Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions

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Abstract

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KEYWORDS: fradulent, property, transactions
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I. Introduction

In May 1982, as the Davises strolled through the Johnsons’ home, they thought they had found the house of their dreams. Little did they realize, however, that the contract they were about to enter into would form the basis for a nightmare of litigation. The Johnsons, fully aware of their home’s defective condition, readily accepted the Davises’ initial deposit, thereby setting the stage for one of the most important and controversial decisions in Florida real property law within the past several years.

In Johnson v. Davis, the Florida Supreme Court recognized that, in some instances, a vendor of real property may be held liable for the nondisclosure of a material defect that affects the value of the property and, which is not readily discoverable by the purchaser. Though an increasing number of jurisdictions now permit redress for the injured homebuyer, this was not always the case.

This Note presents an historical review of the rule of fraudulent nondisclosure, and an analysis of Florida’s most recent pronouncement on the subject — Johnson v. Davis. The supreme court’s decision, as well as holdings in other jurisdictions reveal that, while a remedy now exists where traditionally there was none, concepts of materiality in this context remain confusingly intermingled with those of good faith and fair dealing.

Lastly, this author will offer a prediction on the impact such vague and amorphous concepts may have on the future course of this body of law.

II. Historical Development of the General Rule and Its Exceptions

A. Generally, No Liability for Mere Silence

Traditionally, absent an affirmative misrepresentation by a seller, there was no liability grounded in fraud. Actionable fraud required,

1. 480 So. 2d 625 (Fla. 1985).
among other elements, an affirmative act by the wrongdoer. The act may consist of words or conduct as long as another party, by relying upon such an act, was induced to do something to his detriment. Thus, notwithstanding special circumstances, a mere nondisclosure of a fact, however material, would not sustain such a claim for fraud. At that time there was simply no legal duty to disclose facts, no matter how "morally censurable" their nondisclosure may have been. This rule when applied to undisclosed yet patent defects seems just, since both parties to the transaction often appear to be on equal footing with respect to an obvious defect. A difficult situation arises, however, where a defect is latent or unobservable through reasonable inspection. Should vendors repeatedly escape liability through their silence because archaic case law condones such advantageous behavior? It appears that an increasing number of jurisdictions now hold that they may not.

The rationale behind the nondisclosure rule, however questionable, was based upon the dated business ethics of the older common law and the distinctions which old tort law made between nonfeasance and misfeasance.

At early common law, the distinction between nonfeasance and misfeasance was essentially the same as exists between action and inaction. During that era, liability would not be imposed for merely failing to protect another from harm, since the courts were fully occupied with other more glaring forms of misconduct. Thus, one could only be held liable for actions that either worsened another’s position or resulted in a situation which was likely to cause harm.

Not surprisingly, this era was characterized by a societal attitude that was staunchly opposed to any governmental interference with the economic sector. Many felt that business and society would flourish only by allowing individuals to act unchecked, in their own self-interests. The doctrine of caveat emptor exemplified the attitude of the

day: laissez faire economics and individualism.

Originally, caveat emptor applied to transactions involving both personal and real property. The sale of personal property and consumer goods, however, lost its inclusion to this rigid standard with the enactment of the Uniform Sales Act and, subsequently, the Uniform Commercial Code. Unfortunately, the law of real property has been slow to follow the lead set by these progressive bodies of law.

The rationale frequently given in support of real property's steadfast adherence to the doctrine of caveat emptor has been that vendors and purchasers deal at arms length and, therefore, they each have an equal opportunity to investigate for themselves the bargained for property. This questionable rationale dates back to a time when parties to land transactions were quite often neighbors and dealt with each other in face to face transactions. Buyers were usually well acquainted with the seller's property, since they often lived in the same small community. Thus, buyers were able to inspect the land throughout all of the negotiations.

Furthermore, during this time it was not uncommon for the purchaser to make two separate contracts, one with the owner of the land and another with the builder constructing the home. If a defect were discovered in the dwelling, the builder would then be liable to the purchaser for breach of an implied warranty of workmanlike quality. As a result, the law currently governing the sale of real estate gathers bits

quad jus et alium cedit," meaning let a buyer beware, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution. H. BROOM, LEGAL MAXIMS 768 (7th ed. 1874).

10. Hamilton, supra note 8, at 1186 ("Not until the nineteenth century, did judges discover that caveat emptor sharpened wits, taught self-reliance, made a man - an economic man - out of the buyer, and served well its two masters, business and justice.").

11. Id at 1133.

12. UNIFORM SALES ACT (1960).


16. Id at 110.

17. Id at 111.

18. Id.
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11. \textit{Id} at 1133.

12. \textit{UNIFORM SALES ACT} (1906).


15. Dunham, \textit{Vendor’s Obligation as to Fitness of Land for a Particular Pur-}

16. \textit{Id.} at 110.

17. \textit{Id.} at 111.

