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Comment

THE PERIMETERS OF LIABILITY FOR NEGLIGENT MISREPRESENTATION IN MARYLAND

The purpose of this comment is to explore the current contours of the duty element in an action for negligent misrepresentation in which the resulting harm is limited to economic loss. In particular, this comment will address the application of Jacques v. First National Bank to negligent misrepresentation claims arising out of arm's length commercial transactions. Currently, sophisticated parties acting at arm's length may not limit their liability for innocent but negligent misrepresentations in precontractual negotiations. By allowing the scope of liability for negligent misrepresentation to expand to this extent, the Maryland courts have ignored both precedent and the sound policy of a limited scope of liability in tort within the context of a business transaction.

Under current Maryland law, a cause of action for negligent misrepresentation is established by showing: (a) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; (b) intending that the statement will be acted upon by the plaintiff; (c) with knowledge that the plaintiff will probably rely on

2. In the field of purely economic loss ... the extension of the duty to use care beyond special relationships has been sluggish and it is uncertain whether it will (or should) be carried to the full extent that it has been in physical damage cases. The source of the doubt is ... the potentially limitless range of economic harm. And while the history of tort law has been marked by increasing abandonment of limitations based on similar considerations—usually without the fulfillment of the dire predictions—it does not follow that such considerations are without merit in all situations or at all times. In the present context they may justify limiting the scope of defendant's duty of care at some point short of its scope in physical damage cases.
3. On the whole ... courts have provided a remedy for negligent misrepresentation principally against those who advise in essentially nonadversarial capacity. As against sellers and other presumed antagonists, on the other hand, the tendency of most courts has instead been either to rely on deceit with the requirement of scienter, however expanded, or to shift (by analogy to restitution or warranty) to strict liability ... .

Id. at 412-13 (footnotes omitted). The treatise footnotes one anomaly to this proposition—Martens Chevrolet, Inc. v. Seney, 292 Md. 328, 439 A.2d 534 (1982). For a discussion of Martens, see infra notes 73-80 and accompanying text.
the statement and which, if erroneous, will cause loss or injury; (d) the plaintiff, justifiably, takes action in reliance on the statement; and (e) suffers damage proximately caused by the defendant's negligence.4

An action for fraud is distinguishable from an action for negligent misrepresentation in that the scope of liability for fraud is limited by the scienter requirement. The elements of fraud under current Maryland law are: (1) that a representation made by the defendant was false; (2) that either its falsity was known to the defendant or the misrepresentation was made with such reckless indifference to the truth to impute knowledge to the defendant; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) that the plaintiff not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that the plaintiff would not have done the thing from which the damage resulted if it had not been made; and (5) that the plaintiff suffered damage directly resulting from the misrepresentation.5 The scienter element for fraud requires a showing of intentional suppression of material fact with the object of creating or continuing a false impression.6 Furthermore, fraud must be proved with clear and convincing evidence.7 This higher standard of proof, along with the subjective evidence required to prove a defendant's state of mind, serves to protect business parties acting honestly in a commercial context.

The Maryland courts have consistently required that a special relationship exist between the parties to support a negligent misrepresentation claim.8 The contours of the "special relationship" re-

6. 2 HARPER, JAMES & GRAY, supra note 2, § 7.3, at 393-94.
8. See Martens, 292 Md. at 338 n.7, 439 A.2d at 539-40 n.7 (finding precontractual negotiations gave rise to a special relationship between buyer and seller of a car dealership); St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 220, 278 A.2d 12, 26 (1971) (finding knowledge possessed by a mortgage broker created special relationship with clients giving rise to tort duty); Ward Development v. Ingrao, 65 Md. App. 645, 653-54, 493 A.2d 421, 425-26 (1985) (implicitly finding homeowners and subdivision developers had special relationship giving rise to a tort duty); RESTATEMENT (SECOND) OF TORTS § 552 comment h (1977) (stating that the negligent supplier of misinformation is liable only to those individuals for whose benefit the information is supplied).

Negligent misrepresentation bases liability on the defendant's relationship to the plaintiff. It does not impose liability on an individual who makes an honest but negli-
quired for the maintenance of a cause of action for negligent misrepresentation under Maryland law, however, have yet to be clearly defined by the courts. The decision by the court of appeals in *Jacques v. First National Bank* illustrates the current contours of the relationship giving rise to a duty in a common negligence action. Although *Jacques* was a pure negligence action, its test for determining the necessary special relationship for imposing a duty of care should be equally applicable in an action for negligent misrepresentation. Actions in negligence are predicated on a defendant’s failure to use due care. Negligent misrepresentation may be viewed as a subset of a negligence claim which may be maintained if it can be shown, among other things, that the defendant “negligently” asserted a false statement and the plaintiff suffered damage proximately caused by the defendant’s “negligence.” Furthermore, several decisions have expressly found *Jacques*, a pure negligence action, applicable to the duty element in an action for negligent misrepresentation.

