

IN THE
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-156

STEPHEN H. BLAYDES, M.D.
Plaintiff-Appellant

v.)

PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.
Defendant-Appellee

Circuit Court of Mercer County in Civil Action No. 22-C-137

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

- A. Did the Circuit Court of Mercer County commit reversible error by granting summary judgment in favor Princeton Community Hospital Association, Inc and against Stephen H. Blaydes, M.D. in regard to his cause of action based on negligent misrepresentation?

- B. Did the Circuit Court of Mercer County commit reversible error by granting summary judgment in favor Princeton Community Hospital Association, Inc and against Stephen H. Blaydes, M.D. in regard to his cause of action based on fraudulent misrepresentation?

STATEMENT OF THE CASE

This is an appeal of an Order Granting Defendant Princeton Community Hospital Association, Inc.'s Motion For Summary Judgment entered by the Circuit Court of Mercer County.

Plaintiff-Appellant Steven H. Blaydes, M.D. (Blaydes) filed his Complaint in the Circuit Court of Mercer County to recover economic damages resulting from misrepresentation made by a representative of Defendant-Appellee Princeton Community Hospital Association, Inc. (PCH) to Blaydes. Blaydes' Complaint asserts causes of action for negligent misrepresentation and fraudulent misrepresentation. Both causes of action are based on representations by PCH to Blaydes regarding the reopening of an ambulatory surgical center owned by PCH (the RSS), at which Blaydes anticipated performing eye surgery. App. 17 - 21. At all relevant times, Blaydes was a medical doctor, specializing in the field of ophthalmology. App. 6. PCH was the only entity operating any facility in Mercer County at which medical surgery, other than minor office procedures, could be performed.

Blaydes filed his Complaint against PCH on August 15, 2020. In his Complaint, Blaydes requests that he be awarded economic damages from PCH arising from misrepresentations by PCH to Blaydes about the reopening of the RSS. The Complaint asserts causes of action for negligent misrepresentation and fraudulent misrepresentation. PCH filed its Answer to Plaintiff's Complaint on October 17, 2020. App. 25 - 33. On January 5, 2024, after the conclusion of the period established by the Circuit Court for the parties to conduct discovery, PCH filed its Motion for Summary Judgment (PCH's Motion). App. 34 - 44. Blaydes filed his response to the Motion for Summary Judgment on January 22, 2024. App. 122 - 137. PCH filed its Reply on January 26, 2024. App. 192 - 202. The Circuit Court heard oral arguments for and against PCH's Motion on March 12,

2024 and entered its Order Granting Defendant Princeton Community Hospital Association, Inc.'s Motion for Summary Judgment (the Summary Judgment Order) on March 26, 2024, dismissing Blaydes' action, with prejudice. App. 4-13.

Blaydes is an ophthalmologist who has practiced in Bluefield, West Virginia for a number of years. App. 6. Blaydes followed in the footsteps of his grandfather and father and continuing a medical practice which has served southern West Virginia and southwest Virginia for over 100 years. App. 48 (p.11:23-24 and 12;1). A significant portion of Blaydes' medical practice consists of eye surgery. App. 51 (p. 22 :5-6). The majority of Blaydes surgical practice is cataract surgery, App. 50 (p. 20:16). Bluefield Regional Medical Center ("BRMC") was a hospital located in Bluefield, West Virginia and it was one of two hospitals located in Mercer County. PCH was the other Mercer County hospital. On June 25, 2019, PCH entered into an agreement to purchase BRMC. App.143. The necessary regulatory approval for PCH to purchase BRMC was received and PCH assumed ownership of BRMC on October 1, 2019. App.146. After the purchase was consummated, PCH continued to operate BRMC for a brief period of time as a full service hospital. At some point in time, the Board of Directors of PCH made the decision to close BRMC. App. 148. Blaydes was performing eye surgery at BRMC before it was purchased by PCH and continued performing surgery at BRMC until it was closed by PCH. App. 139 (¶ 4).

The decision to close BRMC had been made by April 10, 2020. On that afternoon, Wayne B. Griffith ("Griffith") met with Blaydes. App. 53 (p. 30:20-21). Griffith had previously served as the CEO of PCH. App.6. Blaydes had known Griffith for a number of years, both in Griffith's capacity as a hospital administrator and as a patient of Blaydes and, based on that relationship, Blaydes believed that Griffith was a "straight shooter". App. 53 (p. 31: 15-19). At the beginning of

their meeting, Griffith informed Blaydes that he, Griffith, was serving as a consultant for strategic planning for PCH's Board of Directors. App.53 (p. 30:24 and 31:1). Griffith's position as Strategic Advisor to PCH's Board of Directors is documented by a Memorandum from James "Rusty" Sarver, III, President of the PCH Board of Directors. App. 151. During their meeting, Griffith made Blaydes aware of several facts that would have a significant adverse impact on Blaydes' medical practice:

1. PCH was closing BRMC as of June 30, 2020 and, as a result, Blaydes' practice would be put in a difficult position, App. 53. (p. 31:6-7);
2. PCH could not provide space for Blaydes' surgical practice at its hospital in Princeton, West Virginia, because the surgical schedule at that facility was full and, in addition, PCH would have to accommodate surgeries, other than eye surgeries, which were being transitioned from BRMC to PCH, due to the closing of BRMC, App. 53. (p.31:10-13); and,
3. Eye surgeries performed at PCH required more time than eye surgeries performed at BRMC or at an ambulatory surgical center. App 53. (p. 31: 13-14).

