiler and goes in your system.'' I said, ''Lord have mercy.'' So he put the water in his boiler and put the water in my boiler, and he put them on the stove, and all the while he was talking. He said, ''Look. This is your boiler, and this is my boiler.'' I said, ''Yes, sir, surely is.'' He said, ''Look what's going on in your system.'' I said, ''Lord have mercy.'' That what was in my boiler was thick as starch. I said, ''You don't mean to tell me that stuff come out of my boiler.'' He said, ''Yes, it really does, and,'' he said, ''it's going to cause you and your children to have cancer before the year's out.'' I got so scared I didn't know what to do. He said, ''I'll just take your aluminum ware and throw it away.'' He said, ''I'll take it with me.'' I said, ''If it's no good to me, if it's going to cause me and my children to have cancer,'' I said, ''it's no good to me.''

Id. at 124.

How does the misrepresentation in King v. Towns differ from the misrepresentation in Jones v. West Side?

In Saylor v. Handley Motor Co., 169 A.2d 683 (D.C.Mun.App.1961), plaintiffs informed defendant's salesman that they could afford monthly payments of no more than $80. The parties reached agreement on the

terms of the sale, including monthly payments of $80. Plaintiffs signed a blank conditional sales contract, which the salesman later filled in, requiring monthly payments of $88.15. The court wrote,

> appellee contends that the Saylors were bound to know the contents of the contract before they signed. Appellee argues that the couple must assume responsibility for having entrusted its salesman with the transcription of the prior oral understanding of the parties on a form bearing their signature.
>
> The proposition that one is obligated by his contract, though signed without knowledge of its terms, does not extend to situations where assent to such terms is procured by the proponent's fraud.
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> Not only will relief be afforded where a party's signature is procured upon the misrepresentation that the writing before him faithfully reflects a prior oral agreement; it will also be granted to the person who delivers a signed form under the false promise that it will contain certain terms.
>
> Accordingly, where a party is induced to sign a paper as a result of a false representation that it will be filled in or prepared as orally agreed, the intentional omission of terms required by the authorization to be included, or the inclusion of terms not so authorized, constitutes fraud invalidating the instrument as between the parties thereto, notwithstanding that the party signing was negligent in relying on the misrepresentation. The rule is that where one party to an oral agreement entrusts the other with the obligation of reducing it to writing, he has a right to rely upon the representation that it will be drawn accurately and in accordance with the oral understanding between them. The presentation of the paper for signature is in itself a representation that the terms of such oral agreement have been or will be embodied in the writing.

Id. at 684–685.

How does the misrepresentation in Saylor v. Handley differ from the misrepresentations in Jones v. West Side and in King v. Towns?

3. In *Jones*, exactly how was defendant trying to use the (alleged) fact of trade custom? To which element(s) is it relevant? Why does the court reject defendant's argument?

4. What standard does the court use to determine whether plaintiff relied on the misrepresentation?

5. According to the court, punitive damages may be awarded when there is legal malice. What does the adjective ''legal'' add to the word ''malice''? Is the alleged trade custom (any more) relevant to the propriety of punitive damages than it is to the right of plaintiff to recover actual damages?