Recent decisions considering the applicability of *Jacques* to a negligent misrepresentation action, however, have left *Jacques’* status...
This comment will illustrate that, when *Jacques* is properly applied to the duty element of a negligent misrepresentation claim, both the contours of the requisite relationship are clearly defined and the valid policy underlying limited tort liability in a business context is furthered. Such a limited tort liability, i.e., allowing arm's length commercial actors to confine their economic exposure to the four corners of the contract, permits parties to bargain freely, absent an intent to defraud. Liability for innocent but negligent misrepresentations in a business context unjustifiably interferes with the arm's length bargaining process, thus creating unwarranted and unnecessary additional transaction costs.

I. THE NEGLIGENT MISREPRESENTATION ACTION IN MARYLAND

A close analysis of the development of the negligent misrepresentation action in Maryland indicates a shift from a narrow scope of duty to an expansive reading of the duty element. Initially, Maryland courts required an employer-employee or a fiduciary relationship to exist before imposing negligent misrepresentation liability. With each decision, the "special relationship" required to support the cause of action became less demanding until finally the court of appeals in *Weisman v. Connors* concluded that the relationship between arm's length actors in a commercial setting was sufficient.

In 1938 the Maryland Court of Appeals recognized the tort of negligent misrepresentation for the first time. In *Virginia Dare Stores, Inc. v. Schuman* the plaintiff incurred physical injury as a result of relying on the defendant's misrepresentation. At the time of the misrepresentation, the plaintiff and the defendant stood in an employer-employee relationship. The plaintiff, who was employed to clean the walls of a store, stepped upon a dress display case, relying on the assurances of the employer's agent that it was strong enough

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15. *Id.* at 450, 540 A.2d at 794.
16. 175 Md. 287, 1 A.2d 897 (1938). A window cleaning company sent its employee to a store to wash the walls under the direction of the store manager. The court concluded that the store owner owed the employee some duty either as an employee of the store's contractor, or as an individual doing work on the premises under the direction and supervision of the store manager. *Id.* at 291, 1 A.2d at 901.
17. *Id.*, 1 A.2d at 898.
to support the plaintiff’s weight.\textsuperscript{18}

While the court did not directly discuss the existence of a duty to give information with care, two things can be implied from the reasoning in \textit{Virginia Dare}. First, one may reasonably infer that an employer-employee relationship is a sufficiently close relationship to support a cause of action for negligent misrepresentation. Second, it is reasonable to infer that the contours of the requisite nexus go beyond the rather clear and narrow confines of such a relationship.

The court of appeals cited the New York case of \textit{International Products Co. v. Erie Railroad Co.}\textsuperscript{19} to support the proposition in \textit{Virginia Dare}:

\begin{quote}
Liability in such cases arises only when there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.\textsuperscript{20}
\end{quote}

Thus, Maryland apparently adopted the New York rule allowing recovery for negligent misrepresentation if there is some business or personal relationship, arising out of a contract or otherwise, between the parties which causes the plaintiff to rely on the words spoken.

Ten years later in \textit{Holt v. Kolker}\textsuperscript{21} the court of appeals denied recovery to a plaintiff who was physically injured when she relied on statements made by both her landlord and her plumber that a porch was safe to walk on.\textsuperscript{22} The court analyzed whether the defendants were under a duty to the plaintiff arising from either a previous special relationship or any special knowledge or expertise relating to their misstatements.\textsuperscript{23} The court concluded that the defendants

\textsuperscript{18} \textit{Id.} at 290, 1 A.2d at 900.
\textsuperscript{19} 244 N.Y. 331, 155 N.E. 662 (1927).
\textsuperscript{20} \textit{Id.} at 338, 155 N.E. at 664.
\textsuperscript{21} 189 Md. 636, 57 A.2d 287 (1948).
\textsuperscript{22} \textit{Id.} at 639, 57 A.2d at 288.
\textsuperscript{23} \textit{Id.} at 640, 57 A.2d at 289. From the inception of the tort in \textit{Virginia Dare}, the court has considered expertise as a factor in defining whether a duty was present. \textit{Virginia Dare Stores, Inc. v. Schuman}, 175 Md. 287, 291, 1 A.2d 897, 899 (1938).
were not under a duty to the plaintiff arising out of any previous relationship to the plaintiff or to the property and, as a result, the plaintiff was not entitled to rely on their statements.\textsuperscript{24}

At this point in the development of the law, because \textit{Virginia Dare} and \textit{Holt} involved only physical injury, the viability of a cause of action in negligent misrepresentation for mere pecuniary loss was questionable. The court dispelled the possibility that a claim for nonphysical injury would be barred in \textit{Brack v. Evans}.\textsuperscript{25} In \textit{Brack} the defendants were held liable for advice given to a client by one of their employee stockbrokers.\textsuperscript{26} The court reasoned that because the defendants possessed both a special knowledge and a special relationship, \textit{i.e.}, an employer-employee relationship, with the plaintiffs, they were under a duty to give competent advice.\textsuperscript{27}