However, at their April 10th meeting, Griffith also told Blaydes "This is what's going to happen. Bluefield Regional is closing. The surgery center is opening for you.". App. 93. (p. 193:5-6). Griffith "basically said it's a "done deal". App. 93. (p. 193: 3-4). Blaydes described Griffith's representations in other terms in response to multiple questions but, Blaydes' testimony is clear, there were no uncertainty about for the reopening of the RSS. App. 57 (p. 47: 24 and p. 48:1).

The RSS was acquired by PCH in connection with its purchase of BRMC. Blaydes had performed surgery at the RSS before it was closed by BRMC and it met his needs as a surgical facility, App. 140 (¶ 6).

In response to the representations by Griffith, Blaydes advised Griffith that he was in the process of recruiting an experienced ophthalmologist, C. Blake Meyers (Meyers), to join Blaydes' medical practice and, based on PCH reopening the RSS, Blaydes would continue those efforts. App. 53.(p. 31:21-24). The reopening of the RSS was welcomed news to Blaydes. App. 53. (p. 32:8-12). Blaydes would have ended his efforts to recruit Meyers to join his practice, but for Griffith's representation about the reopening of the RSS. App. 140. (¶ 11). If the RSS did not reopen, the closing of BRMC would have left Blaydes and, more importantly, any new associate with no place to perform surgery within a reasonable distance from Blaydes' Bluefield, West Virginia Office. App. 139. (¶ 5).

At their April 10th meeting, Blaydes and Griffith also discussed the anticipated growth of Blaydes' surgical practice as a result of the recent retirement of an ophthalmologist who had practiced in Bluefield and the anticipated retirement of an ophthalmologist who practiced in Princeton. App. 53 (p. 32:1-7). Upon the retirement of the second ophthalmologist, Blaydes would be the sole ophthalmologist practicing in southern West Virginia and much of southwest Virginia, Blaydes. App. 139. (¶ 3).

Blaydes met with Griffith a second time approximately two week after the first meeting. During the second meeting, the reopening of the RSS was again discussed. The purpose of the second meeting was for Griffith to advise Blaydes that he, Griffith, was suffering from serious health problems and that he would not be able to actively participate in the reopening of the RSS.

App. 54 (p. 36: 8-18). However, Griffith told Blaydes that “the staff had the direction to get the place open.” referring to the administrative staff of PCH getting the RSS open. App. 54 (p. 36:19-21), Griffith also confirmed that “he had the authority to make that happen.”, App. 54 (p. 36:20-21).

Between April 10, 2020 and late August 2020, PCH took steps to reopen the RSS. Also, during this same time period, there was regular communication between representatives of PCH and Blaydes and Myers regarding the reopening of the RSS. App. 7. Unexpectedly, on the day after the August 2020 meeting of the PCH Board of Directors, Jeffery Lilley, PCH’s CEO, advised Blaydes that the Board of Directors of PCH had determined not to reopen the RSS. App. 67 (p. 87:11-24 and p. 88: 1-8). At this time, Blaydes had agreed to employ Myers and Myers had accepted Blaydes offer of employment. App.140 (§ 10). Because of PCH’s failure to reopen the RSS, Myers left Blaydes employment and the Mercer County area in June of 2022, approximately one and one-half years after first being employed by Blaydes. App. 140 - 141. (§12).

SUMMARY OF ARGUMENT

Negligent Misrepresentation

The Circuit Court improperly granted summary judgment in favor of PCH in regard to Blaydes’ cause of action based on negligent misrepresentation for two reasons. First the Circuit Court failed to properly apply Rule 56(c) of the West Virginia Rules of Civil Procedure. Second, the Circuit Court failed to apply a principle applicable to a cause of action for negligent misrepresentation and improperly applied principles applicable to a cause of action for fraud.

The Circuit Court incorrectly weighed the evidence and determined, based on one of several descriptions of PCH’s representations to Blaydes, that all relevant representations by PCH were a “prediction about the future”. App. 13. In doing so, the Circuit Court ignored facts which, at a

minimum, created a genuine issue of material fact as to whether or not the representations were a “prediction about the future”. This constitutes error and the grant of summary judgment against Blaydes on his cause of action for negligent misrepresentation was improper.

The nature of the representations, present fact or a prediction about the future, can be relevant to determine if a representation is a false statement necessary to support a cause of action for fraudulent misrepresentation but, it is not relevant in determining if a representation is erroneous and properly supports a cause of action for negligent misrepresentation. It was improper for the Circuit Court to base the grant of summary judgment against Blaydes on his cause of action for negligent misrepresentation on its determination that the representations by PCH to Blaydes were a “prediction about the future.” App.13.

Negligent misrepresentation occurs when: “One under a duty to give information to another, who makes an **erroneous** statement when he has no knowledge on the subject, and thereby misleads the other to his injury. . .” *Folio v. City of Clarksburg*, 221 W. Va. 397, 405, 655 S.E.2d 143, 151 (2007), (citations omitted) (emphasis added) .

