

NO. 33295

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

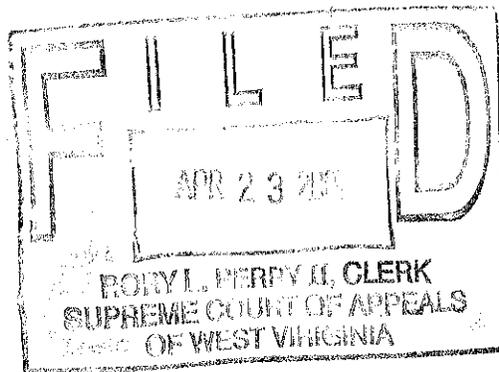
GRANDEOTTO, INC.,

Appellant,

vs.

CITY OF CLARKSBURG,

Appellee.



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

APPELLANT'S RESPONSIVE BRIEF ON APPEAL

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TABLE OF CONTENTS

KIND OF PROCEEDINGS, NATURE OF RULING OF LOWER COURT	3
STATEMENT OF THE CASE	5
ASSIGNMENTS OF ERROR	16
POINTS AND AUTHORITIES	17
DISCUSSION OF LEGAL POINTS RAISED BY APPELLEE	34
PRAYER FOR RELIEF	36

RESPONSIVE BRIEF OF APPELLANT, GRANDEOTTO, INC.

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I.

KIND OF PROCEEDINGS, NATURE OF RULING OF LOWER COURT

This appeal in No. 33295 also contains the issues existing in the matter formerly identified by the Court as No. 33302 because the matters were merged by Order of the Supreme Court of Appeals entered on January 24, 2007.

Case No. 33295 was a civil action for specific performance and enforcement of right-of-way interests or other relief before the Circuit Court of Harrison County in Civil Action No.: 04-C-640-3. The Appellant sought review of a final order entered on March 1, 2006 by the Circuit Court granting summary judgment to the appellee by finding that the Appellant had no valid right-of-way interests. Your Appellant had argued that since the appellee municipal government had represented through a real estate sales contract and a deed of conveyance, both prepared by the appellee municipal government, that the conveyance was made subject to the duly recorded right-of-way interests of the seller-Appellant, the appellee was estopped from arguing that the said right-of-way interests were non-existent.

Case No. 33302 was a civil action arising from the torts of fraudulent misrepresentation and or negligent misrepresentation before the Honorable Circuit Court of Harrison County in Civil Action No.: 06-C-108-2. This case arises from facts developed and occurring before and during the course of the proceedings in Harrison County Civil Action No.: 04-C-640-3 assigned Supreme Court No. 33295. The

Appellant sought review of a final order entered on May 25, 2006 by the Circuit Court dismissing all of the Appellant's claims upon the Appellee's Rule 12b Motion to Dismiss, the Court converting the same to a Motion For Summary Judgment and then granting it. The Circuit Court found, among other things, that the tort of negligent misrepresentation was not litigible in West Virginia or not sufficiently defined under current law despite the some eleven cases that refer to it.

This Responsive Brief on behalf on the Appellant is timely submitted within the time frames of the Appellate Rules of the Supreme Court of Appeals.

II. STATEMENT OF THE CASE

The Appellant continues to rely upon its Statement of the Case set forth in its Brief on Appeal heretofore present to the Honorable High Court.

III.

ASSIGNMENTS OF ERROR

Enforcement of Right-Of-Way Interests

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED, BY APPLYING THE DOCTRINE OF MERGER TO EXTINGUISH RIGHT-OF-WAY INTERESTS, AND BY REFUSING TO APPLY THE DOCTRINE OF ESTOPPEL TO THE ARGUMENTS OF THE CITY THAT THE RIGHT-OF-WAYS IT HAD AGREED IN WRITING AND ORALLY TO BE SUBJECT TO DID NOT EXIST.