The court further defined the privity requirement for a negligent misrepresentation claim in \textit{St. Paul at Chase Corp. v. Manufacturers Life Insurance Co.}\textsuperscript{28} where the court held a mortgage broker liable for negligent misrepresentations made to a developer concerning the withdrawal of a mortgage offer by a prospective lender.\textsuperscript{29} As in \textit{Brack} the court adopted the theory that the defendants held themselves out as having knowledge in a special field causing the plaintiffs to rely upon such expertise.\textsuperscript{30} Significantly, the parties had no special relationship defined by a contract in \textit{St. Paul at Chase}. The court extended the scope of duty for the tort in this case by relying solely on the fact that the defendant possessed special knowledge beyond that of the general public.\textsuperscript{31}

Under similar reasoning, the court in \textit{Local 75, United Furniture Workers of America v. Regiec}\textsuperscript{32} held a union liable for hospital bills as a result of union employees' misrepresentations concerning the plaintiff's coverage.\textsuperscript{33} The court found that a duty of care existed because the union employees were in the business of advising people

\begin{itemize}
\item \textsuperscript{24} \textit{Holt}, 189 Md. at 640, 57 A.2d at 289. The \textit{Holt} court stated that "[i]n Maryland there can be no recovery in an action for deceit on the ground of negligent misrepresentation." \textit{Id.} at 639, 57 A.2d at 288. The scope of liability in deceit actions is traditionally limited to damages for pecuniary harm. 2 \textsc{Harper, James \\& Gray}, \textit{supra} note 2, § 7.2, at 381.
\item \textsuperscript{25} 230 Md. 548, 187 A.2d 880 (1963).
\item \textsuperscript{26} \textit{Id.} at 554, 187 A.2d at 883.
\item \textsuperscript{27} \textit{Id.} at 551-52, 555, 187 A.2d at 882-84.
\item \textsuperscript{28} 262 Md. 192, 278 A.2d 12 (1971).
\item \textsuperscript{29} \textit{Id.} at 215, 219-20, 278 A.2d at 24-26.
\item \textsuperscript{30} \textit{Id.} at 219-20, 278 A.2d at 25-26.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} 19 Md. App. 406, 311 A.2d 456 (1973).
\item \textsuperscript{33} \textit{Id.} at 413, 311 A.2d at 460.
\end{itemize}
as to their coverage and that the plaintiff was entitled to rely on the information given. 34

Thus, the Maryland courts have failed to define clearly the particular nature of the relationship necessary to support a cause of action for negligent misrepresentation, particularly where the allegedly negligent misrepresentations were made in the precontractual stage of an arm's length transaction.

II. DEFINING THE NATURE OF THE DUTY ELEMENT: THE APPLICATION OF JACQUES V. FIRST NATIONAL BANK

The court of appeals recently spoke on the issue of duty in a negligence action for pecuniary loss. In Jacques v. First National Bank 35 the court considered an action in tort against a bank for the negligent processing of a loan application. 36 This case provided the court with an ideal opportunity to illustrate the current contours of the duty element in a negligence action.

In Jacques Robert and Margaret Jacques entered into a residential sales contract contingent upon their ability to obtain specified financing. 37 The contract was further modified, requiring the Jacques to increase their down payment to "whatever amount is necessary to qualify for a mortgage loan." 38 The Jacques submitted an application for a mortgage along with the contract and addendum to the First National Bank of Maryland (the Bank). These items were submitted along with the required processing fee for the appraisal and credit report to initiate processing of the loan. The Bank informed the Jacques that they qualified for a loan well below their expectations. The Jacques requested that their application be refused outright, to allow them to obtain a larger loan, but the Bank refused the request under the provisions of the contract. The Jacques proceeded to settlement with the Bank's mortgage loan and obtained the balance from relatives and a short-term personal loan of $50,000 from the Bank. 39

34. Id.
36. Id. at 528, 515 A.2d at 756.
37. Id. at 528-29, 515 A.2d at 756-57. The contract provided that the Jacques secure the purchase price of $142,000 by paying $30,000 down and the balance of $112,000 through a conventional deed of trust, due in 30 years and having interest at the rate of 12-1/4% per annum. Id.
38. By handwritten addendum, the parties agreed to the following significant modification: "Purchaser agrees to increase the downpayment to whatever amount is necessary to qualify for a mortgage loan." Id. at 529, 515 A.2d at 757.
39. 307 Md. at 530, 515 A.2d at 757.
The Jacques sued the Bank in the Circuit Court for Montgomery County on counts of malicious interference with contract, gross negligence, and negligence. The jury returned a verdict in favor of the Bank on the first two counts and in favor of the Jacques on the negligence count for $10,000. The Jacques appealed on the ground that the judge erred in instructing the jury concerning the plaintiffs' duty to mitigate damages, and the Bank cross-appealed arguing that there was no duty as a matter of law owed in the processing of a loan application. The court of appeals held that the bank owed a duty of care to the Jacques in the processing of their loan application.

