Thus, the conclusion in the *Fischer* case that merely being a party to a formal or informal business transaction is sufficient to impose liability for failure to disclose subsequently acquired information which will make a previous good faith representation untrue or misleading is inadequate. In addition to a business transaction, there ought also be either an intent to deceive or a relationship of trust or confidence.[26] There may be liability absent a business transaction if there is a fiduciary relationship accompanied by a professional or family tie, or if there is an intent to deceive and all the other elements of actual fraud are present.

STEVEN J. SEILER

Infants—Doctrine of Disaffirmance Disallowed in Minor's Attempted Avoidance of Tort Liability Arising Out of a Contract.—*Friedhoff v. Engberg* (S.D. 1967).

Plaintiff brought suit against minor driver and against ranch operators, their common employer for injuries received in an automobile accident occurring in the regular course of their employment. Defendant driver served notice of disaffirmance on ranch operators of his employment contract and returned all consideration received. It was alleged that this rendered the employment contract void *ab initio* and changed plaintiff's status, arising out of the employment contract, to that of a *guest*. This would have forced her to seek recovery under the guest statute which required more than the ordinary negligence present. The circuit court granted defendants' motion for a directed verdict on the ground that the disaffirmance related back and enabled defendant to avoid liability for his negligence. On appeal to the Supreme Court of South Dakota, *Held*, reversed. Minor driver could not use the doctrine of disaffirmance of his contract to escape tort liability arising out of the contract. Due to the common employment, plaintiff was not a *guest* but a *passenger* and therefore she was not barred from recovery due to the lack of wilful and wanton misconduct required by the South Dakota guest statute. *Friedhoff v. Engberg*, 149 N.W.2d 759 (S.D. 1967).

One of the greatest sources of judicial controversy in the law regarding minority is found in cases in which the minor's torts arise out of or are connected with a contractual situation. There exists a shadowy line between contractual immunity and tort liability, across which the infant may sometimes

---

[26] The fiduciary relationship need not be direct, but may be indirect, which gives a court more scope to determine a duty. In respect to a fraud, "it is not essential that one occupy a direct fiduciary relationship as a predicate to the imposition of liability based upon a claim of breach of duty. One who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary." Oil and Gas Ventures—First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966) and cases cited therein.

flee and escape the consequences of his tort.[1] The court in *Slayton v. Barry*[2] observed that generally infants are liable for their torts. Such a rule must be applied with discretion with regard to another equally settled rule, that, with certain exceptions, infants are not liable on their contracts.[3] The general rule is that an infant is liable, in the same manner as an adult, for a tort not connected with or arising out of a contract.[4] The legal effect of infancy depends upon whether or not such a cause of action is tortious. In case of doubt, it is more important to preserve the infant's right to avoid contractual liability than to enforce his liability for tort.[5] The only satisfactory test is whether or not the infant can be held liable without directly or indirectly enforcing his promise.[6]

The general liability of infants for their torts does not deprive them of their special immunity from liability for their contracts.[7] The general rule is that disaffirmance of a contract by an infant renders it void *ab initio*.[8] As a result, the rights of the parties are to be determined as though the contract had not been made.[9] Another approach is to treat the infant's contract as binding unless disaffirmed within a reasonable time after reaching majority.[10] This latter approach is reflected in the following Iowa statute, which states:

> A minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority except as otherwise provided.[11]

The exception to this concept is the contract for necessaries for which the minor is normally held liable.[12]

The law of torts, on the other hand, has been more concerned with the compensation of the injured party[13] than with the moral guilt of the infant

---

1 Bell v. Smith, 155 Miss. 227, 234, 124 So. 331, 332 (1929), where the court said: "When an infant exercises the privilege to avoid his contract, whether during infancy or upon arrival at full age, the rights of the parties are as if the contract never existed."

2 175 Mass. 513, 56 N.E. 574 (1900).

3 *Id.* at 514-515, 56 N.E. at 575.

4 T. Cooley, Torts § 66 (4th ed. 1932).

5 27 Am. Jur. *Infants* § 92 (1940).

6 Rice v. Boyer, 108 Ind. 472, 9 N.E. 420 (1886); Patterson v. Kasper, 182 Mich. 281, 148 N.W. 690 (1914).

7 Note, *Infant's Tort Liability Incident to Contractual Liability*, 30 Iowa L. Rev. 88 (1944).

8 Loomis v. Imperial Motors, Inc., 88 Ida. 74, 396 P.2d 467 (1964); Mellott v. Love, 152 Miss. 860, 119 So. 913 (1929); Windisch v. Farrow, 159 S.W.2d 392 (Mo. Ct. App. 1942); Coker v. Virginia-Carolina Joint Stock Land Bank, 208 N.C. 41, 178 S.E. 863 (1935).

9 27 Am. Jur. *Infants* § 45 (1940).

10 Green v. Wilding, 59 Iowa 679, 13 N.W. 761 (1882).

11 Iowa Code § 599.2 (1966).

12 27 Am. Jur. *Infants* § 17 (1940) states that an infant may bind himself to pay for his meat, drink, apparel, necessary physic and other such necessaries, and likewise for his good teaching or instruction, whereby he may profit afterward.

