

NO. 33908

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

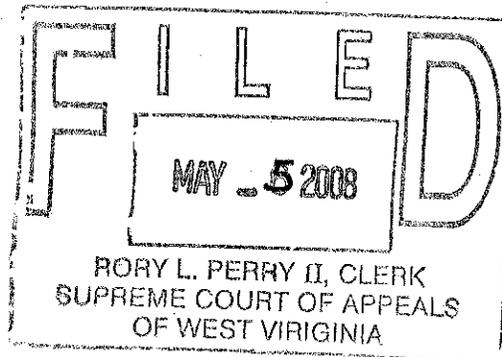
TERRA FIRMA COMPANY, a West)
Virginia company and wholly-owned)
subsidiary of CONSOL ENERGY, INC.,)
a Delaware corporation,)

Appellees,)

v.)

ROBERT MORGAN and)
VICKIE MORGAN, husband)
and wife,)

Appellants.)



APPELLANTS' BRIEF

Arch W. Riley, Esquire (#3106)
Martin J. Wright, Jr., Esquire (#8622)
BAILEY, RILEY, BUCH & HARMAN, L.C.
Post Office Box 631
Wheeling, WV 26003-0081
Telephone: (304) 232-6675
COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	iv
Kind of Proceeding and Nature of the Ruling Below	1
Statement of Facts	2
Assignments of Error	7
Standard of Review	7
Discussion of Law	8
I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT INEQUITABLE CONDUCT BY TERRA FIRMA AND ITS AGENT	9
A. Terra Firma’s false denial at closing contained multiple misrepresentations	10
(1) Misrepresentation that a coal company not buying Morgan property	11
(2) Misrepresentation that property only being used for land development purposes	12
(3) Record supports clear and convincing evidence to support elements of fraud and/or inequitable conduct	13
B. Record supports Petitioners’ own mistake as to identity and intended use	15
C. Record supports material facts in dispute as to Morgans’ mistake and Terra Firma’s fraud and/or inequitable conduct	15
II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT THE NOTICE OF AGENCY PROVISION REQUIRING TERRA FIRMA’S AGENT TO DISCLOSE “ALL FACTS KNOWN TO AGENT MATERIALLY AFFECTING THE VALUE OR DESIRABILITY OF THE PROPERTY”	16

A.	Burton owed duty to disclose identity to Morgans	16
B.	Dispute over obligations under Notice is genuine issue of material fact in dispute	17
III.	THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE AND THE FINDINGS ARE CONTRADICTED BY THE RECORD	18
	Finding ¶ 25	19
	Finding ¶ 37	19
	Finding ¶ 40	20
	Finding ¶ 22	20
	Conclusion	22
	Certificate of Service	23
	Exhibits A through E	

TABLE OF AUTHORITIES

CASES

PAGE

<u>Aetna Cas. & Sur. Co. v. Federal Ins. of New York</u> , 148 W.Va. 160, 133 S.E.2d 770 (1963)	7
<u>Crain v. Lightner</u> , 178 W.Va. 765, 364 S.E.2d 778 (1987)	8
<u>Hanlon v. Chambers</u> , 195 W.Va. 99, 464 S.E.2d 741 (1995)	20
<u>Jividen v. Law</u> , 194 W.Va. 705, 461 S.E.2d 451 (1995)	8
<u>Kidd v. Mull</u> , 215 W.Va. 151, 595 S.E.2d 308 (2004)	13, 19
<u>Lusher v. Sparks</u> , 146 W.Va. 795, 122 S.E.2d 609 (1961)	9, 11, 13, 16, 19
<u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	7, 8
<u>Taylor v. Culloden Pub. Serv. Dist.</u> , 214 W.Va. 639, 591 S.E.2d 197 (2003)	8
<u>Via v. Beckett</u> , 217 W.Va. 348, 617 S.E.2d 895	8, 20
<u>Williams v. Precision Coil, Inc.</u> , 194 W.Va. 52, 459 S.E.2d 329 (1995)	8

RULES

West Virginia Rules of Civil Procedure 56	passim
---	--------

Kind of Proceeding and Nature of the Ruling Below

This appeal seeks reversal of the June 15, 2007, Order of the Circuit Court of Monongalia County granting summary judgment against Appellants Robert and Vickie Morgan on their counterclaim for monetary damages and reformation of the deed arising out of misrepresentation and inequitable conduct by the Appellee Terra Firma Company, and its real estate agent, William Burton.