Jacques affirmed the well-established rule in Maryland that, absent a duty of care, there can be no liability in negligence. The duty element in a negligence action is "an obligation to which the law will give effect and recognition to conform to a particular standard of conduct toward another." Jacques set forth two principal considerations for recognizing a duty of care: the nature of the injury likely to result from the failure to exercise due care and the relationship existing between the parties. Where only pecuniary harm is likely to result from the failure to exercise due care, a special relationship—contractual privity or its equivalent—must exist between the parties in order to impose tort liability. The court described contractual privity or its equivalent as an "intimate nexus" necessary to maintain the cause of action. While contractual privity is usually quite obvious, as illustrated by the parties in Jacques, "its equivalent" is more difficult to recognize. The court in Jacques set out three factors to make this task easier for the courts.

Briefly, if there is no contractual privity, the court will consider (a) the peculiar skill required of the defendant's calling, (b) the

40. Id. at 530-31, 515 A.2d at 757-58.
41. Id. at 531, 515 A.2d at 758.
42. Id.
43. 307 Md. at 543-44, 515 A.2d at 764.
44. Id. at 531, 515 A.2d at 758; Ashburn v. Anne Arundel County, 306 Md. 617, 626, 510 A.2d 1078, 1083 (1986) (holding that police officer was not in a special relationship with pedestrian and therefore did not have a duty to prevent drunk driver from injuring him).
45. 307 Md. at 532, 515 A.2d at 758 (quoting J. DOOLEY, MODERN TORT LAW § 3.03, at 18-19 (1982 & Supp. 1985)).
46. Id. at 534, 515 A.2d at 759.
47. Id. at 534-35, 515 A.2d at 759-60.
48. Id.
49. 307 Md. at 535-42, 515 A.2d at 761-64.
50. Id. at 541, 515 A.2d at 763.
nature of the business of the party upon whom the burden is sought to be imposed and its relationship with the public interest, and (c) the magnitude of risk created by the activity. These variables will be addressed seriatim.

First, the *Jacques* court considered *Glanzer v. Shepard* to clarify the expertise prong of the intimate nexus requirement. In *Glanzer* the New York court held a public weigher of beans liable to a buyer for negligence in weighing, notwithstanding that there was no privity of contract between the weigher and the buyer. The court found it significant that the weigher held himself out as skilled and careful in his calling. As in *Glanzer*, the Maryland courts have held that if occupations require a peculiar skill, a tort duty to act with reasonable care will be imposed on those who hold themselves out as possessing that requisite skill.

Second, the court will consider the relationship of the defendant’s activity to the public interest when identifying an intimate nexus between the parties. The *Jacques* court looked to decisions relying heavily on the nature of the industry in deciding whether to impose tort liability in the absence of a contractual relationship. In *Djowharzadeh v. City National Bank & Trust Co.*, for example, the Court of Appeals of Oklahoma imposed a tort duty on a bank to preserve the confidentiality of information submitted by a loan applicant. That court relied on the close relationship between the banking industry and public interest. Similarly, the *Jacques* court cited *Duffie v. Bankers’ Life Association of Des Moines*, in which the Supreme Court of Iowa imposed a duty to act promptly when processing submitted applications, reasoning that an insurance company is affected with a public interest because it can operate

51. *Id.* at 541-42, 515 A.2d at 763-64.
52. *Id.* at 537, 515 A.2d at 761.
54. *Id.* at 238, 135 N.E. at 276.
55. *Id.* at 238-39, 135 N.E. at 275-76. Compare Ultramares Corp. v. Touche, 255 N.Y. 170, 188, 174 N.E. 441, 448 (1931), in which the same court held public accountants who carelessly prepared balance sheets could not be held liable to the plaintiff who made loans in reliance upon the balance sheet. That court distinguished *Glanzer v. Shepard*, 233 N.Y. 236, 238-39, 135 N.E. 275, 275-76 (1922), by finding that there was no contractual relation or even one approaching it that imposed any duty to the indeterminate class of persons who may rely on the audit. 255 N.Y. at 183, 174 N.E. at 446.
59. *Id.* at 619-20.
60. 160 Iowa 19, 199 N.W. 1087 (1913).
only under a state franchise.\textsuperscript{61}

While the court considered the public nature of the business in Jacques, it pointed out that it was not necessarily assigning this part of the test as much weight as the Iowa and Oklahoma courts had.\textsuperscript{62} Because the court found a contractual relation to exist, it was not necessary for it to determine the Bank's liability absent a contract.\textsuperscript{63}

The third prong in determining whether an intimate nexus exists evaluates the magnitude of risk created by the activity.\textsuperscript{64} In Jacques the court found compelling the fact that the Bank was on notice of the great potential for economic harm that its negligence could cause the plaintiff.\textsuperscript{65}

Thus, Jacques stands for the proposition that in the absence of contractual privity, an action in negligence for economic harm will fail for a lack of duty unless the defendant's business (1) is connected to the public interest, (2) requires special knowledge or expertise not available to the general public, and (3) creates great and foreseeable economic harm in light of its business setting. A correct reading of Jacques would require the court to find either contractual privity or the satisfaction of the above elements before allowing the claim to proceed.

