



## STATEMENT OF THE CASE

Dr. Kurt Kessler, M.D., appeals the trial court's grant of summary judgment in favor of Memorial Hospital and Health Care Center ("Memorial") and Dr. Joseph Munning, M.D., on Dr. Kessler's complaint alleging fraud. Dr. Kessler raises a single dispositive issue on appeal, namely, whether the trial court erred when it concluded that there are no genuine issues of fact precluding summary judgment.

We affirm.

## FACTS AND PROCEDURAL HISTORY

In 2003, Dr. Kessler, a general surgeon, had staff privileges at Memorial in Jasper. After Dr. Kessler began exhibiting "inappropriate interpersonal conduct at the Hospital that may suggest a psychological impairment[.]" he entered into a "Physician Understanding" ("the contract") with Memorial on July 22, 2003. Appellant's App. at 17. The contract provided in relevant part that Dr. Kessler "subject[ed] himself to the supervision of the PAC [Physician Assistance Committee] relative to his Possible Impairment" and agreed to perform "any acts and/or take any actions reasonably necessary to comply with the directives of the PAC[.]" Id. at 18. The contract further provided that Dr. Kessler would obtain a "complete medical and psychological assessment for his Possible Impairment ("Assessment") at the program run by Dr. Alexis Polles, in Hattiesburg, Mississippi ("Program") and to follow its recommendations[.]" Id. at 17. In the meantime, Dr. Kessler agreed to "voluntarily refrain from exercising his clinical privileges until obtaining the Program's Assessment, execution of their [sic] recommendations, obtaining a Program release to resume his practice and execution of a

[Physician's] Support Agreement with the PAC[.]” Id. (emphasis added). Dr. Kessler would not have to sign a Physician's Support Agreement if Dr. Polles did not find him to be impaired.

After Dr. Polles conducted a battery of psychological tests and interviewed Dr. Kessler, she prepared an eighteen-page report detailing her conclusions and recommendations. In August 2003, Dr. Polles provided copies of her report to both Memorial and Dr. Kessler for their review. On September 24, 2003, Dr. Munning, the chairperson of the PAC, informed Dr. Kessler that Dr. Polles' report had found him to be “impaired” and that, pursuant to the contract, Dr. Kessler would have to sign a Physician Support Agreement by 4:00 p.m. on September 25. Under the terms of the Physician Support Agreement, Dr. Kessler would agree to comply with the recommendations included in Dr. Polles' report and to submit to monitoring by the PAC. Dr. Kessler would further agree that if he failed to “comply and cooperate with the PAC and/or the Recommendations,” the PAC was “authorized to recommend summary suspension of [Dr. Kessler's] clinical privileges” pending a hearing. Id. at 194.

Sometime between August and September 24, Dr. Kessler had asked his psychologist, Dr. Thomas Holsworth, Ph.D., and another doctor, Dr. Taylor, to review Dr. Polles' report. Both Dr. Holsworth and Dr. Taylor told Dr. Kessler that Dr. Polles' report “did not find [him to be] impaired.” Id. at 239. But Dr. Munning disagreed and told Dr. Kessler that because Dr. Polles' report found him to be impaired, he had no choice but to sign the Physician Support Agreement if he wanted to maintain his privileges at Memorial. Dr. Kessler signed the Agreement.

In the years after Dr. Kessler signed the Physician Support Agreement, he noticed that other physicians in the Jasper area were referring fewer patients to him. And in July 2008, Dr. Kessler filed a complaint against Memorial and Dr. Munning alleging fraud. In particular, Dr. Kessler alleged that Dr. Munning fraudulently induced him to sign the Agreement, which resulted in his practice being “so compromised the he was forced to leave the area to find gainful employment in his chosen profession.” Id. at 16.

Memorial and Dr. Munning moved for summary judgment alleging that: 1) Dr. Kessler’s allegations “do not support a viable claim of fraud;” 2) Dr. Kessler’s claims amount to a “tort action for injury to character” and are, therefore, “time-barred” under the applicable statute of limitations; and 3) Memorial and Dr. Munning are immune from liability under the Indiana Peer Review Act and the Federal Health Care Quality Improvement Act of 1986. Dr. Kessler filed a memorandum in opposition to summary judgment and designated evidence in support thereof. The trial court entered summary judgment in favor of Memorial and Dr. Munning following a hearing. Dr. Kessler filed a motion to correct error, which the trial court denied. This appeal ensued.

### **DISCUSSION AND DECISION**

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to

a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. Heeb v. Smith, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993), trans. denied.

Special findings were neither requested nor required, and the trial court did not enter findings and conclusions in support of its order on summary judgment.<sup>1</sup> Thus, on appeal, Dr. Kessler argues all three issues raised in the motion for summary judgment, namely: whether Memorial and Dr. Munning are immune from liability; whether Memorial is estopped from claiming that Dr. Kessler suffers from a psychological impairment; and whether Dr. Kessler's complaint is time-barred. But we need not address those issues. We may affirm summary judgment if it is proper on any basis shown in the record. Pfenning v. Lineman, 947 N.E.2d 392, 408-09 (Ind. 2011). We hold that Memorial and Dr. Munning are entitled to summary judgment on the issue of whether Dr. Kessler reasonably relied on the alleged fraud.