In King v. Towns, described in Note 2 supra, the court wrote,

> It is pleaded and shown by the evidence that the plaintiff is an illiterate person. The jury may well observe and weigh the divergence of intelligence between the parties as a circumstance in a case of this nature when such is shown by the evidence, and the method or scheme to weave a web of fright whereby the plaintiff was overreached and induced to purchase the goods and depart with her own property, as well as money. The court is not unmindful of those who prey upon the ignorant. The illiterate are entitled to the protection of the law as well as the educated. The jurors, who are the arbiters of fact, may weigh all the facts and circumstances in determining whether to award punitive damages. The application of the law to the facts rested upon the 12 jurors. Judge Lumpkin observed: ''It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically, when Juries are the preachers.''
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> . . . The question of punitive damages is one for the jury. Code § 105–2002 provides that additional damages may be allowed for a tort where there are aggravating circumstances for two purposes: (1) to deter the wrongdoer, or (2) as compensation for the wounded feelings of the plaintiff. It should be observed that the rule which requires that the amount of punitive damages have some reasonable proportion to the extent of injury refers to those cases where exemplary damages are awarded for wounded feelings. In the instant case the pleadings and the evidence show that additional damages were sought to deter the defendants from repeating acts such as alleged in the instant case. The facts and circumstances as shown by the several witnesses testifying as to their similar experiences with the defendant corporation and its agents, together with the documentary evidence, are sufficient to show an over-all scheme to mislead potential purchasers. This court cannot say that the jury's verdict reflects bias and prejudice, or that the amount is so excessive as to demand a reversal. Under such circumstances, the measure of damages is within the enlightened conscience of the jury.

118 S.E.2d at 127, 128.

6. Compare the elements of deceit (page 7 supra) with the elements of express warranty. Which elements of deceit are also elements of express warranty? Which elements of express warranty are not also elements of deceit? In which of the three cases described above (*Jones, King, Saylor*) would there be an express warranty?

In view of the differences you have identified between deceit and express warranty, which of them is more advantageous to the consumer? Can you think of any other factors, procedural or otherwise, that might affect this assessment?

7. Examine the elements of deceit. What is the justification for requiring each of them before a plaintiff may recover? In particular, why require reliance by the plaintiff? Why require that the reliance relate to a material

fact? Why require that the reliance be justifiable? Why require that the defendant know of the falsity of the representation?

8. The defendant in *Jones* undoubtedly was correct in asserting that it was a common practice for sellers of used cars to turn back odometers. There were even people, known as ''speedo men,'' who would travel from dealer to dealer with a special machine to reset odometers. To deal specifically with deception in rolling back odometers, Congress and many state legislatures have created special rules for used car dealers. See 49 U.S.C. §§ 32701–32711, and the accompanying regulations, reproduced in the Statutory Supplement. These statutes and regulations prohibit tampering with odometers and require sellers of automobiles to disclose certain information about the vehicles. See section 580.5 of the regulations.

Have you ever sold a used car? If so, did you supply the buyer with the statement required by the federal regulation? Note that the statute and regulation apply to consumer sellers as well as to dealers, and see section 32710 (civil liability for treble damages or $1,500, whichever is more, and two-year statute of limitations).

9. Enactment of the odometer statutes is an example of a common phenomenon in the regulation of consumer transactions. Although common law deceit provides a remedy for those injured by odometer rollbacks, the availability of that remedy has not eradicated the objectionable behavior. Therefore, the legislature—at both the federal and state levels—responded by enacting statutes to deal with the problem. And since the common law rules were not effective to prevent odometer rollbacks, it is not surprising that these statutes go further than the common law rules. The federal statute, for example, not only prohibits changing an odometer reading, it also prohibits operating a motor vehicle with the odometer disconnected and prohibits the sale of any device that changes odometer readings. In addition to these prohibitions, the statute (and regulations) impose an affirmative requirement that the seller make a written disclosure of the odometer reading and affirm its accuracy. The statute authorizes a federal agency to promulgate regulations and provides for enforcement by both federal and state officials. These additional prohibitions, the affirmative disclosure requirement, and the enforcement mechanism all go well beyond the requirements of the common law. Hence, the case of odometer fraud provides a good example of what may happen when the conduct of actors in the market place does not conform to the requirements of the common law.

Enactment of legislation is also a common response when the common law rules do not regulate particular conduct at all. This is true with respect to deceptive conduct that does not rise to the level of deceit (e.g., see the New York false advertising statute on page 83), and it is true with respect to conduct that is not deceptive but nevertheless injures consumers (e.g., see the Equal Credit Opportunity Act, which is the subject of Chapter 6). Consequently, much of the law of consumer transactions is statutory law that legislatures have enacted because the common law does not address some of the problems in consumer transactions, either adequately or at all. The common law remains relevant, however, and the remaining materials

in this chapter reveal ways in which the common law of deceit has evolved to recognize, and reflect, changes in the standard of conduct appropriate for bargain transactions.