For purposes of its Motion for Summary Judgment, PCH did not contest the existence of “a factual question with regard to reliance and damages. . .” App. 6. Neither PCH or the Circuit Court addressed the existence of a duty owed by PCH to Blaydes and, therefore, that issue will not be addressed by Blaydes at this time. PCH relied solely “on the absence of evidence of a false statement . . .” to support its Motion for Summary Judgment. App. 6. A false statement is not an element of a cause of action for negligent misrepresentation. An erroneous statement is an element of a cause of action for negligent misrepresentation. Neither PCH’s Motion nor the Summary Judgment Order addresses whether the representations by PCH to Blaydes were erroneous. The

discussion by the Circuit Court regarding negligent misrepresentation is contained in a footnote, App. 13. The footnote contains a limited discussion of elements and principles which pertain to fraud and which are not applicable to a cause of action for negligent misrepresentation. The facts before the Circuit Court, at a minimum, created a genuine issue as to whether or not the representations by PCH to Blaydes were erroneous and sufficient to support a cause of action for negligent misrepresentation. The grant of summary judgment against Blaydes on his cause of action for negligent misrepresentation was error because the Circuit Court failed to address the applicable element of a cause of action for negligent misrepresentation, an erroneous representation.

Fraudulent Misrepresentation

The Circuit Court improperly granted summary judgment in favor of PCH in regard to Blaydes' cause of action based on fraudulent misrepresentation for two reasons. First the Circuit Court failed to properly apply Rule 56(c) of the West Virginia Rules of Civil Procedure. Second, the Circuit Court incorrectly applied established rules applicable to a cause of action for fraudulent misrepresentation.

In the Summary Judgment Order, the Circuit Court adopts language from PCH's Motion and summarily finds: "The claim here, relates to future action, and representations about the future cannot be false in the same way as a statement about the present or the past." App. 9. This finding by the Circuit Court is based on one of several descriptions by Blaydes of the representations by PCH about the reopening of the RSS. In arriving at the conclusion that the representations by PCH to Blaydes related to future action, the Circuit Court ignored Blaydes other descriptions of PCH's representations regarding the reopening of the RSS which, at a minimum, created a genuine issue of material fact regarding the nature of the representation, present fact or future action. Relying on

its determination that the representations by PCH to Blaydes were promises as to future acts, the Circuit Court again weighed the evidence and held there was no evidence of lack of intent on the part of PCH to reopen the RSS in the future because administrative employees of PCH worked toward the reopening of the RSS after the representations were made to Blaydes. App. 12. The Circuit Court made this determination without considering the facts that the reopening of the RSS required the approval of PCH's Board of Directors and PCH's Board of Directors had taken no action regarding the reopening of the RSS when the representations were made to Blaydes. As a result, the Circuit Court improperly weighed the evidence and decided that the representations were about future acts and that there was no evidence that PCH lacked the intent to reopen the RSS when the representations were made to Blaydes. The weighing of evidence by Circuit Court and its determination of facts based on conflicting evidence is error.

The element of fraud addressed in the Summary Judgment Order is whether the representations by PCH to Blaydes were false statements necessary to support a cause of action for fraud. The general rule is that in order for a statement to be a false statement that will support a cause of action for fraud, the statement must be about an existing or past fact. Contrary to the finding by the Circuit Court, the representations by PCH to Blaydes were representations about an existing fact, the state of mind of the PCH Board of Directors regarding the reopening of the RSS at the time the representations were made. It is uncontested that the reopening of the RSS required the approval of PCH's Board of Directors. It is also uncontested that the PCH Board of Directors had not decided whether or not it would reopen the RSS when PCH made representations to Blaydes regarding the reopening of the RSS. Therefore, the representations to Blaydes by PCH were false statements of a present fact, the state of mind of PCH's Board of Directors. The Circuit Court did not address

why the state of mind of the PCH's Board of Directors at the time the representations were made to Blaydes, was not an existing fact. The Circuit Court incorrectly determined that the representations to Blaydes by PCH about an existing fact were representations about the future. This is error and the grant of summary judgment on Blaydes cause of action for fraudulent misrepresentation was improper.

If the Circuit Court was correct in its determination that the representations to Blaydes by PCH were representations about the future, the Circuit Court failed to properly apply an exception to the general rule pertaining to intent. An exception to the general rule is that a statement about a future act that the speaker does not intend to perform when the statement is made is a false statement that will support a cause of action for fraud. The Circuit Court recognized this exception to the general rule. App. 9-10. However, the Circuit Court then incorrectly applied the exception by considering facts regarding acts of administrative employees of PCH subsequent to the time the representations were made to Blaydes to determine intent and by failing to consider facts that established PCH's lack of intent to perform when the representations were made. App. 10-11. The subsequent acts of PCH employees are not dispositive of whether or not PCH, at the time it made representations to Blaydes about the reopening of the RSS, intended to reopen the RSS. The representations by PCH to Blaydes were false statements because, at the time the representations were made, PCH's Board of Directors had no present intent to reopen the RSS in the future. The RSS could not reopen without the approval of PCH's Board of Directors. When the representation regarding the reopening of the RSS were made by PCH to Blaydes, PCH's Board of Directors had not approved or disapproved the reopening of the RSS. Therefore, at the time the representations were made by PCH to Blaydes, PCH lacked intent, one way or the other, regarding the reopening of

the RSS. A lack of intent is the same as no intent. At a minimum, the evidence before the Circuit Court created a genuine issue of material fact as to the intent of PCH to reopen the RSS at the time it made representations to Blaydes about the reopening of the RSS and the grant of summary judgment against Blaydes on his cause of action for fraudulent misrepresentation is error.

The Circuit Court also held that an intentional misrepresentation is an essential element of a cause of action for fraud. App. 11 and 12. Intentional misrepresentation or dishonesty is not a required element of fraud. A false statement made scienter will support a cause of action for fraud. “[I]t is elementary doctrine that a false representation may be made scienter, so as to afford a right of action in damages, in contemplation of law, in any of the following ways: (1) with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; or (3) under circumstances in which the person making it ought to have known if he did not know of its falsity.” *Folio v. City of Clarksburg*, supra (citations omitted).

