

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

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

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APPELLANT'S REPLY BRIEF

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## SUMMARY OF ARGUMENT

The Circuit Court's grant of summary judgment to Princeton Community Hospital Association, Inc. (PCH) and against Stephen H. Blaydes, M.D. (Dr. Blaydes) was based on a factual findings by the Circuit Court that representations made by Wayne Griffith (Mr. Griffith), on behalf of PCH, to Dr. Blaydes, were "representations about or promises about the future", App. 12, and that there was "no basis on which to find that the predicated or promised reopening of the RSS was made without intent to carry through on it." App. 11. RSS refers to an ambulatory surgical center owned by PCH. Relying on these findings of fact, the Circuit Court determined that the representations by Mr. Griffith would not support a claim for negligent misrepresentation because there was no false statement of fact and there was a lack of evidence that Mr. Griffith was dishonest. App. 13. The Circuit Court made a similar finding of fact and came to similar legal conclusions in regard to Dr. Blaydes' cause of action for fraudulent misrepresentation. App. 12.

The Circuit Court's grant of summary judgment and PCH's argument in support of the grant of summary judgment are wrong. First, the representations by Mr. Griffith were representations about existing facts and were not representations about or promises about the future. The Circuit Court made a summary determination of a factual question when, at a minimum, a question of fact existed on that issue. Second, the finding that there was no evidence that PCH lacked the intent to carry out the representations made by Mr. Griffith is a summary determination of a factual question by the Circuit Court when, at a minimum, a question of fact existed on that issue because the undisputed evidence is that PCH's Board of Directors had not considered the reopening of the RSS



when the representations were made to Dr. Blaydes. Without action by its Board of Directors, PCH lacked intent to reopen the RSS. Lack of intent and no intent are the same. Third, the general rule pertaining to fraudulent misrepresentation regarding a representation about or a promise about the future is not applicable to a claim for negligent misrepresentation.

## ARGUMENT

### Princeton Community Hospital Association, Inc. Misrepresented Existing Facts

The Circuit Court granted summary judgment to PCH based, in part, on its factual determination that the representations in question “. . .were, at most, representations about or promises about the future.” App. 12. The Order Granting Defendant Princeton Community Hospital Association, Inc.’s Motion For Summary Judgment contains two brief references to the representations made by Mr. Griffith, App. 7 and 13, and contains no discussion of the basis for the Circuit Court’s factual determination. Likewise, the Circuit Court did not discuss the intent of PCH, as determined by its Board of Directors, at the time the representations in question were made to Dr. Blaydes. The Circuit Court made factual determinations without considering other descriptions of Mr. Griffith’s representations or the intent of PCH at the time the representations were made to Dr. Blaydes. PCH does not contest the Circuit Court’s failure to consider Dr. Blaydes’ other descriptions of Mr. Griffith’s representation. Resp. Br. 13. The facts before the Circuit Court, at a minimum, created a genuine issues as to whether the representations were about existing facts or representations about or promises about the future and whether PCH had a lack the intent to perform at the time the representations were made to Dr. Blaydes. The factual determinations by the Circuit Court violate a fundamental principle regarding summary judgment, “The circuit court’s function at the summary

judgment stage is not to weigh the evidence and determine the truth of th matter, but to determine if there is a genuine issue for trial.” Syllabus Point 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Mr. Grifith misrepresented existing facts to Dr. Blaydes. The only evidence regarding Mr. Griffith’s representations to Dr. Blaydes comes from the deposition testimony of Dr. Blaydes. One of Dr. Blaydes’ various descriptions of Mr. Griffith’s representations is as follows: “. . . he basically said it’s a done deal. I mean it’s what’s going to happen. Bluefield Regional is closing. The surgery center is opening for you.” App. 93(p. 193:3-6) Mr. Griffith also told Dr. Blaydes that “. . . the staff had the direction to get the place open.” and that he, Mr. Griffith, “. . . had the authority to make that happen.” App. 54 (p.36:19-21) Contrary to the factual determination made by the Circuit Court and relied on by PCH in its argument to this Court, these are not promises or statements about the future. A done deal is not a future event. The statement that “the surgery center is opening for you.” is in the present tense, not the future tense. The direction to the staff “to get the place open” by Mr. Griffith had occurred and was a past act, not something that would happen in the future. This fact is confirmed by the steps taken by PCH management to reopen the RSS. Mr. Griffith’s assertion that he had the authority to reopen the RSS was an existing fact and not an assertion about authority that would be granted in the future. These are current facts and it was improper for the Circuit Court to determine otherwise.