This action was originally filed on January 6, 2006, by Terra Firma Company, an undisclosed subsidiary of Consol Energy, Inc., as a "Petition for Wrongful Occupation of Residential Real Estate." In answer to the Petition, Mr. and Mrs. Morgan counterclaimed asserting, *inter alia*, that Terra Firma and its agent William Burton misrepresented Terra Firma's true identity and intended purpose for purchase of the property. More specifically, Mr. and Mrs. Morgan seek reformation of the purchase price for the inequitable conduct of Terra Firma as well as William Burton's breach of a duty to disclose "all facts known to the agent [Burton] materially affecting the value or desirability of the property." This latter duty and basis for relief arises out of a Notice of Agency sent by Terra Firma and William Burton as part of the purchase agreement in this matter.

On January 18, 2006, the Circuit Court of Monongalia County ordered the Morgans to vacate the property and to pay Terra Firma back-rent from August, 2005, through January, 2006. The Circuit Court, however, denied Terra Firma's motion to dismiss Appellants' counterclaim and the counterclaim proceed forward with discovery. On May 29, 2007, Terra Firma filed a renewed motion for summary judgment, which was granted by the Circuit Court on June 15, 2007.

Thereafter, on or about July 2, 2007, the Morgans filed a Motion to Alter/Amend/Set Aside Order Granting Summary Judgment pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. On August 31, 2007, the Circuit Court denied the motion, and the Morgans filed this appeal seeking reversal of the summary judgment order entered against them.

Statement of Facts

Although there are disputed facts in this matter, the operative facts derive from a sale of farm land owned by the Appellants Robert and Vickie Morgan (“Appellants”) to an undisclosed subsidiary company of Consol Energy, Inc. (“Consol Energy”). At the time, the company in question in the sale was Terra Firma Company (“Terra Firma”).

Background of Terra Firma Company

Terra Firma was incorporated on August 29, 2003, by James A. Russell, a lawyer with Steptoe & Johnson. Mr. Russell was retained by Consol Energy’s real estate service company CNX Resources to set up a company to start acquiring property for a planned coal facility in the western part of Monongalia County. (Russell Depo., p. 4, l: 1-24).¹ The purpose of the shell company was to acquire approximately 3,050 acres of contiguous property **“in the most expeditious and economical fashion[.]”** Terra Firma’s Response to [Appellants] Interrogatory No. 5. (Emphasis added). In other words, Consol Energy wanted to hide its identity as the purchaser of the properties in order to derive a lower purchase price.

To facilitate the acquisition of properties on behalf of Consol Energy, Terra Firma, through its President, James A. Russell, hired William Burton as its exclusive real estate agent to negotiate for Terra Firma, and ultimately its true buyer, Consol Energy.² The operational structure was such that Mr. Burton would receive from Mr. Russell a Notice to Proceed on the acquisition of certain

¹ As noted by Appellee in their Response in Opposition to Petition for Appeal, all depositions were attached as Exhibit B to Terra Firma’s Second “Motion for Summary Judgment” which is believed included as part of the original record at Designation Page # 356.

² Appellee’s dispute that William Burton had knowledge of Terra Firma’s intent to purchase property for Consol Energy, and as will be discussed herein, is one of the genuine issues of material fact in dispute, which Appellants maintain should have precluded summary judgment. The Appellants have supplied evidence of checks issued to Mr. Burton with Consolidated Coal listed as the client, including his retainer fee of \$1,000.

properties and set the monetary limits. (An example of a Notice to Proceed is attached as “**Exhibit A**”).

Although the Morgans did not know it at the time, the planned coal facility included 173 acres of farm land owned by the Morgans in Monongalia County, and its central location within the 3,050 total acres of property had been a desired site to place a coal preparation plant.

Morgans Multiple Real Estate listings

While this planned purchase of property by Consol Energy was ongoing, Mr. and Mrs. Morgan met with a real estate agent, Nancy Kincaid of J. S. Walker in September 2004 in order to list a business store owned by them in Hundred, West Virginia. Although the initial engagement was to sell the store and business, the Morgans were persuaded by Ms. Kincaid and her fellow real estate agent, Robert Beach, to additionally seek the sale of their farm land located in Monongalia County, West Virginia.