Negligent or Fraudulent Misrepresentation

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY GRANTING SUMMARY JUDGMENT UPON APPELLEE'S RULE 12B MOTION TO DISMISS BY FINDING THAT THE APPELLANT HAD NOT STATED A CLAIM FOR FRAUDULENT MISREPRESENTATION OR NEGLIGENT MISREPRESENTATION AND BY GOING FURTHER TO FIND THAT THE EVIDENCE DID NOT SUPPORT SUCH CLAIMS WHEN IT CLEARLY DID.

**IV.
POINTS AND AUTHORITIES**

Cases

<i>Kidd v. Mull</i> , 595 S.E.2d 308, 215 W. Va. 151 (2004).....	18
<i>Cordial v. Ernst & Young</i> , 199 W. Va. 119, 483 S.E.2d 248 (1996).....	18
<i>Darrisaw v. Old Colony Realty Company</i> , 202 W. Va. 23, 501 S.E.2d 187 (1997).....	18
<i>Paden City v. Felton</i> , 136 W. Va. 127, 66 S.E.2d 280 (1951).....	12
<i>Cottrell v. Numberger</i> , 131 W. Va. 391, 47 S.E.2d 454 (1948).....	14
<i>Post v. Bailey</i> , 110 W. Va. 504, 159 S.E. 524 (1931).....	14
<i>Jones v. Beavers</i> , 221 Va. 214, 269 S.E.2d 775 (1980).....	14
<i>Lance J. Marchiafava, Inc. v. Haft</i> , 777 F.2d 942 (4th Cir. 1985).....	14
<i>Hansen v. Stanley Martin Companies, Inc.</i> 585 S.E.2d 567, 266 Va. 345 (2003).....	18
<i>Stanley v. Sewell Coal Co.</i> , 169 W.Va. 72, 285 S.E.2d 679 (1982).....	20
<i>Teter v. Old Colony Co.</i> , 190 W.Va. 711, 441 S.E.2d 728 (1994).....	18

Treatises

<i>Easements</i> , M.J.2d, Creation, § 7.....	14
<i>Black's Law Dictionary</i> , 6 th Ed., 509, 1326	12

V.

DISCUSSION OF LEGAL POINTS RAISED BY APPELLEE

Enforcement of Right-of-Way Interests

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED, BY APPLYING THE DOCTRINE OF MERGER TO EXTINGUISH RIGHT-OF-WAY INTERESTS, AND BY REFUSING TO APPLY THE DOCTRINE OF ESTOPPEL TO THE ARGUMENTS OF THE CITY THAT THE RIGHT-OF-WAYS IT HAD AGREED IN WRITING AND ORALLY TO BE SUBJECT TO DID NOT EXIST.

Appellee's assertion that the Appellant failed to prove by clear and convincing evidence the existence of the easements must be taken in the light that the Appellant was not given an opportunity to prove a fact because the matter was not allowed to be heard by a trier of fact. The Appellant did clearly demonstrate a sufficient legal basis for upholding the validity of the right-of-ways, i.e., express grant or reservation, implication, estoppel, and or prescription.

A. "Ambiguity" in the Easements

The lower court erred in ruling that the easements are void as a matter of law. Further, Appellee's assertion that Judge Bedell passed judgment upon the validity of the easements is, with all due respect, misleading. Judge Bedell absolutely did not make any independent analysis or ruling as to the validity or invalidity of the easements, but to the extent that they are referenced in his Order, that Court based its ruling upon

Judge Matish's Order alone. The Appellant argued before Judge Bedell that the validity of the easements was not relevant in the analysis of that fraudulent representation or negligent misrepresentation case. That case was about promises and representations made by the City that were not honored, purposely or negligently. Whether or not the right-of-ways were independently legally valid in theoretical jurisprudence is of no import to the issues of misrepresentation when our government promises that they will take the property "subject to" the right-of-ways as the Deed and the Contract for Sale, both drafted by the City, represented.