Post-Jacques negligent misrepresentation cases in Maryland, however, have failed to apply this analysis. The predictable result is that commercial parties acting at arm's length are deprived of the commercial certainty previously provided by the privity requirement of an action in tort.

In 1982 the court of appeals considered such a negligent misrepresentation action in Martens Chevrolet, Inc. v. Seney.\textsuperscript{66} The court held that a seller could be liable to a buyer for negligent misrepresentations made in the precontractual stage of an arm's length

\textsuperscript{61} Id. at 25, 139 N.W. at 1089-90.
\textsuperscript{63} Id. at 540, 515 A.2d at 762.
\textsuperscript{64} See supra note 52 and accompanying text.
\textsuperscript{65} 307 Md. at 540-41, 515 A.2d at 762-63. Once the First National Bank of Maryland (the Bank) accepted the loan application for processing, the Jacques were "legally obligated to either proceed to settlement with the loan determined by the Bank or forfeit their deposit of $10,000 and lose any benefit of their bargain." Id. at 541, 515 A.2d at 763. See Council of Co-Owners of Atlantis Condominium, Inc. v. Whiting-Turner Constr. Co., 308 Md. 18, 517 A.2d 336 (1986), where the court held that the "determination of whether a duty will be imposed . . . should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage." Id. at 95, 517 A.2d at 345.
\textsuperscript{66} 292 Md. 328, 439 A.2d 534 (1982).
agreement. Martens represented a departure from previous case law by imposing liability on a defendant who stood neither in contractual privity with the plaintiff nor worked in a field traditionally requiring a higher duty to the general public. Likewise, in 1988 the court of appeals affirmed this departure in Weisman v. Connors where liability was imposed for misrepresentations made to a prospective employee. The court in Weisman applied Jacques to a negligent misrepresentation claim and found that the requisite privity or its equivalent had been established by the precontractual negotiations of the parties. This conclusion created a degree of uncertainty as to the status of Jacques. If Jacques meant that privity must be shown by a contract or its equivalent, and that this equivalent could be established by a consideration of the three factors noted above, then the Weisman result is inexplicable. That is, the Jacques decision, and subsequent cases applying its rationale to negligent misrepresentation claims, proposed that the expansion of liability into the precontractual stage of an arm's length transaction was ill advised.

III. Jacques and a Negligent Misrepresentation Claim Arising out of an Arm's Length Transaction

In Martens Chevrolet, Inc. v. Seney the court of appeals affirmed that the tort of negligent misrepresentation exists in Maryland. The Martens court considered the development of the tort and concluded that negligent misrepresentation may be established by a showing of the five principal elements stated previously. The court specifically found that a negligent misrepresentation claim may be applied to statements made in connection with the consummation of an arm's length transaction.

In Martens Henry J. Marten, Jr. and his son, Henry J. Marten,
III, entered into negotiations for the purchase of a car dealership owned by Howard F. Seney. During the precontractual negotiations, the Martens informed Seney that they intended to continue operation of the dealership and therefore requested information about the corporation's financial status. Seney provided the Martens with a handwritten financial trend sheet. The sheet indicated a profitable enterprise, but, unknown to the buyers, failed to make adjustments for bonuses and taxes. The Martens made repeated requests to see audited financial statements but were told that none existed. In reliance on the handwritten financial trend sheet, the Martens purchased the franchise from Seney. After six months, the newly owned business experienced a $187,000 loss.

The plaintiffs alleged, among other things, a cause of action for negligent misrepresentation. The trial judge directed a verdict in favor of the defendants "seemingly on the ground that the cause of action does not exist in this State." The court of appeals reversed the lower court, affirmed the existence of the claim in Maryland, and rejected the defendants' argument that the cause of action does not apply to parties acting at arm's length. Martens was decided four years before the court of appeals' decision in Jacques.

Post-Jacques decisions suggest that applying Jacques to a negligent misrepresentation claim gives substance to the "special relationship" required to support the cause of action. A reasoned policy analysis underlying the imposition of tort liability for purely economic harm indicates not only that the Jacques analysis is appropriately applied to the duty requirement of an action for negligent misrepresentation, but that the valid policy concerns underlying the limitation of liability would be furthered by such application. Therefore, it is reasonable to assume that Jacques was intended to clarify the situations in which a tort action for economic loss would be allowed to proceed.

