

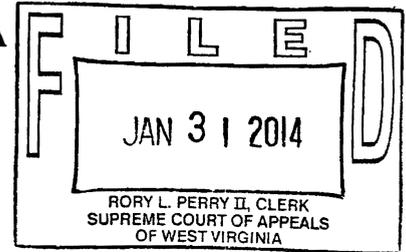
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Jerry N. Black, M.D.,
Defendant below, Petitioner**

vs. No. 13-0926 (12-C-52)

**St. Joseph's Hospital of Buckhannon, Inc.,
Plaintiff Below, Respondent**



PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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PETITIONER’S REPLY TO RESPONDENT’S BRIEF

ARGUMENT

Petitioner directs this Honorable Court’s attention to the key issue in controversy, which is the insertion of the word “valid” before the words “option contract” in paragraph 2, page 2, of the Order entered August 8, 2013. Respondent offers no explanation of the drafting decision to insert a word that is not in the record and which St. Joseph’s counsel strenuously insisted during oral argument he was not seeking.

The dialogue in the transcript quoted in paragraphs 52, 53, 56, 61, and 63, pages 15 through 18 of Petitioner’s Brief, reveals that Petitioner was induced to agree to the entry of an order reflecting only that the “Memorandum Agreement” and “Option to Repurchase” in question were in the form of an “option contract”. The issues of enforceability, validity, and interpretation were expressly excluded.

The prior discussion made it clear that Dr. Black’s counsel was concerned that St. Joseph’s counsel was seeking a ruling on enforceability¹ of the contract and, if enforceable, the time period during which the “option to repurchase” could be exercised. The following exchange took place during the hearing on June 21, 2013:

...BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract -

MR. SELLARDS: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. SELLARDS: Yes, Your Honor, and -

BY THE COURT: I understand your position. Let me hear from Mr. Hunter and see if he agrees with you...

...MR. HUNTER: No, what I want to tell the Court is that the real issue in this case is whether St. Joseph's can exercise that option now or during the last year of a 99-year term and if St. Joseph's is saying -

¹ On June 14, 2013, Dr. Black filed, and provided the Court a copy of, his Supplement to Response to Motion for Summary Judgment AND Renewal of Motion to Dismiss, which included a memorandum opinion from Dean John W. Fisher, II stating that the subject contract was unenforceable and in violation of the common law and WV Statute of Frauds.

BY THE COURT: So you're saying -

MR. HUNTER: - (if) they are not seeking a ruling on that issue and they want to take their marbles and go home, I think we would take them up on that. Because I don't think they would ever dare file suit again now that they know that...

BY THE COURT: So you are saying that you agree with them that it's an option contract?

MR. HUNTER: Always have.

BY THE COURT: Period. Done deal. Case dismissed. Right?

MR. HUNTER: Well, if that's what they're saying. But it's our understanding -

BY THE COURT: That's what they are saying and they are saying you agree with them.

MR. HUNTER: As far as it goes.

BY THE COURT: And that's **all they want to know**. (emphasis added)

MR. HUNTER: And if they are not seeking a ruling on whether they can exercise that option now, (I) go on record saying that if they try, we will resist it.

BY THE COURT: That's not part of the case. That's not part of the case, Mr. Hunter.

MR. HUNTER: I understand that.

BY THE COURT: **I'm not deciding that one way or the other. Please prepare an Order which says that the matter was determined by the Court to be an option contract...** (Transcript pages 10-11 of hearing on June 21, 2013) (emphasis added)

St. Joseph's counsel insisted it was seeking only a ruling that the "Option to Repurchase" is an option contract, not a right of first refusal. The following is an excerpt from the hearing on June 21, 2013:

(Mr. Sellards) ...Well, the Court ruled that it was an option contract. That's the question, the only question that we moved for and asked for clarification on in the complaint for declaratory judgment. (Transcript pages 8-9 of hearing on June 21, 2013)

Only upon the absolute and express assurances by Respondent's counsel, as reflected in pages 10 and 11 of the transcript from the hearing on June 21, 2013, did Petitioner withdraw objection to St. Joseph's motion. Having induced reliance thereon, the drafter of that order had a fiduciary duty to draft it in accordance with the agreement of the parties.