The Circuit Court’s grant of summary judgment on Blaydes’ cause of action for fraudulent misrepresentation was improper because it violated a principle of Rule 56(c) and weighed evidence which, at a minimum, was conflicting, and determined contested issues of fact and, in reliance the facts it determined, misapplied established rules pertaining to a cause of action for fraud. Therefore, the Circuit Court’s grant of summary judgment to PCH on Blaydes’ cause of action for fraudulent misrepresentation is error.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure. This case involves assignments of error in the application of settled law but, provides an opportunity to provide a more comprehensive statement of the elements of a cause of action for

negligent misrepresentation. This case is not suitable for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

Negligent Misrepresentation

Failure to Properly Apply Rule 56(c)

Negligent misrepresentation occurs when: “One under a duty to give information to another, who makes an **erroneous** statement when he has no knowledge on the subject, and thereby misleads the other to his injury. . .” *Folio v. City of Clarksburg*, supra (emphasis added).

Rule 56 (c) of the West Virginia Rules of Civil Procedure provides, in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that **there is no genuine issue as to any material fact** and that the moving party is entitled to judgment as a matter of law.

(emphasis added).

“A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment” Syllabus Point 2, *Thomas v. Goodwin*, 164 W. Va. 770, 266 S.E. 2d 792 (1980) (citations omitted).

The Circuit Court’s analysis of Blaydes cause of action for negligent misrepresentation is limited to Footnote 1 of the Summary Judgment Order. That Footnote provides as follows:

[1]As to the claim that there was “negligent misrepresentation,” Dr. Blaydes again has no **false statement** of fact for such basis. The only possible negligence identified by Dr. Blaydes was the statement by Wayne Griffith that **the RSS” was going to open**.” Blaydes Dep. at 197:14-198:2. Dr. Blaydes did not identify any information or evidence that suggested that Mr. Griffith was careless or negligent in his **prediction about the future**. Moreover in discussing negligent misrepresentation,

our Supreme Court has noted that any **promise as to the future** “impl[y] necessarily the belief of the party making it that the statement is true.” *Folio v. City of Clarksburg*, 221 W. Va. 397, 405, 655 S.E. 2d 143, 151 (2007). There is no evidence, or even claim, that Mr. Griffith was **dishonest**, and Dr. Blaydes testified to the contrary. Blaydes Dep. at 192:24 - 193:3. Summary judgment is therefore proper on the negligence claim as well.

App. 13. (emphasis added)

The Circuit Court improperly applied Rule 56(c) when it concluded that the representations to Blaydes by PCH were a “prediction about the future.” In reaching these conclusion’s, the Circuit Court relied on one description by Blaydes of the representations, “the RSS ‘was going to open.’” App.13. The Circuit Court ignored multiple other descriptions by Blaydes of the representations by PCH. The other descriptions include: “it wasn’t a potential reopening” App. 53 (p. 30:16), the RSS “would open for us” App. 53 (p.31:15-16), “it’s going to be opened” App 53 (p. 33:3), “I left the meeting knowing he was going to get the surgery center open” App. 53 (p.33:15-16), “the staff had the direction to get the place open” App.54 (p. 36:19-20), “There was no uncertainty. The plan was to get it opened. That was the certainty.” App. 57 (p. 47:24 and p. 48:1), “everybody told me all the time this is - -this is what we’re doing. We’re all committed to it.” App. 61 (p. 65:1-3) “it’s a done deal” App. 93 (p. 193:4), and “That the surgery center would open. That was the representation from Mr. Griffith. No - - no - - no qualifications. Not if we have this or that, or this turns up this way, this turns that way.” App. 95 (p.199:3-6), These are expressions of a current fact and, at a minimum, create a question of fact to be decided by a jury as to whether the representations by PCH to Blaydes were about an existing fact or a prediction about the future.

“The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syllabus Point 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). The Circuit Court

violated this principle. In Footnote 1, the Circuit Court adopted language from PCH's Motion and determined that the representations by PCH were a "prediction about the future". App. 13. The Circuit Court provided no explanation of its reasoning in arriving at this determination nor did it explain why it ignored Blaydes other descriptions of the representations in making that determination. When the Circuit Court determined that the representations were a "prediction about the future", it violated the principle that: "On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue." Syllabus Point 3, *Thomas v. Goodwin*, supra.

Contrary to Rule 56(c) and well established law regarding that Rule, the Circuit Court improperly acted as the trier of fact, and in doing so, limited its consideration of the representations by PCH to Blaydes to one description by Blaydes of the representations, to the exclusion of numerous other description, to find facts which were relied on by the Circuit Court in granting summary judgment against Blaydes on his cause of action for negligent misrepresentation. This constitutes error and summary judgment on Blaydes cause of action for negligent misrepresentation was not proper.

Failure to Follow Established Rules

As a basis for its grant of summary judgment against Blaydes on his cause of action for negligent misrepresentation the Circuit Court's relied on: (1) its finding that the representations by PCH to Blaydes were "predictions about the future"; (2) its finding that there was no evidence to establish a lack of intent on the part of PCH to reopen the RSS when the representations by PCH to Blaydes were not made; and (3) its finding that PCH's representations to Blaydes were not dishonest.

These elements can relate to a cause of action for fraud, but they are not applicable to an analysis of Blaydes cause of action for negligent misrepresentation.

