No. 99768-3
COA No. 80772-2-I

IN THE COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

G. STEVEN HAMMOND, M.D.,

Appellant,

v.

THE EVERETT CLINIC, PLLC, f/k/a/, THE EVERETT CLINIC, P.S., a limited liability corporation,

Respondent.

APPELLANT'S PETITION FOR REVIEW

Mark G. Olson, WSBA #17846
Olson Law Firm, PLLC
P.O. Box 1066
Everett, WA 98206
(425) 388-5516

Attorney for Appellant,
G. Steven Hammond, M.D.

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III. IDENTITY OF PERSON REQUESTING RELIEF

Appellant, Dr. G. Steven Hammond, asks the Court, through the undersigned counsel, for the relief requested in Part IV of this motion.

IV. STATEMENT OF RELIEF SOUGHT

Appellant Dr. Hammond moves the Court, pursuant to RAP 13.4 (a), (b) and RAP 1.2 (a) for review of the Court's unpublished opinion, dated March 15, 2021. Specifically, Dr. Hammond moves the Court to review the Court of Appeals affirmance of the trial court's order granting summary judgment to respondent, The Everett Clinic, PLLC (TEC). Dr. Hammond also requests the Court to review the Court of Appeals' affirmance of the trial court's award of costs to respondent. Dr. Hammond also request the Court to review the Court of Appeals' denial of his motion for reconsideration, entered on April 12, 2021. Copies of the Court of Appeals' unpublished decision and the order denying reconsideration are attached hereto as Appendices A and B.

V. ISSUES PRESENTED

1. Should the Court review the Court of Appeals' Unpublished Opinion under RAP 13.4 (b) (1)?

2. Should the Court review the Court of Appeals' Order Denying Reconsideration under RAP 13.4 (b) (1)?

VI. FACTS RELEVANT TO MOTION

This case is about a closely held medical business tricking its former shareholders into signing a release that disclaimed their contractual rights to the proceeds from a stock sale.

TEC was founded in 1924 and grew to include 20 locations in Snohomish County.[1] TEC's physicians owned the business, and the corporate structure was designed to keep it that way. CP 899. Physicians who joined TEC were expected to buy into the corporation by purchasing shares of stock, and they

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[1] The Everett Clinic Joins DaVita HealthCare Partners, TheEverettClinic.com, https://www.everettclinic.com/news/everett-clinic-joins-davita-healthcare-partners (last accessed May 25, 2020).

were expected to sell their stock back to TEC if they left. CP 96, 123, 258, 898-99. Individual physicians could not sell or transfer the shares of stock they held. CP 121-22, 898-99.

TEC's ownership structure had a unique additional feature. Physicians who had left TEC within the prior 15 years were entitled to share in the proceeds from the current stockholders' sale of all stock or dissolution of the corporation *on the same basis as current shareholders*. CP 124-25, 898-900. This arrangement went hand-in-hand with the provisions that restricted the ownership of the corporation: Besides the limitations on the sale or transfer of stock, departing physicians had to sell back their stock to TEC at the same price they bought it—depriving the stock of any "investment value." CP 900. At the same time, however, if a physician had departed and the current shareholders then sold or dissolved the corporation, the departed physician would share in the proceeds of the sale or dissolution. CP 124-25, 900.

TEC, as is common with closely held corporations, had a "Buy-Sell Agreement" to address these ownership matters. CP 121-29, 863, 899-902. The Buy-Sell Agreement defined the rights of Shareholders and Redeemed Shareholders if TEC ever sold its stock. CP 124. The Agreement defined "Redeemed Shareholders" as "any former Shareholder of the Corporation whose stock has been redeemed by the Corporation within fifteen (15) years prior to the date of the dissolution of the Corporation ... or the date of sale of all stock of the Corporation." CP 124. TEC agreed to "redeem" (buy back) a shareholder's stock if the shareholder's employment "terminated for any reason, whatsoever." CP 122. The redemption price was generally the same as the price which the shareholder originally paid to buy the stock. CP 123. Section 6.4 of the Agreement set out the right of these Redeemed Stockholders to a distribution of the proceeds from any sale of TEC:

> In the event that all of the outstanding stock of the Corporation is sold to one or more third parties [in] any one or more related transactions, then the Net

> Sales Proceeds *shall be held in trust* for the benefit of the Shareholders whose stock was sold pursuant to the transaction or related transactions, and the Redeemed Shareholders.

CP 124 (Emphasis added). The amount of the distribution from a stock sale was established in interrelated provisions in sections 6.2, 6.3, and 6.4—equal distributions for current Stockholders and Redeemed Stockholders from the sum total of previous buy-back amounts for redeemed shares plus "the stock sale proceeds less all expenses and costs of sale." CP 124-25. In this way, TEC's Buy-Sell Agreement "valued the contributions of prior shareholder/physicians to the growth and success of the clinic." CP 898.

Because the proceeds of a total stock sale were to be maintained in trust for current and Redeemed Shareholders, a duty of fiduciary care arose. TEC officers and board members—as well the corporation itself—owed them duties of "loyalty, good faith, full disclosure of all material facts, and avoidance of conflicts of interest," according to expert witness Scott Milburn. CP 863.