In regard to the assertion by St. Joseph's counsel that this Court must be bound by the order the Court signed and not by the record, Dr. Black relies on the case cited by St. Joseph's which states, in pertinent part,

...As an appellate court, we concern ourselves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect

the existing law and the trial record... (State ex. Rel. Cooper v. Caperton, 470 S. E. 2d 162, 196 W.Va. 208 (1996))

A ruling that this agreement is “valid” is neither consistent with the record nor existing law.

The record shows that St. Joseph’s never asked for a ruling that it was a valid contract and never received same. It also reveals that Dr. Black’s counsel made it clear he would object to any finding that defined whether or when the option contract could be enforced. The order should be corrected by deleting the word “valid”.

In summary, Respondent should be barred by the equitable doctrine of promissory estoppel from gaining an unfair advantage by inserting the word “valid” into the order. Thus, any conclusion of the Court on the issue of validity is extraneous and not part of the Court’s announced ruling or the agreement of the parties as spread on the record.

Dr. Black is concerned that by refusing to excise that word, St. Joseph’s will try to assert its enforceability based upon this word, which would grant St. Joseph’s a potential advantage over Dr. Black, gained by fraudulent inducement.

CONCLUSION

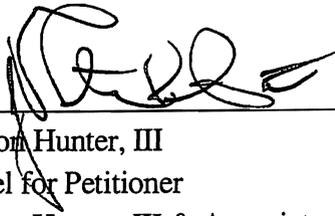
In light of the foregoing, Petitioner believes that the Order tendered by Dr. Black’s counsel, which reflects the agreement of the parties at the hearing, and the precise ruling of the Court, be entered forthwith and that the Order submitted by St. Joseph’s counsel that was ultimately entered be set aside, or that the word “valid” be excised from St. Joseph’s order.

Only in the alternative does Dr. Black pray that this matter be remanded to the Circuit Court of Upshur County, West Virginia, if this Court determines that factual development or trial on all issues is necessary. If it is found the contract is unenforceable, the complaint should be dismissed and attorney fees and damages awarded to Dr. Black. If enforceable, the terms of the

contract should be interpreted by the Court. The Petitioner is entitled to his day in Court to argue the validity/enforceability of the Option to Repurchase and the ambiguity of the Option to Repurchase.

Dr. Black also moves for attorneys' fees and such sanctions as this Court deems appropriate.

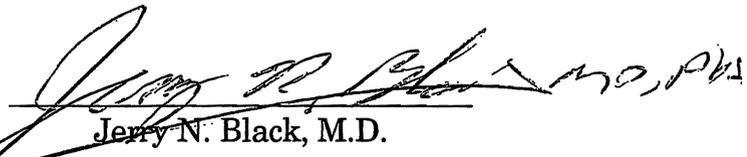
Respectfully Submitted,
JERRY N. BLACK, M.D., Petitioner
By Counsel



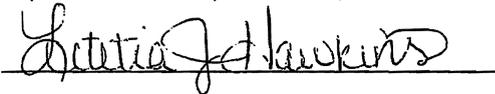
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STATE OF WEST VIRGINIA,
COUNTY OF UPSHUR, TO-WIT:

I, Jerry N. Black, M.D., being first duly sworn, says that the facts and allegations set forth in the *Petitioner's Reply to Respondent's Brief* are true and correct, except insofar as they are therein stated to be upon information and belief, he believes them to be true and correct.


Jerry N. Black, M.D.

Taken, sworn to and subscribed before me this 30th day of January, 2014 by
Jerry N. Black, M.D.

My commission expires: March 5, 2022


Notary Public



CERTIFICATE OF SERVICE

I, J. Burton Hunter, III, attorney for Jerry N. Black, do hereby certify that I served the foregoing *Petitioner's Reply to Respondent's Brief* upon the following counsel by depositing a true copy thereof in the United States Mail, with postage prepaid in envelopes addressed as follows:

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Dated this 30th day of January, 2014.



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