While there remain questions about Mr. Beach’s involvement with the Monongalia County Planning Commission and his knowledge of the planned coal mining operation in western Monongalia County, Mr. and Mrs. Morgan unknowingly agreed to list their farm for sale as well. At the time, Mr. Morgan originally wanted \$1,000,000 for the farm land, but the real estate agent talked him into listing the property for \$640,000.

Purchase of Appellants’ Land

Soon after the listing of the farm, the Morgans received an offer to purchase the land from Mr. Burton, the agent for Terra Firma. At the time, Mr. Morgan was unaware of who Terra Firma was and he erroneously thought it might be a landfill company, which he would not sell to, or possibly a coal company. He inquired of Mrs. Kincaid, his real estate agent, as to the background/

identity of Terra Firma and why it wanted the property. All of these communications were by telephone. Mrs. Kincaid, in answer to Mr. Morgan's inquiry, told him she would call him back. When Mrs. Kincaid called back, she informed Mr. Morgan that Terra Firma was a company of investors who were purchasing the property for land development. (R. Morgan Depo., p. 62 - p. 63) Mr. Morgan defined development as putting up residential housing (*Id.* at p. 63). Despite several offers and rejections between the parties, negotiation between Ms. Kincaid and Mr. Burton resulted in an agreed upon purchase price of \$525,000.

Notice of Agency and Purchase Agreement

Beginning with the first offer to purchase, Mr. Burton forwarded a document entitled "Notice of Agency Relationship" ("Notice") as part of the purchase agreement. Although the Notice reflected Mr. Burton's representation of the buyer, it specifically and expressly outlined affirmative duties that Mr. Burton owed to **both the buyer and the seller**, in part as follows:

"A duty of honest and fair dealing and in good faith.

* * *

"Must disclose all facts known to the agent materially affecting the value or desirability of the property."

See original Notice attached as "**Exhibit B**".

This Notice would again be reiterated and included as part of the purchase agreement with subsequent offers to the Morgans. Ultimately, on November 3, 2004, the Morgans accepted the proposed purchase agreement (with modifications), including the addendum and a renewed Notice of Agency Relationship. As with the purchase agreement, Mr. Burton and the Morgans executed the Notice, which was additionally endorsed by James A. Russell, President of Terra Firma. (*See*

Notice attached "**Exhibit C**"). As with the original Notice, this second Notice again contained the same affirmative duty that Mr. Burton:

"Must disclose all facts known to the agent materially affecting the value or desirability of the property."

Given the signature of Mr. Russell coupled with his repeated inclusion of this Notice with the purchase agreement, Mr. Burton was acting in the scope of his employment when he assumed the affirmative duties to disclose his knowledge for himself and his principal.

Burton Knowledge that Purchasing for Consol

However, despite this Notice and affirmative duty included with the purchase agreement, Mr. Burton never disclosed that Terra Firma was purchasing property for Consol Energy. Rather, Mr. Burton has maintained that he did not know the intended purpose of Terra Firma's purchase of the property.

Q. All this time, it's your testimony that you had no idea why Terra Firma was buying this property and they did not disclose why they were buying it to you, is that correct?

A. [Mr. Burton] That's correct.

Burton Depo., p. 37, l. 6-10.

However, the record in this matter contradicts this asserted lack of knowledge. In fact, Mr. Burton had continual knowledge that Terra Firma was purchasing property for Consol. This was evidenced by Consolidation Coal imprinted on two separate checks drawn out of Steptoe & Johnson's general checking account to Mr. Burton. The first of these was the retainer fee of \$1,000 paid to Burton where the stub states it was to be charged to Consolidation Coal, and the second check which was out of Steptoe & Johnson's general checking account stating that the payment of Burton's bill was to be charged to Consolidation Coal's account. (See Checks attached as "**Exhibit**

D”). These checks coupled with the fact that Burton received 20 tracts of real estate to negotiate for Terra Firma, placed Mr. Burton on knowledge as to the identity and intended use of the property. Any broker with the experience of Mr. Burton would know, or should at least know, who the real party in interest was and who the property was intended for.