18. \textit{Id.}
and pieces of implied warranty, negligence, fraud and strict liability to construct a remedy for the distressed or injured purchaser.19

B. Some Circumstances Giving Rise to a Duty to Disclose

There are several widely held exceptions to the no duty to disclose rule. Perhaps one of the most common sense caveats has been described as the half truth. If one chooses to speak at all then the whole truth must be disclosed. This prevents misleading the recipient by selectively communicated facts.20

Another common exception has been labeled the continuing representation.21 A duty to disclose arises when a statement which is true when spoken later becomes false, either by subsequently acquired knowledge or a change in the spoken facts.22 Using this approach, a speaker may be held liable for failing to disclose the newly acquired information, because the recipient has relied upon the prior representation and the speaker was subsequently presented with an opportunity to prevent this reliance, which he failed or refused to do.23

Furthermore, if one party to a transaction attempts to conceal a defect or prevent the other party from discovering it by some trick or artifice, an action for fraud will lie.24

Another exception arises in the context of a confidential or fiduciary relationship.25 A fiduciary relationship exists “where confidence is reposed by one party and a trust accepted by the other.”26 For instance,

confidential relationships are often said to exist between, principle and agent, attorney and client, and husband and wife.27 Fiduciary relationships are exempt from the rule of caveat emptor. Instead, a duty of loyalty and full disclosure has been imposed upon these relationships which, by their very nature, demand the utmost trust and fair dealing between the parties.

Traditionally, however, the law has refused to consider the vendor-purchaser relationship to be fiduciary in character.28 An examination of the confluence of cases and other authority that discuss the vendor-purchaser relation aptly demonstrates this statement.29 However, at least one commentator suggested that if one accepts the rationale that a fiduciary relationship may exist “in fact” as well as “in law,” then the vendor-purchaser relation might, under some circumstances, be classified as fiduciary in nature.30 This reasoning is also based upon the premise that vendors and purchasers do “in fact,” rely upon each other for full and fair disclosure.31 The acceptance of this logic, however, has been extremely limited.

As courts have been reluctant to find the existence of a confidential relationship between vendors and purchasers, so too have they been hesitant to extend either duty to disclose beyond those exceptions previously mentioned. The obvious explanation for this reluctance is that courts are, ostensibly, bound to concepts of law, though not necessarily those of morality.32 Nonetheless, imposing a duty to disclose upon a vendor initially had to be premised upon moral and ethical considerations,33 until recently, the law simply did not recognize such a duty.34 Indeed, some commentators have actually suggested that courts should be guided by such considerations which the “ordinary ethical person” would disclose.35 At the same time, despite justifications to the
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27. Farmers State Bank v. Lamar, 132 Wash. 369, 231 P. 952, 953 (1925) (The list of fiduciary relationships include: “trustee and cestui que trust, principle and agent, attorney and client, physician and patient, priest and penitent, patron and ward, and many others of like character.”)
29. Id. at 39-40.
30. Id.
31. Id.
32. Id at 9.
33. Id.
34. Keeton, supra note 21, at 37. See also Comment, Is the Duty to Disclose a
contrary, others contend that these are precisely the vague standards upon which many courts continue to base their holdings. 88

Despite the somewhat modern trend to impose a duty of disclosure upon real property vendors, some states maintain a steadfast hold upon traditional notions of fraud. In those jurisdictions, a purchaser remains solely dependent upon his own diligence in conducting inspections of the property he intends to purchase.

Those cases that hold a vendor to have no duty to reveal known material defects have justified their holdings upon various grounds. For instance, purchasers have been denied recovery because: (1) the purchaser had an equal opportunity to inspect for material impairments or to obtain an expert for such purposes; 89 (2) the vendor’s mere silence does not constitute fraud if no representation was made concerning the defect; 90 (3) there is normally no relationship of trust or confidence between vendor-purchaser, thus no special duty is imposed to disclose; and (4) the transaction was conducted at arms length, thereby obviating the need to disclose, since ordinary principles of contract law apply. 88

III. Florida’s Approach to the Cause of Action

A. The Law Prior to Johnson v. Davis

Prior to Johnson, 88 a Florida real estate purchaser could obtain relief only upon a showing of fraudulent representation and resultant injury. The elements of fraud require a false statement regarding a material fact, knowledge that the fact was false, the intention that the representation induce another to act on it, and injury resulting from the party’s reliance upon the statement. 89 Additionally, the purchaser was required to make his own investigation of the premises, not only to discover undisclosed defects, but also to ascertain the veracity of any representations made by the sellers. 90 To be actionable, a misrepresentation must be considered one of fact rather than opinion. 91 Therefore, a purchaser could not justifiably rely upon a seller’s statements, as they might be deemed to be statements of opinion. 91 In effect, the entire risk of the transaction was placed upon the purchaser, with Florida courts thereby telling prospective purchasers of real estate to “beware.”

In Benett v. Biemert, 92 the Florida Supreme Court seemingly reduced its caveat emptor position in the context of fraudulent misrepresentation. The buyers in Benett failed to investigate the seller’s statements concerning the value of the property. The court held that absent a buyer’s knowledge of the statement’s falsity, the buyer was justified in relying on the veracity of a seller’s statements even though the statement might have been ascertained upon reasonable inspection. 93 In mitigating the buyer’s duty to investigate, the court recognized that “a person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor.” 94 Therefore, a Florida vendor may no longer escape liability for intentional false misrepresentations by merely claiming that the purchaser should have investigated their trustworthiness.

However, at this time, and irrespective of Benett, if the seller had made no representations and simply remained silent, the purchaser’s duty to conduct a reasonable investigation for undisclosed defects still remained intact. Indeed, prior to the Johnson decision, at least two Florida cases specifically held that a seller was not under an affirmative duty to reveal material facts that affected the value or desirability of the property.