Regarding the Appellee's assertion that the right-of-way instruments are "unreasonably ambiguous as to both width and length," the Appellant respectfully asserts that the instruments, while not containing "metes and bounds" descriptions, more than adequately describe the right-of-way interests such that any "reasonable person" could determine the route of the right-of-ways through the property without resort to any other source and, further, that to declare those duly recorded right-of-way descriptions insufficient as a matter of law is paramount to destroying many less particularized instruments in existence and routinely upheld in the courts of this State. Each instrument in this case¹ states that:

- 1) the grant is for the purpose of "a sewer line and pedestrian travel for the benefit of the property located at 110-112 Souh Third Street";
- 2) that the grant shall "be a covenant running with the land";
- 3) that the grant shall be "for a sewer line and for pedestrian ingress and egress to

¹The instruments are attached as exhibits to various documents in the record, including the deposition transcript of Cecil Jarvis as Exhibits No. 1 and 2, and their language is likewise particularly quoted in various pleadings throughout.

the back of the property owned by Grandeotto, Inc. being 110-112 South Third Street, Clarksburg, Harrison County, West Virginia”;

4) that the sewer line grant “shall go from the back of the property of Grandeotto, Inc. at 110-112 South Third Street to be located in the discretion of said Grantee to Pike Street over a reasonable route as necessary to connect to the sewer system at such location as determined by the Grantee”;

5) that “[t]he right-of-way for pedestrian travel shall connect with Traders Alley and shall connect with Pike Street across said property purchased from Abbruzino, et al, and shall be 10 feet wide² for the purpose of ingress and egress for any and all purposes to the rear of the building of Grantee located at 110-112 South Third Street.” Therefore, the description for length is between fixed points upon parallel streets. The Description for width is plainly stated as Five Foot and Ten Foot respectively. There is no ambiguity in this regard.

This is because the pedestrian right-of-ways are connecting the parallel streets of Pike Street and Traders Alley³ connecting to the rear of the 110-112 South Third Street building. Since South Third Street forms right perpendicular angles with Pike Street and Traders Alley on the easterly side of the subject property conveyed, there is no room for ambiguity here. It was, respectfully, an abuse of discretion for the lower court to find ambiguity in regard to these right-of-way instruments and it is incomprehensible why the Appellee argues that they are ambiguous as to width or length. Applying the

²The only difference in the language of the instruments is that the November 25, 2003 instrument says “5 feet wide,” while the March 26, 2004 instrument says “10 feet wide.”

³Also known as “Traders Avenue.”

pertinent portion of High Court's analysis in *Belcher v. Powers*, 212 W.Va. 418; 573 S.E.2d 12 (2002), the instruments at bar clearly should not fail for ambiguity as a matter of law. Syl. Pt. 3 of that decision states that "A deed granting ... a ... right of way must contain on its face a description of the land in itself certain, so as to be identified, or, if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land" citing Syl. Pt. 1, in part, *Hoard v. Huntington & B.S.R. Co.*, 59 W.Va. 91, 53 S.E. 278 (1906). There is no other geography in this State which could be interpreted to be ambiguous to the description in these instruments. There is no room for ambiguity when the parallel Clarksburg city streets of Traders Alley and Pike Street abut to the rear of the property of the perpendicular South Third Street. Far from ambiguous, it is certain. The *Belcher* case also reminds us that much consideration is to be given to the intention of the grantor, which, from these facts, is also obvious.

B. Application of the Doctrine of Merger

Again, the Appellant's analysis and argument in regard to the lower court's finding of merger invalidating the right-of-way interests of the Appellant is essentially that, regardless of the application or non-application of the doctrine of merger, the City, through its conduct, should be held to being "subject to" the right-of-way instruments it said it would be subject to in the Contract of Sale and the Deed of conveyance it drafted. The question of law regarding the application, if any, of the doctrine of merger was brought *sua sponte* by the lower court at the pre-trial hearing held on October 21, 2005. Only at that time, and never before it, the City began stating that a merger of interests occurred.

Again, while there exists a doctrine of law which supports the argument that the right-of-ways of Grandeotto, Inc. merged into Grandeotto's fee interest prior to its conveyance of the property to the City (*Easements*, M.J.2d, Creation § 21), that issue is not dispositive of the matter because there is no doubt that whether or not such is the case, the said right-of-ways of Grandeotto, Inc. should have been held intact and valid in every respect by other well-established doctrines of law surrounding the methods by which an easement may be created, including grant or reservation, and estoppel.