Direct Question at Closing

Any speculation as to whether the identity and intended use of the property materially affected the desirability and value of the property was resolved at the closing of this sale. The closing was held at the offices of Steptoe & Johnson in Morgantown and at this closing, Mr. Morgan asked a direct question about the identity of the purchaser. Specifically, he wanted to know if the purchaser was a landfill or coal company. In response, representatives of Terra Firma who were present assured him that it was going to be for “land development purposes only.” *See* R. Morgan Dep., p. 91, l. 17- 24. (*See* Depo excerpt attached as “**Exhibit E**”). Mr. Burton was also present for this conversation, and despite his affirmative duty to disclose the identity and intended purchase for Consol, he remained silent.

In reliance of this assurance from Terra Firma, Appellants proceeded forward with closing and signed the deed over to Terra Firma and its agents. Thereafter, Appellants went away on vacation. Upon their return, Appellants were informed about the true identity of Terra Firma and its relation to Consol Energy.

Mr. Morgan contacted one of the agents for Terra Firma/ Consol Energy, Neil Jenkins, about their plans. During their discussion, Mr. Morgan testified that Neil Jenkins, agent of Terra Firma and Consol Energies, told him after the sale of the property that the property was going to used for a prep plant. (R. Morgan Depo., p. 100, l. 3 - p. 101, l. 11).

Thereafter, Appellants were ultimately served with a Petition for Eviction filed by Terra Firma/ Consol Energy. This lawsuit and counterclaim then ensued.

Assignments of Error

- I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT INEQUITABLE CONDUCT BY TERRA FIRMA AND ITS AGENT.
- II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT THE NOTICE OF AGENCY PROVISION REQUIRING TERRA FIRMA'S AGENT TO DISCLOSE "ALL FACTS KNOWN TO AGENT MATERIALLY AFFECTING THE VALUE OR DESIRABILITY OF THE PROPERTY."
- III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, AND THE FINDINGS OF FACT ARE CONTRADICTED BY THE RECORD.

Standard of Review

This Appeal seeks reversal of a summary judgment order entered pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). Further, this Honorable Court has held:

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). In further elaboration of this standard for summary judgment, this Court has stated:

Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence

favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syl. Pt. 5, Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995).

Additionally, in consideration of a motion for summary judgment, the nonmoving party is entitled to the benefit of the inferences that may reasonably be drawn from the evidence. Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995); Painter v. Peavy, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (Court “must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.”). “In providing plenary review of a grant of summary judgment, ‘the benefit of the doubt’ is to be given to the nonmoving party. Via v. Beckett, 217 W.Va. 348, 357, 617 S.E.2d 895, 904 (*Albright, J. dissenting*) citing Taylor v. Culloden Pub. Serv. Dist., 214 W.Va. 639, 644, 591 S.E.2d 197, 202 (2003).

“If there is any evidence in the record from any source from which a reasonable inference in the nonmovant's favor may be drawn as to a material fact, the moving party is not entitled to a summary judgment.” Crain v. Lightner, 178 W.Va. 765, 769, 364 S.E.2d 778, 782 (1987).

Therefore, in determining whether summary judgment should be granted in the case *sub judice*, the Court must be satisfied that there exist no genuine issues of material fact in dispute, and that the movants were entitled to judgment as a matter of law.

Discussion of Law

This is a case about a coal company that sought to purposefully conceal its identity in order to buy property at a reduced price and without the full knowledge of the sellers. It is a case about a coal company that orchestrated a scheme to hide all reference to its true identity including

misrepresentations through its agents. It is a case about a couple that was misled about the identity and intent of the coal company, and who unknowingly sold their farm land to it.

Unfortunately, this case is not just an opposing counsel's ideations. It is a plan readily admitted by the coal company during discovery.

Consol Energy Inc. decided to acquire properties in the name of Terra Firma Company in an effort to acquire approximately 3,050 acres of contiguous property. It was necessary to acquire all of the acreage necessary, not just some of it. Consol Energy Inc. has a number of wholly owned subsidiaries that are used in the same fashion, and thought that it could **accomplish the goal of purchasing all of the acreage in the most expeditious and economical fashion** by forming the subsidiary and contracting with a real estate broker to assist it in the purchase of the properties.

Terra Firma's Response to [Appellants'] Interrogatory No. 5. (Emphasis added) (See excerpt attached as "Exhibit F").

This stated intent of Consol provides the backdrop for a pattern of conduct that permeates this case. There was inequitable conduct, misrepresentations, and a disregard of an express duty owed to Mr. and Mrs. Morgan by Terra Firma's agent, William Burton. The goal was to buy all the property before their identity was discovered, and if summary judgment is affirmed, the coal company will have succeeded in this goal.