In Banks v. Salina 95 the Fourth District Court of Appeal reversed a purchaser’s award for swimming pool repairs, despite evidence which indicated that the sellers knew that the swimming pool was in extreme disrepair before they signed the contract for sale. The court concluded that, absent an express warranty in the contract for sale or a material

35. PROSSER & KEeton, supra note 4, § 106, at 738.
See also Hendrick v. Lynn, 37 Del. Ch. 402, 144 A.2d 147 (1958).
37. Swinton, 311 Mass. at 677, 42 N.E.2d at 808.
39. 480 So. 2d at 625.
40. See American Int'l Land Corp. v. Hanna, 323 So. 2d 567 (Fla. 1975); Mizell v. Upchurch, 46 Fla. 443, 35 So. 9 (1903).
41. Davis v. Dunn, 58 So. 2d 539 (Fla. 1952).
43. Davis, 58 So. 2d at 542.
44. 389 So. 2d 995 (Fla. 1980).
45. Id.
46. Id. at 997.
47. Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982); Ramef, 135 So. 2d at 876.
48. 413 So. 2d at 851.

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resentations made by the sellers.\textsuperscript{41} To be actionable, a misrepresentation must be considered one of fact rather than opinion.\textsuperscript{42} Therefore, a purchaser could not justifiably rely upon a seller’s statements, as they might be deemed to be statements of opinion.\textsuperscript{43} In effect, the entire risk of the transaction was placed upon the purchaser, with Florida courts thereby telling prospective purchasers of real estate to “Beware.”

In \textit{Besett v. Basnett},\textsuperscript{44} the Florida Supreme Court seemingly relaxed its caveat emptor position in the context of fraudulent misrepresentation. The buyers in \textit{Besett} failed to investigate the seller’s statements concerning the size of the land offered for sale. The court held that absent a buyer’s knowledge of the statement’s falsity, the buyer was justified in relying on the veracity of a seller’s statements even though their falsity might have been ascertained upon reasonable inspection.\textsuperscript{45} In mitigating the buyer’s duty to investigate, the court recognized that “a person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor.”\textsuperscript{46} Therefore, a Florida vendor may no longer escape liability for intentional false misrepresentations by merely claiming that the purchaser should have investigated their trustworthiness.

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\item \textsuperscript{42} See Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (Fla. 2d Dist. Ct. App. 1968).
\item \textsuperscript{43} Davis, 58 So. 2d at 542.
\item \textsuperscript{44} 389 So. 2d 995 (Fla. 1980).
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 997.
\item \textsuperscript{47} Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982); Ramel, 135 So. 2d at 876.
\item \textsuperscript{48} 413 So. 2d at 851.
\end{itemize}
misrepresentation by the seller, "there is no duty to disclose when the parties are dealing at arms length."

Similarly, in Ramel v. Chasebrook Construction Co., the Second District Court of Appeal decided that "[i]n the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arm's length transaction is ordinarily not actionable misrepresentation . . . ." 34

B. The Facts and Holding in Johnson v. Davis

In Johnson, the Davises entered into an executory agreement to purchase the Johnsons' three year old home. The agreement required an initial deposit of $5000, to be followed by an additional $26,000 within five days. The contract contained a standard roof inspection provision that entitled the Davises to obtain, at their expense, a roof inspection to ensure that the roof was in watertight condition. After the initial $5000 deposit had been made but before the additional $26,000 payment was remitted, the Davises noticed some buckling and peeling plaster around a window frame, as well as some stains on the ceiling in the family room. The Davises inquired as to the cause of these discolorations, but were assured by the Johnsons that there had been only minor problems with the window and that the ceiling stains were caused by a combination of wallpaper adhesive and shifting ceiling beams. The Davises then paid the remaining deposit and took possession of the home. However, after a heavy rain a few days later, Mrs. Davis entered the home to find water actually "gushing" from the ceiling, lighting fixtures, window frame and kitchen stove.

After three of the Davises' roofers had all determined that the roof was inherently defective, the Davises brought an action against the

49. Id. at 852.
50. 135 So. 2d at 876.
51. Id. at 862.
52. Johnson, 480 So. 2d at 626. The provision stated:
F. Roof Inspection: Prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to facia or soffit, seller shall pay for said repairs which shall be performed by a licensed roofing contractor.
53. The facts have been taken from the opinions of the Third District and the Florida Supreme Court. Johnson, 449 So. 2d at 344, aff'd, 480 So. 2d at 625.
54. Johnson, 480 So. 2d at 626. The roofers hired by the Davises found that the roof was actually "slipping" and that the only way to make it watertight would be to construct a new roof, at an estimated cost of $15,000. Id.