Methods of Creating an Easement

An easement is the right to utilize the land of another. See *Black's Law Dictionary*, 6th Ed., p. 509. A right-of-way is a species of easement which generally involves passage over the land. *Id.* p. 1326.

"There are a number of ways an easement can be created. An easement may be created by express grant or reservation, by implication, by estoppel or by prescription." *Easements*, M.J.2d, Creation § 7, see also *Paden City v. Felton*, 136 W. Va. 127, 66 S.E.2d 280 (1951).

The actions of the City estopped it from arguing that no right-of-ways existed. As stated, the Appellant had a legitimate business purpose in creating the right-of-ways, i.e. to insure pedestrian and other access to the other properties it owns as stated in the right-of-way instruments themselves. This interest was preserved through lawfully constructed and duly recorded right-of-ways. Knowledge of these right-of-ways was communicated to the City on several occasions by Grandeotto's counsel for the transaction, Cecil Jarvis as stated above-herein. The City then, in its own construction of the sales agreement, included the right-of-ways as follows:

"The sale and conveyance of the Property shall be and is subject to the following:... b) To all exceptions, reservations, covenants, restrictions and easements contained in prior instruments now of record pertaining to the Property, including, without limiting the generality of the foregoing, those two (2) certain right-of-way agreements, one dated the 25th day of November, 2003, of record in the aforesaid Clerk's Office in Deed Book No. 1359, at page 432, and one dated the 26th day of March, 2004, of record in the aforesaid Clerk's Office in Deed Book No. 1361, at page 774." Exhibit D p. 2, ¶ 1. b).

Again, the same language is included in the Deed of conveyance and, obviously, this language expressly declares the conveyance subject to all easements contained in prior instruments of record including those two right-of-ways, which are particularly referenced. For clarity, the language does not generally exclude these right-of-way instruments by any limiting language such as "legally enforceable instruments of record" or "valid instruments of record" or "instruments of record which are not subsumed by the doctrine of merger" or the like - just "prior instruments now of record" (which both right-of-way instruments at bar were) - but the recitation even goes on to particularly referencing the two instruments at bar stating that the conveyance would be "subject to" them. **In the absence of the right-of-ways surviving a merger into the fee estate, *arguendo* then, the City made what can only be described as an express grant of the right-of-ways through the sale instrument.** And, then, the City ratified the grant to Grandeotto, Inc. by memorializing it in the Deed of conveyance it prepared with the exact same language. Since both grants cited instruments of record with particularity, those grants are to be regarded as if the complete language of the right-of-ways were

fully set forth in each instrument and should be regarded as such.

“An easement may be acquired by express grant and may also be created by covenant or agreement.” *Easements*, M.J.2d, Creation, § 7; *Cottrell v. Numberger*, 131 W. Va. 391, 47 S.E.2d 454 (1948); *Post v. Bailey*, 110 W. Va. 504, 159 S.E. 524 (1931). These two instruments, i.e. the Contract of Sale and the Deed of conveyance, then, are irrefutable evidence of covenant, agreement, and express grant creating or re-creating the easements in question, irrespective of the doctrine of merger.

Further, the doctrine of estoppel applies in several ways here. First, “[e]asements are sometimes created by estoppel.” *Easements*, M.J.2d, Creation, § 16; *Paden City v. Felton*, 136 W. Va. 127, 66 S.E.2d 280 (1951). Second, the allegations of the complaint and the evidence adduced in discovery factually support the doctrine that “[a] showing of inducement, reliance, user and injury may establish an implied easement through the doctrine of estoppel.” *Id.* (M.J.2d); *Jones v. Beavers*, 221 Va. 214, 269 S.E.2d 775 (1980). Third, and perhaps most importantly, is the application of the usual meaning of estoppel, i.e., that the City is now estopped from claiming that no right-of-ways exist after it has acknowledged them so explicitly throughout the history of this matter in legal instruments and oral representations. The Fourth Circuit Court of Appeals has reasoned that the doctrine of equitable estoppel is a bar to the assertion of a statute of frauds' defense.” *Lance J. Marchiafava, Inc. v. Haft*, 777 F.2d 942 (4th Cir. 1985). If it is a bar to a strong, central doctrine of jurisprudence which came to us through the common law and was implemented by statute, then it must be a bar to a weaker doctrine which has come to us from the common law which is not implemented in statute.