These representations by Mr. Griffith were false at the time they were made to Dr. Blaydes. It is uncontradicted that the reopening of the RSS required the approval of the PCH Board of Directors. It is also uncontradicted that the PCH Board of Directors had not approved the reopening of the RSS at the time Mr. Griffith made the representations to Dr. Blaydes. The only evidence of

any action by the PCH Board in regard to the reopening of the RSS is the testimony by Jeffrey Lilley that the PCH Board of Directors voted in late August 2020 not to reopen the RSS. Resp.Br. 3. PCH incorrectly describes this as a “decision of the PCH Board not to proceed with the project.” Id. The decision by the PCH Board in August 2020 was not a decision about proceeding with the reopening of the RSS because the PCH Board of Directors had never agreed to begin the project. The action by the PCH Board of Directors in August 2020 was well after the representations were made to Dr. Blaydes in April 2020. Minutes of the PCH Board of Directors do not reflect any action by the PCH Board of Directors in regard to the reopening of the RSS, including a grant of authority to Mr. Griffith to reopen the RSS. App.155 (Interr. No. 3), App. 172 (Req. For Prod. No. 3), App. 181-191 (Board Minutes Produced). PCH never authorized Mr. Griffith to reopen the RSS and had taken no action in that regard when Mr. Griffith made the representations to Dr. Blaydes and therefore, the representations by Mr. Griffith on behalf of PCH were false even if Mr. Griffith believed them to be true.

There is a lack of any evidence as to the intent of the PCH Board of Directors, in April 2020, regarding the reopening of the RSS. Therefore, PCH had no present or positive intention regarding the reopening of the RSS when Mr. Griffith made the representations to Dr. Blaydes about reopening the RSS. “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.” *Elk Refining Co. v. Daniel*, 199 F.2d 479, 481 (4<sup>th</sup> Cir. 1952). (citations omitted). The facts in *Elk Refining Co. v. Daniel* are similar to the facts in the present case. Both involve representations by a corporate employee about corporate actions prior to the corporations’ boards of directors approving that action. In each case, prior approval by the corporations’ boards of directors was required. *Elk Refining Co.*

v. *Daniel* differs from the present case because the relief sought in that case was rescission of a contract based on a fraudulent misrepresentation. The present case is based, in part, on a claim for damages resulting from a fraudulent misrepresentation. However, that difference does not make the principles set forth in *Elk Refining Co. v. Daniel* any less relevant. Just as Elk Refining Co. had no definite intent to act as represented by its agent, PCH had no definite intent to reopen the RSS when Mr. Griffith made the representations to Dr. Blaydes. Mr. Griffith did not tell Dr. Blaydes that PCH was considering reopening the RSS. He told Dr. Blaydes that PCH is reopening the RSS for you, that he, Mr. Griffith had the authority to reopen the RSS and that it was a done deal. These were misrepresentations of the state of mind of PCH and Mr. Griffith's authority and constitute misrepresentations of existing material facts.

PCH argues "The lack of prior Board approval did not mean that the hospital as an institution did not 'intend' to do what management planned and proposed to the Board." Resp. Br. 16. PCH also asserts "Dr. Blaydes also has no support for his theory that the requirement of ultimate Board approval meant that Mr. Griffith or PCH management had to obtain such [PCH Board] approval, in advance, to avoid misrepresentation." Resp. Br. 18. The decision to reopen or not to reopen the RSS was reserved to the PCH Board of Directors and only to the PCH Board of Directors. PCH could only form the intent to reopen the RSS by action of the PCH Board of Directors. The uncontradicted evidence is, at the time the representations were made to Dr. Blaydes, PCH's Board of Directors had not formed any intent regarding the reopening of the RSS, it had not even considered the reopening of the RSS. PCH's management had no authority to reopen the RSS without the approval of the PCH Board of Directors and the intent of management is not relevant. Mr. Griffith did not tell Dr. Blaydes that PCH management wanted to reopen the RSS and that management would recommend reopening

the RSS to the PCH Board of Directors but, the PCH Board would make the final decision on reopening. Instead, Mr. Griffith told Dr. Blaydes the RSS is reopening for you, that he, Mr. Griffith, had the authority to reopen the RSS and it was a done deal. These are misrepresentations of Mr. Griffith's authority and the intention of the PCH in regard to the RSS, both of which are existing facts..