Vokes v. Arthur Murray, Inc.

Court of Appeals of Florida, 1968.
212 So.2d 906.

PIERCE, JUDGE.

This is an appeal by Audrey E. Vokes, plaintiff below, from a final order dismissing with prejudice, for failure to state a cause of action, her fourth amended complaint, hereinafter referred to as plaintiff's complaint.

Defendant Arthur Murray, Inc., a corporation, authorizes the operation throughout the nation of dancing schools under the name of ''Arthur Murray School of Dancing'' through local franchised operators, one of whom was defendant J. P. Davenport whose dancing establishment was in Clearwater.

Plaintiff Mrs. Audrey E. Vokes, a widow of 51 years and without family, had a yen to be ''an accomplished dancer'' with the hopes of finding ''new interest in life''. So, on February 10, 1961, a dubious fate, with the assist of a motivated acquaintance, procured her to attend a ''dance party'' at Davenport's ''School of Dancing'' where she whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as ''an excellent dancer'' was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight 1/2–hour dance lessons to be utilized within one calendar month therefrom, for the sum of $14.50 cash in hand paid, obviously a baited ''come-on''.

Thus she embarked upon an almost endless pursuit of the terpsichorean art during which, over a period of less than sixteen months, she was sold fourteen ''dance courses'' totalling in the aggregate 2302 hours of dancing lessons for a total cash outlay of $31,090.45, all at Davenport's dance emporium. All of these fourteen courses were evidenced by execution of a written ''Enrollment Agreement—Arthur Murray's School of Dancing'' with the addendum in heavy black print, ''No one will be informed that you are taking dancing lessons. Your relations with us are held in strict confidence'', setting forth the number of ''dancing lessons'' and the ''lessons in rhythm sessions'' currently sold to her from time to time, and always of course accompanied by payment of cash of the realm.

These dance lesson contracts and the monetary consideration therefor of over $31,000 were procured from her by means and methods of Davenport and his associates which went beyond the unsavory, yet legally permissible, perimeter of ''sales puffing'' and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free exercise of rational judgment, if what plaintiff alleged in her complaint was true. From the time of her first contact with the dancing

school in February 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.

She was incessantly subjected to overreaching blandishment and cajolery. She was assured she had ''grace and poise''; that she was ''rapidly improving and developing in her dancing skill''; that the additional lessons would ''make her a beautiful dancer, capable of dancing with the most accomplished dancers''; that she was ''rapidly progressing in the development of her dancing skill and gracefulness'', etc., etc. She was given ''dance aptitude tests'' for the ostensible purpose of ''determining'' the number of remaining hours instructions needed by her from time to time.

At one point she was sold 545 additional hours of dancing lessons to be entitled to award of the ''Bronze Medal'' signifying that she had reached ''the Bronze Standard'', a supposed designation of dance achievement by students of Arthur Murray, Inc.

Later she was sold an additional 926 hours in order to gain the ''Silver Medal'', indicating she had reached ''the Silver Standard'', at a cost of $12,501.35.

At one point, while she still had to her credit about 900 unused hours of instructions, she was induced to purchase an additional 24 hours of lessons to participate in a trip to Miami at her own expense, where she would be ''given the opportunity to dance with members of the Miami Studio''.

She was induced at another point to purchase an additional 126 hours of lessons in order to be not only eligible for the Miami trip but also to become ''a life member of the Arthur Murray Studio'', carrying with it certain dubious emoluments, at a further cost of $1,752.30.

At another point, while she still had over 1,000 unused hours of instruction she was induced to buy 151 additional hours at a cost of $2,049.00 to be eligible for a ''Student Trip to Trinidad'', at her own expense as she later learned.

Also, when she still had 1100 unused hours to her credit, she was prevailed upon to purchase an additional 347 hours at a cost of $4,235.74, to qualify her to receive a ''Gold Medal'' for achievement, indicating she had advanced to ''the Gold Standard''.