Dr. Hammond is a former physician employee and redeemed shareholder of TEC. CP 95-96, 257-58. Dr. Hammond bought into TEC as a shareholder with four shares of common stock, and he signed the Buy-Sell Agreement that had last been revised in 1997. CP 258, 856. Dr. Hammond left TEC within the 15-year period before 2014, and TEC redeemed (bought back) his shares in accordance with the Buy-Sell Agreement (at the price he bought them). CP 264.

By 2014, the healthcare industry had consolidated, and TEC leadership no longer felt tethered to the classic model of TEC as a physician-owned enterprise. CP 900. At that time, TEC's board approved a request for proposals to outside entities for "a strategic partnership or an acquisition." CP 900.

Initially, TEC leadership took the position that physicians who had departed TEC and sold their stock back to TEC within the last 15 years would share in any cash distribution from an asset sale or stock sale. CP 900. A TEC leader informed TEC physicians on TEC's "Doc Talk Blog" that proceeds would be

distributed to current and Redeemed Shareholders alike. CP 900. When a doctor planning to retire asked how his retirement date might affect his right to a distribution of the proceeds, a TEC leader assured the doctor by email that "all shareholders within 15 years would be included in any cash exchange for their shares." CP 900.

TEC's initial understanding about the nature of the intended transaction persisted for some time. In summer 2015, TEC's consultant Kauffman Hall provided an analysis to TEC leadership of several proposals, and its analysis assumed that distributions to shareholders would include Redeemed Shareholders. CP 901. After that presentation, TEC's attorneys forwarded term sheets to prospective bidders. CP 901. In these documents, TEC's attorneys informed prospective bidders that it was "critical" that the transaction be structured in a way that it "be treated for income tax purposes as a sale of stock by the Sellers." CP 901.

In late 2015, TEC approved an agreement with healthcare

conglomerate DaVita HealthCare Partners, Inc. CP 119, 264. With this transaction, the question under TEC's Buy-Sell Agreement with current and Redeemed Shareholders was whether "*all of the outstanding stock of the Corporation is sold to one or more third parties* [in] *any one or more related transactions*" within the meaning of section 6.4. CP 124. By then, however, TEC's board had heard from current shareholders who resisted the idea of Redeemed Shareholders receiving proceeds from the deal. CP 883, 1163. At the same time, TEC's board knew it needed two-thirds of current shareholders to vote to approve any deal. CP 359.

TEC leadership structured the transaction in a manner that it later claimed was *not* a stock sale triggering Redeemed Shareholder's rights under section 6.4. Working with DaVita, TEC designed what it called "a "seven-step reverse triangular merger." CP 346. In the initial step, TEC merged with a shell corporation that TEC termed the "Company Merger Sub"—a corporation which was to be formed solely "for the purpose of

effecting the transactions contemplated" in the agreement with DaVita. CP 132. At this juncture, TEC common stock was nominally to be canceled, not sold. CP 133. Then TEC would be merged with another shell corporation created for the transaction. CP 132-33. TEC's current shareholders would then obtain stock shares in the newly formed corporation. *Id.* After additional steps, this new corporation would merge with a wholly owned subsidiary of DaVita, and TEC's current shareholders—now shareholders of the just-merged new corporation—would receive a "cash merger consideration" in exchange for all their stock in the new corporation. CP 132.

Though this transaction was "complex," TEC admitted that the steps were "related," CP 132, which was a term also used in section 6.4 "... any one or more *related* transactions," CP 124 (emphasis added)). And despite its complexity, the transaction's seven steps were all executed within seven minutes, and "[*t*]*he net result was that the TEC shareholders gave up their ownership interest in the Clinic at the start of the seven step process and*

received cash at the end of it." CP 901. But TEC was loathe to acknowledge the transaction was an acquisition of TEC stock; TEC edited at least one draft document describing the transaction to replace the word "acquisition" with "merger." CP 866, 888-89.

DaVita took a different view. DaVita "*insisted that the word 'acquisition' appear in the press release announcing the transaction so that DaVita could not be accused of misleading potential investors.*" CP 902. DaVita also disclosed to the federal Securities and Exchange Commission ("SEC") it had bought all TEC common stock shares for nearly $400 million in cash. CP 119, 866. In the SEC filing, DaVita characterized the transaction as an "acquisition." CP 119. While DaVita also referred to the transaction as a "merger," DaVita's SEC report disclosed "[*t*]*he total consideration paid at closing*" and the "*purchase price*" for "*all outstanding common units of TEC.*" CP 119. That price was "398,093,[000]," with some minor adjustments. CP 119.

Internally, TEC appeared to understand the substance of the transaction. TEC's then-board president, Dr. Harold Dash, later agreed that the deal with DaVita "*was a method to acquire 100 percent of the stock, the TEC stock, held by the TEC shareholders.*" CP 1161. He also confirmed that a central purpose of TEC "*was to find a transaction that would result in an equity payout to shareholders for their TEC stock.*" CP 1161.