The subsequent acts by members of the PCH management team may be relevant to what management of PCH hoped to accomplish and may confirm Mr. Griffith's representations to Dr. Blaydes but, they are not relevant to PCH's intent at the time the representations were made to Dr. Blaydes or Mr. Griffith's authority to reopen the RSS..

Princeton Community Hospital Association, Inc. Had No Intent To Reopen The RSS When  
Representations Were Made By Mr. Griffith To Dr. Blaydes

In the alternative, if the representations by Mr. Griffith to Dr. Blaydes were representations about or promises about the future, summary judgment on that basis was improper. PCH had no intent to reopen the RSS at the time the representations were made by Mr. Griffith to Dr. Blaydes. PCH improperly characterizes the lack of intent by PCH as implied promises. Resp. Br. 16-20.

PCH's position is that misrepresentations, whether negligent or fraudulent, cannot be based on promises or predictions as to the future. Resp. Br. 13. Dr. Blaydes agrees that this general rule is applicable to claims for fraudulent misrepresentation. Dr. Blaydes does not agree that this general is applicable to his claim for negligent misrepresentation for reasons discussed below. However, for purposes of this portion of his argument, Dr. Blaydes will accept this statement as true for both claims.

PCH acknowledges an exception to this general rule, set out by the Supreme Court in *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 746 S.E.2d 568, 576 (2013). Reply Br. 7. That exception is: “fraud ‘cannot be based on statements which are promissory in nature, or which constitute expressions of intention, unless the non-existence of the intention to fulfill the promise at the time it was made is shown.’” *Id.*

As discussed above, PCH had no intention of reopening the RSS at the time Mr. Griffith made the representations in question because PCH’s Board of Directors had not considered reopening the RSS. Therefore, if Mr. Griffith’s representations were representations about or promises about the future, then they are actionable because PCH had no intention of opening the RSS when the representations were made by Mr. Griffith to Dr. Blaydes.

PCH attempt to compare the present case to a corporate merger, Resp. Br. 17, is misplaced. Corporate mergers in West Virginia are governed by statute, W. Va. Code §31D-11-1101 et seq. Typically, a corporate merger is presented to shareholders by a plan of merger adopted by the merging corporations’ boards of directors and approved by the shareholders of one or both corporations. W. Va. Code § 31D-11-1104 (1) and (2).

### An Erroneous Statement Is The Applicable Standard For For A Claim For Negligent

#### Misrepresentation

PCH asserted and the Circuit Court agreed that a cause of action for negligent misrepresentation cannot be based on representations about or promises about the future. In asserting this position, PCH relies on principles applicable to causes of action for fraudulent misrepresentation

and on cases from other jurisdictions. West Virginia law regarding the elements of a cause of action for negligent misrepresentation is limited but, it exists, is long standing and controls.

The Supreme Court of Appeals has recognized the existence of a specific cause of action for negligent misrepresentation separate and apart from a cause of action for fraudulent misrepresentation. *Folio v. City of Clarksburg*, 221 W.Va. 397, 405, 655 S.E.2d 143, 151 (2007). In connection with that ruling, the Supreme Court of Appeals 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.* These constitute the elements of negligent misrepresentation in West Virginia that are long standing. The elements of fraud in West Virginia 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 defendant relied on it and was justified under the circumstances in relying on it; and, (3) that he was damaged because he relied on it. *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004).

PCH asserts that Dr. Blaydes misrepresents the holding in *Folio v. City of Clarksburg*. Resp. Br. 8. PCH asserts that the application of the erroneous standard would be a silent departure from an established rule. Resp. Br. 8. This is not true. The erroneous standard is a long established standard. The Supreme Court of Appeals stated, in reference to a claim for negligent misrepresentation, “This Court has long since held”. *Folio v. City of Clarksburg*, *supra*, citing *James v Piggott*, 70 W.Va. 435, 74 S.E. 667 (1910).