On another occasion, while she still had over 1200 unused hours, she was induced to buy an additional 175 hours of instruction at a cost of $2,472.75 to be eligible ''to take a trip to Mexico''.

Finally, sandwiched in between other lesser sales promotions, she was influenced to buy an additional 481 hours of instruction at a cost of $6,523.81 in order to ''be classified as a Gold Bar Member, the ultimate achievement of the dancing studio''.

All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no ''dance aptitude'', and in fact had difficulty in ''hearing the musical beat''. The complaint alleged that such representations to her ''were in fact false and known by the defendant to be false and contrary to the plaintiff's true ability, the truth of plaintiff's ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons''. It was averred that the lessons were sold to her ''in total disregard to the true physical, rhythm, and mental ability of the plaintiff''. In other words, while she first exulted that she was entering the ''spring of her life'', she finally was awakened to the fact there was ''spring'' neither in her life nor in her feet.

The complaint prayed that the Court decree the dance contracts to be null and void and to be cancelled, that an accounting be had, and judgment entered against the defendants ''for that portion of the $31,090.45 not charged against specific hours of instruction given to the plaintiff''. The Court held the complaint not to state a cause of action and dismissed it with prejudice. We disagree and reverse.

The material allegations of the complaint must, of course, be accepted as true for the purpose of testing its legal sufficiency. Defendants contend that contracts can only be rescinded for fraud or misrepresentation when the alleged misrepresentation is as to a material fact, rather than an opinion, prediction or expectation, and that the statements and representations set forth at length in the complaint were in the category of ''trade puffing'', within its legal orbit.

It is true that ''generally a misrepresentation, to be actionable, must be one of fact rather than of opinion''. But this rule has significant qualifications, applicable here. It does not apply where there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at ''arm's length'' as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented. As stated by Judge Allen of this Court in Ramel v. Chasebrook Construction Company, Fla.App.1961, 135 So.2d 876:

> * * * A statement of a party having * * * superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.

It could be reasonably supposed here that defendants had ''superior knowledge'' as to whether plaintiff had ''dance potential'' and as to whether she was noticeably improving in the art of terpsichore. And it would be a reasonable inference from the undenied averments of the complaint that the flowery eulogiums heaped upon her by defendants as a

prelude to her contracting for 1944 additional hours of instruction in order to attain the rank of the Bronze Standard, thence to the bracket of the Silver Standard, thence to the class of the Gold Bar Standard, and finally to the crowning plateau of a Life Member of the Studio, proceeded as much or more from the urge to ''ring the cash register'' as from any honest or realistic appraisal of her dancing prowess or a factual representation of her progress.

Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so he must disclose the *whole truth*. From the face of the complaint, it should have been reasonably apparent to defendants that her vast outlay of cash for the many hundreds of additional hours of instruction was not justified by her slow and awkward progress, which she would have been made well aware of if they had spoken the ''whole truth''.

. . .

We repeat that where parties are dealing on a contractual basis at arm's length with no inequities or inherently unfair practices employed, the Courts will in general ''leave the parties where they find themselves''. But in the case sub judice, from the allegations of the unanswered complaint, we cannot say that enough of the accompanying ingredients, as mentioned in the foregoing authorities, were not present which otherwise would have barred the equitable arm of the Court to her. In our view, from the showing made in her complaint, plaintiff is entitled to her day in Court.

It accordingly follows that the order dismissing plaintiff's last amended complaint with prejudice should be and is reversed.

Reversed.