Before the deal closed, TEC issued a letter dated December 3, 2015, along with a summary of the transaction, to Dr. Hammond and other Redeemed Shareholders. CP 132-43. TEC's letter described the deal was a "*merger*" and not a "*sale of stock.*" CP 141. Accordingly, TEC's letter said, the TEC board stated section 6.4 of the Buy-Sell Agreement did not apply, and thus "*there are no payment rights for former shareholders under the Buy-Sell Agreement with respect to transactions contemplated by the Merger Agreement.*" CP 141. TEC's letter claimed, however, the TEC board "*understands how opinions on the application of the Buy-Sell Agreement may differ with respect*

to the merger transactions." CP 142. In an effort "'[*t*]*o avoid the costs, risks and delays in possible litigation*," TEC's board approved an offer of $350,000 in exchange for a release. CP 142. By representing the transaction as a merger that was not a sale of stock under section 6.4, TEC and its officers and board members breached their duties to redeemed shareholders, including Dr. Hammond, according to an expert witness. CP 867.

Dr. Hammond read the documents and discussed them with his wife and briefly discussed with an attorney friend. CP 409-12, CP 415-16.

Under pressure to act before the TEC imposed deadline, Dr. Hammond signed the release on December 28, 2015. CP 435. At the time, Dr. Hammond did not realize that he might have claims against TEC also under the Washington State Securities Act; he would not find that out until pre-trial discovery in this case in mid-2019. CP 857.

DaVita subsequently sold TEC and other practices in California, Colorado, Florida, and New Mexico to OptumCare. TEC's roots as a physician-owned practice are long gone.

Procedural History

Objecting Redeemed Shareholders brought claims against TEC in a private arbitration action. CP 876-78. The arbitrator, Henry C. Jameson, ruled for the redeemed shareholders. CP 897-906. Jameson rejected the proposition that Redeemed Shareholders' rights under the Buy-Sell Agreement turned on whether the TEC-DaVita transaction was a merger. CP 903. Instead, Jameson concluded "'*all of the outstanding stock of the Corporation* [wa]*s sold to one or more third parties* [in] *any one or more related transactions' within the meaning of Section 6.4.*" CP 903-04 Jameson ruled, "It clearly did." CP 904. He rejected TEC's argument that the seven-minute, seven-step structuring of the transaction as a "merger" was sufficient to remove the deal from section 6.4. CP 902. He reasoned each step was a "clearly 'related' transaction." CP 902 (quoting Buy-Sell Agreement §

6.4). Arbitrator Jameson also concluded "[*t*]*he evidence showed a concerted effort by TEC to scrub from draft documents any reference to 'acquisition,' substituting in its place 'merger consideration.*'" CP 901.

Dr. Hammond brought suit in King County Superior Court CP 1-29, 39-92, 95-148. TEC answered and brought a counterclaim for a declaratory judgment that the release agreement signed by Dr. Hammond was "valid and enforceable." CP 30-36, 257-74. One year later, TEC brought a motion for summary judgment, CP 329-56, which Dr. Hammond opposed. CP 844-53. Contemporaneously with his opposition to TEC's summary judgment motion, Dr. Hammond filed a motion for leave to amend his complaint to add a claim against TEC under the Washington State Securities Act. CP 826-43. The trial court, The Honorable Melinda J. Young, granted summary judgment to TEC, CP 807-09, and denied Dr. Hammond's motion to amend, CP 801-03. Dr. Hammond sought reconsideration of these orders. CP 810-22. The trial court denied the motion. CP 915.

On March 15, 2021, the Court of Appeals entered its unpublished opinion. App. 1. Therein the Court affirmed the summary judgment of the trial court. Dr. Hammond sought reconsideration of the unpublished opinion. The Court of Appeals denied reconsideration on April 12, 2021. App. 2.

VII. GROUNDS FOR RELIEF AND ARGUMENT

RAP 1.2 (a) provides, in pertinent part, as follows: "*These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits...*" RAP 13.4 (b) (1) provides, as follows: "*A petition for review will be accepted by the Supreme Court only*: (1) *If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court*;..."

In In *State ex rel Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn. 2d 375, 385, 391 P. 2d 979 (1964), the trial court found a company's release of its president was not binding on the company because there was no disclosure of the president's interest in a newly created company. The president had

acquired an interest in the newly created company without disclosing that interest to the company for whom the president worked. "*A corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights.*". *State ex rel. Hayes Oyster Co.*, 64 Wn. 2d 385-86.

In *Wool Growers Service Corp. v. Ragan*, 18 Wn. 2d 655, 140 P. 2d 512 (1943), a creditor of a certain stockholder who was appointed trustee of voting trust and trustee continued a debtor stockholder as manager long after trustee knew that manager was taking undue personal advantage of his power, and assisted him in doing so, to the disadvantage of the corporation and its stockholders. The record established the release was obtained without full disclosure and was not supported by adequate consideration, and therefore neither the complaining stockholder nor the corporation was "estopped" by the release from demanding an accounting. 18 Wn. 2d 697.

Two important rules emerge from *Hayes Oyster Co.* and *Wool Growers*: (1) a corporate officer is a fiduciary; and (2) a release by a fiduciary requires full and complete disclosure of all facts and circumstances.