The Maryland Court of Special Appeals considered the application of Jacques to a negligent misrepresentation claim for the first time in Weisman v. Connors. The court considered whether misrepresentations made to a prospective employee were actionable. In

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76. Id. at 331-32, 439 A.2d at 536-37.
77. 292 Md. at 332, 439 A.2d at 537.
78. Id. at 330, 439 A.2d at 536.
79. Id. at 337, 439 A.2d at 539.
80. Id. at 337-38, 439 A.2d at 539-40.
81. See cases cited supra note 12.
Weisman, the plaintiff, Arthur Connors, was asked by the defendant, Frederick Weisman, to leave his job as vice president of Ford Motor Company (FMC) to join Weisman's company as executive vice president. Connors resigned his post at FMC in reliance on various statements made by Weisman in connection with his new employment. Several promises made by Weisman never came to pass.

Two years after he joined Weisman's company, Connors resigned and filed suit alleging, among other things, negligent misrepresentation. The trial court entered a verdict in favor of Connors, and Weisman appealed, arguing that the relationship between the parties did not give rise to a duty of care to support a cause of action for negligent misrepresentation.

Apparently, Weisman asked the court to apply a plain reading of Jacques to the duty element of the case, requiring contractual privity, or in the alternative to find that he was not engaged in activity giving rise to liability in the absence of privity. As noted, Jacques would require contractual privity or its equivalent in order to impose liability in negligence for pecuniary loss, an element not present in Weisman. If the court were to accept this interpretation of Jacques, parties acting at arm's length should be shielded from liability for negligent misrepresentations in the precontractual stage of a negotiation.

The intermediate appellate court in Weisman dismissed the application of Jacques by finding that "[w]hile Jacques contains an excellent exposition of the nature and elements of tortious negligence, we fail to see how it affects this case. There is nothing in Jacques that purports to modify the principles set forth in Martens Chevrolet." This assumption misses the mark. A careful review of Maryland cases indicates that the duty of care owed in an action for negligent misrepresentation resulting in economic harm has the same scope

83. Id. at 736, 519 A.2d at 788.
84. Id. at 745, 519 A.2d at 788.
85. Id. at 745 n.4, 519 A.2d at 801 n.4. "At oral argument appellants laid great stress on the recent decision of the Court of Appeals in Jacques v. First National Bank." Id.
86. Jacques mandates that before liability for negligence resulting solely in economic harm will be imposed, the plaintiff and defendant must stand in contractual privity or its equivalent. Absent contractual privity, liability may also be imposed under Jacques after consideration of (1) the nature of the defendant's business; (2) whether the defendant possesses special skill or knowledge; and (3) the foreseeability of harm. Jacques v. First Nat'l Bank, 307 Md. 527, 541, 515 A.2d 756, 763 (1986). In Weisman, neither contractual privity nor these criteria were satisfied.
87. Weisman, 69 Md. App. at 745 n.4, 519 A.2d at 801 n.4.
as the duty of care in a negligence action for the same harm.\textsuperscript{88}

The court of appeals granted Weisman's petition for certiorari to consider several questions relating to whether the evidence supported a negligent misrepresentation claim and, if so, whether the jury employed the proper theory of damages in making its award.\textsuperscript{89} Weisman argued that his alleged failure to exercise due care "creates only a risk of economic loss, [and] an intimate nexus between the parties, \textit{i.e.}, contractual privity or its equivalent, is required as a condition to the imposition of tort liability."\textsuperscript{90} Weisman further argued that commercial expectations are protected by contract and not by negligence actions.\textsuperscript{91}

The court of appeals reviewed the relevant Maryland law on negligent misrepresentation and concluded that the "requisite privity of contract or its equivalent, essential to the establishment of a tort duty of care, as required by \textit{Martens} and \textit{Jacques}, was an issue properly submitted to the jury on the evidence adduced at the trial."\textsuperscript{92} Although the \textit{Weisman} court cited \textit{Jacques} when it considered the duty issue, it did not apply the \textit{Jacques} three-prong analysis\textsuperscript{93} in determining the scope of liability in tort for economic harm, as \textit{Jacques} indicates is required in the absence of contractual privity. Instead, the court held that the "jury could have found from the evidence that the circumstances under which the two men came together in precontractual negotiations created a sufficiently close nexus or relationship as to impose a duty on Weisman not negligently to make statements . . . ."\textsuperscript{94}

A proper application of the \textit{Jacques} holding was illustrated in \textit{Hill v. Equitable Bank}\textsuperscript{95} where the federal district court in Delaware, applying Maryland law, held that a bank could be held liable for negligent misrepresentation relating to inducements leading to the plaintiff's participation in an ultimately unprofitable real estate partnership.\textsuperscript{96} The court closely followed the reasoning in \textit{Jacques}, first by finding a contractual relationship and, second, by identifying the relevant policy concerns underlying the imposition of liability on a

