

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO	)	
	)	
Plaintiff,	)	Civil No. 1:12-cv-00130-JD
v.	)	
	)	
WRIGHT-PIERCE,	)	
	)	
Defendant.	)	

**WOLFEBORO’S OBJECTION TO WP’S MOTION TO LIMINE TO PRECLUDE  
EVIDENCE OF “UNACTIONABLE CLAIMS”**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby submits this Objection in response to Wright-Pierce’s omnibus motion seeking to exclude Wolfeboro from presenting evidence on its claims of Gross Negligence (Count II)<sup>1</sup>, Violation of RSA 358-A (Count VI) and Fraudulent Misrepresentation (Count VII) (See Document No. 100).

**I. Introduction**

As set forth in its Amended Complaint, Wolfeboro’s related RSA 358-A and Fraudulent Misrepresentation claims (the “Fraud Claims”) are based on WP’s knowledge of groundwater modeling results that showed serious and significant problems in WP’s design of the RIB system, including the fact the Site did not have the capacity previously identified by WP. Wolfeboro alleges that WP altered the input data in the groundwater model to eliminate the problematic results and then knowingly misrepresented the “results” to Wolfeboro, which relied on these false statements to its detriment. These allegations of fraud are buttressed by admissions WP made at recent depositions.

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<sup>1</sup> As indicated in its Pretrial Statement, Wolfeboro is voluntarily dismissing its claim for Gross Negligence. WP’s request for relief as it pertains to Wolfeboro’s claim for Gross Negligence is therefore moot.

WP sets forth two arguments supporting its request for dismissal of the Fraud Claims: (1) Wolfeboro's allegations do not set adequately set forth a claim for fraud, only a claim for professional negligence; and (2) Wolfeboro failed to produce expert opinion to support the Fraud Claims.

WP's Motion must fail. First, the Court has already held that Wolfeboro sufficiently pled its Fraud Claims in its ruling on Wolfeboro's Motion to Amend. See Doc. #40. WP now improperly seeks to re-litigate the exact same issue in a purported Motion in Limine. Furthermore, WP badly mischaracterizes Wolfeboro's Fraud Claims, which do not concern WP's "exercise of professional judgment" or "opinion," but are rather false statements of fact regarding the results of the groundwater modeling and the known capacity of the Site.

Nor is there any merit to WP's claim that expert testimony is necessary to prove Wolfeboro's Fraud Claims. The Fraud Claims are not based on a complex matters not "beyond the ken of a layperson" -- but are grounded in WP's own blatant misstatements regarding the results of the groundwater model and the capacity of the Site. In its simplest terms, WP had groundwater modeling results that stated "X," and it told Wolfeboro they stated "Y." The jury need only look at WP's own internal documents to find fraud by clear and convincing evidence.<sup>2</sup>

## **II. Factual Background**

In the course of discovery, Wolfeboro discovered internal emails in which WP acknowledged serious and significant problems in its design of the RIB System. Specifically, the internal WP communications reveal internal discussions indicating that WP did not have enough data to create an accurate groundwater model of the Site, and that data inputted into the model

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<sup>2</sup> The jury may also find by clear and convincing evidence that WP's representations to Wolfeboro in 2009 that the Site could be fixed to restore the RIB System to accommodate the design flow is fraud based on WP's knowledge that the modeling results indicated that the Site did not have the capacity to handle the design flow. Wolfeboro submits that the evidence at trial will suggest that these false statements were made in an attempt to shield WP from liability.

showed that breakouts would occur when the Site was operating at or below WP's design capacity (600,000 gpd as an annual average). The internal WP emails further indicate that WP misrepresented the groundwater modeling results and the capacity of the Site to Wolfeboro, and that WP altered the input data in the groundwater model to eliminate problematic results.

#### **A. Specific Evidence of Fraud**

Wolfeboro's specific allegations of Fraud are located at paragraphs 91 through 107 of the Amended Complaint, and are largely supported by internal WP documents.