The rules announced in *Hayes Oyster Co.* and *Wool Growers* are strengthened by *Jordan v. Duff & Phelps,* 817 F. 2d 429, 435 (7th Cir. 1987). ("*Close corporations buying their own stock, like knowledgeable insiders of closely held firms buying from outsiders, have a fiduciary duty to disclose material facts.*"). Such disclosure was necessary here to prevent Dr. Hammond from erroneously concluding he was not entitled to his share of the net sales proceeds of TEC.

The following material facts were not disclosed to Dr. Hammond prior to execution of the release:

- A TEC assured a current shareholder doctor by email that "*all shareholders within 15 years would be included in any cash exchange for their shares.*" CP 900.

•TEC's own consultant provided an analysis to TEC leadership of several proposals with the understanding that distributions to shareholders would include Redeemed Shareholders. CP 901.

•TEC's then-board president, Dr. Harold Dash, knew that the transaction was designed to obtain an equity payment for current shareholders in exchange for their shares of stock. CP 1161.

•TEC's attorneys forwarded term sheets to prospective bidders informing them that it was "critical" that the transaction be structured in a way that it "*be treated for income tax purposes as a sale of stock by the Sellers*" and not a merger. CP 901.

•Based on these term sheets presented by TEC's attorneys, TEC must have known that its board members, officers, and shareholders all would report to the IRS that the "*merger considerations*" were capital gains from a stock sale.

•DaVita told TEC that the transaction had to be structured as a stock sale and knew that the nature of the transaction meant that Redeemed Shareholders had claims under section 6.4 of the Agreement. CP 119, 866, 1191-92.

•TEC knew that DaVita believed the transaction satisfied the condition precedent in Section 6.4.

TEC does not dispute that the foregoing facts were not disclosed in its letter of December 3, 2015 to Steven Hammond and the Redeemed Shareholders.

From the foregoing, at a minimum, triable issues of fact persist whether TEC made the full disclosure of material facts required by *Hayes Oyster Co.*, *Wool Growers* and *Jordan v. Duff & Phelps*. The Court should therefore take review of this case under RAP 13.4 (b) (1) to ensure the rules announced in *Hayes Oyster Co.*, and *Wool Growers* are followed by the lower courts.

The Court of Appeals' Order Denying Reconsideration also merits review under RAP 13.4 (b) (1). Appellant incorporates herein the arguments and authorities stated above.

VIII. CONCLUSION

For the forgoing reasons, this Court should undertake review, reverse the Court of Appeals and the trial court, and remand the case for trial.

DATED this 12th day of May 2021.

Respectfully submitted,

Mark G. Olson

Mark G. Olson, WSBA #17846
Olson Law Firm, PLLC
P.O. Box 1066
Everett, WA 98206
(425) 388-5516
Attorney for Appellant
G. Steven Hammond, M.D.
Per RAP 18.17 (c) (8), the above document consists of 3,536 words.

IX. CERTIFICATE OF MAILING

I hereby certify that on the 12th day of May 2021, I electronically served a true and correct copy of Appellant's Petition for Review to the following:

David R. Goodnight, Esq.
Jenna Poligo, Esq.
Jill D. Bowman, WSBA #11754
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

Dated this 12th day of May 2021 at Seattle, WA.

Mark G. Olson

Mark G. Olson, WSBA 17846

X. APPENDICES

1. Unpublished Opinion, Court of Appeals No. 80772-2-I
2. Order Denying Reconsideration, April 12, 2021

APPENDIX 1

FILED
3/15/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

G. STEVEN HAMMOND, M.D., Appellant, v. THE EVERETT CLINIC, PLLC, f/k/a THE EVERETT CLINIC, P.S., a limited liability corporation, Respondent.	)	No. 80772-2-I UNPUBLISHED OPINION

VERELLEN, J. — A party is bound by the contract he knowingly and voluntarily signs. Dr. G. Steven Hammond argues the litigation release he signed should be avoided because he was misled into signing it. Because Hammond fails to establish any misrepresentation or that his reliance on the alleged misrepresentation was reasonable, the trial court did not err by concluding the release barred his claims.

Hammond contends the court abused its discretion when it denied a motion to amend his complaint to add a misrepresentation claim under the Securities Act of Washington, chapter 21.20 RCW. Because Hammond fails to establish any misrepresentation occurred, the court did not abuse its discretion by denying the motion as futile.

Therefore, we affirm.

FACTS

For many years, The Everett Clinic's (TEC) Buy-Sell Agreement with its physicians required that they purchase shares of stock in the company and hold the shares while employed. When a physician left, TEC would buy the shares back at their original purchase price. The Buy-Sell Agreement also imposed an ongoing duty for the next 15 years on TEC to the former physician-shareholder. If "all of the outstanding stock of [TEC] is sold to one or more third parties and any one or more related transactions," then TEC would distribute part of the proceeds to the former shareholder equal with current shareholders.[1]

In 2015, TEC and DaVita HealthCare Partners, Inc., decided to merge. TEC's board of directors sent its former shareholders a letter notifying them of the transaction. A current shareholder could be entitled to $1,000,000. But for former shareholders, "it is the Board's assessment" that the transaction would not trigger TEC's duty to share the proceeds "[b]ecause a merger is neither a dissolution nor a sale of stock."[2] However, because "opinions on the application of the Buy-Sell Agreement may differ with respect to the merger transaction," TEC offered to pay each former shareholder $350,000 in exchange for signing a litigation release "from any and all claims . . . arising under the Buy-Sell Agreement."[3]

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[1] Clerk's Papers (CP) at 124.