The conduct of the City of Clarksburg, a government entity, in this matter must

be considered and the lower court, with due respect, never considered that conduct and found that no right-of-ways exist in the face of all of the evidence that the City acknowledged, ratified, and or created said right-of-ways in multiple ways, there having been a "meeting of the minds" regarding the validity of the same. The documentary evidence and the testimony cited all together demonstrate that the City knew of and ratified the existence of the right-of-ways. The right-of-ways constituted encumbrances on the property, as stated by Cecil Jarvis in his deposition (P. 8, L. 20). Therefore, the City bought property subject to encumbrances, with certain knowledge of those encumbrances. It is the same as if the City would have bought real estate subject to the encumbrance of a first deed of trust lien which diminished the value of the property substantially. See, generally, Syl. Pt. 4 of *Belcher*.

The Appellant has further asserted and will continue to assert that the City, being a governmental body, has an even higher standard of conduct than a commercial corporation and a heightened duty of fair dealing. The conduct of the City in this matter is reprehensible and should not be condoned. With all due respect, the assertions of the City continue to be implausibly flawed inasmuch as it is saying, in essence, that it can do or say what it wants to accomplish its purposes without any accountability.

Negligent or Fraudulent Misrepresentation

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY GRANTING SUMMARY JUDGMENT UPON APPELLEE'S RULE 12B MOTION TO DISMISS BY FINDING THAT THE APPELLANT HAD NOT STATED A CLAIM FOR FRAUDULENT MISREPRESENTATION OR NEGLIGENT MISREPRESENTATION AND BY GOING FURTHER TO FIND THAT THE EVIDENCE DID NOT SUPPORT SUCH CLAIMS WHEN IT CLEARLY DID.

The Appellant respectfully posits that, if the City did not commit negligent misrepresentation, and it did not commit fraudulent misrepresentation, then what was it that the City did under the facts of record. The Appellee asserts that the City did nothing for which it should be held accountable. The Appellant disagrees.

The Appellant alternatively and sufficiently pleaded the torts of fraudulent and negligent misrepresentation below against the City of Clarksburg. As previously stated, the Appellant respectfully asserts that the extant evidence comprises much more than a prima facie case of both torts and, of course, believes that a trier of fact should decide for which tort(s), if either, the City should be held culpable.

The lower court appropriately ruled that Your Appellant had a right to bring both of these claims, that they were not barred by *res judicata* from the prior "sister" case of Harrison County Civil Action No.: 04-C-640-3 involving the enforcement of right-of-way interests against the City as discussed above-herein. The lower court felt that the fraudulent misrepresentation claim was not present by virtue of the fact that another

division of the circuit court had found that the Appellant had no valid right-of-way interests. As for the negligent misrepresentation claim, the lower court found that it could not allow the Appellant to proceed on such because it had insufficient guidance from West Virginia case law as to what comprises the elements of that tort. While the lower court is correct in that legal finding and cannot be faulted therefore, it is a harsh justification for dismissing a claim which is explicitly declared to exist in our jurisprudence. By the same token, while a litigant never wishes to see its case extinguished in such a manner with the real possibility of not being able to be heard at the appellate level, it is also appreciated by the Appellant that such express declarations of previously unarticulated legal elements are probably best left for this High Court to decide instead of the lower court.

The Appellant continues to see several issues in regard to this assignment of error: A) an explication of the elements which comprise the tort of negligent misrepresentation in this State; B) the independent existence of the torts of fraudulent or negligent misrepresentation irrespective of the legal existence of the Appellant's right-of-way interests; and, C) the conceptual sufficiency of a circuit court converting a Rule 12(b) motion to dismiss to a Rule 56 motion for summary judgment, then granting the motion for summary judgment, and then dismissing the claims without prejudice.