Johnson for breach of contract, fraud and misrepresentation and sought rescission of the contract with a return of both deposits. 49

The trial court stated no factual findings but simply awarded the Davises their $26,000 deposit and awarded the Johnsons the initial $5000 as liquidated damages. Apparently, the trial court reasoned that, since there were no affirmative misrepresentations by the Johnsons prior to the initial $5000 deposit, the Davises were not entitled to a return of these monies in an action that was based upon fraud. 49

On appeal, the Third District Court of Appeal affirmed the trial court's decision as to the $26,000 award, but reversed that portion of the holding which had awarded the $5000 to the Johnsons as liquidated damages. Germane to the appellate court's holding was the fact that the Johnsons' own testimony revealed their awareness of the roof's shortcomings some time prior to any negotiations with the Davises. Although this evidence was intended to disprove allegations of affirmative misrepresentations, it served rather as an "unrebutted admission" that the Johnsons were completely aware of serious roofing problems that were never disclosed to the Davises. 73 Based upon this evidence, the district court held that the Johnsons had an affirmative duty to disclose the known roofing problem prior to receipt of any deposit whatsoever and, consequently, the failure to do so was equivalent to fraud. 49

Though the Third District Court acknowledged the authority expressed in Ramel and Banks, it held that those cases "represent[e]d an offensive view of societal duties and fail[e]d to embody the ideals which the law should always strive to reflect . . . ." 74 Additionally, the court stated that the relevant decisions of neighboring jurisdictions represented a better view and that fair dealing and good conscience demanded their acceptance. 75

Beyond these vague statements, the opinion does not address in any detail the important question of whether the standard roof inspection provision was designed to "induce" misrepresentations or to "expose" misrepresentations. If the standard provision is merely a "blanket" provision that is intended to have the effect of inducing the buyer to relied upon the seller's representation of the roof's condition, then the Johnsons were not entitled to have the roof inspected by an independent roofer. If, however, the provision is intended merely to expose any defects or misrepresentation of the roof, then the Johnsons were entitled to obtain an independent inspection to determine whether the roof was watertight. The question is answered by a consideration of the plain language of the provision and the intention of the parties in forming the contract.

For example, the Johnsons' contractual right to obtain a written report from a licensed roofer before closing is not conditioned by the requirement that the report be prepared by an independent third party, and, indeed, the Johnsons never attempted to have an independent inspection of the roof. Rather, the Johnsons complied with the provision of the contract by obtaining a written report from a licensed roofer who was employed by the Davises. This report was included with the closing documents and was not reviewed or scrutinized by the Johnsons. The Johnsons, therefore, did not comply with the provision of the contract and, accordingly, were not entitled to a return of the $5000 deposit.

In sum, the Johnsons' right to a return of the $5000 deposit was based upon a finding that the Johnsons were entitled to a return of the $26,000 deposit. As such, the Johnsons' right to a return of the $5000 deposit was based upon a finding that the Davises were entitled to a return of the $26,000 deposit. Therefore, the Johnsons were not entitled to a return of the $5000 deposit.
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Beyond those vague justifications, the opinion is devoid of a ratio decidendi. It seems that the court simply decided that the time had come to set caveat emptor aside in the vendor purchaser relationship, and that fair dealing and good conscience would be a better guide for future cases of this nature.

On review, the Florida Supreme Court affirmed the district court's

\begin{itemize}
  \item \textsuperscript{55} \textit{Johnson}, 480 So. 2d at 625.
  \item \textsuperscript{56} \textit{Johnson}, 449 So. 2d at 347.
  \item \textsuperscript{57} \textit{Id.} at 350.
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{Id.} at 347-48.
  \item \textsuperscript{60} \textit{Id.} at 348-49.
\end{itemize}
holding and stated that, "[t]hese unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing."  

While the evolution of the disclosure rule in most jurisdictions was incremental, Florida has achieved through one case what had taken other states many years and many decisions to accomplish. For Florida sellers, innocent non-disclosure became fraudulent non-disclosure, overnight.

One of the objectives of this article is to hypothesize, in light of the Johnson decision, the future course of this body of law. It therefore becomes necessary, at this point, to examine the development of this rule in other jurisdictions, as well as the justifications those states have advanced in support of its usage. A brief overview of what other jurisdictions have done in this regard may clarify and lend credence to this commentator's predictions.

IV. The Duty to Disclose in Other Jurisdictions

A comparison of those jurisdictions that presently require vendors to disclose material defects reveals great inconsistency among the justifications each advances in support of its holdings. Though this lack of continuity has contributed to much of the confusion in this area of the law, a clear-cut rule concerning disclosure seems unrealistic, as concepts of materiality are inherently dependent upon the individual circumstances of each transaction. Furthermore, it often seems that the determination of whether a vendor's silence is fraudulent depends on little more than the degree to which the court's conscience is stirred.

Admittedly, there is no consistent thread of logic that is common to all those cases which have held a nondisclosing seller liable to an injured purchaser. There are, however, identifiable factors which frequently appear to have a considerable impact upon a court's determination of whether or not to impose a duty on a silent seller. These consist of the nature of the defect, in conjunction with its latency or discoverability.

A. The Latency Factor

When a material defect is considered latent, in contrast to one that is discoverable upon a reasonable inspection, the courts often side with the purchaser and impose the somewhat subjective duty to disclose.

For instance, defects which are discoverable only at night may be considered latent and, if found to be material, would require the seller to disclose. In the Tennessee Supreme Court case of Simmons v. Evans, an inspection of the premises during normal business hours did not reveal that the water supply to the subject residence was discontinued from 7 p.m. to 7 a.m. and, as a result, the court found that the sellers were under an obligation to disclose this fact to prospective purchasers. In support of its holding, the court acknowledged that the undisclosed fact was so contrary to ordinary experience that it would have been ridiculous to expect a purchaser to either inquire about it or to make a nighttime inspection of the premises.