[2] CP at 368.

[3] CP at 501-02.

Hammond worked for TEC until he left in 2004. In December of 2015, he received the letter and an enclosed packet of information—the release agreement, a copy of the Buy-Sell Agreement, and a detailed merger summary—read them several times; discussed them with his wife, an attorney, and a physician still employed by TEC; and decided to sign the release. Hammond received $350,000 from TEC and invested it.

In April of 2017, a group of former shareholders who had decided against signing the release won in arbitration against TEC. The arbitrator concluded the merger with DaVita triggered TEC's duty to share the proceeds pursuant to the Buy-Sell Agreement and awarded the group just over $30,000,000, or about $1,000,000 each. Because of their success, Hammond decided TEC had misled him about the nature of its transaction with DaVita and filed a complaint alleging breach of the Buy-Sell Agreement and seeking to void the release agreement.

As litigation progressed, Hammond amended his complaint and moved to do so for a third time. He also moved for partial summary judgment. TEC moved for summary judgment on all claims on the basis of Hammond's signed release and opposed the third motion to amend, arguing it was futile. The court agreed with TEC, granted its motion for summary judgment, denied Hammond's motion for partial summary judgment as moot, and denied his third motion to amend as futile. The court awarded TEC attorney fees and costs.

Hammond appeals.

ANALYSIS

I. Summary Judgment

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court.[4] Summary judgment is appropriate when there are no issues of material fact and the movant is entitled to judgment as a matter of law.[5] All facts and inferences are viewed in a light most favorable to the nonmoving party.[6] We can affirm on any ground supported by the record.[7]

Hammond argues he should be allowed to avoid the release because TEC misrepresented the nature of its transaction with DaVita by calling it a "merger" when "the end result (to the trained eye) was still a stock sale."[8] As explained in his motion for partial summary judgment, "[TEC] failed to inform Plaintiffs the substance of the DaVita transaction was a sale of stock, not simply a merger, and therefore, contrary to the assertions in [TEC's] letter, the Buy-Sell Agreement did apply."[9]

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[4] Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) (citing Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 737, 844 P.2d 1006 (1993); RAP 9.12).

[5] Washington Fed. Sav. & Loan Ass'n v. Alsager, 165 Wn. App. 10, 13, 266 P.3d 905 (2011) (citing CR 56(c)).

[6] Id. (citing Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)).

[7] Id. at 14 (citing King County v. Seawest Inv. Assoc., LLC, 141 Wn. App. 304, 310, 170 P.3d 53 (2007)).

[8] Appellant's Br. at 23.

[9] CP at 302.

"The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs."[10] Releases are contracts and are governed by the same rules.[11] If one party enters a contract due to the other's misrepresentation, then the contract can be voidable.[12] The party seeking to avoid the contract must prove (1) he agreed to the contract due to the other party's misrepresentation, (2) the assertion was fraudulent or material, and (3) he reasonably relied upon the misrepresentation.[13]

A "misrepresentation" is an assertion of fact that is false under the circumstances.[14] A misleading factual assertion can be made by an affirmative factual representation, an omission, or a statement of opinion.[15]

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[10] Skagit State Bank v. Rasmussen, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (quoting Nat'l Bank of Wash. v. Equity Inv., 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973)).

[11] See Del Rosario v. Del Rosario, 152 Wn.2d 375, 382, 97 P.3d 11 (2004) (explaining personal injury releases are interpreted as contracts) (citing Beaver v. Estate of Harris, 67 Wn.2d 621, 627-28, 409 P.2d 143 (1965)).

[12] Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 390, 858 P.2d 245 (1993) (citing Skagit State Bank, 109 Wn.2d at 384; RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981)).

[13] Brinkerhoff v. Campbell, 99 Wn. App. 692, 697, 994 P.2d 911 (2000) (citing Fire Prot. Dist., 122 Wn.2d at 390).

[14] Restatement (Second) of Contracts § 159 cmt. a; see Fire Prot. Dist., 122 Wn.2d at 390 ("A misrepresentation is 'an assertion that is not in accord with the facts.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 159)).

[15] See Skagit State Bank, 109 Wn.2d at 384 (explaining when an affirmative misrepresentation of fact can allow avoidance); Brinkerhoff, 99 Wn. App. at 698 (explaining misrepresentations can be made by omission); RESTATEMENT (SECOND) OF CONTRACTS § 168 (explaining misrepresentations can be made by statements of opinion).