QUESTIONS AND NOTES

1. Does the court hold that plaintiff's complaint stated that defendant made actionable misrepresentations of fact? If so, what were they? If not, how does the complaint state a cause of action for deceit? A case similar to *Vokes* is Parker v. Arthur Murray, Inc., 295 N.E.2d 487 (Ill.App.1973). Excerpts from the court's opinion follow:

> The operative facts are not in dispute. In November, 1959 plaintiff went to the Arthur Murray Studio in Oak Park to redeem a certificate entitling him to three free dancing lessons. At that time he was a 37–year-old college-educated bachelor who lived alone in a one-room attic apartment in Berwyn, Illinois. During the free lessons the instructor told plaintiff he had ''exceptional potential to be a fine and accomplished dancer'' and generally encouraged further participation. Plaintiff thereupon signed a contract for 75 hours of lessons at a cost of $1000. At the bottom of the contract were the bold-type words, ''NON–CANCELLABLE NEGOTIABLE CONTRACT.'' This initial encounter set the pattern for the future relationship between the parties. Plain-

> tiff attended lessons regularly. He was praised and encouraged regularly by the instructors, despite his lack of progress. Contract extensions and new contracts for additional instructional hours were executed . . . .
>
> On September 24, 1961 plaintiff was severely injured in an automobile collision, rendering him incapable of continuing his dancing lessons. At that time he had contracted for a total of 2734 hours of lessons, for which he had paid $24,812.80. Despite written demand defendants refused to return any of the money, and this suit in equity ensued. At the close of plaintiffs case the trial judge dismissed the fraud count (Count II), describing the instructors' sales techniques as merely ''a matter of pumping salesmanship.'' . . . It is contended on appeal that representations to plaintiff that he had ''exceptional potential to be a fine and accomplished dancer,'' that he had ''exceptional potential'' and that he was a ''natural born dancer'' and a ''terrific dancer'' fraudulently induced plaintiff to enter into the contracts for dance lessons.
>
> Generally, a mere expression of opinion will not support an action for fraud. In addition, misrepresentations, in order to constitute actionable fraud, must pertain to present or pre-existing facts, rather than to future or contingent events, expectations or probabilities. Whether particular language constitutes speculation, opinion or averment of fact depends upon all the attending facts and circumstances of the case. Mindful of these rules, and after carefully considering the representations made to plaintiff, and taking into account the business relationship of the parties as well as the educational background of plaintiff, we conclude that the instructors' representations did not constitute fraud. The trial court correctly dismissed Count II. We affirm.

Does the court conclude that defendant made no misrepresentations of fact? Are the sales practices or specific statements in the two cases materially different? How can the difference in results be justified?

Plaintiff in *Vokes* sought rescission and return of the money she had paid. Plaintiff in *Parker* sought not only rescission but also punitive damages. Does this difference justify or explain the difference in results?

2. It may be difficult to determine whether a statement amounts to a representation of fact or an expression of opinion. In Morehouse v. Behlmann, 31 S.W.3d 55, 59–60 (Mo.App.2000), defendant sold plaintiff a minivan, describing it as '' 'in good condition,' 'in tip-top shape' and 'reliable.' '' In fact, the minivan tended to overheat and eventually became inoperable. The court stated:

> A given representation can be an expression of opinion or a statement of fact depending upon the circumstances surrounding the representation. . . . [T]he evidence established that [the salesman] assured [plaintiff] that the vehicle was in excellent condition when he, at best, had no knowledge as to whether his statements were true or false. . . . [A case cited by defendant is distinguishable because an]

integral part of that holding . . . was that the buyer and the seller were on equal footing in terms of knowledge of car mechanics and the seller gave no impression of knowledge about cars. In the present case, [plaintiff] told [the salesman] several times that she was an inexperienced car buyer and that she had no idea what to look for in a car. [He] responded that he had years of experience selling cars and knew what was good. Given [the salesman's] advantage in experience and his representation thereof, his statements to [plaintiff] about the condition of the car conveyed sufficient information to be representations of fact, and not merely statements of opinion.