A) Negligent Misrepresentation

Negligent misrepresentation is a lesser form of fraud and deceit, and is recognized as a litigible claim in our jurisdiction in multiple published opinions of the

West Virginia Supreme Court,⁴ including *Kidd v. Mull*, 595 S.E.2d 308, 215 W. Va. 151 (2004); *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996); and *Darrisaw v. Old Colony Realty Company*, 202 W. Va. 23, 501 S.E.2d 187 (1997).

The leading case we do have regarding this cause of action is *Kidd v. Mull*, 595 S.E.2d 308, 215 W. Va. 151 (2004). In an opinion authored by Justice Albright, the High Court does appear to reference one necessary element of the tort:

“As both parties have correctly asserted, a successful claim for negligent misrepresentation would require a finding that Ms. Mark-was was a real estate broker and thereby maintained a special relationship or duty to the Appellants.” *Kidd* at 215 W. Va. 160.

Though that reference cites “*Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728(1994)(fn11),” it was only for the purpose of showing that a special interrogatory should be submitted to a jury in such matters. Both cases involve the representations of a vendor or its agents in selling real property and the responsibilities of a vendee upon receiving and relying upon such representations. Other than that, while the case provides much clear guidance regarding fraudulent misrepresentation, there may not be much else to be gleaned specifically regarding the tort of negligent misrepresentation.

The Virginia high court has ruled that “[N]egligent misrepresentation is the essence of a claim for constructive fraud in Virginia.” *Hansen v. Stanley Martin Companies, Inc.* 585 S.E.2d 567, 266 Va. 345 (2003), citing *Richmond Metro. Auth. v.*

⁴While a thorough search reveals the existence of the phrase “negligent misrepresentation” in thirteen case opinions, a smaller subset of those cases use the term as referencing an independent tort.

McDevitt St. Bovis, Inc., 256 Va. 553, 559, 507 S.E.2d 344, 347 (1998). While West Virginia has no explicit declaration of equality of the claims of "negligent misrepresentation" and "constructive fraud," there may be an implied equality in looking at the pertinent cases as a whole. For example, this High Court has reasoned that

"While it is true that we did not expressly utilize fraud concepts in *Harless*, its underlying rationale is clearly compatible with our general principles of fraud. Fraud has been defined as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another. See, *Dickel v. Smith*, 38 W.Va. 635, 18 S.E. 721 (1893); 8B Michie's Jurisprudence, *Fraud and Deceit* §§ 1 and 2 (1977); 37 Am.Jur.2d *Fraud and Deceit* § 1 (1968).

"Fraud may be either actual or constructive. The word "fraud" is a general term and construed in its broadest sense embraces both actual and constructive fraud. Actual fraud, or fraud involving guilt, is defined as anything falsely said or done to the injury of property rights of another. *Hulings v. Hulings Lumber Co.*, 38 W.Va. 351, 18 S.E. 620 (1893). Actual fraud is intentional, and consists of intentional deception to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941). See also, *Steele v. Steele*, 295 F.Supp. 1266 (S.D. W.Va. 1969); *Bowie v. Sorrell*, 113 F.Supp. 373 (W.D. Va. 1953).

"Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feisor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941). See also, *Steele v. Steele*, 295 F.Supp. 1266 (S.D. Va. 1969); *Bowie v. Sorrell*, 113 F.Supp. 373 (W.D. Va. 1953); *Loucks v. McCormick*, 198 Kan. 351, 424 P.2d 555 (1967); *Bank v Board of Education of City of New York*, 305 N.Y. 119, 111 N.E.2d 238 (1953); *Braselton v. Nicolas & Morris*, 557 S.W.2d 187 (Tex. Civ. App. 1977).

"Perhaps the best definition of constructive fraud is that it exists in cases in which

conduct, although not actually fraudulent, ought to be so treated, that is, in which conduct is a constructive or *quasi fraud*, which has all the actual consequences and legal effects of actual fraud. *In Re Arbuckle's Estate*, 98 Cal. App.2d 562, 220 P.2d 950 (1950). Constructive fraud does not require proof of fraudulent intent. The law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence, both public and private.(fn4) *Perlberg v. Perlberg*, 18 Ohio St.2d 55, 247 N.E.2d 306 (1969). In this respect, constructive fraud closely parallels the wrongful discharge in *Harless*, which contravened a substantial public policy principle.”

