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# Legal Sufficiency of Replication to Plea of Limitations - Piper v. Jenkins

## LEGAL SUFFICIENCY OF REPLICATION TO PLEA OF LIMITATIONS

### *Piper v. Jenkins*[1]

This is an action of deceit arising out of the purchase of a house and lot by plaintiffs. The declaration, filed on February 18, 1954, alleges that on October 22, 1947, the plaintiffs entered into a contract for the purchase of the land, which was conveyed to them by deed dated November 19, 1947; that prior to the contract the plaintiffs had inspected the land in company of one of the defendants, who had pointed out to them a garden, surrounded by rocks, lying about twenty-five feet east of the house; that the defendant had specifically represented that the east boundary of the lot ran approximately one foot east of the east boundary of this garden, but that in February, 1952, the plaintiffs discovered that both the north and south lines of their house projected beyond the true east boundary of the lot. Plaintiffs alleged that the representation was material and had been made falsely, or with a reckless disregard for its truth or falsity, and claimed damages. In addition to the general issue, defendants filed a plea of limitations. Plaintiffs filed a replication thereto claiming the defendants' fraud had kept them in ignorance of their cause of action. A demurrer to this replication was sustained by the lower court and the Court of Appeals affirmed.[2]

In the course of the opinion, before reaching the problem of the legal sufficiency of the replication, the Court of Appeals made several interesting rulings. They pointed out that a vendor of land can be held liable for a misrepresentation of the boundary made with knowledge of its falsity or

[1] 113 A. 2d 919 (Md., 1955).

[2] However, the case was remanded with leave to amend.

with a reckless disregard for its truth or falsity.[3] This is a specific application of the general Maryland rule[4] to this area.

Another ruling[5] is that where the vendor undertakes to point out unmarked boundaries, he must do it correctly, so that the purchaser is entitled to rely thereon, and is not obligated to search the land records or have a survey made.[6] While there are no prior Maryland cases on this point, there are many American cases holding that the purchaser of land may justifiably rely solely on a representation made by the seller as to the location or acreage of the property sold, and need not make an independent investigation.[7]

However, the appeal is from the judgment entered for the defendants sustaining the demurrer to the replication, which had pleaded:

> "That the said cause of action did accrue within three years prior to the filing of this suit inasmuch as the defendants in this cause did fraudulently represent the boundaries of the property which is the subject of this suit and kept the plaintiffs in ignorance of the said cause of action by failing in the initial representation and by failing at any subsequent time to reveal to the plaintiffs the true locations of the boundary lines; and the said facts did not come to the knowledge of the plaintiffs until on or about the month of February 1952, although they used ordinary and usual diligence to discover the same."[8]

Plaintiffs were trying to come within Art. 57, Sec. 14 of the Code, which provides:

> "In all actions where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be

[3] *Supra*, n. 1, 921.

[4] Cahill v. Applegarth, 98 Md. 493, 56 A. 794 (1904); Boulden v. Stillwell, 100 Md. 543, 60 A. 609 (1905).

[5] *Supra*, n. 1, 922.

[6] *Ibid.*

[7] McGibbons v. Wilder, 78 Iowa 531, 43 N. W. 520 (1889); Castenholz v. Heller, 82 Wisc. 30, 51 N. W. 432 (1892); Roberts v. Holliday, 10 S. D. 576, 74 N. W. 1034 (1898); Rohrof v. Schulte, 154 Ind. 183, 55 N. E. 427 (1899); Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558 (1905), aff'd. 215 Mo. 312, 114 S. W. 979 (1908); Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212 (1905); Stout v. Martin, 87 W. Va. 1, 104 S. E. 157 (1920); Wheeler v. Purseley, 88 Okla. 27, 210 P. 1019 (1922); Pattridge v. Youmans, 107 Col. 122, 109 P. 2d 646 (1941); Younis v. Hart, 59 Cal. App. 2d 99, 138 P. 2d 323 (1943); Lanning v. Sprague, 71 Ida. 138, 227 P. 2d 347 (1951); Clark v. Haggard, 141 Conn. 668, 109 A. 2d 538 (1954).

[8] No. 154, Oct. Term, 1954, Appellants' Brief, App. p. 4.