3. A similar problem of differentiating representations of fact from statements of opinion exists under the law of warranties. Thus UCC section 2–313(2) states that ''an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.'' (See also Official Comment 8 to that section.) It is not always easy, however, to draw the line between an affirmation of fact that creates a warranty under subsection (1) and a statement of opinion under subsection (2). Thus, courts have differed on whether a seller's statement that a motor vehicle is in ''mint'' or ''excellent'' condition creates a warranty. Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565 (8th Cir.1998) (''very nice,'' warranty); Taylor v. Alfama, 481 A.2d 1059 (Vt.1984) (''mint condition,'' warranty); Valley Datsun v. Martinez, 578 S.W.2d 485 (Tex.Civ.App.1979) (''excellent condition,'' warranty); Web Press Servs. Corp. v. New London Motors, Inc., 525 A.2d 57 (Conn.1987) (''mint condition'' and ''excellent condition,'' no warranty). What criteria should a court use to determine whether a statement is a warranty or merely puffing?

A seller of copying machines made the following statements: the copier and its component parts are of high quality; experience and testing have shown that frequency of repairs is very low; replacement parts are readily available; the cost of maintenance is less than 1/2 cent per copy; the copier is safe and cannot cause fires; and service calls will be required on the average of once every 8,000 copies. Which, if any, of these statements could give rise to liability for deceit? Which, if any, could give rise to liability for breach of express warranty? See Royal Business Machines, Inc. v. Lorraine Corp., 633 F.2d 34 (7th Cir.1980).

4. In Sunderhaus v. Perel & Lowenstein, 388 S.W.2d 140 (Tenn.1965), plaintiff purchased a diamond ring from defendant jeweler for $699.25. When plaintiff later sought to trade the ring in on another ring, two other jewelers appraised its value as $300 and $350. Plaintiff sued, seeking either rescission or damages, alleging that defendant represented to her at the time of sale that the ring was worth what she was paying for it. The trial court sustained defendant's demurrer to plaintiffs complaint. The Supreme Court of Tennessee stated:

> The alleged false representations of the appellee's agent relate to the value of the diamond purchased by appellant. We find the general rule to be that ordinarily representations of value made by one seeking

to dispose of property commercially are to be regarded as expressions of opinion or commendatory trade statements not constituting a basis of fraud. There are, however, a number of exceptions to this general rule. In 23 Am.Jur., Fraud and Deceit, 1 59, at Page 830, it is stated:

> * * * Likewise, a statement of value may be of such a character, so made and intended, and so received, as to constitute fundamental misrepresentation; and if it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud. Moreover, a statement of value involving and coupled with a statement of a material fact is fraud.
>
> Value is frequently made by the parties themselves the principal element in a contract; and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among those who are not experts.

The rule is stated as follows in 3 Pomeroy, Equity Jurisprudence, 1 878b (5th ed. 1941):

> There is still another and perhaps more common form of such misrepresentation. Wherever a party states a matter, which might otherwise be only an opinion, and does not state it *as the mere expression of his own opinion*, but affirms it *as an existing fact* material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.

Value.—The statements which most frequently come within this branch of the rule are those concerning value. . . .

Of necessity, in the purchase of a diamond or other precious stone, the purchaser must rely upon the integrity of the jeweler from whom he purchases. The layman is in no position to weigh the stone and make his own determination as to its true value, but must rely upon statements of value made to him by the jeweler. Here, the bill charges the agent of the appellee falsely represented the value of the diamond to the complainant, knowing the falsity of the representation, that the appellant was not familiar with the value of the diamond and relied upon the false representation of the appellee's agent. These averments contain all of the elements necessary to state a cause of action for fraud and deceit. . . .

In our judgment it cannot be said that the bill as amended fails to state a cause of action for fraud and deceit. Therefore, the decree of the Chancery Court is reversed and the cause is remanded. . . .

Id. at 142–44.

If there is to be a requirement that the misrepresentation be a misrepresentation of fact, what reason is there for excusing that requirement in cases like *Vokes* and *Sunderhaus*?