13 Beardsley v. Clark, 229 Iowa 601, 294 N.W. 887 (1940); Daggy v. Miller, 180 Iowa 1146, 162 N.W. 854 (1917); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911).

and has refused to hold that such a wrongdoer is immune from liability.[14] The defense of infancy, being in law "a shield and not a sword," cannot be pleaded to avoid liability for frauds, trespasses, or torts.[15]

The *Friedhoff* case forms the basis of an extremely modern concept and has, on its face, rejected the old classical approach to infancy. Had the court allowed the defendant driver to exert his infant rights and disaffirm the employment contract, such would have rendered the contract void *ab initio*, completely destroying the employment relationship with the plaintiff. As there was no existing compensation between the plaintiff and defendant, their common employment was the sole factor which made the plaintiff a *passenger* as opposed to a *guest*. By being determined a *passenger*, the plaintiff could escape the requirements of the South Dakota guest statute,[16] and thus, by alleging and proving only ordinary negligence, he would be entitled to recovery. Had the court declared the plaintiff to be a *guest* by allowing the disaffirmance of the contract, the plaintiff would not have recovered because there was no "wilful or wanton misconduct" as required by the guest statute. By allowing recovery, the South Dakota court upheld a tort action arising out of a minor's contract and rejected the defense of infancy.

The treatment accorded to like circumstances by other courts has been strikingly dissimilar. The circuit court in *Friedhoff* had relied on the reasoning in the Michigan case of *Brown v. Wood*,[17] in initially finding for the defendant. In *Brown*, four minors brought suit against a minor driver pursuant to an agreement to pay the driver a stated sum for transportation. An accident occurred; and the driver disaffirmed the transportation-for-hire agreement. The Michigan court upheld this disaffirmance as valid and denied the plaintiffs' recovery on the ground that infancy was a defense to an action in tort based upon a contract.[18] The South Dakota court applied this reasoning in *Tennyson v. Kern*,[19] an automobile accident involving minors, where the court stated:

> If the wrong grows out of contract relations, and the real injury consists in the nonperformance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort.[20]

The Oregon court, however, rejected the *Brown* decision by holding that once the carrier-passenger relationship comes into being the carrier owes a

---

14 W. Prosser, Torts § 128 (3d ed. 1964).

15 Jennings v. Rundall, 8 T.R. 335, 101 Eng. Rep. 1419 (Ex. 1799).

16 S.D. Code § 44.0362 (1950).

17 293 Mich. 148, 291 N.W. 255 (1940).

18 Justice North said: "[T]he fact remains that the status of 'a passenger for hire' is one arising out of contractual relations; and in these tort actions the damages sought arise in consequence of defendant's breach of this contract to carry safely, and to permit recovery is to indirectly enforce the contract obligation of the defendant minor." 293 Mich. 148, 156, 291 N.W. 255, 258 (1940).

19 76 S.D. 136, 74 N.W.2d 316 (1956).

20 *Id.* at 142-43, 74 N.W.2d at 320.

duty to exercise due care.[21] In this instance, the court separated the tort from the contract and held the infant liable in tort for his negligence. The court reasoned that, "the status of the parties exists quite apart from the enforceability of their contract."[22] A 1959 Kansas court applied a different rationale in disallowing a minor's disaffirmance, viewing the transportation-for-hire agreement by the infant as not voidable.[23] The Kansas court found that transportation was a necessity and stated: "We are, therefore, of the opinion that private transportation for the worker is now a necessity and an agreement made by a minor for such transportation is binding and not subject to disaffirmance for the reason of minority alone."[24]

In *Friedhoff*, the court dealt directly with the situation by disallowing the disaffirmance altogether. The court could not have used the approach taken in Oregon because if the tort and contract were separated, the plaintiff would not be entitled to recover because she could not prove the recklessness required by the guest statute. The court mentioned, but made no attempt to embody the Kansas decision relating to necessity. Instead *Friedhoff* has struck a blow at the classical approach to infancy by holding that the minor could not disaffirm his employment contract so as to change the status of the passenger to that of a guest.[25]

Paradoxically, the courts declare the infant mature enough to be held legally responsible for his torts and crimes and, yet, not mature enough to be held legally responsible for those contracts which are often the primary links in the commission of such torts and crimes. *Friedhoff* represents a realistic approach to the theory of disaffirmance by minors in holding that once a relationship between the parties is established, the doctrine may not be applied so as to relieve the minor of his negligence.

DONALD F. NEIMAN

Joint Tenancy—Bank Accounts—FUNDS OF A JOINT TENANT BANK ACCOUNT MAY BE SUBJECT TO CLAIMS FOR THE DECEASED JOINT TENANT'S FUNERAL EXPENSES.—*In re Estate of Stamets* (Iowa 1967).

Five years before his death in 1965, Frank Stamets opened a joint tenant savings account payable to either himself or to Lena Stamets, the wife of Frank's deceased brother, or to the survivor. Only Frank signed the signature card. The administratrix of Frank's estate was his sister Beulah Johnson. She argued that unless Lena signed the agreement on the signature card there was

21 Steenson v. Robinson, 236 Ore. 414, 389 P.2d 27 (1964).
22 *Id.* at 423, 389 P.2d at 29.
23 Ehrsam v. Borgen, 185 Kan. 776, 346 P.2d 260 (1960).
24 *Id.* at 779, 347 P.2d at 264.
25 *See* Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 KAN. L. REV. 361 (1963).