WP retained Jesse Schwalbaum of Watershed Hydrogeologic, Inc. to develop a groundwater computer model of the Wolf-1A Site in order to determine the volume of treated wastewater effluent the Site could dispose of if it were used as a location for an RIB System. Amended Complaint at ¶ 91. Subsequently, Mr. Schwalbaum developed a groundwater model of the Site using data provided by WP. Id. at 92.

On or about February 4, 2007, Gary Smith of WP received an email from Mr. Schwalbaum concerning the results of the groundwater model when simulating WP's recommended design load of 600,000 gpd as an annual average. See Exhibit A, 2/4/04 email. Mr. Schwalbaum's email indicated that the groundwater model yielded unfavorable results, stating as follows:

With 600,000 gpd the mound under the discharge area looks fine, but there appears to be a little bit of 'break out' in the southeast – just west of the power line and the southern extent of sand and gravel. I would feel a lot better if everything looked good on the most conservative run but this is the real world. I could make this breakout go away by opening up the drains, increasing the K values, or reducing the discharge. But we should put our heads together and figure out what (sic) how far out on a limb we want to go and what makes the most sense. I've also included a run with slightly higher K values (wolfe6). There is still a very small area indicating breakout but I don't know how real that is. For all we know there could be springs there already or the bedrock could be lower. I just don't think we have much data there. Id.

Mr. Schwalbaum's email plainly states that: (1) the Site would suffer breakouts when operating at WP's recommended design load of 600,000 gpd; (2) that he was provided with insufficient data by WP to accurately construct the groundwater model, and (3) he could manipulate the input data to make this breakout "go away," thus making the results more favorable. The contents of Mr. Schwalbaum's email were never conveyed to Wolfeboro.

Two days after Mr. Schwalbaum's email, WP discovered an error in the data used to construct the groundwater model. Mr. Smith of WP wrote an email to fellow WP employees Neil Cheseldine, Gary Smith, and Melissa Hamkins which stated: ***"I do not want to have this discrepancy picked up by reviewers and have it raise questions on the accuracy of the model and its results."*** See Exhibit B, 2/7/07 email chain. Mr. Smith's email was not sent to Wolfeboro and the contents were never conveyed to Wolfeboro. There is no indication that this "error" was ever corrected.

Just three hours after the discovery of this error, Peter Atherton of WP responded by asking Mr. Smith of WP when the groundwater model results would be available so that he could provide them to Wolfeboro. See Exhibit B. Mr. Smith responded that although the results would not be ready for a couple weeks, WP should "shoot for a loading rate from NHDES greater than N. Conway so we can be the highest in the country!!! Soils can handle it fine." See Exhibit B. Mr. Smith's statement evidences both WP's intent to push forward with the construction of the RIB System at all costs and WP's intent to obtain permission from NHDES to discharge flow to the Site in excess of what WP already knew, based on the results of the groundwater model, the Site could handle without break-outs.

The next day, February 8, 2008, David Ford of Wolfeboro wrote an email to Mr. Atherton asking whether the groundwater model had yielded any results. Instead of truthfully

informing Wolfeboro of the fact that WP's groundwater modeling expert had advised WP that he did not have sufficient data to properly model the Site, and despite the fact that the existing groundwater model showed that the Site would suffer damage at a daily average of 600,000 gpd, Mr. Atherton wrote "*Hi Dave - The model results indicate that the site can take up to 600,000 gpd...*" See Exhibit C, 2/8/07 email.

Mr. Atherton's statement was knowingly false -- the available groundwater modeling results showed damage to the Site at 600,000 gpd. Wolfeboro asserts that Mr. Atherton's statement was made for the purpose of hiding deficiencies in WP's analysis, shielding WP from liability and continuing the design process so that WP could benefit commercially by having designed the RIB system with the highest loading rate in the United States.

On February 20, 2007, Mr. Cheseldine emailed Mr. Ford of Wolfeboro stating "The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating future annual average design flow of 600,000 gpd." See Exhibit D, 2/20/07 email.