5. Consider also Williams v. Rank & Son Buick, Inc., 170 N.W.2d 807 (Wis.1969):

> On March 19, 1968, respondent and his brother went to appellant's used car lot where they examined a 1964 Chrysler Imperial automobile. While doing so, they were approached by a salesman who permitted them to take the car for a test run. They drove the car for approximately one and one-half hours before returning the car to the appellant's lot. During that time they tested the car's general handling as well as its radio and power windows. According to the respondent, however, it was not until several days after he had purchased the car that he discovered that the knobs marked ''AIR'' were for ventilation and that the car was not air-conditioned.
>
> At the trial the respondent testified that while examining the car he discussed its equipment with the salesman and was told that it was air-conditioned. . . .
>
> Upon these facts the trial court found that the respondent had proven fraud on the part of the appellant and awarded him $150 in damages. . . .
>
> This court has consistently held that the party alleging fraud has the burden of proving it by clear and convincing evidence and that factual findings of the trial court will not be upset unless contrary to the great weight and clear preponderance of the evidence. Based upon these principles it is this court's duty on this appeal to determine if all the elements of fraud have been properly established.
>
> . . .
>
> In regard to the alleged oral misrepresentations of the appellant's salesman, there is, of course, conflict in testimony. Despite denial by the salesman, however, there is sufficient evidence upon which the trial court could find that such statements were made and that they were made with intent to defraud the respondent.
>
> Appellant's counsel argues that there was no reliance by the respondent and that therefore there was no fraud. . . .
>
> In response to his attorney's question as to whether the car was represented as having certain features, the respondent answered, ''Oh, yes, that it was full power and air conditioning and everything, and that Chrysler was a nice car, it was, and all that kind of jazz.'' He then added that he had purchased the car ''Mainly because it was a Chrysler Imperial and that it had air-conditioning.''
>
> Despite denials by the salesman, the trial court, having had an opportunity to view the witnesses, apparently determined that the respondent's testimony was more credible than that of the salesman.
>
> The question of reliance is another matter. Many previous decisions of this court have held that one cannot justifiably rely upon obviously false statements. In Jacobsen v. Whitely (1909), 138 Wis. 434, 436, 437, 120 N.W. 285, 286, the court said:

> * * * It is an unsavory defense for a man who by false statements, induces another to act to assert that if the latter had disbelieved him he would not have been injured. * * * Nevertheless courts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him. * * *

It is apparent that the obviousness of a statement's falsity vitiates reliance since no one can rely upon a known falsity. Were the rule otherwise a person would be free to enter into a contract with no intent to perform under the contract unless it ultimately proved profitable. On the other hand, a party who makes an inadvertent slip of the tongue or pencil would continually lose the benefit of the contract.

The question is thus whether the statement's falsity could have been detected by ordinary observation. Whether the falsity of a statement could have been discovered through ordinary care is to be determined in light of the intelligence and experience of the misled individual. Also to be considered is the relationship between the parties.

. . .

. . . The respondent specifically testified that, being a high school graduate, he was capable of both reading and writing. It is also fair to assume that he possessed a degree of business acumen in that he and his brother operated their own business. No fiduciary relationship existed between the parties. They dealt with each other at arms' length. The appellant made no effort to interfere with the respondent's examination of the car, but, on the contrary, allowed him to take the car from the premises for a period of one and one-half hours.

Although the obviousness of a statement's falsity is a question of fact, this court has decided some such questions as a matter of law. . . .

In the instant case the respondent had ample opportunity to determine whether the car was air-conditioned. He had examined the car on the lot and had been allowed to remove the car from the lot unaccompanied by a salesman for a period of approximately one and one-half hours. This customers were normally not allowed to do.

No great search was required to disclose the absence of the air conditioning unit since a mere flip of a knob was all that was necessary. If air conditioning was, as stated by the respondent, the main reason he purchased the car, it is doubtful that he would not try the air conditioner.

> ''It seems plain that, whether the representation in question was made, the [respondent] failed to exercise that care for [his] own protection which was easily within [his] power to exercise, and, under all the circumstances, [he] was not justified in relying upon such a representation, if made.'' Acme Chair & M. C. Co. v. Northern C. Co., supra, at page 17, 243 N.W. at p. 418.
>
> We conclude that as a matter of law the respondent under the facts and circumstances was not justified in relying upon the oral representation of the salesman. This is an action brought in fraud and not an action for a breach of warranty.