As the name connotes, a cause of action for negligent misrepresentation is based on negligence principles. A valid cause of action based on negligence requires “. . . that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff.” *Robertson v. LeMaster*, 171 W. Va. 607, 610, 301 S.E.2d 563, 566 (1983) (citations omitted). The Supreme Court has stated that West Virginia recognizes a separate cause of action for negligent misrepresentation. *Folio v. City of Clarksburg*, *supra*. The Supreme Court of Appeals also stated: “This Court has long since held that, ‘One under a duty to give information to another, who makes an **erroneous statement** when he has no knowledge on the subject, and thereby misleads the other to his injury is as much liable in law as if he had intentionally stated a falsehood.’” *Id* (emphasis added). This statement sets out the elements of a cause of action for negligent misrepresentation in West Virginia.

Footnote 1 does not address whether or not the representations to Blaydes were erroneous. The Circuit Court’s grant of summary judgment against Blaydes on his cause of action for negligent misrepresentation is not based on an absence of evidence that PCH representations to Blaydes were erroneous. Instead, the Circuit Court relied on its finding that the representations to Blaydes by PCH were not false statements. A false statement and an erroneous statement are not synonymous terms. They are different, just as a negligent misrepresentation and a fraudulent misrepresentation support different causes of action. A false statement is an element of an action for fraudulent misrepresentation. An erroneous statement, not a false statement, is an element of a cause of action

for negligent misrepresentation. A false statement has a specific meaning when applied to fraud and that meaning will be discussed later in this Argument.

For purposes of its Motion for Summary Judgment, PCH did not contest that it owed a duty to Blaydes or that Blaydes suffered damages resulting from his reliance on the representations by PCH. App. 6. Therefore, in order for the Circuit Court to have properly granted PCH's Motion, insofar as it pertains to the cause of action based on negligent misrepresentation, PCH had the burden of establishing that there was no evidence to support the claim that the statements to Blaydes by PCH were erroneous. PCH did not address or meet this burden. The Circuit Court did not discuss that burden in the Summary Judgment Order. The Circuit Court made no finding that there was an absence of evidence to establish that PCH's representations to Blaydes were erroneous. Instead, the Circuit Court applied principles applicable to fraud to grant summary judgment on Blaydes cause of action for negligent misrepresentation.

The Circuit Court's stated reasons for granting summary judgment on the issue of negligent misrepresentation, are as follows:

1. "... Blaydes again has no **false statement of fact** for such basis."
2. "The only possible negligence identified by ... Blaydes was the statement by Wayne Griffith that the RSS '**was going to open.**'"
3. "Blaydes did not identify any information that suggested Mr. Griffith was careless or negligent in his **prediction about the future.**"
4. "... any **promises as to the future** also 'impl[y] necessarily the belief of the party making it that the statement is true'"
5. "The is no evidence, or even claim, that Mr. Griffith was **dishonest .**"

App. 13 (emphasis added).

Reason 1 above is based on the lack of evidence of a “false statement of fact”.

A false statement of fact is not an element of a valid cause of action for negligent misrepresentation. A false statement is an element of a valid cause of action for fraud. Syllabus Point 5, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004). An erroneous statement, not a “false statement of fact” is an element of a cause of action for negligent misrepresentation. *Folio v. City of Clarksburg*, supra. Neither the Circuit Court in the Summary Judgment Order nor PCH in its Motion for Summary Judgment refers to any authority to the contrary.

Reasons 2 and 3 and Reason 4, in part, are based on the principle that a promise to act in the future is not a “false statement of fact”. Again, this is a possible consideration when analyzing a claim for fraud. *Janssen v. Carolina Lumber Co.*, 137 W. Va. 561, 73 S.E.2d 12 (1952). However, that principle is not applicable when analyzing a claim for negligent misrepresentation.

Reason 4, in part, and Reason 5 are based on the assertion that dishonesty is an element of a valid cause of action for negligent misrepresentation. Dishonesty is not an element of a cause of action for negligent misrepresentation nor is it necessary for a valid cause of action for fraudulent misrepresentation in this case because of applicable exceptions.

Blaydes’ testimony is clear, PCH represented to him on April 10, 2020 and again approximately two weeks later that the RSS was being opened for Blaydes and that the reopening was a done deal. These representations were erroneous, regardless of whether they were about an existing fact or a promise to act in the future because the RSS was not reopened for Blaydes and it was not a done deal. When Griffith made these representations, he told Blaydes that “he had the

authority to make that happen” App. 54 (p. 36:20-21). Apparently, that statement was also erroneous because PCH’s Board of Directors had not authorized the reopening of RSS.

To prevail on its Motion for Summary Judgment on Blaydes’ cause of action for negligent misrepresentation, PCH had the burden of establishing the absence of any evidence on the basis of which a jury could find that PCH made an erroneous statement to Blaydes about the reopening of the RSS. PCH did not meet that burden. In fact, all of the evidence establishes that the representations by Griffith to Blaydes were erroneous. The failure of the Circuit Court to apply the negligent misrepresentation, erroneous, standard and the Circuit Court’s application of the fraud, false statement, standard when granting summary judgment against Blaydes on his cause of action for negligent misrepresentation constitutes error and the grant of summary judgment as to that cause of action was not proper.