Stanley v. Sewell Coal Co., 169 W.Va. 72 76-77, 285 S.E.2d 679, 683 (1982)(Emphasis added).

After much reflection, the Appellant continues to assert that, in this line of reasoning, this Court has declared that two species of fraud exist (“fraud may be either actual or constructive”). One involves “guilt” or moral culpability and one does not. We also know that “fraudulent misrepresentation” and “actual fraud” are the same thing, with the same elements. See Syl. Pt. 5 of *Kidd v. Mull and Fraud and Deceit* MJ2 § 2. Since the Supreme Court of Appeals has said that the tort of negligent misrepresentation exists, and again, since there are only two species of fraud, then perhaps constructive fraud and negligent misrepresentation must be the same tort. Contrary to the assertions of the Appellee, the Appellant is not “switching horses.” There is nothing in this analysis inconsistent with the position the Appellant has maintained throughout all of these proceedings.

The *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941) case states what has been consistent through time in regard to constructive

fraud: that it "is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feisor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." The facts alleged in this case perfectly apply to these requirements. This was a government entity who made various misrepresentations regarding acquiring land for a public works project with public monies, inducing the Appellant to part with said parcel. It represented that the parcel was being acquired to be used for the public parking project. It has not been. It represented that it was going to demolish the building on the parcel (which again, was extremely important to the Appellant's plan for their downtown properties regarding pedestrian access). It did not demolish the building and then went so far as to maintain (even substantially into litigation until the initial letter was found referenced above) that it never intended to demolish the building. The Appellee does not deny this in its brief. It maintained in the litigation that no right-of-way interests existed and that it never promised to be bound by the same, contrary to the clear documents of record. The chief City official maintained that he did not tell the project architect, contrary to the project architect's contemporaneous memorandum of record and testimony, that he never stated the property would not be acquired or the building demolished during the negotiations with the Appellants when both such representations were being maintained to it to induce it to sell the parcel.

All of the elements of the two species of fraud are sufficiently present and

alleged in the Complaint, and genuine issues of material facts regarding those elements exist such that this case should not have been the victim of summary judgment. And though there was unavoidable confusion regarding the elements of negligent misrepresentation, there is clearly enough of record for negligent misrepresentation in the context of all of the other facts before the lower court.

The Appellant's arguments regarding the City's higher standard of conduct than a commercial corporation and heightened duty of fair dealing and honesty toward its citizens set forth above-herein apply to this assignment of error as well.

B) The Independent Existence of the Torts Alleged

The two species of fraud independently alleged do not depend in any way upon the ultimate validity of the right-of-way instruments. The elements of each tort are still present. The lower court stated in its final order that it "could not fathom" how the fraud could exist if the right-of-way interests, as decided by the other Division of the circuit court, did not have legal validity. But this is about reliance upon representations and promises. The City represented it would honor those interests, which it specifically and explicitly stated. As set forth with acceptance and approval in the *Stanley* case quoted above, "[F]raud has been defined as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another." See, *Dickel v. Smith*, 38 W.Va. 635, 18 S.E. 721 (1893); 8B Michie's

Jurisprudence, *Fraud and Deceit* §§ 1 and 2 (1977); 37 Am.Jur.2d *Fraud and Deceit* § 1 (1968). Finally, the last sentence of Syl. Pt. 6 of *Kidd* illustrates the matter:

"Where one person induces another to enter into a contract by false representations which he is in a situation to know, and which it is his duty to know, are untrue, he, in contemplation of law, does know the statements to be untrue, and consequently they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. It is not indispensable to a recovery that the defendant actually knew them to be false." *citing* Syl. Pt. 1, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927)(Emphasis added).

The actual legal validity of the right-of-ways is not indispensable to maintaining a claim. The representations of the appellee and the reasonable reliance of the Appellant are the critical issues in the analysis.