Again, this statement was knowingly false: there were no modeling results to support "annual average design flow of 600,000 gpd."<sup>3</sup> Days after this exchange, on March 7, 2007, Mr. Smith sent an internal email to four WP employees in which he acknowledged that the Site could not handle any load above 600,000: "It is our opinion the modeling does show breakout will occur in the vicinity of B-7 at flows of 800,000 and 1,000,000 gpd. The memo and Section 9.5 of our report needs to be changed to reflect this finding." See Exhibit E, 3/7/07 email chain. In a reply email Mr. Atherton voiced concern that if the Site could not handle these levels of discharge, it would be impossible to achieve an annual average of 600,000 gpd (design capacity

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<sup>3</sup> The design capacity of 600,000 gpd as an "annual average" is significant because it presupposed that there will be certain days that the flow will exceed 600,000 gallons, and certain weeks where the average flow will exceed 600,000 gallons per day. Indeed, this fact is acknowledged by WP throughout the documents produced in discovery.

for the Site produced by WP and the Site's permitted loading capacity per NHDES). See Exhibit E. In other words, WP knew that the Site could not dispose of the 600,000 gpd annual average without causing damage to the Site because the model results clearly indicated damage to the site at flow rates above 600,000 gpd.

WP never informed Wolfeboro of these results.

Mr. Smith responded to Mr. Atherton's email stating "At this time I do not believe we could pass the straight face test if we try to overstate the sites capability without the modeling results to support this" and suggested that WP could gather more data and re-run the groundwater model. See Exhibit E. Instead, it produced its Phase 3 Hydrogeologic Report in March of 2007 which stated "Wright-Pierce and Watersheed Hydrogeologic conclude ***that an annual average treated effluent discharge of 600,000 gpd on the Whitten West site is feasible.***"

This statement was false. At deposition, Mr. Smith testified that he told both Mr. Atherton and Mr. Cheseldine that the 600 annual average gdp could not be met, and acknowledged that it overstated the site's capabilities. See Exhibit G, 11/18/13 Smith Deposition at 119, 122-23. Despite Mr. Smith being a signatory to the Phase 3 Report, he did not review the final report, did not even know he was a signatory, and stated that "*he would never let it go out saying annual average.*" Id. at 124-25. WP, however, desperate to hide the truth from Wolfeboro, simply placed Mr. Smith's electronic signature on the document, included the knowingly false information, and sent it to Wolfeboro.

On March 3, 2009, the RIB System commenced operation and breakouts were subsequently observed on or about April 20, 2009. On June 16, 2009, Mr. Schwalbaum issued an internal memorandum to WP revealing numerous flaws in the groundwater model and

highlighting the fact the model was constructed without sufficient or adequate data. See Exhibit F, 06/16/09 Memorandum. This memorandum, or its contents, was not provided to Wolfeboro.

WP continued to make numerous statements to Wolfeboro (both orally and in writing) that: (1) the Site could be repaired; and (2) following repair, the Site could dispose of an annual average flow of 600,000 gpd. These statements were, again, knowingly false.

WP made these statements for the purpose of generating additional engineering fees (which it did) to correct or remediate its mistakes. WP also made these knowingly false statements to attempt to shield itself from liability that would arise if Wolfeboro became aware that WP knew as early as 2007 that the Site could not handle the design flow recommended by WP and that WP had insufficient data to properly model the Site.

Based on the above communications which were not disclosed to Wolfeboro until discovery in this litigation, Wolfeboro filed a Motion for Leave to file an Amended Complaint on May 12, 2013 to include causes of action for breach of New Hampshire's Consumer Protection Act, RSA 358-A, fraud, fraudulent misrepresentation, and gross negligence. See Document 28. WP vigorously opposed the Motion, claiming Wolfeboro's proposed claims were futile and made in "bad faith."

On August 20, 2013, the Court issued an order allowing the Fraud Claims to proceed. See Doc. #40.

### **III. Legal Analysis**

#### **A. Standard for Fraudulent Misrepresentation**

To prove a claim for fraudulent misrepresentation, a plaintiff must only demonstrate that the defendant misrepresented a material fact to the plaintiff, with a fraudulent intent, that the plaintiff justifiably relied upon that misrepresentation and suffered damages as a result. See

Tessier v. Rockefeller, 162 N.H. 324, 331-332 (2011). A fraudulent intent exists where the representation was made with knowledge of its falsity or with conscious indifference to its truth and with the intention of causing another to rely on the representation. See id.; (quoting Patch v. Arsenault, 139 N.H. 313 (1995)).