Fraud

Failure to Properly Apply Rule 56 (c)

In granting PCH’s Motion in so far as it pertains to Blaydes’ cause of action for fraudulent misrepresentation, the Circuit Court again improperly applied Rule 56(c) and determined that PCH’s representations to Blaydes were “promises”, App. 5, “representations about the future”, App. 9 and “promises as to the future”, App. 11. The “**STATEMENT OF FACTS**” in the Summary Judgment Order, only mentions one of multiple descriptions by Blaydes of the PCH representations to Blaydes, “. . . the hospital would ‘ get the surgery center [RSS] open.’” App. 7. Once again the Circuit Court ignored Blaydes other descriptions of PCH’s representations: “it wasn’t a potential reopening” App. 53 (p. 30:16), the RSS “would open for us” App. 53 (p.31:15-16), “it’s going to be opened’ App 53 (p. 33:3), “I left the meeting knowing he was going to get the surgery center open” App. 53 (p.33:15-

16), “the staff had the direction to get the place open” App.54 (p. 36;19-20), “There was no uncertainty. The plan was to get it opened. That was the certainty.” App. 57 (p. 47:24 and p. 48:1), “everybody told me all the time this is - -this is what we’re doing. We’re all committed to it.”, App. 61 (p. 65:1-3) “it’s a done deal” App. 93 (p. 193:4), and “That the surgery center would open. That was the representation from Mr. Griffith. No - - no - - no qualifications. Not if we have this or that, or this turns up this way, this turns that way.” App. 95 (p.199:3-6), ”. Relying on the single description to the exclusion of all other descriptions, the Circuit Court adopted language from PCH’s Motion and determined that the representations were “promises”, “representations about the future” and “promises about the future”. The Circuit Court did not explain how or why it made these determinations.

For the same reasons it was improper for the Circuit Court to determine that the representations to Blaydes were “predictions about the future” in granting summary judgment against Blaydes on his cause of action for negligent misrepresentation, it was improper for the Circuit Court to make the determination that the PCH’s representations were “promises”, “representations about the future” or “promises about the future” in granting summary judgment on Blaydes cause of action for fraud. The Circuit Court again violated fundamental principles applicable to motions for summary judgment. “On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue.” Syllabus Point 3, *Thomas v. Goodwin*, supra. “The circuit court’s function at the summary judgment state is not to weigh the evidence and determine the truth of the matter, but to determine if there is a genuine issue for trial.” Syllabus Point 3, *Painter v. Peavy*, supra.

In determining that the representation by PCH to Blaydes were “promises” or “representations about the future” or “ promises about the future”, the Circuit Court ignored descriptions of the representations by Blaydes which, at a minimum, created a genuine issue of fact and summarily concluded that the representations by PCH were “promises”, “representations about the future” and promises as to the future”. The question of fact determined by the Circuit Court was material because the finding that the representations by PCH were “promises”, “representations about the future” and “promises as to the future” is the basis for the Circuit Court’s grant of summary judgment on Blaydes’ cause of action for fraudulent misrepresentation. This determination by the Circuit Court constitutes error and, for this reason, summary judgment on Blaydes cause of action for fraud was not proper.

Failure to Properly Apply Established Rules

It is undisputed that the elements necessary to establish a cause of action for fraud are: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying upon it; and (3)that he was damaged because he relied on it.” *Kidd v. Mull*, supra (citing Syllabus Point 1, *Lengyel v. Lint*, 280 S.E.2d 66 (1981).

Whether or not PCH’s representations to Blaydes were “false” is the only element of fraud considered by the Circuit Court in granting summary judgment to PCH on Blaydes’ cause of action for fraudulent misrepresentation. The Summary Judgment Order provides: “For purposes of its motion for summary judgment, PCH accepts (without agreeing) that Dr. Blaydes could create a factual question with regard to reliance and damages and relies on the absence of evidence of a false statement in support of the motion.” App. 6. Therefore, in order to properly grant PCH’s Motion,

the Circuit Court had to find a lack of evidence to establish that the representations by PCH to Blaydes were “false statements”.

The Circuit Court’s reasons for granting PCH’s Motion, as it pertains to Blaydes’ cause of action for fraudulent misrepresentation, are summarized in the first paragraph of the **CONCLUSION** of the Summary Judgment Order, as follows:

“ . . . the allegedly **fraudulent** statements on which the complaint is based were, at most, representations about or promises about the future. **Under West Virginia law, such statements are not statements of fact, and can only be deemed fraudulent if the speaker had not believed them to be true at the time they were made or did not intend to keep the promise when the promise was made.** Dr. Blaydes admits that the individuals making the statements or “promises” believed them to be true at the time they were made and therefore, has failed to prove that such statements were fraudulent. Because Dr. Blaydes has failed to establish an essential element of his claim (i.e., intentional misrepresentation), there is no genuine issue of material fact for a jury’s consideration and summary judgment is proper.”

App. 10 (emphasis added) .

The Circuit Court continued in the second paragraph of the **CONCLUSION**, stating:

“Under long-settled precedent in West Virginia, a promise of representation as to the future is not a statement of fact and cannot be the basis of a fraud claim. *Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952). An exception exists if the plaintiff can show that the promise was made without the intention to keep it. *Croston v. Emax Oil Co.*, 195 W.Va. 86, 90, 464 S.E.2d 728, 732 (1995).”

App. 12.

Blaydes believes that the Circuit Court properly stated established rules applicable to fraud. However, these rules were not correctly applied by the Circuit Court.