\textsuperscript{88} See supra notes 25-34 and accompanying text.
\textsuperscript{89} Weisman v. Connors, 312 Md. 428, 440-41, 540 A.2d 783, 789 (1988).
\textsuperscript{90} Id. at 441, 540 A.2d at 789.
\textsuperscript{91} Id. at 442, 540 A.2d at 790.
\textsuperscript{92} Id. at 458, 540 A.2d at 794.
\textsuperscript{93} See supra notes 49-52 and accompanying text.
\textsuperscript{94} Weisman, 312 Md. at 448, 540 A.2d at 793.
\textsuperscript{95} 655 F. Supp. 631 (D. Del. 1987).
\textsuperscript{96} Id. at 650.
bank under the circumstances. The court held that the parties possessed the relationship required by Jacques to maintain a cause of action for negligent misrepresentation. The court reasoned that opening accounts and fostering a business relationship with the defendant bank created the requisite contractual relationship giving rise to tort liability for negligent misrepresentation.

The Delaware court also considered the three factors noted by the Maryland court in Jacques and held that the Delaware bank satisfied these criteria as well. The Delaware court followed the reasoning in Jacques stating that

[t]he banking business is affected with the public interest. Traditionally banks and their officers have been held to a high degree of integrity and responsiveness to their public calling. Although not directly applicable to the respondent because of its status as a national bank, the requirements imposed by the Maryland Legislature upon state banks illustrate this State’s policy concerning the banking industry . . . . The recognition of a tort duty of reasonable care under the circumstances presented by this case is thus consistent with the policy of this State as expressed by the Legislature, and reasonable in light of the nature of the banking industry and its relation to public welfare.

Significantly, the court found this policy rationale equally appropriate to finding a duty under a negligent misrepresentation claim.

Judging from the court of appeals’ decision in Weisman, it is apparent that the court will apply Jacques to a negligent misrepresentation claim in the future. What is not clear, however, is the manner in which Jacques will be applied. A reading of Jacques, as suggested by the Weisman decision, will do little to establish appropriate and easily discernable perimeters of liability for negligent misrepresentation.

IV. SUMMARY

Jacques provided the court with the opportunity to move closer
to establishing a more consistent analytical framework for the duty element in a tort action for economic harm. The court in Weisman confused the issue by not applying the sound analysis and the plain language of its previous decision in Jacques.

Although Weisman correctly recognized that "Jacques contains an excellent exposition of the nature and elements of tortious negligence," \(^{104}\) it incorrectly applied the Jacques three-prong test.\(^{105}\) Jacques explicitly indicates that a contract must have been formed in order to give rise to liability in negligence for economic harm.\(^{106}\) Because Jacques should be applied when defining the duty element for negligent misrepresentation, the lack of contractual privity or its equivalent would bar a claim for negligent misrepresentation when the parties act at arm's length. Jacques suggests that a duty should be found in the absence of contractual privity only after considering the nature of the defendant's business, the magnitude of risk, and the public interest.\(^{107}\)

An example of the dangers inherent in expanding the duty element beyond the perimeters set by Jacques may be found in Giant Food v. Ice King\(^{108}\) where the court of special appeals purported to apply Jacques to a negligent misrepresentation claim.\(^{109}\) That court failed to apply the three-prong analysis in the absence of contractual privity. The court found that a "full-fledged" business relationship indicated the presence of an "‘intimate nexus' akin to a contractual relationship or its 'equivalent' " to support a cause of action for negligent misrepresentation.\(^{110}\) The indeterminate boundaries set by this full fledged "business relationship" test create commercial uncertainty for parties seeking to enter into new contracts.

In Ice King the court relied on several communications between the parties concerning the possibility of entering into a contract to supply ice. Conversations between the plaintiff, Ice King, and the defendant, Giant Food (Giant), included: (1) the type, price, and quantity of ice; (2) the delivery terms; (3) the location of Ice King's plant; (4) the size of the storage facility needed to satisfy Giant's demand; (5) Giant's authorization of the plaintiff's statement on a loan application that Giant was going to buy ice from Ice King;

\(^{105}\) See supra notes 49-52 and accompanying text.
\(^{107}\) Id. at 541-42, 515 A.2d at 763. See St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 219-20, 278 A.2d 12, 26 (1971).
\(^{109}\) Id. at 191, 536 A.2d at 1185-86.
\(^{110}\) Id., 536 A.2d at 1185 (quoting Jacques, 307 Md. at 534-35, 515 A.2d at 759-60).
Giant’s assurances that everything was “all right”; (7) arrangements for the inspection of Ice King’s plant; and (8) Giant’s demand for further samples. The court concluded that these communications constituted a full-fledged business relationship indicating the presence of an intimate nexus.