Although a claim for fraud must be based on clear and convincing evidence, the proof “need not be absolute but may be founded on circumstances...where the defendant’s motive to mislead was strong and his conduct both before and after the misrepresentation complained of evinced a controlling intent to look after his own interests rather than carry out his commitments to the plaintiff.” Lampesis v. Comolli, 101 N.H. 279, 283 (1958) (citation omitted).

**B. Wright-Pierce’s Misrepresentations Concerning the Groundwater Modeling Results Are a Sufficient Basis for a Claim for Fraudulent Misrepresentation.**

WP first alleges that Wolfeboro “cannot meet its burden of proof” on the Fraud Claims since the WP’s representations at issue are “expressions of professional opinion” and thus not actionable as fraud.

WP mischaracterizes the evidence and the law. First, the WP statements are not “opinions” – they are knowingly false statements of fact. Peter Atherton told David Ford of Wolfeboro that “The model results indicate that the site can take up to 600,000 gpd...” See Exhibit C. That statement was false, not simply because the Site did not have that capacity (which it did not), but because he knowingly misrepresented what Mr. Schwalbaum told him the groundwater model results indicated.

Moreover, even after this point WP continued to make representations to the Town that the Site could handle an annual average flow of 600,000 gpd when it knew that it could not, and actively concealed the true modeling results from Wolfeboro. New Hampshire courts have repeatedly upheld fraud claims based upon knowing misstatements of fact. In Snieron v.



Scruton, the New Hampshire Supreme Court held that the plaintiff had stated a claim for fraud by alleging that sellers of real estate had made written statements that they had no problems with their septic tank when they had, in fact, encountered difficulties with the septic tank. 145 N.H. 73, 78 (2000).

Even if the WP statements could be couched as a “professional opinion,” they would still be actionable under New Hampshire law as the statements underpinning the “opinion” were knowingly false. *See, e.g., DePalantino v. DePalantino*, 139 N.H. 522, 524 (1995) (opinion may constitute the basis of fraud); *Eno Brick Corp. v. Barber-Greene Co.*, 109 N.H. 156, 158-159 (1968) (opinion given by an expert concerning the capacity of a machine actionable where the defendant knew the expert did not have the expertise to render the opinion).

As WP expressly acknowledges, courts from other jurisdictions have repeatedly held that a statement by a design professional may constitute actionable fraud if the representation is false and the subject matter is one susceptible of actual knowledge. *See* Doc. # 100-1, p. 8 (citing *Nota Construction Corporation v. Keyes Associates*, 45 Mass. App. Ct 15, 17 (1998) (knowingly false statement by an architect in the plans was actionable as deceit); *see also Giovanni Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 294 (Va. 1996) (engineer’s false representations concerning present quality or character of the property could be sufficient to maintain fraud claim); *Holy Cross Parish v. Huether*, 308 N.W.2d 575, 577 (S.D. 1981) (action for fraud maintainable against architect due to knowing misrepresentation in signing final certificate assuring acceptability of the building); *Samuels v. Fradkoff*, 38 A.D.3d 208 (N.Y. App. Div. 2007) (upholding fraud claim against architect due to concealment of project violations and design and construction deficiencies); *Board of Managers of the Canton Court Condominium v. Canton Development LP*, 41 Misc. 3d 1231(A) (N.Y. Sup. Ct. 2013)

(architect's knowing misrepresentation that building would be constructed in accordance with standards specified by building code actionable as fraud); Fredericksa Sands v. Caliendo, 2010 N.Y. Misc. LEXIS 1654, \*41 (N.Y. Sup. Ct. 2010) (upholding common law fraud claim against architect for affirmative misrepresentations concerning design and construction).

WP cites to a single case, KDK Enterprises, Inc. v. Peabody Construction Co, Inc., 2006 Mass. Supr. 04-01305-C, to support its position. KDK involved a subcontractor's claim that the architect's specifications regarding on-site standards constituted a negligent misrepresentation (not fraud), where the subcontractor was alleged to be later held to differing standard by that same architect. Id. at 2. The fact pattern bears no conceivable relation or relevance to the instant case and serves only to illustrate the lack of any law supporting WP's position.