In a similar case, which involved the nondisclosure of a serious cockroach infestation, the Supreme Court of New Jersey took judicial notice of the fact that cockroaches are by nature nocturnal creatures and that a nighttime inspection would have been the only way to have discovered their presence. In holding that the seller had a duty to speak, the court implied that one's sense of fair dealing and justice required disclosure of a fact that became apparent only when the lights had been turned off. Implicit in the court's reasoning was that regardless of the purchaser's diligence in inspecting the premises, this defect would not have been discoverable under ordinary circumstances and, therefore, a duty must be imposed.

Though lateness is a threshold inquiry, it should be noted that recovery in some situations involves a confusing balancing test. In other words, the degree of lateness is often weighed against the degree of materiality, with concepts of fair dealing and good conscience tipping the scale in those instances where the call is close.

61. Johnson, 480 So. 2d at 638 (emphasis added).
62. As will be discussed in Section IV(B), infra, jurisdictions which have long since adopted the disclosure doctrine began by requiring full disclosure only when the defect was considered dangerous to the general health or safety of the purchaser. In other words, materiality was defined by the degree of danger associated with the defect. Eventually, courts interpreted materiality in terms of the decrease in the property's market value.
63. See Keeton, supra note 21, at 6; Goldfarb, supra note 28, at 43-44.
64. Goldfarb, supra note 28, at 19.
65. 185 Tenn. 282, 206 S.W.2d 295 (1947).
66. Id. at 287, 206 S.W.2d at 297.
68. Id.
69. Id.
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When a material defect is considered latent, in contrast to one that is discoverable upon a reasonable inspection, the courts often side with the purchaser and impose the somewhat subjective duty to disclose.44

For instance, defects which are discoverable only at night may be considered latent and, if found to be material, would require the seller to disclose. In the Tennessee Supreme Court case of Simmons v. Evans, 45 an inspection of the premises during normal business hours did not reveal that the water supply to the subject residence was discontinued from 7 p.m. to 7 a.m. and, as a result, the court found that the sellers were under an obligation to disclose this fact to prospective purchasers. In support of its holding, the court acknowledged that the undisclosed fact was so contrary to ordinary experience that it would have been ridiculous to expect a purchaser to either inquire about it or to make a nighttime inspection of the premises.46

In a similar case, which involved the nondisclosure of a serious cockroach infestation,47 the Supreme Court of New Jersey took judicial notice of the fact that cockroaches are by nature nocturnal creatures and that a nighttime inspection would have been the only way to have discovered their presence. In holding that the seller had a duty to speak, the court implied that one’s sense of fair dealing and justice required disclosure of a fact that became apparent only when the lights had been turned off.48 Implicit in the court’s reasoning was that regardless of the purchaser’s diligence in inspecting the premises, this defect would not have been discoverable under ordinary circumstances and, therefore, a duty must be imposed.49

Though lateness is a threshold inquiry, it should be noted that recovery in some situations involves a confusing balancing test. In other words, the degree of lateness is often weighed against the degree of materiality, with concepts of fair dealing and good conscience tipping the scale in those instances where the call is close.

64. Goldfarb, supra note 28, at 19.
65. 185 Tenn. 282, 206 S.W.2d 295 (1947).
66. Id. at 287, 206 S.W.2d at 297.
68. Id.
69. Id.
Materiality is, of course, a principle element of any action based upon a fraudulent misrepresentation.76 This concept seems to apply with equal force to those cases involving fraudulent nondisclosures as well. In either context, two reasons are given in support of a materiality requirement.

The first reason relates to the element of causation.77 The materiality of a fact often provides circumstantial evidence of whether the plaintiff was actually induced into the transaction. This is true because if the undisclosed defect is determined to be relatively insignificant, it would be unlikely that its disclosure or nondisclosure would have affected the buyer's choice in one way or the other.78 Therefore, the requirement of a particular fact being material to a transaction is essential before the concealment or misrepresentation of that fact will be considered a vital part of the agreement.

The second reason given in support of a materiality requirement relates to a policy consideration that opposes the avoidance of contractual obligations.79 To permit a denial of contractual obligations for insubstantial reasons would, essentially, render all business transactions unpredictable to the point of absurdity.

B. Varying Concepts of "Materiality"

1. Potentially unsafe or unhealthy defects

When the undisclosed defect is considered dangerous to the general health and safety of the residents, the courts have quite often been willing to consider such a defect as material. Furthermore, the more dangerous the defect, the more likely the court will impose upon the seller a duty to disclose. For instance, in the Pennsylvania case of Shane v. Hoffman,74 the vendor and real estate brokers were held jointly liable for failing to disclose a condition that had the potential for materially affecting the health of the purchasers. The court found that "[t]he inulation of the basement with human excrement and other waste material involves such a clear hazard to the health of the occupants of this residence, that the duty to disclose said condition is evident . . . ."79 In doing so, the court adopted Section 353 of the Restatement (Second) of Torts,80 which recognizes a duty to disclose any dangerous condition to life, limb or to the general health or safety of the purchaser or his family. However, in the absence of a serious threat to the occupant's health or safety, Pennsylvania courts have made it clear that no such duty shall be imposed.79

Similarly, a Colorado court allowed a purchaser to rescind a contract because the seller failed to disclose that the house was constructed on filled ground and that this had resulted in the house tilting, sinking, and developing significant cracks in the walls.79

Other jurisdictions have allowed recovery for undisclosed defects such as a buried cesspool,81 structural problems,82 and uranium mine tailings under the home,83 all on the grounds that such defects were deleterious to human habitation and, therefore, material.