However, the record in this matter warrants this Honorable Court's reversal of the Circuit Court's Order granting summary judgment and remand for trial in this matter.

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT INEQUITABLE CONDUCT BY TERRA FIRMA AND ITS AGENT.

Appellants seek reformation of the deed as a result of mistake on the Morgan's part, and fraud and/or inequitable conduct on Terra Firma's part. Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961). Although both parties cite and rely upon Lusher as controlling authority in this

matter, Appellants challenge the Circuit Court's finding that no material facts are in dispute thereby allowing conclusions of law to be rendered.

Prior to seeking this appeal, Appellants attempted to demonstrate in their "Designation/Supplementation of the Record in Further Opposition to Petitioner's Motion for Summary Judgment" as well as their "Motion to Alter/Amend/Set Aside Order Granting Summary Judgment," that the record in this matter is contradicted with disputed evidence, including differing recollections about a material conversation that took place between the parties at closing.

Appellants maintain that the record contains strong, clear and convincing evidence to support a finding of fraud and/or inequitable conduct by Terra Firma. As such, Appellants maintain that the Circuit Court erred in its findings of facts and conclusions of law because genuine issues of material fact remain in dispute, especially when inferences are to be drawn in Appellants' favor as the non-moving party.

A. Terra Firma's false denial at closing contained multiple misrepresentations.

In order to better understand Appellants' asserted error in this matter, it is important to highlight one of the key material facts disputed in this matter. On the day of closing between the Morgans and Terra Firma, the parties were gathered around a table at the law firm of Steptoe & Johnson. Prior to signing the documents, Mr. Morgan asked a clear and specific question of the Terra Firma representatives.

Q. What was the question?

A. I asked Mr. Burton, I looked over at him, and I said- -before - - - "I have not signed this document yet," this is my exact words, "I have not signed this document yet, the sale is not final until I do, and *I want to know if this is a landfill or the coal company buying it.*" And the answer was exactly, "*rest assured, it is for land development purposes only.*"

R. Morgan Depo. p. 91, l. 17- 24. (Emphasis added)

This evasive and misleading response is an important material fact which goes to the heart of the fraud and/or inequitable conduct by Terra Firma. Specifically, Terra Firma's response contains misrepresentations about the true identity of Terra Firma as a coal company, as well as the intended purchase and use of the Morgan's property. More importantly, these misrepresentations constitute fraud and/or inequitable conduct warranting reformation of the deed pursuant to Lusher v. Sparks, supra.

(1) *Misrepresentation that a coal company not buying Morgan property.*

With respect to the first alleged misrepresentation, Appellant Robert Morgan testified that he specifically asked at closing whether the purchaser was a landfill or the coal company, and that he was informed by someone with Terra Firma that it was for land development purposes only. Terra Firma denies such a statement occurred. On its face, this is a genuine issue of material fact that is in dispute, and would alone justify denial of the motion for summary judgment. However, the statement is also factually incorrect, and, as alleged by Appellants, constituted a purposeful misrepresentation about the true identity of Terra Firma.

Terra Firma is a wholly owned subsidiary of Consol Energy, Inc. It was incorporated by James A. Russell, Esq., an attorney with the law firm Steptoe & Johnson, who also served as the CEO of Terra Firma. At all times relevant to this case, the articles of incorporation and other corporate documents only contained reference to Mr. Russell. Without personal knowledge that Mr. Russell did legal work on behalf of Consol Energy, Inc., there would have been no public information connecting Terra Firma and Consol Energy.

Indeed, as was previously highlighted, this concealment of identity was part of the overall goal of Consol Energy to "purchase all of the acreage in the most expeditious and economical

fashion[.]” The problem for Consol Energy’s plan was that Mr. Morgan asked them directly about their identity at closing. Rather than answer his question, Terra Firma failed to give him this important information. In failing to disclose the true identity of Terra Firma as a subsidiary for a coal company, Terra Firma committed a misrepresentation.

(2) *Misrepresentation that property only being used for land development purposes.*

The second misrepresentation that occurred at the closing related to the misstatement about the intended use of the property. The deposition testimony of Mr. Morgan is that Terra Firma assured him that it would be “for land development purposes only.” However, as asserted by Appellants, this statement is also a factually inaccurate statement made by Terra Firma.