Hammond asserts TEC's letter made affirmative misrepresentations by describing a reverse triangular merger when TEC's transaction with DaVita was actually an acquisition. A reverse triangular merger is a "merger in which the acquiring corporation's subsidiary is absorbed into the target corporation, which becomes a new subsidiary of the acquiring corporation."[16] TEC's letter described the proposed merger:

> [A] subsidiary of a newly formed Washington professional services corporation will merge with and into TEC, with TEC being the surviving corporation in the merger. As a result of this merger, the newly formed professional services corporation (the "Company") will own 100% of the shares in TEC (making the Company the sole shareholder of TEC), the shares held by the current TEC shareholders will be extinguished, and initially the TEC shareholders will receive non-voting shares in the Company. This merger will be followed by a complex series of steps transferring the non-practice assets of TEC to the Company, converting TEC into a professional limited liability company and, upon the closing of a subsequent merger, making the Company a wholly-owned subsidiary of DaVita. . . .
>
> Upon closing of the subsequent merger between the DaVita subsidiary and the Company, we anticipate payment of merger proceeds will be made to the current TEC shareholders in exchange for their Company stock received in the initial merger.[17]

The merger summary attached to the letter described the transaction in more detail.

Both the letter and merger summary use plain English to describe a reverse triangular merger resulting in DaVita acquiring TEC. The documents explain how 100 percent of the shares in TEC would change ownership to a newly formed

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[16] BLACK'S LAW DICTIONARY 1185 (11th ed. 2019).

[17] CP at 367-68.

company, and DaVita would gain possession of those shares when the newly formed company merged with a DaVita subsidiary. The merger summary explains that DaVita would pay around $385 million in consideration for TEC and that each of the current shareholders would be entitled to approximately $800,000 to $1,000,000 of the proceeds. Hammond provides no evidence to show this transaction did not occur or that it occurred differently than described. TEC did not affirmatively misrepresent the facts of its transaction.

Hammond also argues TEC misrepresented its transaction by omitting TEC and DaVita's communications and internal deliberations about the deal. An omission amounts to a misleading assertion of fact when the speaker knows revealing the information will prevent a mistaken belief by the other party or will prevent a previous factual statement from becoming a material or fraudulent misrepresentation.[18] A contracting party also has an obligation to disclose information when it has a "relation of trust and confidence" with the other.[19]

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[18] RESTATEMENT (SECOND) OF CONTRACTS § 161(a)-(c); see Brinkerhoff, 99 Wn. App. at 698 (an omission "is equivalent to an assertion that the fact does not exist 'where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract'") (quoting Mitchell v. Straith, 40 Wn. App. 405, 410-11, 698 P.2d 609 (1985)).

[19] RESTATEMENT (SECOND) OF CONTRACTS § 161(d); see Basin Paving, Inc. v. Port of Moses Lake, 48 Wn. App. 180, 184, 737 P.2d 1312 (1987) (when negotiating a release, the paving company had an obligation to disclose the port's accidental overpayment from an earlier contract). Assuming that Basin Paving stands for the proposition that the duties of good faith and fair dealing alone compelled TEC to disclose additional information, as discussed below, Hammond fails to show those disclosures would have been material or prevented fraud.

Hammond also asserts a genuine issue of material fact exists about whether TEC owed him duties as a fiduciary. He relies upon his proffered corporate law expert, attorney Scott Milburn, to assert this poses a genuine issue

Whether characterized as a merger or acquisition, TEC accurately described its proposed transaction with DaVita. Hammond fails to explain how providing additional details about, for example, TEC's efforts to refer to the transaction as a "merger" rather than an "acquisition," would have changed the accuracy of TEC's description of its impending transaction with DaVita. Providing additional details about TEC's reason for holding back between $75.5 million and $136 million "to satisfy . . . any claims that may be asserted by former shareholders,"[20] would also have not changed the accuracy of TEC's portrayal of its transaction with DaVita. Because revealing the allegedly omitted facts would not have materially changed the facts disclosed, Hammond fails to establish an omission by TEC caused a material misrepresentation or fraud.[21] Thus, Hammond's real argument is that TEC misled him by asserting former

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of material fact. See, e.g., Appellant's Br. at 35 ("Here, at a minimum there was a genuine issue of material fact whether TEC breached these [fiduciary] duties to Dr. Hammond. After all, expert Milburn opined that TEC did."). Although Hammond's proffered expert opined, for example, TEC's "fundamental misrepresentation of the transaction constitute[d] a breach of the contractual duty of good faith and fair dealing," CP at 1194, experts' legal opinions on the ultimate legal issues before the court are inadmissible and not considered as evidence on summary judgment. King County Fire Prot. Dists. No. 16, No. 36 & No. 40 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (citing Wash. State Physicians Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)).

[20] CP at 374.

[21] See Kaas v. Privette, 12 Wn. App. 142, 149, 529 P.2d 23 (1974) (omitting facts "vital and material to a transaction" can make a contract voidable) (citing Sorrell v. Young, 6 Wn. App. 220, 491 P.2d 1312 (1971)).

shareholders would have no right to share in the merger's proceeds under the Buy-Sell Agreement.[22]

TEC's letter asserted that "[b]ecause a merger is neither a dissolution nor a sale of stock, it is the Board's assessment that those provisions of the Buy-Sell Agreement are not applicable and there are no payment rights for former shareholders."[23] TEC argues the allegedly misleading statement in the letter was merely a legal opinion surrounded by accurate facts.