Termitie infestation is an excellent example of a defect that may be both latent and ultimately dangerous to the home's structure and occu-

75. Id. at 182, 324 A.2d at 538.
76. Id. at 181, 324 A.2d at 537. The applicable part of the Restatement reads as follows:

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others if

(a) the vendor does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition or the risk involved and

(2) should have disclosed the condition or the risk involved.

Restatement (Second) of Torts, supra note 73, at 327 (1965).

77. In a Tennessee court case, the court held that the seller had a duty to disclose the termite infestation; the court emphasized that "it is not necessary to state the precise location of the infestation or the extent of the damage, but the seller should have disclosed the existence of the condition and the probable nature of the infestation." 49 S.W.2d 444 (1933).

78. Quameland v. Haggard, 445 A.2d 121 (Pa. Super. 1982). The court held that the vendor had a duty to disclose the termite infestation, the court emphasized that "it is not necessary to state the precise location of the infestation or the extent of the damage, but the seller should have disclosed the existence of the condition and the probable nature of the infestation." 49 S.W.2d 444 (1933).


70. See Prosser & Keeton, supra note 4, at § 108; Keeton, Actionable Misrepresentation, 2 Okla. L. Rev. 56, 58 (1949).
71. Keeton, supra note 70, at 59-60.
72. Id.
73. Id.; Prosser & Keeton, supra note 4, at § 108, at 753.
In doing so, the court adopted Section 353 of the Restatement (Second) of Torts, which recognizes a duty to disclose any dangerous condition to life, limb or to the general health or safety of the purchaser or his family. However, in the absence of a serious threat to the occupant’s health or safety, Pennsylvania courts have made it clear that no such duty shall be imposed.

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Termite infestation is an excellent example of a defect that may be both latent and ultimately dangerous to the home’s structure and occup-
pants. It has also been the subject of an enormous amount of litigation in this area.**

In a Washington case, *Obde v. Schlemeyer*, the sellers/defendants had originally purchased an apartment building that was infested with termites. Defendants, however, knew of this infestation and the price was adjusted accordingly. Later, after purportedly but not actually eradicating the problem, the sellers/defendants placed the property back on the market. Because the plaintiffs did not inquire into the existence of a termite condition beforehand, the defendants argued at trial that there was no affirmative duty to speak of the supposedly past infestation. However, in holding that the sellers had a duty to disclose this past condition, the court recognized that "termite infestation . . . is manifestly a serious and dangerous condition . . ." and, if known to the vendor, it must in good faith be disclosed.**

Additionally, evidence presented at trial revealed that the sellers in *Obde* employed experts to repair and actually hide the damage caused by the past termite infestation. In Washington, as well as most other states, this conduct would have clearly established active concealment, and as such constituted actionable fraud. However, instead of drawing upon traditional fraud concepts to justify a recovery by the buyers, the court seemed to rely upon notions of justice and fair dealing in imposing a duty to disclose upon the sellers.** In doing so, the court summarized its position by quoting from Professor Keeton's renowned article:

>[1] If either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent.

The attitude of the courts toward non-disclosure [sic] is undergoing a change . . . [1] It would seem that the object of the law in these cases should be to impose upon the parties to the transaction a duty to speak whenever justice, equity and fair dealing demand it.**

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82. As one court has stated, "[o]f the forms of animal life known to modern science, few, if any, classifications other than *Homo sapiens* have been the subject of as much legal controversy as the members of the order Isoptera [termites]." Hughes v. Stusser, 415 P.2d 89, 90 (Wash. 1966).
83. 56 Wash. 2d 449, 333 P.2d 672 (1960).
84. Id. at 452, 333 P.2d at 675. One of the vendor's own witnesses testified that "if termites are not checked in their damage, they can cause a complete collapse of a building . . . [T]hey would simply eat up the wood." Id.
86. Kaip v. Goldsby, 735 S.W.2d 761 (emphasis added).

Thus, honesty and good faith require a seller to speak of material defects, even though past precedent may not.

Curiously, these rationalizations sound strikingly parallel to those espoused by the Third District Court of Appeal and the Florida Supreme Court in *Johnson*. They are also quite similar to the justifications espoused by various other jurisdictions that impose a duty to disclose material defects upon vendors of real property.

2. Impairment of Value

The broadest interpretation of materiality has been applied to situations in which the undisclosed defect merely decreases the value of the subject property. Notably, this is the position taken by an increasing number of jurisdictions** including Florida.** For instance, in various jurisdictions defects that have been found to materially affect a property's value and thus warrant their disclosure include: occasional sewer problems, basement flooding and roof leakage,** and the failure to reveal a planned tennis court that would be adjacent to property which the sellers knew was being sought for its sailboat.*

In *Johnson*, the contract for sale provided for a roof inspection as well as repairs, if the inspection revealed a problem. Perhaps more important, though, the court acknowledged that the sellers had immediately failed to disclose that there had been roofing difficulties two years earlier. The *Johnson* court implicitly held that the sellers' failure to reveal this fact prior to signing the agreement was a material nondisclosure.**

Logically, a history of roofing problems goes to the very essence of a real estate contract; without a watertight roof, the house no longer serves its basic function of sheltering the occupants. Though the materiality issue was not specifically addressed in *Johnson*, an overview of relevant case law among the various jurisdictions reveals the issue to be a primary source of confusion and litigation within this body of law.