In truth, Terra Firma had long planned to purchase the acreage in order to build a coal preparation plant on the property. Dating back to 1999, Consol had established a plan to purchase at least 3,050 acres in the Battelle District of Monongalia County, WV in order to build a coal preparation plant and mine coal.³ As one of the larger, centrally located pieces of property in the Battelle District, Consol Energy needed the Morgan’s property in order to complete their plans.

Understandably, Terra Firma disputes the accuracy of Mr. Morgan’s memory, and also disputes whether such inquiry was even made during closing. However, Terra Firma’s disagreement with the evidence to be presented by Appellants further reinforces and highlights the factual discrepancies that exist in this matter. Whether a question was made by Mr. Morgan, and whether Terra Firma misrepresented the intended purpose of the property at the closing are direct examples

³ This intended use of the property was admitted by Terra Firma in its answer to Respondents’ Interrogatory No. 5. Additionally, in his deposition, Mr. Morgan testified that Neil Jenkins, agent of Terra Firma and Consol Energies, told him after the sale of the property that the property was going to used for a prep plant. Robert Morgan Deposition of April 20, 2006, page 100, lines 3 to page 101, line 11.

of material facts in dispute. With respect to this central question of misrepresentation, there clearly exists a factual dispute that needs to be resolved by a finder of fact.

(3) *Record supports clear and convincing evidence to support elements of fraud and/or inequitable conduct.*

In its Order, the Circuit Court held that in order to establish a claim for misrepresentation, the Morgans must prove: (1) that a misrepresentation was committed by Terra Firma or induced by it; (2) that the misrepresentation was material and false; (3) that the Morgans relied upon the misrepresentation and were justified under the circumstances in doing so, and (4) that the Morgans were damaged because of their reliance. Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308 (2004). Order, pg. 6.

Applying these requirements to the two alleged misrepresentations by Terra Firma at the closing, Appellants are able to satisfy the requisite fraud and/or inequitable conduct required by Lusher.

First, Terra Firma committed a misrepresentation by failing to inform Mr. Morgan that Terra Firma was a coal company when he asked a direct question about the identity of the purchasers. Terra Firma committed a second misrepresentation by stating that land development was the only purpose for the land.

Second, the fact that the buyer was a coal company was material, and impacted the sale of the property. Aside from the "sale not final" comment of Mr. Morgan, his wife Vickie Morgan testified in deposition that they would not have sold at the price had they known the coal company was the buyer. Further, as has been previously stated, Terra Firma is a wholly owned subsidiary of Consol Energies, Inc., and was formed with the purpose of purchasing property "in the most expeditious and economical fashion[,]" in order to use the property in the operation of their coal mines. Therefore, the misstatements were both material and false.

Third, the Morgans were justified in relying upon the misrepresentations by Terra Firma because it comported with the Morgans' mistaken understanding that Terra Firma was (1) a group of lawyers who (2) desired to develop the property residentially. This misunderstanding was bolstered by the Morgans' real estate agent Ms. Kincaid. In response to inquiries made by the Appellants, she informed them that a group of lawyers/investors that intended to develop land. During his deposition, Mr. Morgan testified that "land development" meant residential housing to him, and the record further presents disputed material facts as to the source of Ms. Kincaid's information and inferences that she made with respect to Terra Firma. However, these again are issues of material fact in dispute. With respect to this third prong, Appellants assert that the evidence will support their claim that they had a unilateral mistake as to the identity and intended purpose of the property. This is an expected result of Consol Energy's use of a shell company whose only corporate officer and public representative was an attorney with no direct ties to Consol. Hence, while the Appellants were in error as to the true identity and purpose, it was a justifiable mistake that was relied upon by the Morgans. The misrepresentations by Terra Firma at the closing further bolstered the Appellants' reliance upon these two misrepresentations.

Finally, the Appellants' reliance upon the misrepresentations caused them damage. Aside from selling their farm to a coal company, the misrepresentations caused them to lose monetary value of their property. Despite the finding of the Circuit Court, the record in this matter makes clear that at the very least Mrs. Morgan would not have sold the farmland at the price to a coal company. Further, Mr. Morgan's testimony would also support a finding that Mr. Morgan would have treated the sale differently had he known it was a coal company.

