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Caveat Vendor: Sellers of Real Estate Now Need to Beware of Misrepresentations about the Condition of Property

Timothy A. Reuschel

Notes

Caveat Vendor: Sellers of Real Estate Now Need to Beware of Misrepresentations About the Condition of Property

Droz v. Trump[1]

I. INTRODUCTION

The common law approach to disclosure of latent defects in real property was *caveat emptor*, which meant sellers had no duty to disclose latent defects to purchasers.[2] Most modern courts have mitigated the harshness of the doctrine by adopting a system that mandates disclosure by a seller of any latent defect[3] material to the purchaser's decision to buy the property and whose existence is known by the seller.

Droz v. Trump highlights a growing trend among a number of Missouri courts willing to further narrow the seller protections of *caveat emptor* in favor of protecting innocent purchasers of real property. Most significant in this case is the use of the affirmative representation doctrine to completely cancel the purchaser's duty to investigate latent defects.

II. FACTS AND HOLDING

Laura Trump and her late husband, Wallace, purchased the site of the former Trenton Landfill in 1980.[4] The Trumps raised a variety of row crops and livestock on the site until enrolling it in the Conservation Reserve Program (CRP) in 1984.[5]

In a letter dated February 20, 1990, the Missouri Department of Natural Resources (MDNR) informed Mrs. Trump that the property was being investigated as an uncontrolled hazardous waste disposal site.[6] Shortly after

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1. 965 S.W.2d 436 (Mo. Ct. App. 1998).

2. GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT 175 (5th ed. 1998).

3. A latent defect is one that is not reasonably discoverable through a reasonable inquiry by the purchaser.

4. *Droz*, 965 S.W.2d at 439.

5. *Id.*

6. Droz v. Trump, 965 S.W.2d 436, 439 (Mo. Ct. App. 1998). The specific regulations pertaining to property placed on the Registry of Abandoned or Uncontrolled Hazardous Waste Disposal Sites are located at MO. CODE REGS. ANN. tit. 10, § 25-10 (1998). Once placed on the registry, no changes, including the keeping of livestock or sowing of crops, are allowed without the specific permission of the MDNR. Most

receiving the MDNR notification, Trump listed the property for sale with Walden Realty of Trenton.[7]

Clifford Droz was interested in purchasing land in the Trenton area on which he could build a home and raise horses.[8] Droz contacted Virgil Walden of Walden Realty who, along with agent Wayne King, showed Droz the Trump property and disclosed the fact that the site had previously been used as a landfill.[9] Walden informed Droz of the Trumps' uses of the property and assured him that the site would be suitable for his intended purposes.[10] At trial, Walden denied being told about the MDNR investigation, but Trump testified that she instructed Walden to inform any potential buyers of the investigation.[11] Interestingly, a copy of the MDNR letter was located in the Walden Realty file.[12]

Because the Trenton Mercantile Bank had concerns about the site's previous use as a landfill, Droz secured a personal loan (instead of a real estate loan) to purchase the property.[13] A copy of the MDNR letter appeared in the Bank's file, although the Loan Officer in charge could not remember whether the letter or its contents were ever discussed with Droz.[14]

On July 30, 1990, Droz and Trump entered into a real estate contract for the purchase of the property.[15] The contract did not disclose the MDNR investigation and no evidence was produced at trial that Droz ever learned of the MDNR investigation prior to the sale.[16] The sale closed in November 1990.[17]

In May 1991, the MDNR notified Droz that it intended to place the former Trenton landfill on the "Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites in Missouri."[18] Droz contested the placing of the property on the Registry at an administrative hearing,[19] but the site was ultimately placed on the Registry in July 1992.[20]

In April 1993, Droz filed a three count petition seeking (1) damages for fraud against the realtor Walden, (2) damages for breach of warranty against Trump, and (3) rescission of the contract based upon fraudulent

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owners of registry properties can do little more with their land than mow down weeds and pay taxes.