When an opinion creates a misleading impression by implying the existence of facts reasonably known to the speaker but unknown or undisclosed to the listener, the opinion can amount to a misleading factual assertion.[24] A legal opinion can be misleading under the same circumstances.[25] But a legal opinion is not misleading when limited to "the legal consequences of a state of facts" without commenting on the facts themselves.[26] Thus, the question is whether TEC's

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[22] Significantly, Hammond admitted in an interrogatory that the only alleged misrepresentation inducing him to sign the release was TEC telling former shareholders "that the transaction was a 'merger,' and that because it was a 'merger,' the payout provisions for our stock ownership under the Buy-Sell [A]greement did not apply." CP at 548. In both another interrogatory, CP at 531, and a deposition, CP at 427-28, Hammond confirmed the only alleged misrepresentation that caused him to sign was TEC's assertion that its merger with DaVita did not require paying former shareholders.

[23] CP at 368.

[24] RESTATEMENT (SECOND) OF CONTRACTS § 168 cmt. d.

[25] See RESTATEMENT (SECOND) OF CONTRACTS § 170 (legal opinions are analyzed under the same rules as other opinions).

[26] RESTATEMENT (SECOND) OF CONTRACTS § 170 cmt. b.

assertion about the Buy-Sell Agreement being inapplicable was mere opinion or a misleading factual assertion.

Hammond does not dispute that the Buy-Sell Agreement conditioned TEC's obligation to pay stock sale proceeds to former shareholders in "the event that all of the outstanding stock of [TEC] is sold to one or more third parties and any one or more related transactions."[27] TEC concluded its reverse triangular merger with DaVita did not satisfy this condition, so it had no obligation to pay former shareholders. TEC's statement was a mere legal opinion because its assertions were limited to the effect of the merger on the Buy-Sell Agreement and did not comment implicitly or explicitly on the facts of the merger. Although Hammond disputes what the legal effect of TEC's merger with DaVita should have been, he does not show the substance of TEC's merger with DaVita differed from the transaction described in the letter.[28] Because TEC's assertion was limited to a legal opinion, it was not a factual misrepresentation. Hammond fails to show TEC's letter contained misrepresentations of fact.

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[27] CP at 385.

[28] Hammond asserts that TEC's opinion misstated facts because, for example, TEC's board president "knew that the transaction was designed to obtain an equity payment for current shareholders in exchange for their shares of stock." Reply Br. at 13 (citing CP at 1161). But this fact was disclosed to Hammond in TEC's letter and the attached materials. CP at 368, 373. He also asserts TEC's opinion was misleading because it "was loath to acknowledge the transaction was an acquisition of TEC stock." Reply Br. at 14. Even if TEC had characterized its transaction with DaVita differently, that characterization would not have changed the structure of the transaction itself, which TEC's letter described in detail. Hammond fails to demonstrate a material fact, as opposed to an opinion, about the merger that was obscured by TEC's legal opinion.

Even assuming TEC's legal opinion was an actionable misrepresentation, Hammond fails to show his reliance on it was reasonable. A party seeking avoidance of a contract must prove his reliance on the misrepresentation was reasonable.[29] Whether a party's reliance was reasonable depends upon the circumstances.[30]

In Skagit State Bank v. Rasmussen, the Supreme Court concluded a farmer was bound by a mortgage contract he signed as a guarantor.[31] The farmer signed the contract without reading it, relying instead on his "long-time close friend and business partner" to describe the contract's legal effect.[32] The contract stated that each signatory's property could be taken to repay the loan in the event of a default.[33] The court concluded the farmer's reliance on his friend was not reasonable.[34] Their friendship and former business relationship "alone d[id] not justify [the farmer's] reliance."[35] The farmer's reliance was also not reasonable because, among other reasons, he knew his friend was a borrower on the loan.[36]

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[29] Skagit State Bank, 109 Wn.2d at 384 (citing RESTATEMENT (SECOND) OF CONTRACTS § 164(1)).

[30] Id.

[31] 109 Wn.2d 377, 378, 745 P.2d 37 (1987).

[32] Id. at 385.

[33] Id. at 383.

[34] Id. at 386.

[35] Id. at 385.

[36] Id. at 386.

Here, Hammond read the letter from TEC and its accompanying materials, including the release, "several times."[37] He spoke with an attorney for legal advice about the entire packet of materials. He spoke with a physician at TEC to discuss the impending merger, the proposed release, and the $350,000 offer. The physician told Hammond a group of former shareholders were going to challenge the release. Hammond also knew current TEC shareholders had a financial interest in completing the transaction because the letter told him current shareholders could receive around $1,000,000 from the merger. TEC itself warned Hammond its assertion about the Buy-Sell Agreement was "the Board's assessment" and that "opinions on the application of the Buy-Sell Agreement may differ with respect to the merger transactions."[38]

Like Skagit State Bank, Hammond knew the entity opining about the transaction had a financial interest adverse to his own. Unlike Skagit State Bank, Hammond did not have a longstanding friendly relationship with TEC, TEC warned Hammond it was providing an opinion with which former shareholders could disagree, and Hammond knew other former shareholders actually disagreed. Because the circumstances show Hammond had ample warning that the allegedly misleading opinion should not be relied upon, his reliance on it was not reasonable.

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[37] CP at 409-10.

[38] CP at 368-69.