C) Granting a Rule 56 Motion Without Prejudice

The Appellant still maintains with confidence that, in regard to the lower court granting a summary judgment motion by dismissing Appellant's claims without prejudice, the Appellant believes that the lower court wanted to insure that, if the High Court explicated the elements of negligent misrepresentation or other such ruling in a way which would allow the Appellant to, in its contemplation, proceed upon a claim for either of these misrepresentation torts, either in this case or another, the Appellant would justly be permitted to re-file its action. While the Appellant understands the just and right intention of the lower court, the Appellant has a procedural conceptual difficulty with that act because a summary judgment is a final judgment as to the issues

and, though appealable, it is, by definition, final. A dismissal of claims without prejudice leaves the door open to re-file the exact same claims. Certainly, a circuit court can convert a Rule 12(b) motion to a Rule 56 motion as expressly stated under Rule 12 of the West Virginia Rules of Civil Procedure, but can it then dismiss the claims without prejudice? While Appellant could find no particularly relevant cases in this regard for guidance, the ruling seems to strain a straightforward and perhaps simplistic interpretation and application of the Rules. Certainly, Rule 56 does not expressly state the availability of that ruling by a trial court. It is a matter in regard to this case that deserves consideration by the Honorable High Court. The Appellant therefore asserts that the final order should be set aside for that ground alone.

Therefore, in considering all of these issues surrounding the Appellant's claims of misrepresentation, the lower court acted erroneously and abused its discretion in depriving your Appellant of significant rights by dismissing Appellant's claims. The order of the lower court should be set aside and the matter remanded for further proceedings with instructions to the honorable circuit court.

Conclusion

In conclusion, the Appellant presents meritorious claims and serious and consequential matters in West Virginia jurisprudence which need clarification by this High Court. With all sincere due respect, the Appellant believes that the clarifications

should include rulings:

1) That the circuit court erred and abused its discretion by finding ambiguity in the right-of-way instruments of such a character that such ambiguity gave the instruments no legal effect;

2) That the circuit court erred and abused its discretion by applying the doctrine of merger to the right-of-way instruments which gave the instruments no legal effect when superior interests of justice and equity, such as estoppel, should have been applied to effect the binding legality of the said right-of-way instruments and or interests;

3) That the circuit court erred and abused its discretion by granting summary judgment to the City finding that no genuine issues of material fact existed in regard to the Appellant's claims to enforce the right-of-way instruments and or interests;

4) That the circuit court erred and abused its discretion by granting summary judgment as to both of the Appellant's claims of negligent and fraudulent misrepresentation on grounds that one or either such tort was inadequately expressed in the body of West Virginia jurisprudence sufficiently to allow the Appellant to proceed to trial upon the same;

5) That the circuit court erred and abused its discretion by reasoning that the existence of fraudulent misrepresentation was dependent upon the actual sufficient legal interest of the right-of-ways by relying upon another judge's determination that

such interests were not legally valid; and

6) That the circuit court erred and abused its discretion by converting a Rule 12 motion to dismiss to a Rule 56 motion for summary judgment and then granting a dismissal without prejudice.

PRAYER FOR RELIEF

WHEREFORE, your Appellant respectfully requests that its appeal be found meritorious by this High Court, that the particular rulings of the lower courts be reversed, that the matters be remanded and allowed to proceed to trial upon their merits, and in any event, for whatsoever other relief may be necessary.

GRANDEOTTO, INC.,

By Counsel,

A handwritten signature in cursive script, appearing to read "Jerry Blair", is written over a horizontal line.

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NO. 33295

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

GRANDEOTTO, INC.,

Appellant,

vs.

CITY OF CLARKSBURG,

Appellee.

CERTIFICATE OF SERVICE

I, Jerry Blair, hereby certify that I have on this 19th day of April, 2007 given notice of the filing of the foregoing "*Appellant's Responsive Brief on Appeal*" by placing a true copy of same, in the United States mail, postage prepaid, in an envelope addressed to counsel of record as follows:

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