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Droz v. Trump, 965 S.W.2d 436, 439 (Mo. Ct. App. 1998).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Droz v. Trump, 965 S.W.2d 436, 439 (Mo. Ct. App. 1998).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 439-40.

misrepresentation.[21] Prior to trial, Droz dismissed the fraud count against Walden and the breach of warranty claim against Trump, electing to pursue his equitable remedy of rescission.[22] Droz argued that Trump (and/or her agent, Walden Realty) had a duty to disclose the MDNR investigation because it was material to Droz's decision to buy the property.[23] Droz further argued that this fact was not readily discoverable by a potential purchaser.[24] Droz testified that he would not have purchased the property had he been aware of the MDNR investigation and its potential consequences.[25] Trump argued that there was no duty to disclose the investigation because Droz knew of the landfill's previous use and did not make an adequate inquiry into the status of the property.[26]

The trial court entered judgment for Trump finding: (1) that neither Trump nor her agent *knowingly* concealed a material fact; and (2) that Droz did not make a reasonable inquiry which would have discovered the alleged nondisclosed material fact.[27]

On appeal, Droz argued that the trial court misapplied the law of rescission by requiring a knowing concealment of a material fact.[28] Droz contended that rescission could be based upon constructive fraud predicated by an innocent misrepresentation or nondisclosure.[29] Droz also contended that he was under no duty to make an inquiry and that, even if he had investigated, there was no evidence that the MDNR review could have been discovered.[30]

The Missouri Court of Appeals for the Western District of Missouri reversed the trial court's decision and held that: (1) rescission of a real estate contract for fraudulent misrepresentation may be based on either actual or constructive fraud; and (2) while there is a duty to investigate potential defects where a reasonable person would be suspicious, there is no duty of inquiry where a purchaser relies on a specific representation made by the vendor or her agent.

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21. Droz v. Trump, 965 S.W.2d 436, 440 (Mo. Ct. App. 1998).

22. *Id.* The decision to pursue rescission stemmed primarily from the fact that Droz no longer wanted to have an ownership interest in the encumbered property. Even if Droz had been granted a judgment for damages, he would still have had a virtually useless piece of property totally unsuitable for his purposes. Another interesting factor in this decision was the fact that the realtor, Walden, had been involved in a disabling accident shortly before trial, and Droz's attorney felt that Walden might appear sympathetic to the court.

23. *Id.*

24. *Id.*

25. *Id.*

26. Droz v. Trump, 965 S.W.2d 436, 443 (Mo. Ct. App. 1998).

27. *Id.* at 440.

28. *Id.*

29. *Id.*

30. *Id.*

III. LEGAL BACKGROUND

A. Caveat Emptor and the Modern Approach to Seller Disclosure

As every first year student of property learns, the common law approach to disclosure of latent defects in a given piece of real estate was *caveat emptor*,[31] which placed no duty upon the seller to disclose any defect, including material defects known to the seller.[32] The modern trend, however, is clearly away from a strict *caveat emptor* regime and toward a system that shifts the burden to the seller to disclose any defect that is: (1) known by the seller; (2) latent; and (3) material to the purchaser's decision to buy the property.[33] Recently, a number of states (including Missouri) have expanded this principle by requiring disclosure of off-site defects, such as nearby environmental contamination or nuisances.[34] Some states have even entertained criminal prosecutions in situations where the undisclosed information could have been discovered in the public land records.[35]

Caveat emptor, however, is not completely dead. In *Stambovsky v. Ackley*,[36] New York reaffirmed *caveat emptor* when a seller failed to disclose that a number of paranormal events had occurred in the home and that many individuals had come to the conclusion that the house was haunted.[37] The appellate panel applied the common law *caveat emptor* rule and stated that there was "no duty upon the vendor to disclose any information concerning the premises."[38]

Missouri has followed the modern trend and abandoned the traditional formulation of the *caveat emptor* doctrine.[39] The general rule in Missouri

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31. NELSON & WHITMAN, *supra* note 2, at 175.

32. *Id.*

33. *See generally* Johnson v. Davis, 480 So. 2d 625 (Fla. 1986); Strawn v. Canuso, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994).

34. *See* Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1992); O'Leary v. Indust. Park Corp., 542 A.2d 333, 335 (Conn. App. Ct. 1988); Haberstick v. Gordon A. Gundaker Real Estate Co., 921 S.W.2d 104, 108 (Mo. Ct. App. 1996); *Strawn*, 638 A.2d at 144.

35. State v. Young, 711 A.2d 134, 135 (Me. 1998). The defendant was charged with theft by fraud for not disclosing the fact that there was an outstanding mortgage on the property sold to purchaser. *Id.*

36. 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

37. *Id.* at 674.