On their face, the statements to Blaydes by PCH, as described by Blaydes, were not “promises”, “representations about” or “promises about the future”. The representations by PCH to Blaydes were representations of an existing fact, the state of mind of PCH’s Board of Directors at

the time the representations were made. It is uncontested that the reopening of the RSS by PCH required the approval of PCH's Board of Directors. It is uncontested that PCH's Board of Directors had not approved the reopening of the RSS at the time the representations were made to Blaydes. Based on minutes of meetings of PCH's Board of Directors produced in response to Blaydes' discovery requests, PCH's Board of Directors never took any action to approve or disapprove the reopening of the RSS. App. 155 (Interr. No. 3), App. 172 (Req. for Prod. No 3.), App. 181-191 (Board Minutes Produced). PCH has argued that this fact is contradicted, at least in part, by Blaydes testimony that, in late August 2020, Jeffrey Lilley, the CEO of PCH, advised Blaydes that the PCH Board of Directors voted not to reopen the RSS. App. 67 (p. 87- 88). If PCH's Board of Directors did vote in August 2020 not to reopen the RSS, a fact contradicted by PCH's own records, that fact is not evidence of the state of mind of PCH's Board of Directors when the representations in question were made to Blaydes by PCH in April 2020 and is not relevant as to PCH's intent at the time the representations were made.

Whether or not the state of mind of a corporation constitutes an existing fact or a promise of future action is addressed in *Elk Refining Co. v Daniel*, 199 F.2d 479 (4th Cir. 1952). The facts in that case, in relevant part, are: a representative of Elk Refining Co, promised Mrs. Daniel that Elk Refining Co. would lease a lot in Oceana owned by Mrs. Daniel; that promise was for the purpose of obtaining Mrs. Daniel's agreement to lease a lot in Pineville, which she owned with her husband, to Elk Refining; and, at the time the promise was made to Mrs. Daniel, Elk Refining Co. was only considering the lease of the Oceana property. In its decision, the Circuit Court of Appeals for the Fourth Circuit states: "The presence or lack of a positive intention at any time is a factor of a state of mind, and a misstatement of that mental position is a false representation of an existing fact." *Id.*

at 481 (citations omitted). At all relevant times, the PCH Board of Directors may have been considering reopening the RSS, but when the representations were made to Blaydes, there was no presence or lack of a positive intention by PCH's Board of Directors regarding the reopening of the RSS. Therefore, the representations to Blaydes regarding the reopening the RSS were false statements regarding an existing fact, the state of mind of PCH's Board of Directors. The Circuit Court's analysis of Blaydes' cause of action for fraud was predicated on the factual determination that PCH's representations to Blaydes were "promises", "representations about the future" or "promises about the future". The Circuit Court failed to consider the state of mind of PCH's Board of Directors. The state of mind of PCH's Board of Directors created, at a minimum, a question of fact as to the nature of the representations to Blaydes, present fact or "promises", "prediction about the future" or "promises about the future". The Circuit Court's analysis was based on a material fact, found by the Circuit Court to exist, when there was a genuine issue as to the existence of that fact, and, therefore, the grant of summary judgment on Blaydes cause of action for fraudulent misrepresentation is error.

In the **CONCLUSION** of the Summary Judgment Order the Circuit Court states: "Because Dr. Blaydes has failed to establish an essential element of his claim (i.e., intentional misrepresentation), there is no genuine issue of material fact for a jury's consideration and summary judgment is proper." App. 12. This statement is not correct because an "intentional misrepresentation" is not an essential element to establish Blaydes' cause of action for fraud.

A general rule regarding fraud is that actionable fraud "... must **ordinarily** be predicated upon an intentional misrepresentation . . .". *Gaddy Eng'g Co. v. Bowles Rice Mc David Graff & Love, LLP*, 231, W.Va. 577, 585, 746 S.E.2d 568, 576 (2013) (emphasis added) . As stated above,

an exceptions to the general rule occurs if “the speaker had not believed them to be true at the time they were made or did not intend to keep the promise when the promise was made.” App. 12. An established rule in West Virginia is that it is not indispensable to an action based on a fraudulent representation that the person making the statement knew it was false. *Horton v Tyree*, 104 W. Va. 238, 139 S.E.2d 737 (1927). The Supreme Court of Appeals stated in that decision: “ For it is elementary doctrine that a false representation may be made scienter, so as to afford a right of action in damages, in contemplation of law, in any of the following ways: (1) with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; or (3) under circumstances in which the person making it ought to have known if he did not know of its falsity.” Id. at 242, 738 (citations omitted). Based on the evidence that was before the Circuit Court, a jury could properly find that Griffith’s representations to Blaydes fall into any of these categories and are false representations.

At the time Griffith made the representations to Blaydes he was the retired CEO of PCH and the Strategic Advisor to the PCH Board of Directors. App. 6 and 151. While Blaydes did not believe Griffith was acting dishonestly, a jury could find that he acted dishonestly based on the fact that, because of his past position with PCH and then current position with PCH ‘s Board of Directors, he knew that the reopening of the RSS required the approval of PCH’s Board of Directors and that no such approval had been given or, based on those facts, a jury could find that Griffith did not know if his representations were true or false or, based on those facts, a jury could find that, Griffith should have known the reopening required action by PCH’s Board of Directors and that Board had taken no action. Therefore, the conclusion of the Circuit Court that: “Because Dr. Blaydes has failed to establish an essential element of his claim (i.e. intentional misrepresentation), there is no genuine issue of material fact for a jury’s consideration and summary judgment is proper.”, App. 12, is a

misapplication of the general rules regarding an intentional misrepresentation and the Circuit Court's grant of summary judgment on Blaydes cause of action for fraudulent misrepresentation is error.

In the alternative, if the uncontested evidence supports the Circuit Court's characterization of the representations by PCH as being "promises", "representations about the future" or "promises as to the future", an exception to the rule excluding those statements as a basis for fraud applies. A representation or promise about the future can be fraudulent if " . . . the non-existence of the intention to fulfill the promise at the time it was made is shown." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, supra.