Negligent misrepresentation and fraudulent misrepresentation are different torts. Both require that the defendant is the tortfeasor. Both require that the plaintiff rely on representations by the

tortfeasor. Both require that the plaintiff is damaged because of his reliance on the representations of the tortfeasor. These torts differ in two ways. First, negligent misrepresentation is based on a “duty” of the tortfeasor to give information and fraudulent misrepresentation requires that the damaged party be “justified under the circumstance in relying on the misrepresentation”. Second, negligent misrepresentation requires an “erroneous” statement and fraudulent misrepresentation requires a statement that is “material and false”. Each of these causes of action have separate protection against abuse. The erroneous standard is less stringent than the material and false standard but the requirement for the breach of a duty is more stringent than a party being justified under the circumstances. In addition, the duty breached to support a cause of action when only economic damages are claimed, must arise in connection with a “special relationship”. *Eastern Steel v. City of Salem*, 209 W.Va. 392, 549 S.E.2d 266 (2001) and *Aikens v. Debow*, 208 W.Va. 486, 541 S.E. 2d 576 (2000)

The representations by Mr. Griffith were clearly erroneous. The reopening of the RSS was not a done deal. Only the PCH Board of Directors could authorized the opening of the RSS and the PCH Board of Directors had not considered that possibility in April of 2020 when the representations were made by Mr. Griffith to Dr. Blaydes. In addition, contrary to his representation, Mr. Griffith did not have the authority to reopen the RSS. Mr. Griffith may have believed that the RSS was reopening and that he had the authority to cause that to happen. However, he made erroneous representations on behalf of PCH when he lacked knowledge on the subject.

### CONCLUSION

The Circuit Court, contrary to Rule 56 (c) of the West Virginia Rules of Civil Procedure, improperly made factual determinations when genuine issues of material fact existed and based on



those factual determinations granted summary judgment in favor of PCH and dismissed Dr. Blaydes' claims for negligent misrepresentation and fraudulent misrepresentation.

It is undisputed that, in April 2020, PCH, through Mr. Griffith, represented to Dr. Blaydes that the RSS is opening for Dr. Blaydes, that he, Mr. Griffith, had the authority to cause the RSS to reopen and that the reopening was a done deal. It is undisputed that the reopening of the RSS required the approval of PCH's Board of Directors. PCH's Board of Directors either never considered the reopening of the RSS or, if it did consider the reopening of the RSS, that consideration occurred in late August 2020, after the representations were made to Dr. Blaydes in April 2020.

Contrary to the factual finding of the Circuit Court, the misrepresentations by PCH, through Mr. Griffith, were misrepresentations of existing facts, not representations about or promises about the future. The only evidence available to the Circuit Court regarding the representations made by PCH, through Mr. Griffith, to Dr. Blaydes was the deposition testimony of Dr. Blaydes, given on October 19, 2023. In spite of the passage of time and the various ways Dr. Blaydes described Mr. Griffith's statements, the Circuit Court, relied on two of various descriptions of the representations by PCH, through Mr. Griffith, and incorrectly found that the representations by PCH, through Mr. Griffith, were representations about or promises about the future. The Circuit Court made an additional factual finding that there was no evidence of any lack of intent to reopen the RSS when the representations were made to Dr. Blaydes. In making that determination, the Circuit Court ignored the fact that the reopening of the RSS required the approval of PCH's Board of Directors and ignored the fact that the PCH Board of Directors had not considered the reopening of the RSS when the representations were made to Dr. Blaydes. Based on these determinations of fact, the Circuit Court then found that because the representations by Mr. Griffith were representations about or promises

about the future, those representations would not support causes of action for fraudulent misrepresentation or negligent misrepresentation and that the lack of intent exception did not apply and granted summary judgment in favor of PCH. Each of these acts on the part of the Circuit Court constitutes error and Dr. Blaydes requests that this Court reverse the Order of the Circuit Court of Mercer County and remand this case for trial.

In addition, the Circuit Court incorrectly analyzed Dr. Blaydes' claim for negligent misrepresentation applying the same factual findings it used in analyzing Dr. Blaydes' claim for fraudulent misrepresentation and, using those factual findings it applied a rule applicable to claims for fraudulent misrepresentation (a claim may not be based on a representation about or promise about the future) to grant summary judgment. These acts by the Circuit Court constitute error and summary judgment as to Dr. Blaydes' claim for negligent misrepresentation should be set aside and that issue should be remanded to the Circuit Court of Mercer County for trial.

Respectfully submitted this 23rd day of September, 2024.



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**CERTIFICATE OF SERVICE**

I, C. William Davis, counsel for Appellant, hereby certify that on September 23, 2024 a true copy of the Appellant's Reply Brief was filed electronically and emailed to:

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