38. *Id.*

39. *See generally* Wasson v. Schubert, 964 S.W.2d 520, 524 (Mo. Ct. App. 1998); VanBooven v. Smull, 938 S.W.2d 324, 328 (Mo. Ct. App. 1997); Stephenson v. First Missouri Corp., 861 S.W.2d 651, 656 (Mo. Ct. App. 1993); Mobley v. Copeland, 828 S.W.2d 717, 726 (Mo. Ct. App. 1992).

requires disclosure by the seller of all material latent defects that are not discoverable through a reasonable investigation.[40]

B. What is the Scope of a Purchaser's "Reasonable Investigation"?

Unless they are in a strict *caveat emptor* jurisdiction, courts dealing with disclosure cases face questions focused primarily on the type of investigation necessary and its scope. As with many areas of the law, the battleground will be found where parties need to determine whether some course of action is "reasonable." In a real estate case, is visual inspection of the property enough to be considered reasonable? Must an inspector be hired to verify the representations made by the seller? Is searching the recorded documents sufficient or should a prospective purchaser go further?

Many jurisdictions find that reasonable care for a purchaser encompasses at least a cursory physical inspection of the property coupled with a search of the recorded land title records.[41] The rationale behind these requirements is that it is neither unusual nor unnecessarily burdensome to have a title search performed and that a purchaser's willful blindness to the property's true state of title should not protect her. A California court has gone even further and required a purchaser to search any public records that contain information about the latent defect.[42] In *Pagano*, the court declined to hold a seller's agent liable for failing to disclose the existence of a pending lawsuit on the theory that the purchaser could have discovered the true situation by searching the public records.[43]

C. The Doctrine of Affirmative Representation

Equitable remedies, such as rescission of a real estate sale contract, usually require a finding that the plaintiff did not create or contribute to the situation by failing to make reasonable inquiry into the specific nature of the transaction. However, whether a state follows the traditional common law (*caveat emptor*) approach or the modern formulation requiring more expansive seller disclosure, courts generally agree that a specific representation made by a seller or his agent greatly affects the duties imposed on the respective parties.

Some courts hold that a specific representation made by a seller or his agent relieves the purchaser of any duty to inquire into the truth or falsity of the representation, even if the truth would be easily discoverable by the purchaser. In *Mahler v. Keenan Real Estate*,[44] a real estate agent told the purchasers that

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40. *See supra* note 39.

41. Dickinson v. Moore, 468 So. 2d 136 (Ala. 1987); Sisler v. Security Pac. Bus. Credit, Inc., 614 N.Y.S.2d 985, 988 (N.Y. App. Div. 1994).

42. Pagano v. Krohn, 70 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 1997).

43. *Id.*

44. 876 P.2d 609 (Kan. 1994).

there was no problem with the water system for a house.[45] The Kansas Supreme Court held that despite the ease with which the false representation could have been discovered by the purchasers, the affirmative representation made by the seller canceled any duty the purchasers had to inspect the premises and that the purchasers had an unconditional right to rely on any statements made by the vendor.[46]

A second approach adopted in some jurisdictions places a duty on the purchaser to investigate the statements made by the vendor when the parties stand on equal footing. Representative of this second view is *Hope v. Brannan*,[47] in which the seller's broker told the purchasers that the house was free of termites (it was not) and the roof was 2 years old (it was more than 15 years old).[48] The Alabama Supreme Court held that since the purchasers could have easily discovered the defects, and because the seller did nothing to impede the purchasers' right to investigate, the purchasers failed to protect themselves and were not entitled to recover.[49]

Missouri courts have generally followed the more liberal approach to specific misrepresentations, often finding that the purchaser's duty to investigate is canceled by a positive representation made by the seller or her agent.[50] For instance, in *Stephenson v. First Missouri Corp.*,[51] a real estate broker misrepresented the existence of ingress/egress easements to the subject property when in fact the tract being purchased was landlocked.[52] The Missouri Court of Appeals for the Western District of Missouri held that when "distinct and specific" representations are made, the purchaser's equitable duty to investigate

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45. *Id.* at 610. The problem could have been discovered through a simple investigation by an experienced inspector.

46. *Id.* at 614. *See also* Upledger v. Vilanor, 369 So. 2d 427, 430 (Fla. Dist. Ct. App. 1979); Waste Management v. Carver, 642 N.E.2d 1058, 1061-62 (Mass. App. Ct. 1994) (Purchaser not faulted for failure to investigate vendor's misrepresentation concerning the environmental condition of the property); Russo v. Williams, 71 N.W.2d 131, 137 (Neb. 1955); Wirth v. Commercial Resources Inc., 630 P.2d 292, 297 (N.M. Ct. App. 1981); Grube v. Dawn, 496 N.W.2d 106, 114 (Wis. 1992) (Broker liable to purchasers of farm buildings for misrepresenting that property would be suitable for purposes).