> deemed to have first accrued at the time at which such fraud shall or with usual or ordinary diligence might have been known or discovered."[9]

The appeal was unsuccessful for two reasons: (1) The replication failed to allege specifically how defendants kept plaintiffs in ignorance of their right of action; and, (2) the replication failed to state *specifically:* (a) how plaintiffs discovered the fraud; (b) why the discovery was not made sooner; and (c) what diligence plaintiffs exercised to discover the fraud.

Actually the Court did not rest its conclusion too heavily on the first point in view of the determination that such a misrepresentation can be a fraud, that the plaintiffs would be entitled to rely on it, and that the Maryland statute does not require a separate fraud in concealing the right of action where the original fraud is concealed or is of such a nature as to conceal itself.[10]

The second point, which is the crux of the opinion, is perfectly consistent with the conditions expressed in the Statute and with previous enunciations of the Court as to the requirements of the statute. For example, in *State v. Henderson,*[11] the Court, in dealing with the propriety of rejecting a prayer under this section, said:

> "There was no error in the Court in rejecting the prayer, for it excluded from the consideration of the jury one most material element necessary to the protection which the Statute intended to secure, namely, that by ordinary diligence the fraud could not have been discovered sooner."[12]

However, the particularity required under the principal case has not always been observed, or indeed demanded. In *Wear v. Skinner,*[13] a case dealing with an alleged fraudulently induced assignment of a partnership interest, no question was made as to the sufficiency of pleading detail in the following replication:

> " 'That he was kept in ignorance by the fraud of the defendant for a long time of the cause of action, which

[9] Md. Code (1951), Art. 57, Sec. 14; Md. Laws 1868, Ch. 357. The present form is for all practical purposes identical with the statute as originally enacted.

[10] Wear v. Skinner, 46 Md. 257 (1877); New England Ins. Co. v. Swain, 100 Md. 558, 60 A. 469 (1905); Berman v. Leckner, 188 Md. 321, 52 A. 464 (1947).

[11] 54 Md. 332 (1880).

[12] *Ibid,* 341. See also, Insurance Co. of North America v. Parr, 44 F. 2d 573 (4th Cir., 1930).

[13] *Supra,* n. 10.

> he had against the defendant, and that he brought his action within three years from the time at which he could, with usual and ordinary diligence, have discovered the fraud'."[14]

In *Cummings v. Bannon* a replication substantially similar to the one above, and probably patterned after it, is said by the Court to be "drawn in strict conformity with the act of 1868".[15]

*Cumberland Glass Mnf'g. Co. v. DeWitt,*[16] a leading Maryland case, involved a tortious interference with a contractual relation. The contract was made in February, 1906, breached almost immediately, and suit was filed in 1910. Plaintiff's amended replication stated that the defendant fraudulently concealed the interference "although the plaintiff did charge the defendant with the same upon the first of March, in the year 1906; and the said facts did not come to the knowledge of the said plaintiff until the latter part of the year 1909, although he had used ordinary diligence to discover the same".[17] The Court said, "We also hold that the amended replication to the plea of limitations was good. . . . The language of the replication sets out facts which avoid the plea."[18]

However, by 1945, the requirement which is spelled out in the principal case began to appear. In dealing with a suit filed well over twenty years after the cause of action accrued, the Court gave additional support to its finding of limitations and *res judicata,* in this language:

> "Nor is this case within Section 14 of Article 57. No facts alleged show either (i) that the plaintiff 'has been kept in ignorance of his cause of action by fraud' of the defendant or (ii) that 'such fraud with usual or ordinary diligence might not have been known or discovered' within three years before this suit."[19]

Of course the purpose of this rule is to allow the trial court to make a determination early in the case as to whether the plaintiff exercised reasonable diligence to discover the fraud. The requirement seems to be a perfectly fair way of separating those who have slept on their rights from the real victims of fraud, with a minimum of expense and delay.

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[14] *Ibid,* 264.
[15] 8 A. 357, 359 (Md., 1887).
[16] 120 Md. 381, 87 A. 927 (1913), aff'd. 237 U. S. 447 (1915).
[17] *Ibid,* 387.
[18] *Ibid,* 389.
[19] Giessman v. Garrett County, 185 Md. 350, 362, 44 A. 2d 862 (1945).