Dr. Kessler contends Dr. Munning lied when he stated that Dr. Polles' report indicated she had found Dr. Kessler to be "impaired." And Dr. Kessler maintains that Dr. Munning's false statement was designed to induce him into signing the Agreement and was, therefore, fraudulent. The parties had agreed that Dr. Kessler was not obligated to sign the Agreement unless Dr. Polles found him to be impaired.

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<sup>1</sup> In any event, special findings do not affect our standard of review on summary judgment.

The elements of fraudulent inducement are the same as those for any action for fraud. See Siegel v. Williams, 818 N.E.2d 510, 515 (Ind. Ct. App. 2004). Actual fraud consists of five elements: 1) the fraud feisor must have made at least one representation of past or existing fact; 2) which was false; 3) which the fraud feisor knew to be false or made with reckless disregard as to its truth or falsity; 4) upon which the plaintiff reasonably relied; 5) and which harmed the plaintiff. Heyser v. Noble Roman's, Inc., 933 N.E.2d 16, 19 (Ind. Ct. App. 2010), trans. denied. We conclude that the issue whether Dr. Kessler reasonably relied on Dr. Munning's statement is dispositive of this appeal.

In support of their summary judgment motion, Memorial and Dr. Munning argued that, even assuming Dr. Munning knowingly lied about the report,<sup>2</sup> Dr. Kessler could not have reasonably relied on Dr. Munning's statement. In his memorandum in opposition to summary judgment, Dr. Kessler argued that he had a right to rely on Dr. Munning's statement because Dr. Munning was the chairman of the PAC and "a member of the Hospital's Board of Directors." Appellant's App. at 218. Dr. Kessler argued that when he told Dr. Munning that both Dr. Holsworth and Dr. Taylor had read Dr. Polles' report and concluded that she had not found him to be impaired, Dr. Munning responded, "It doesn't matter." Id. at 219. In short, Dr. Kessler argued that Dr. Munning compelled him to sign the Agreement under false pretenses.

The reasonable reliance element of fraud is established only where the complaining party demonstrates he had a right to rely upon the defendant's representations. Biberstine v. New York Blower Co., 625 N.E.2d 1308, 1316 (Ind. Ct.

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<sup>2</sup> This is, of course, an argument in the alternative. Memorial and Dr. Munning insist that Dr. Munning did not knowingly make a false representation with respect to Dr. Polles' report.

App. 1993). Ordinarily, one contracting party has no right to rely upon the statements of the other as to the character or contents of a written instrument. Id. The law is designed “to protect the weak and credulous from the wiles and stratagems of the artful and cunning.” Id. (quoting Plymale v. Upright, 419 N.E.2d 756, 762 (Ind. Ct. App. 1981). However, where persons stand mentally on equal footing and in no fiduciary relation, the law will not protect one who fails to exercise common sense and judgment. Id.

Whether reliance was justified is, on conflicting evidence, a matter for the jury to determine. Id. However, where the evidence is so clear as to be susceptible of only one reasonable inference, it is for the court to determine as a matter of law whether plaintiff was justified in relying on the representation. Id. When confronted with representations which are “simply not the stuff that fraud is made of,” this court may find as a matter of law either that the representations are not actionable or that the plaintiff had no right to rely as a matter of law. Id. (quoting Plymale, 419 N.E.2d at 763).

Here, Dr. Kessler is a medical doctor and is, therefore, “mentally on equal footing” with Dr. Munning. See id. Indeed, Dr. Kessler is presumably capable of reading and interpreting a psychological report for himself. Still, he consulted with a psychologist and a physician regarding the report’s conclusion before he signed the Agreement. Despite the fact that both Dr. Holsworth and Dr. Taylor told Dr. Kessler that Dr. Polles’ report did not find him to be impaired, Dr. Kessler allegedly relied on Dr. Munning’s statement to the contrary when he signed the Agreement. We note that Dr. Kessler does not allege that he was misled regarding the contents of the Agreement, and, regardless, he is charged with having read that document before he signed it.

Further, it is well settled that expressions of opinion cannot be the basis for an action in fraud. Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005). Dr. Munning's conclusion that Dr. Polles found Dr. Kessler to be impaired was an opinion based on his interpretation of the report. The fact that Dr. Kessler obtained contrary opinions from others emphasizes the point. We hold that Dr. Kessler's reliance on Dr. Munning's statement regarding Dr. Polles' finding of impairment was not reasonable, as a matter of law. See Roberts v. Agricredit Acceptance Corp., 764 N.E.2d 776, 779 (Ind. Ct. App. 2002) (holding summary judgment proper where plaintiff's reliance on defendant's alleged representations unreasonable as a matter of law) ); see also, Dean V. Kruse Foundation, Inc. v. Gates, 932 N.E.2d 763, 768 (Ind. Ct. App. 2010) (holding trial court erred when it denied summary judgment on issue of reasonable reliance), trans. denied.

In sum, Dr. Kessler could not have been deceived by Dr. Munning because he knew or should have known the contents of Dr. Polles' report and had the opinions of both Dr. Holsworth and Dr. Taylor that were contrary to Dr. Munning's statement. Thus, Dr. Kessler had no right to rely on Dr. Munning's statement. Because Memorial and Dr. Munning have established the lack of a genuine issue of material fact on the reasonable reliance element of fraud, the trial court properly entered summary judgment in their favor. See Siegel, 818 N.E.2d at 515.

Affirmed.

RILEY, J., and MAY, J., concur.