47. 557 So. 2d 1208 (Ala. 1989).

48. *Id.* at 1210.

49. *Id.* at 1211. *See also* Dickinson v. Moore, 468 So. 2d 136, 138 (Ala. 1985); Evans v. Teakettle Realty, 736 P.2d 472, 473 (Mont. 1987); Dawson v. Tindell, 733 P.2d 407, 409 (Okla. 1987); RESTATEMENT (SECOND) OF TORTS § 463 (1965).

50. *See* Wasson v. Schubert, 964 S.W.2d 520 (Mo. Ct. App. 1998); VanBooven v. Smull, 938 S.W.2d 324, 328 (Mo. Ct. App. 1997); Stephenson v. First Missouri Corp., 861 S.W.2d 651, 656 (Mo. Ct. App. 1993); Mobley v. Copeland, 828 S.W.2d 717, 726 (Mo. Ct. App. 1992); Fox v. Ferguson, 765 S.W.2d 689, 691 (Mo. Ct. App. 1989).

51. 861 S.W.2d 651 (Mo. Ct. App. 1993).

52. *Id.* at 654.

is canceled.[53] The court noted that Stephenson was not even required to check the recorded deed to make sure the easements were in place once the representation was made.[54]

D. When is a Statement "Distinct and Specific" Enough to Cancel the Purchaser's Duty?

Another difficult question encountered in these cases deals with the nature of the representation made by the seller and whether the purchaser was justified in her reliance. Where will a court draw the line between permissible "puffing" about general characteristics of a piece of property and intentionally misleading statements designed to get the purchaser to let down her guard? Obviously, if the seller makes an intentional misrepresentation in direct response to an inquiry by the purchaser ("This site was never used as a landfill"), courts will hold the seller liable if the representation is false. The question is significantly more difficult when the seller has made less specific representations or when the purchaser has not asked the "right" question. In *Whittlesey v. Spence*,[55] the Missouri Court of Appeals for the Southern District of Missouri held that an agent's statement regarding title ("It looks all right to me") was a mere expression of opinion upon which the purchaser was not entitled to rely.[56] Other jurisdictions have made similar findings when the representation was in the nature of a sales pitch rather than an affirmative statement about a particular aspect of the subject property.[57] These cases generally claim to apply a bright-line rule concerning the unreliability of "mere opinions,"[58] but as one can imagine, the line is very fine and it appears that most of these cases are fact-

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53. *Id.* at 656.

54. *Id. See generally* Tietjens v. General Motors Corp., 418 S.W.2d 75, 82 (Mo. 1967); Clark v. Edgar, 84 Mo. 106 (Mo. 1884) (fraud may be predicated upon false representations or concealment although truth could have been discovered in public records); *Wasson*, 964 S.W.2d at 527; *Mobley*, 828 S.W.2d at 726; *Fox*, 765 S.W.2d at 691; Norris v. Jones, 661 S.W.2d 63, 65 (Mo. Ct. App. 1983) (immaterial that means of knowledge available); Gamel v. Lewis, 373 S.W.2d 184, 191-92 (Mo. Ct. App. 1963) (no duty to make any inquiry after a specific representation is made).

55. 439 S.W.2d 195 (Mo. Ct. App. 1969).

56. *Id.* at 198.

57. *See* Williamson v. Realty Champion, 551 So. 2d 1000, 1002 (Ala. 1989) (Agent's statement that house was "very well built" too general to be regarded as material to purchaser's decision to buy house); Holland v. Lentz, 397 P.2d 787, 790 (Or. 1964) (Seller represented that house was well built). However, a representation that seller owned property "lock, stock and barrel" was held sufficiently specific to permit reliance. Upledger v. Vilanor, 369 So. 2d 427, 430 (Fla. Dist. Ct. App. 1979).

58. *See generally* Nixon v. Franklin, 289 S.W.2d 82, 85 (Mo. 1956); Budd v. Budd, 122 S.W.2d 402 (Mo. Ct. App. 1938).

specific and provide little insight as to how the rule will be applied in future situations.