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88. Johnson, 480 So. 2d at 625.
90. See Posner, 76 Ill. App. 3d at 638, 395 N.E.2d at 133.
92. Johnson, 480 So. 2d at 625.
Therefore, any forecasts concerning the future direction of this rule within Florida should include an examination of the possible consequences of applying a subjective interpretation of materiality to those cases involving fraudulent nondisclosure. Relatively, this prediction should also take into account the possibility of holding a seller responsible for constructive knowledge as well as actual knowledge of a defects existence.

V. The Future of Nondisclosure as a Cause of Action

A. Materiality: Objective vs. Subjective

The desired predictability in this body of law can only be attained by basing materiality upon an objective standard. The Second Restatement of Torts defines a fact as material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." By utilizing this standard, the parties to any given transaction can usually determine what must be disclosed, and thereby avoid much potentially costly confusion.

A close examination of the disclosure cases, however, indicates that in practice the courts apply a subjective standard of materiality. For instance, at least one California court has held that there are many factors which may affect the value of real property, including the buyer's personal feelings and beliefs concerning the estate's reputation and history. In Reed v. King, a California seller was held liable for failing to disclose that the property had been the scene of a mass murder several years before. The elderly buyer in Reed argued that as a result of the incident the value of the property had been diminished such that it should be considered a material defect warranting disclosure. The court agreed and announced several factors to be considered in defining materiality, such as the gravity of the harm, the fairness of imposing a duty of discovery on the buyer, and the overall impact upon

the stability of contracts if rescission was permitted.

Despite these criteria, the Reed court, like so many others, implied that any determination of materiality must turn upon whether the nondisclosure amounted to bad faith and was against standards of fair dealing. Additionally, though the court's holding was ostensibly intended to prevent "the floodgates to rescission [from opening] on subjective and idiosyncratic grounds," at least one commentator has suggested that the vague standards which were applied, in reality, permit the exact opposite to occur.

Though the Reed case appears to be a high watermark in determinations of materiality, the processes utilized in reaching the decision are, in the long run, perhaps more important than the decision itself. In other words, though the Reed court permitted an "elderly" buyer to rescind a contract due to the nondisclosure of a fact of dubious and subjective materiality, the logic supporting this holding is quite consistent with the majority of cases in this area.

For instance, as the court in Reed pointed to concepts of "good faith" and "fair dealing" in defining materiality, so too did the Johnson court speak in terms of "elementary fair conduct" in justification of a duty to disclose.

Subjective terms such as "morally right," "good faith," "good conscience" and "fair dealing" continue to highlight the parameters of materiality and the concomitant duty to disclose in these transactions. One can only ponder what direction these vague concepts will lead courts next.

Will the permissible grounds of rescission evolve from the nondisclosure of a decade-old mass murder to that of a fatal slip and fall? Though perhaps taking this example to an extreme, it is illustrative of the gross unpredictability which plagues concepts of materiality within this context.

As long as courts continue to confuse traditional notions of materiality with those of moral correctness, this body of law will remain fraught with confusion. Practitioners should realize that materiality in

93. Restatement (Second) of Torts § 538(2)(a) (1977).
94. In one case a court recognized that a minor condition of cockroach infestation "would clearly not call for judicial intervention." However, in the case at bar, the court admitted that because the roach infestation was "of such magnitude and was so repulsive" to these buyers that disclosure was required. Weintraub, 64 N.J. at 451, 317 A.2d at 74.
95. Reed, 145 Cal. App. 3d at 267, 193 Cal. Rptr. at 133.
96. 145 Cal. App. 3d at 261, 193 Cal. Rptr. at 130.
97. Id. at 267, 193 Cal. Rptr. at 132.
98. Id.
99. Id. at 268, 193 Cal. Rptr. at 134.
102. Johnson, 480 So. 2d at 628.
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\item Id. at 267, 193 Cal. Rptr. at 132.
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\item Note, Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction, 45 U. PIT. L. REV. 877, 890 (1984).
\item Reed, 145 Cal. App. 3d at 267, 193 Cal. Rptr. at 132.
\item Johnson, 480 So. 2d at 628.
\end{references}
the context of nondisclosure may not be judged against concepts of "reasonableness" but instead against those of "moral and ethical reasonableness."

B. Knowledge: Actual vs. Constructive

For the present, at least, it seems that the majority of jurisdictions, including Florida, only require disclosure of facts which are actually within the seller's knowledge. However, though the Johnson court only required disclosure of facts deemed to be within the seller's knowledge, an extremely critical dissent predicted that this may not always be the case. Dissenting, Justice Boyd cautioned that this "is the first step toward making the seller a guarantor of the good condition of the property." He also predicted that the net impact of such a trend would be to "significantly burden the alienability of property because sellers [would] have to worry about the possibility of catastrophic post-sale judgments for damages sought to pay for repairs." Finally, he argued that this trend will, in effect, place the entire duty of inspection upon the seller, leaving the buyer dutless.

In fact, those practitioners actually involved in this landmark decision also agree that because Florida courts "are not interested in delving into the exact mental state of a seller at the time of sale," the development of some sort of constructive knowledge theory of recovery is "inevitable." The nature of the defect would, therefore, provide circumstantial evidence as to whether the seller knew or should have known of its existence.