The Circuit Court failed to consider PCH's intent regarding the reopening of the RSS at the time the representations in question were made to Blaydes. The Circuit Court's analysis of PCH's intent is primarily a discussion about whether or not representatives of PCH were "dishonest" when PCH made representations to Blaydes about the reopening of the RSS. The Circuit Court also discussed acts taken by representatives of PCH after the representations were made to Blaydes in connection with its analysis of PCH's "intent" at the time the representations were made. App. 11.

Undisputed evidence establishes that PCH lacked the intent to reopen the RSS when the representations were made to Blaydes by PCH that it would reopen the RSS. It is undisputed that the reopening of the RSS required the approval of PCH's Board of Directors. It is undisputed that Griffith was acting for PCH's Board of Directors when he made representations to Blaydes regarding the reopening of the RSS by PCH. It is undisputed that, at the time the representations were made, PCH's Board of Directors had taken no action to approve or disapprove the reopening of the RSS. At a minimum, the failure of the PCH Board of Directors to have taken any action regarding the

reopening of the RSS at the time the representations were made to Blaydes creates a question as to the PCH's lack of intent to reopen the RSS when the representations were made. The fact that PCH's Board of Directors had taken no action regarding reopening the RSS when the representations were made to Blaydes is evidence that PCH had no intent to reopen the RSS. A failure to form an intent is the same as the "nonexistence of intent". Therefore, if PCH's representations regarding the reopening of the RSS were promises about future action, then they are still a proper basis for Blaydes' claim for fraudulent misrepresentation because, at the time the representations were made to Blaydes, PCH had no intention to reopen the RSS, presently or in the future. For this reason, the Circuit Court's grant of summary judgment on Blaydes' cause of action for fraudulent misrepresentation was error.

CONCLUSION

The grant of summary judgment by the Circuit Court of Mercer County against Blaydes on the causes of action asserted by Blaydes against PCH, negligent misrepresentation and fraudulent misrepresentation, was improper. Contrary to the conclusions by the Circuit Court, the representations by PCH to Blaydes regarding the reopening of the RSS provide an element which supports both causes of action.

The Circuit Court's grant of summary judgment on both causes of action was based on determinations of two issues of fact, the nature of the representations by PCH to Blaydes and the intent of PCH at the time those representations were made. The evidence before the Circuit Court created, at a minimum, genuine questions of material fact as to both issues and it was improper for the Circuit Court to make a determination of factual issues based on the conflicting evidence. The

Circuit Court summarily and improperly determined that the representations by PCH to Blaydes were promises to reopen the RSS in the future.

The Circuit Court also summarily and improperly determined that the promises by PCH to reopen the RSS in the future could not be false statements because there was no evidence that, at the time the promises were made, PCH lacked intent to fulfill those promises and because there was no evidence that the misrepresentations by PCH were intentional or dishonest. These determinations of fact by the Circuit Court violate Rule 56 (c) of the Rules of Civil Procedure and established principles pertaining to the application of that Rule and constitute error.

The Circuit Court based its grant of summary judgment on its findings set out above. These findings, if proper, might be properly considered when analyzing a cause of action for fraud, but they are not elements of negligent misrepresentation and should not have been considered by the Circuit Court when it analyzed Blaydes cause of action for negligent misrepresentation. The Circuit Court should have based its analysis of Blaydes' cause of action for negligent misrepresentation on whether there was an absence of evidence to support a finding that the representations were erroneous. The Circuit Court's failure to base its analysis of Blaydes' cause of action for negligent misrepresentation on the existence of evidence of an erroneous statement was improper and the grant of summary judgment against Blaydes on that cause of action is error.

The Circuit Court's grant of summary judgment against Blaydes in regard to his cause of action for fraud is also improper and also constitutes error. First, the evidence before the Circuit Court created, at a minimum, a question of fact as to the state of mind of the PCH Board of Directors at the time the representations were made and the character of the representations by PCH, present fact or promise to act in the future, and the Circuit Court's finding that the representations

were promises to act in the future was improper. However, if the Circuit Court correctly found that all of the evidence before the Circuit Court established that the representations were promises by PCH to open the RSS in the future, then the evidence before the Circuit Court created, at a minimum, a genuine issue as to whether there was a lack of intent on the part of PCH to honor its promises to reopen the RSS at the time the promises were made to Blaydes. A genuine issue of fact exists regarding PCH's intent because the RSS could only reopen after PCH's Board of Directors approved the reopening and, at the time the representations to Blaydes PCH's Board of Directors had taken no action regarding the reopening. The failure of PCH's Board of directors to act is evidence of its lack of intent to reopen the RSS and properly supports a cause of action for fraud. However, once again the Circuit Court weighed the evidence regarding lack of intent on the part of PCH and summarily determined that there was no evidence to establish a lack of intent on the part of PCH. This action by the Circuit Court is improper and constitutes error.

The grant of summary judgment against Blaydes on both of his causes of action should be set aside and the case should be remanded to the Circuit Court of Mercer County for trial

Respectfully submitted this 19th day of July, 2024.



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IN THE
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-156

STEPHEN H. BLAYDES, M.D.
Plaintiff-Appellant

v.)


PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.
Defendant-Appellee

CERTIFICATE OF SERVICE

I, C. William Davis, counsel for Appellant, hereby certify that on July 19, 2024 a true copy
of the Appellant's Brief was filed electronically and emailed to:

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