IV. THE INSTANT DECISION

In *Droz*, the court first analyzed the actual fraud/constructive fraud issue.[59] Beginning with the general proposition that rescission of a contract may be based upon constructive fraud, the court found that the trial court misapplied the law of rescission by requiring a showing of actual fraud before such relief could be granted.[60] Based upon the foregoing rule, the court noted that the fact that Trump did not intentionally defraud Droz was immaterial to the question of whether the real estate contract could be rescinded based upon the misrepresentations of Trump's agent.[61] Once the court dealt with the preliminary question of whether rescission was even available as a remedy, the court next turned its attention to the alleged misrepresentation.[62] The court questioned whether Droz had a duty to make an inquiry into the status of the property in light of the representation made by Trump's agent.[63] The court reaffirmed Missouri's general disclosure rule by stating that a purchaser of real property has a duty to investigate discoverable latent defects under circumstances that would place a reasonable purchaser on notice of a potential problem.[64] However, the rule was not applied in this case because the seller (through her agent) made a material misrepresentation.[65] According to the court, the purchaser's duty to make any investigation whatsoever is canceled when the vendor makes a "distinct and specific" representation concerning the property which induces action by the purchaser.[66] Here, the real estate agent's representation that the property was suitable for Droz's intended purposes was deemed sufficiently "distinct and specific" enough to relieve Droz of his duty to investigate potential latent defects (including information contained in publicly recorded land title records).[67] Because constructive fraud was sufficient to justify rescission, coupled with the fact that Droz had no duty to investigate latent defects on

59. Droz v. Trump, 965 S.W.2d 436, 440-41 (Mo. Ct. App. 1998).

60. *Id.*

61. *Id.* at 441. In fact, the question of whether constructive fraud is sufficient to justify rescission is so clearly settled that Trump did not contest the issue on appeal. *See* Ellenburg v. Edward K. Love Realty, 59 S.W.2d 625, 627 (Mo. 1933).

62. *Id.* at 443.

63. *Id.*

64. Droz v. Trump, 965 S.W.2d 436, 443 (Mo. Ct. App. 1998).

65. *Id.* at 444.

66. *Id.* at 443-44.

67. *Id.* Droz did hire an attorney to perform a title investigation of the property. The lawyer did not discover the existence of the MDNR investigation (not surprising because such information is not recorded), but the lawyer nonetheless withheld any opinion regarding the property based upon its previous use as a landfill.

account of the seller's representations, the court concluded that the trial court's decision should be reversed and remanded for further proceedings.[68]

V. COMMENT

As *Droz* and the other Missouri disclosure cases illustrate, the current state of the law is quite unclear, and predicting how future cases might be decided is nearly impossible. Much of the difficulty stems from the fact that many recent cases, such as *Droz* and *Stephenson*,[69] pay lip service to purchasers protecting themselves and the investigation requirement, while simultaneously finding other reasons to protect purchasers through mechanisms such as the doctrine of affirmative representation. A question that necessarily arises in connection with this line of cases is whether the courts are demonstrating a willingness to reduce the investigation required of the purchaser and moving toward a regime that requires more in the nature of seller disclosure.

A. Caveat Emptor or Seller Disclosure of Latent Defects: Competing Policy Rationales

Policy rationales must be examined to determine if the modern trend of seller disclosure is really better than common law *caveat emptor*. *Caveat emptor* seems reasonable in the sense that traditional views of equity require one who seeks relief to take steps to protect herself. Another argument frequently cited in opposition to the modern trend of seller disclosure is that it places too high a burden on a seller to discover defects of which he or she may not even be aware and that minor nondisclosures would afford a purchaser an easy way to back out of a deal. However, relieving a seller of a duty to disclose information that he knows is material to the purchaser's decision seems patently unfair to the unsuspecting buyer. As the Florida Supreme Court stated in *Johnson v. Davis*,[70] "[o]ne should not be able to stand behind the impervious shield of *caveat emptor* and take advantage of another's ignorance."[71]

The modern approach (as adopted in Missouri) represents a fair and equitable compromise in that it tends to limit unfair dealing on the part of a seller while encouraging responsible, prudent conduct by the purchaser. Purchasers are not allowed to purposefully avoid taking reasonable steps to inspect a property before buying, and sellers are not allowed to take advantage of unsuspecting purchasers by failing to disclose problems that they know exist. However, an obvious problem that arises under such a scheme is determining the scope of a

68. Droz v. Trump, 965 S.W.2d 436, 443-44 (Mo. Ct. App. 1998).
69. Stephenson v. First Missouri Corp., 861 S.W.2d 651 (Mo. Ct. App. 1993).
70. 480 So. 2d 625 (Fla. 1980).
71. *Id.* at 628.