Does the court hold that, as a matter of law, plaintiff did not rely on the misrepresentation? What is the relevance of the observation by three dissenting justices that cars with factory-installed air conditioning have no visible sign of that feature in the passenger compartment?

Reconsider Parker v. Arthur Murray. Does *Williams* provide any additional support for the court's decision in *Parker*? Does *Williams* support the court's opposite decision in *Sunderhaus*? in King v. Towns (the cancer-causing cookware case)?

In some jurisdictions the standard of proof for establishing fraud is not ''clear and convincing,'' but rather is ''preponderance of the evidence.'' In some states the lowering of the standard resulted from judicial decision (e.g., see the next case); in others, it resulted from legislation.

Halpert v. Rosenthal

Supreme Court of Rhode Island, 1970.
107 R.I. 406, 267 A.2d 730.

KELLEHER, JUSTICE.

[Defendant contracted to buy plaintiff's house for $54,000, making a down payment of $2000. During the negotiations plaintiff and her real estate agent each stated that there was no termite infestation in the house. When an inspection revealed the presence of termites, defendant refused to proceed. Plaintiff sold the house to another person for $35,000 and brought this action against defendant to recover the $19,000 difference. Defendant counterclaimed for return of his $2000 deposit. Plaintiff moved for a directed verdict on the counterclaim. The trial court denied the motion and rendered judgment for defendant on both the claim and the counterclaim. Plaintiff appealed.]

In contending that she was entitled to a directed verdict, plaintiff contends that to sustain the charge of fraudulent misrepresentation, some evidence had to be produced showing that either she or her agent knew at the time they said there were no termites in the house, that such a statement was untrue. Since the representations made to defendant were made in good faith, she argues that, as a matter of law, defendant could not prevail on his counterclaim.

The defendant concedes that there was no evidence which shows that plaintiff or her agent knowingly made false statements as to the existence of the termites but he maintains that an innocent misrepresentation of a material fact is grounds for rescission of a contract where, as here, a party relies to his detriment on the misrepresentation.

We affirm the denial of the motion for a directed verdict.

The plaintiff, when she made her motion for a directed verdict, stated that her motion was restricted to the issue of ''fraud.'' The word ''fraud'' is a generic term which embraces a great variety of actionable wrongs. It is a word of many meanings and defies any one all-inclusive definition. Fraud may become important either for the purpose of giving the defrauded person the right to sue for damages in an action for deceit or to enable him to rescind the contract. 12 Williston, Contracts § 1487 at 322 (Jaeger 3d ed. 1970). In this jurisdiction a party who has been induced by fraud to enter into a contract may pursue either one of two remedies. He may elect to rescind the contract to recover what he has paid under it, or he may affirm the contract and sue for damages in an action for deceit.

The distinction between a claim for damages for intentional deceit and a claim for rescission is well defined. Deceit is a tort action, and it requires some degree of culpability on the misrepresenter's part. Prosser, Law of Torts (3d ed.) § 100. An individual who sues in an action of deceit based on fraud has the burden of proving that the defendant in making the statements knew they were false and intended to deceive him. On the other hand, a suit to rescind an agreement induced by fraud sounds in contract. It is this latter aspect of fraud that we are concerned with in this case, and the pivotal issue before us is whether an innocent misrepresentation of a material fact warrants the granting of a claim for rescission. We believe that it does.

When he denied plaintiff's motion, the trial justice indicated that a false, though innocent, misrepresentation of a fact made as though of one's knowledge may be the basis for the rescission of a contract. While this issue is one of first impression in this state, it is clear that the trial judge's action finds support in the overwhelming weight of decision and textual authority which has established the rule that where one induces another to enter into a contract by means of a material misrepresentation, the latter may rescind the contract. It does not matter if the representation was ''innocent'' or fraudulent.

. . .

This statement of law is in accord with Restatement of Contracts, § 476 at 908 which states:

> Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter * * *

Misrepresentation is defined as