Consequently, this Court should uphold its determination that WP's misrepresentations may constitute actionable fraud. See Doc. # 40, p. 4.

### **C. The Fraud Claims Do Not Require Expert Testimony**

WP offers no legal support for its contention that expert testimony is required to prove a claim for fraudulent misrepresentation. See generally, Doc. #100-1. Expert testimony is only required where "the matter to be determined is so distinctly related to some science, profession, business, or occupation, as to be beyond the ken of the average layman." See Estate of Joshua v. State, 150 N.H. 405 (citing Powell v. Catholic Medical Center, 145 N.H. 7 (2000)).

Wolfeboro's fraud allegations are grounded in Wright-Pierce's repeated and intentional misstatements that the groundwater model results indicated that the Site could take up to an annual average of 600,000 gpd without breakouts. See id. It is within the ken of an average layperson to determine whether WP was aware that the groundwater model demonstrated

different results than those communicated by WP to Wolfeboro. As a result, Wolfeboro is not required to supply expert testimony in support of its claim for fraudulent misrepresentation.

Moreover, WP attempts to overcomplicate the nature of Wolfeboro's claims into matters not "susceptible of actual knowledge" by characterizing them as opinions concerning the ultimate "feasibility of the Site being able to dispose of up to 600,000 gpd" and the ability of the Site to be remediated. See Doc. #100-1 p. 9. This characterization of Wolfeboro's Fraud Claims is simply incorrect. Again, WP's statements were fraudulent because they intentionally misstated what Mr. Schwalbaum told it regarding the groundwater model results. See Doc. #41, ¶¶ 93-105, 140-141. What Mr. Schwalbaum told WP, and what WP then told Wolfeboro, is clearly a matter "susceptible of actual knowledge," as is the fact that WP deliberately concealed critical information relative to capacity of the Site.<sup>4</sup>

Accordingly, this Court should deny WP's motion in *limine* to preclude Wolfeboro from offering evidence in support of its claim for fraudulent misrepresentation (Count VII).

**D. Wolfeboro Has Established a Cause of Action Under RSA 358-A**

WP's next argues that all evidence of Wolfeboro's claim for violation of RSA 358-A should be precluded because the statements relied upon by Wolfeboro were "merely preliminary statements of professional judgment." See Doc. #100-1, p. 13. Like its Fraud Claim, Wolfeboro's claim for violation of RSA 358-A is based upon WP's knowing misstatements about the results of the groundwater model concerning the capacity of the Site and as to the capacity of the Site after the defects were discovered. See Verified Amended Complaint, Doc. #41, ¶¶ 134-135. As this Court stated in its order on Wolfeboro's Motion to Amend the Complaint, "[f]raudulent misrepresentations made to induce a business relationship or to

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<sup>4</sup> Wolfeboro notes that its' expert, Fuss & O'Neill, opines that the RIB Site was never capable of performing anywhere near the capacity WP represented.

maintain the relationship based on deception in some circumstances can violate RSA 358-A.” Doc. # 40, p. 4 (citing State v. Moran, 151 N.H. 450 (2004)). Accordingly, as Wolfeboro has set forth evidence that WP made fraudulent misrepresentations to Wolfeboro, this Court should deny WP’s motion to exclude evidence relating to Count VI.

**CERTIFICATION PURSUANT TO LR 7.1(a)(2)**

Pursuant to LR 7.1(a)(2), no memorandum of law is necessary, as all supporting authorities are cited herein.

**REQUEST FOR RELIEF**

Wherefore, Wolfeboro respectfully requests that this Honorable Court deny WP’s Motion in Limine in its entirety, and grant such further relief as is necessary and just.

Respectfully submitted,

**The Town of Wolfeboro,**

By its attorneys,

Date: March 27, 2014

/s/ Seth M. Pasakarnis

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**CERTIFICATE OF SERVICE**

I, Seth M. Pasakarnis, Esq., hereby certify that on this date a true and accurate copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Seth M. Pasakarnis

Seth M. Pasakarnis