"reasonable investigation" and whether typical non-lawyer vendors and purchasers have any idea what is reasonably discoverable by the other party.

B. What is a "Reasonable Investigation" by a Purchaser of Real Estate?

Although some cases generally state that no investigation of public records is necessary when a specific statement is relied upon by the purchaser,[72] it seems reasonable to require the purchaser to visually inspect the property and to have a title search performed. Most prudent purchasers in today's world automatically take such steps, and there seems to be no compelling reason to protect a buyer who makes no effort to learn if the vendor actually owns the property that she purports to convey. Requiring a purchaser to go beyond a visual inspection and title search proves problematic. For instance, the *Pagano*[73] rule from California, which required the buyer to discover any publicly available information concerning the subject property, seems to go too far. Is it reasonable for every buyer to go to the courthouse and search all pending lawsuits to see if their property is affected? With the vast amount of public information now available, requiring such a search would impose an overwhelming burden on a purchaser who would, as a practical matter, be required to contact every state and federal agency that might potentially take an interest in the property. One trip to a title company or to the Recorder's office seems reasonable and manageable; a blanket search of every potential source of problems is far too broad, especially when the seller has knowledge of the defect.[74]

A bright-line rule requiring only physical inspection and a title search would be easy to apply and understand, but it is probably better that these serve only as the bare minimum and that the purchaser's duty not always be limited to these two steps. Many cases, as when a person seeks to buy environmentally questionable property, might require more than a simple inspection and title search to classify the purchaser's investigation as "reasonable." A "reasonableness" standard makes sense because it allows a court to look at the particular facts of a case when determining whether the scope of a particular purchaser's investigation was proper under the circumstances.[75]

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72. Clark v. Edgar, 84 Mo. 106 (Mo. 1884).

73. Pagano v. Krohn, 70 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 1997).

74. Of course, this formulation is only relevant to situations where the purchaser has no knowledge of the defect, while the seller does know of the problem. In situations where neither party knows of the defect, it seems reasonable to put the burden of loss on the purchaser, as one can hardly expect a seller to disclose information of which she has no knowledge.

75. This flexibility for judges is especially important in property cases, where the types of property sold and the sophistication level of the parties varies greatly.

C. Did Droz Conduct a "Reasonable Investigation"?

The *Droz* court did not apply the Missouri disclosure rule to the facts of the case because of the affirmative representation made to Droz by the vendor's agent. The court may have been able to achieve the same result without resorting to the affirmative representation doctrine if it had simply applied the prevailing test for disclosure of latent defects.

In applying the modern rule, the key question will always be whether the purchaser could have discovered the material defect through prudent investigation. Perhaps one factor to which courts should pay close attention is the sophistication level of the parties involved. What constitutes a reasonable investigation for a typical purchaser of residential property may be far different from what is reasonable for a large corporation purchasing an industrial site. Droz was a typical small town purchaser, generally inexperienced with respect to the nuances of real estate conveyancing and environmental contamination.

Droz did know that the site was previously a landfill, but the seller's agent made sure to let him know that the Trumps had raised crops and livestock on the property after the landfill had been closed. Surely the fact that the seller had used the property in a manner consistent with that the purchaser intends supports a conclusion that the property is suitable for the purchaser's intended use. Droz visually inspected the property and also hired an attorney to perform a title search which revealed no defects, even though the attorney refused to give an opinion as to the environmental condition of the property.[76] Trump argued that Droz had a duty, considering the property's history, to contact the MDNR to discover the existence of the investigation.[77] The difficult decision for the court

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76. Trial Transcript at 70-71. Droz contacted the attorney in order to obtain a title search after signing the sale contract. While the attorney did not say that the property would be suitable for Droz's purposes, she also did not say that the property was not suitable for Droz's purposes. Of course, the entire question of the reasonability of Droz's investigation would be radically different had Droz obtained the questionable title report *before* signing the contract. If he had obtained the report prior to signing the contract, surely Droz would have been on notice that there might be some serious problems with the property requiring further investigation.