Given the pervasiveness within this area of law of decisions that are based upon concepts of morality and fair dealing, it seems only a

103. Id. at 629.
104. Id. at 631 (Boyd, C.J., dissenting).
105. Id.
106. Id. This is a point well taken, in that acceptance of the disclosure doctrine effectively abolishes the remaining affirmative duty that is required of a purchaser, namely, the duty to inspect. Under this rule, the purchaser may justifiably rely upon the seller's silence to the extent that he would rely upon an affirmative representation. Indeed, the only remaining issue for the court to decide is whether the defect, upon which the purchaser relied, should be deemed sufficiently deplorable to justify rescission of the transaction.
108. Johnson, 480 So. 2d at 631.
109. Holcomb, 365 N.W.2d at 512.
110. Id.
111. Id.
112. Change All Your "Sales Agreements" For Real Estate, supra note 107, at 108.
113. Young, Use of an "As Is" Clause in Residential Real Estate Transactions, 12 Wis. Bus. L. J. 729 (1984), and see also Wolford v. Freeman, 150 Neb. 537, 35 N.W.2d 98 (1948) (emphasizing that the purchase of property "as is" does not bar rescission grounded on fraudulent conduct by the seller). Id. 150 Neb. at 542, 35 N.W.2d at 103; see also Lingach v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963), in which the court acknowledged that an "as is" clause may be effective to relieve a seller of liability for a clearly observable defect (dilapidated stairways), but in a case where the court stated "that such a view does not make good sense but is based upon sound law with good morals." Id. at 737, 29 Cal. Rptr. at 209.
matter of time before a Florida court is confronted by a set of circumstances that will prompt it to reply: "Seller, if you didn’t know of this defect then you should have."

Additionally, at least one jurisdiction currently holds that a real property vendor may be charged with both actual and constructive knowledge of material defects.\textsuperscript{109} In Holcomb v. Zinke, the Supreme Court of North Dakota recognized that, though the vendor purchaser relationship is not characterized as fiduciary in nature, "it is marked by the clearly superior position of the seller vis-a-vis knowledge of the condition of the property being sold."\textsuperscript{110} Furthermore, the court reasoned that a duty to speak imparted no undue hardship upon sellers of real property.\textsuperscript{111}

This commentator approves of the general trend in this body of law but also feels that a great deal of future litigation will be generated by the vague standards upon which courts consistently base their holdings. For instance, how does one consistently and accurately determine when a fact is material enough to warrant its disclosure? More objective standards must be developed and put into practice before the confusion that characterizes these legal concepts begins to subside.

Some have suggested that, for the time being, a real property vendor may avoid some of the uncertainty in this area by inserting "as is" clauses into all real estate contracts.\textsuperscript{112} However, others also contend that no matter how cleverly worded such clauses might be, they only provide a defense against a breach of contract action, and not to those well grounded in theories of fraudulent misrepresentation or nondisclosure.\textsuperscript{113}

Perhaps the worst possible scenario that a future property vendor

\textsuperscript{109} Holcomb, 365 N.W.2d at 512.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Change All Your "Sales Agreements" For Real Estate, supra note 107, at 108.
\textsuperscript{113} Young, Use of an "As Is" Clause in Residential Real Estate Transactions, Wis. B. BULL., Oct. 1984, at 27. See also Wolford v. Freeman, 150 Neb. 537, 35 N.W.2d 98 (1948) (emphasizing that the purchase of property "as is" does not bar rescission grounded on fraudulent conduct by the seller). Id. 150 Neb. at 542, 35 N.W.2d at 103; see also Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963), in which the court acknowledged that an "as is" clause may be effective to relieve a seller of liability for a clearly observable defect (dilapidated stairway), but ineffectual as to a latent defect known yet undisclosed by the seller. In support of its position the court stated "that such a view ... not only makes good sense but equates sound law with good morals." Id. at 737, 29 Cal. Rptr. at 209.
might envision would be that of a court applying subjective notions of materiality, in conjunction with theories of constructive knowledge. Though Florida and a majority of jurisdictions that recognize nondisclosure as actionable have yet to reach this point, this author feels that it is only a matter of time and, probably, not much time at that.

VI. Conclusion

Traditional notions of fraud aside, it now appears that the cause of action for material nondisclosure in real property transactions will become a firmly entrenched maxim within our legal society. Furthermore, while the overall trend is undoubtedly beneficial, it is nonetheless unfortunate that current notions of “justice, equity and fair dealing” continue to be intermingled with traditional legal standards like materiality. Courts must practice the application of materiality in its objective sense, or the disparity between those cases granting, and those denying recovery, will only increase.

Renee D. Braeunig

114. Keeton, supra note 21, at 31. In a subsequent article Professor Keeton admitted that “[p]erhaps this is too general and vague to use as a precept or standard of law, but it is a better guide to use in forecasting how a court will decide a particular case than is the caveat emptor maxim.” Keeton, Rights of Disappointed Purchasers, 32 Tex. L. Rev. 1, 6 (1953).

Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?

I. Introduction

On November 27, 1971, Aloysia Wood was driving a miniature race car at the Grand Prix Raceway in Walt Disney World when she was injured after another car driven by her fiance struck hers. As a result, she sued several defendants, including Walt Disney World.1 During the trial, she settled with some of the defendants. The jury found for the other defendants. The plaintiff appealed. The appellate court affirmed the decision regarding the remaining defendants, but reversed the decision concerning Walt Disney World, ordering a new