Hammond fails to show the trial court erred by upholding the release and granting summary judgment for TEC. Necessarily, the court also did not err by denying Hammond's motion for partial summary judgment on the same topic as moot.[39]

II. Motion to Amend

Hammond moved to amend his complaint by adding a claim under RCW 21.20.010 of the Securities Act of Washington. The court denied his motion as futile.

We review denial of a motion to amend for abuse of discretion.[40] A court abuses its discretion where its decision rests on untenable grounds or was made for untenable reasons.[41] A trial court does not abuse its discretion by denying a motion to add a futile claim.[42]

To establish a prima facie claim under RCW 21.20.010, a plaintiff must demonstrate, at least, "'(1) a fraudulent or deceitful act committed (2) in connection

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[39] See Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) ("A case is moot if a court can no longer provide effective relief.") (citing State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658; In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)).

[40] Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (citing Sprague v. Sumitomo Forestry Co., 104 Wn.2d 751, 763, 709 P.2d 1200 (1985); Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 577, 573 P.2d 1316 (1978)).

[41] Id. (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

[42] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997) (citing MacLean v. First Nw. Indus. of Am., Inc., 96 Wn.2d 338, 345, 635 P.2d 683 (1981); Doyle v. Planned Parenthood of Seattle-King County, Inc., 31 Wn. App. 126, 131, 639 P.2d 240 (1982)).

with the offer, sale or purchase of any security.'"[43] Hammond's proposed claim alleged TEC "deceived and misled Plaintiffs into believing that the transaction with DaVita did not represent the sale of TEC common[ ] stock, and that their respective Buy-Sell Agreements were inapplicable" when "the transaction with DaVita had, as its central purpose, the complete acquisition by DaVita of 100% of TEC common stock, and the Buy-Sell Agreement was fully applicable."[44] Hammond sought to avoid the release on the basis that TEC misrepresented its transaction with DaVita as a merger and misrepresented its duty to share the proceeds under the Buy-Sell Agreement.

There can be some nuances between securities fraud claims of misrepresentation under RCW 21.20.010 and claims to avoid a contract due to misrepresentation, but none of those nuances apply to the misrepresentations alleged by Hammond. Hammond alleged the same misrepresentation as the basis for his contract and Securities Act claims. Because, as discussed, TEC did not mislead Hammond about its transaction with DaVita, adding this claim would have been futile.[45] The court did not abuse its discretion.[46]

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[43] Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC, 194 Wn.2d 253, 267, 449 P.3d 1019 (2019) (internal quotation marks and emphasis omitted) (quoting Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)).

[44] CP at 293.

[45] See Colvin v. Inslee, 195 Wn.2d 879, 901, 467 P.3d 953 (2020) (affirming denial of a motion to amend a personal restraint petition as futile when the plaintiffs failed to demonstrate they were unlawfully restrained).

[46] For the first time on appeal, Hammond argues the release should be declared void due to overreach. The record does not show evidence TEC took unfair advantage of Hammond. TEC did not misrepresent the nature of its

III. Attorney Fees

Hammond asks us to reverse the trial court's award of attorney fees only in the event he prevails on appeal. He does not challenge the basis of the court's decision. Because he has not prevailed, we do not reverse the trial court's award.

TEC requests attorney fees from this appeal and argues it is entitled to fees under section II.6 of the release agreement. Attorney fees may be awarded pursuant to a contract.[47] Whether a contract authorizes an award of fees is a question of law we consider de novo.[48]

Section II.6 of the release governs dispute resolution and provides:

> [A]ny and all disputes arising out of [or] related to this Agreement shall be resolved in arbitration . . . . In the event there is a disagreement regarding the interpretation, implementation, and/or enforcement of this Agreement that is subsequently resolved in arbitration, the substantially prevailing party shall be awarded reasonable attorneys' fees, arbitrator fees, costs and expenses.[49]

The provision's plain language authorizes an award of attorney fees from disputes resolved in arbitration. This is an appeal from a judicial proceeding, and the parties did not arbitrate any of their dispute. TEC provides no authority that a fee provision limited to arbitration has any application to this proceeding. Because the

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transaction, and it allowed sufficient time for Hammond to read the letter and enclosed materials several times and to discuss them with an attorney.

[47] Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 277, 215 P.3d 990 (2009) (citing Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986)).

[48] Tradewell Grp., Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

[49] CP at 503 (emphasis added).

plain language of the release agreement is inapplicable and TEC provides no other basis for attorney fees, we deny TEC's request for attorney fees from this appeal.

Therefore, we affirm.

WE CONCUR:

APPENDIX 2

FILED
4/12/2021
Court of Appeals
Division I
State of Washington

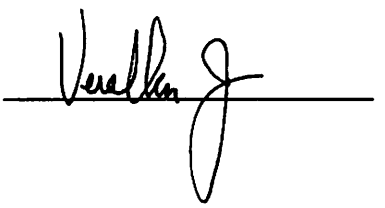
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

G. STEVEN HAMMOND, M.D., Appellant, v. THE EVERETT CLINIC, PLLC, f/k/a THE EVERETT CLINIC, P.S., a limited liability corporation, Respondent.	)	No. 80772-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's March 15, 2021 opinion. The panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



LAW OFFICE OF RODNEY R. MOODY

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