77. Trump's counsel made the argument that Droz should have contacted MDNR to find out whether the Department was investigating this property. Droz v. Trump, 965 S.W.2d 436, 438 (Mo. Ct. App. 1998). Droz argued that there was no evidence in the record that would show whether MDNR would even disclose the information had Droz made this further investigatory step. *Id.* The appellate panel never reached the issue because of its finding that the agent's misrepresentations totally canceled any duty of investigation by the purchaser. *Id.* at 444.

To find out whether an average person could discover the existence of an ongoing MDNR investigation, the Author performed some amateur detective work. I contacted the MDNR office in Jefferson City regarding a possible purchase of the old Columbia, Missouri Landfill site. I did not specifically ask if there was any chance that the property could be put on the Registry (figuring that average citizens normally do not know about

would have been whether such an investigation was reasonable under the circumstances. The court could have been focused on the fact that the property showed no patent physical defects, and Droz's efforts to discover some problems (although he did not actually discover the defect), to conclude that the MDNR investigation was not reasonably discoverable. On the other hand, the court could have ruled that Droz could have discovered the encumbrances affecting the property had he made the proper investigation, which presumably would mandate contacting MDNR in light of the fact that he was purchasing a piece of land with 40 years of garbage sitting 20 feet under the surface.

The appellate panel in *Droz* was faced with an extremely difficult choice. Should the court protect the innocent purchaser who undertook an investigation (albeit an unsuccessful one) or protect the arguably innocent seller who was harmed by the actions of her agent? In the final analysis, it seems that Droz's investigation was reasonable under the circumstances. He spoke with an attorney whose investigation did not uncover the MDNR investigation, he visually inspected the property, and he was reassured and encouraged by the statements of the real estate agent. The modern disclosure scheme seeks to prevent willful blindness and negligence by a purchaser who sleeps on his rights or takes steps to avoid learning the truth.[78] Here, Droz did more than the typical purchaser of real estate and made a good faith effort to learn of any potential defects that might keep him from using the property for his intended purposes. The fears of a purchaser purposefully avoiding the truth are not realized under the facts of *Droz*. Although the appellate court did not reach the issue of

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the Registry of Confirmed Abandoned and Uncontrolled Hazardous Waste Disposal Sites), instead focusing my attention to general questions regarding the potential uses I intended for the property. I relayed my entire story to six different people, each of whom referred me to a different person who they believed could tell me something about this specific property. The person in charge of solid wastes told me that the Department periodically monitors old landfills, but mentioned nothing about placing contaminated properties on the registry.

Finally, I was given a number for the Missouri Superfund Department, whose representative explained that there was a Registry and that the Columbia Landfill site was not currently on that list. I asked whether the property might be placed on the Registry, and she told me that they would tell me (potential purchaser) of the existence of an investigation, if one was ongoing.

Although the process of talking to so many people was maddening and time-consuming (over two hours), I did discover that it is possible for a purchaser to learn if a piece of property is being investigated for possible placement on the Registry. Whether such an investigation is too great a burden for a purchaser is the tough question, and again, the question of reasonableness may well be determined by the level of sophistication of the parties. While two hours of phone calls might not be overly burdensome, the problem still remains as to whether the average purchaser would even think to contact the MDNR, especially in light of the previous uses made of the property, as in *Droz*.

78. *See generally* Johnson v. Davis, 480 So. 2d 625 (Fla. 1980).

whether Droz's investigation was reasonable, one can make a strong argument that the MDNR investigation was not reasonably discoverable through a reasonable investigation, that Droz's investigation was reasonable under the circumstances, and that Droz should have been entitled to rescission even if the court had not utilized the doctrine of affirmative representation.

D. Affirmative Representation Doctrine: Should a Purchaser's Duty Be Canceled Entirely?

Statements made about the condition of property by a vendor's agent raise another set of issues. Although under the Missouri disclosure rule a purchaser has a duty to find latent defects for himself, the court in *Droz* adopted the broader affirmative representation approach and found that the representation made to the purchaser absolutely cancels that duty.[79] A problem with the view that an affirmative representation entirely negates a purchaser's duty to investigate is the lengths to which such a rule could theoretically be stretched. For instance, what if a real estate agent simply states: "This is a good house?" Is such a statement some kind of implied warranty of quality? Would a reasonable person really believe that a broker intends to make a legally binding statement regarding the condition of the property?