Despite its decision to apply Jacques, the Giant Food court proceeded to ignore the three-prong test, as did the court in Weisman, to determine whether the required intimate nexus was satisfied. Although the court could discern no contract between the plaintiff and the defendant, it found that the relationship between the parties gave rise to a tort duty. This conclusion was rather incredible in light of the fact that a grocery store, unlike a bank or a brokerage house, has: (a) little connection with the public interest; (b) no requirement of professional knowledge or expertise; and (c) created a slight and foreseeable risk in light of its commercial setting. After Weisman and Ice King, parties seeking to enter into contracts at arm’s length will be venturing into uncharted waters with the threat of tort liability for innocent misrepresentations in the precontractual bargaining stage.

A review of the factors mandated by Jacques militates against the imposition of liability in negligence for the acts or words of an arm’s length actor in precontractual negotiations. Arm’s length transactions, by definition, do not involve unequal bargaining positions as a result of the possession of peculiar skills required of a particular profession. In addition, a business acting at arm’s length with other commercially sophisticated parties generally has a close relationship with the public interest, investing it with enormous public trust which expects a high degree of integrity. Further, the magnitude of risk involved in bargaining at arm’s length is well within the contemplation of both parties to the transaction. Ironically, the imposition of liability in tort for negligent misrepresentations in these circumstances removes the possibility of commercial certainty.

The policy underlying the requirement of a higher standard of care for professionals is inapplicable to parties acting at arm’s length. Transactions between laypersons and professionals neces-

111. Id.
112. 74 Md. App. at 191, 536 A.2d at 1185.
113. Id.
114. Id. at 192, 536 A.2d at 1186.
115. See supra notes 50-52 and accompanying text.
116. See supra note 56 and accompanying text.
118. See supra note 3.
sarily involve unequal bargaining positions due to the unequal access to specialized knowledge. Consequently, the court is left to weigh the potential for vast tort liability for economic harm, a result it has already sworn to avoid, against creating an incentive for parties at arm's length to deal fairly with each other, which lies arguably within the province of the legislature and not the court. In addition, liability for fraud arguably provides a sufficient safeguard for the fair dealing goal. Absent a specific intent to defraud, the law should "encourage the flow of commercial information upon which the operation of the economy rests... for no interest of society is served by promoting the flow of information not genuinely believed by its maker to be true."

Accordingly, the Maryland courts should follow and apply a plain reading of Jacobs in order to define the duty element in a negligent misrepresentation claim. Significantly, the federal district court in Hill found no difficulty in applying Jacobs. Admittedly, the Hill court was presented with an "easy" case and its ultimate determination would have been the same with or without a consideration of Jacobs. Likewise, Martens would have concluded that a duty ex-

119. 307 Md. at 537, 515 A.2d at 761. Jacobs declared that

[a]s the magnitude of the risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury. Conversely, as the magnitude of the risk decreases, a closer relationship between the parties must be shown to support a tort duty. Therefore, if the risk created by negligent conduct is no greater than one of economic loss, generally no tort duty will be found absent a showing of privity or its equivalent.

Id.

120. Although a duty of fair dealing generally is now imposed on the parties to a contract, that duty is not formulated so as to extend to precontractual negotiations. See U.C.C. § 1-203 (1978); Restatement (Second) of Contracts § 205 & comment c (1979).

121. It is significant that the court in Jacobs cited with approval the holding of the New York court in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). The court stated that

[in the absence of the intimate nexus found in Glanzer, the Ultramares court concluded that the accountants might be liable to the factor for deceit, but not for negligence alone. "[I]f there has been neither reckless misstatement nor insincere profession of an opinion, but only an honest blunder, the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made."

Jacobs, 307 Md. at 536, 515 A.2d at 760 (quoting Ultramares, 255 N.Y. at 189, 174 N.E. at 448).

For recovery in deceit, Maryland law requires that fraud be proved by clear and convincing evidence. See Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft, Inc., 17 Md. App. 646, 656, 303 A.2d 482, 438 (1973).

122. Restatement (Second) of Torts § 552 comment a (1977).
isted even without considering the party’s unequal bargaining positions. Nevertheless, the Hill court recognized the impact that a plain reading of Jacques should have on a negligent misrepresentation claim, and considered the Jacques three-factor analysis before determining that a duty existed.

V. Conclusion

A reasoned analysis of the policy underlying the imposition of tort liability for purely economic harm indicates not only that the Jacques analysis is appropriately applied to the duty requirement of an action for negligent misrepresentation, but that the valid policy concerns underlying the limitation would be furthered by such application. The imposition of tort liability for innocent but negligent misrepresentations in the precontractual stage of an arm’s length transaction goes beyond the contours of liability suggested by a plain reading of Jacques.

ANDREW C.J. McCANDLESS KIDD