In every sale of property, there are seemingly innocuous statements such as "this is a good house" or "the neighborhood is great" that everyone understands to be puffing by a broker trying to make a sale. Application of an all-encompassing rule that any and all representations made by a seller or her agent can absolutely be relied upon might have the unintended effect of discouraging disclosure about a piece of property; the seller may be afraid to say anything about the property, fearing that such statements might be used against her later. Although a vendor's statements should be taken into account when determining whether the scope of the purchaser's investigation was reasonable, completely canceling the purchaser's duty of investigation seems to pose too great a danger.

The alternative approach (a purchaser has a duty to investigate when a reasonable purchaser would be suspicious) appears to be more in harmony with the traditional view of equitable relief that one should not benefit from willful blindness. Just because a purchaser is required to make some investigation when a reasonable person would be suspicious does not impose an undue burden on purchasers and such a requirement addresses the willful blindness problem that equitable relief is designed to prevent. In effect, completely negating a purchaser's duty gives the buyer a license to bury her head in the sand and avoid discovery of defects that could have been easily ascertained.

Perhaps the court was using the affirmative misrepresentation doctrine as a vehicle to avoid making inquiry under the Missouri *caveat emptor* scheme. One could argue that the representation made to Droz might be more in the

79. Droz v. Trump, 965 S.W.2d 436, 443 (Mo. Ct. App. 1998).

nature of a sales pitch[80] or opinion upon which he was not entitled to rely. When one considers the fact that the statement describing legal obligations was made by a salesman and not by anyone with authority over the land (such as a representative of MDNR), it appears that perhaps Droz should not have been entitled to rely on the statement. As described above, the appellate panel in *Droz* probably could have found for Droz without resorting to the affirmative representation doctrine by applying the Missouri disclosure rule and finding that Droz's investigation was reasonable under the circumstances. The fact that an arguably harmless statement will be used by courts to void a transaction is just more evidence of modern courts' willingness to go to greater lengths than ever to protect innocent purchasers of real property, even in situations where the seller has no evil intent in making the representations.

E. A Suggestion for Clarifying the Law and Making Outcomes More Predictable

One practical suggestion for clarifying and simplifying the law in this area would be incorporating the specific representation doctrine into the modern disclosure analysis would clarify and simplify the law in this area. A court could utilize both doctrines by considering any representations made by the vendor (or her agent) when analyzing whether the investigation by the purchaser was reasonable. Under this approach, instead of automatically canceling a purchaser's duty to investigate, a court would ask: "In light of the vendor's representations, was the investigation undertaken by the purchaser reasonable under the circumstances?" The practical advantage of combining the two doctrines at work in *Droz* (affirmative representation *& caveat emptor*) is that practitioners would no longer have to guess whether a court will apply the disclosure analysis or the affirmative representation doctrine or both. Under this system, courts will have the same power to look at the particular circumstances of these fact-specific cases, and the parties will know with certainty the nature of the controlling law.

VI. CONCLUSION

The modern approach to disclosures as adopted in *Droz* is clearly the best way to mitigate the harshness of the common law *caveat emptor* rule without making the seller bear the burden of an implied warranty of quality. Courts should be careful to make sure that the affirmative representation doctrine is not stretched so far as to effectively destroy the purchaser's duty to make some effort to protect himself. Although the statement made to the purchaser in *Droz* was probably "distinct & specific" enough to allow proper application of the affirmative representation doctrine, a scheme that completely negates the buyer's

80. *See supra* note 57.

duty probably goes beyond what is necessary to assure reasonable protection for purchasers. Under the standard articulated in *Droz*, a purchaser is under no duty to make any investigation into the nature of the property once an affirmative representation is made by a seller. This formulation seems to go too far because it effectively gives a purchaser a "Get Out of Jail Free" card if the buyer can find some defect, coupled with some type of statement by the vendor or agent regarding the quality of the property. Under the *Droz* formulation of the affirmative representation doctrine, sellers (and brokers) must be more careful than ever about what they say because it appears that courts are showing an increased willingness to find creative ways to protect innocent purchasers. One way to clear up some of the confusion in this area of the law would be for courts to incorporate analysis of the vendor's statements into the question of whether the investigation made by the purchaser was in fact reasonable. Considering *Droz*'s broad application of the affirmative representation doctrine, it is becoming increasingly clear that the seller is now the party who needs to beware.

TIMOTHY A. REUSCHEL