As reflected by the foregoing, clear and convincing evidence exists to substantiate fraud and/or inequitable conduct, especially considering that all inferences shall be deemed in a light most

favorable to Appellants. At the very least, genuine issues of material facts are in dispute with respect to these two asserted misrepresentations of identity and intended use.

B. Record supports Appellant's own mistake as to identity and intended use.

In addition to proving fraud and/or inequitable conduct, Lusher also requires that the Appellants demonstrate their own mistake. While this was just stated as part of the third prong of Kidd, the relevant summary of the Morgans mistake arise out of their incorrect understanding that Terra Firma was (1) a group of lawyers who (2) desired to develop the property residentially. This misunderstanding was bolstered by the Morgans' real estate agent Ms. Kincaid. She informed them that a group of lawyers/investors intended to develop land. Mr. Morgan testified that in his mind this meant residential housing. Again, whether or not the Appellants' real estate agent, Ms. Kincaid, was correct, or even talked with Terra Firma's real estate agent, William Burton, it evidences that the Morgans were clearly mistaken about the (1) identity and (2) intended use of the property.

C. Record supports material facts in dispute as to Morgan's mistake and Terra Firma's fraud and/or inequitable conduct.

Contrary to the Circuit Court's Order, there exist clear and convincing evidence that, when viewed in a light most favorable to Appellants, clearly presents genuine issues of material fact that prevent the granting of summary judgment. Specifically, there is evidence that supports a material dispute as to whether misrepresentations were made by Terra Firma at the closing in this matter. Appellants maintain that Terra Firma misrepresented the identity and intended use of the property. Terra Firma disputes the substance of the conversation. This dispute is material as to whether Terra Firma acted with fraud and/or inequitable conduct in its purchase of land owned by the Morgans.

Additionally, there is a factual dispute as to whether the Morgans made a unilateral mistake in its sale of the land to Terra Firma. Terra Firma challenges the sufficiency of the mistake, and

whether it was a justified mistake. This dispute is material as to whether Appellants made mistakes in their dealings, such that the alleged fraud and/or inequitable conduct of Terra Firma caused them damage.

Overall, both requirements for reformation as formulated by Syl. Pt. 1, Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961), are factually disputed and create genuine issues of material fact that precluded the granting of summary judgment by the Circuit Court.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE ABOUT THE NOTICE OF AGENCY PROVISION REQUIRING TERRA FIRMA'S AGENT TO DISCLOSE "ALL FACTS KNOWN TO AGENT MATERIALLY AFFECTING THE VALUE OR DESIRABILITY OF THE PROPERTY."

In addition to the misrepresentations at closing, Appellants also maintain that Terra Firma engaged in additional fraud and/or inequitable conduct through its real estate agent, William Burton. Specifically, Appellants assert that Mr. Burton committed misrepresentation when he failed to disclose "facts known to the agent materially affecting the value or desirability of the property" as required under a Notice of Agency Relationship he entered into with the Morgans. Specifically, the record supports the fact that William Burton had actual knowledge that Consol was the true buyer of the property, and knowing that it would affect the value of the purchase price, failed to disclose this information to the Morgans.

A. Burton owed duty to disclose identity and intended purchaser to Morgans.

Although the Circuit Court's Order focuses broadly on this substantial factual dispute, the impact and effect of this duty voluntarily undertaken by Terra Firma and its agent, creates a genuine issue of material fact in dispute. Specifically, William Burton owed a duty to disclose "facts known to the agent to materially affecting the value or desirability of the property."

Clearly, the knowledge that the true identity of the purchaser was a coal company was a material fact affecting the “value and desirability of the property.” Aside from the Appellants’ own testimony, the admission by Terra Firma that it was formed as a shell to allow for the purchase of the property “in the most expeditious and economical fashion” clearly supports the notion that the identity of Consol was an important consideration in the value of the property.

Further, the knowledge that the property was going to be used to mine coal and to run a coal preparation plant also materially affects the desirability of the property. Appellant Vickie Morgan testified that had the true identity been known, Appellants would have changed the price.

However, in violation of the Notice of Agency Relationship signed between he and the Morgans, Mr. Burton failed to disclose each of these two misrepresentations either (1) at the closing or (2) prior to the closing. While each of these alone constitute a breach of the Notice, the clearest omissions would have taken place at the closing. Despite clear knowledge by Mr. Burton about the true identity of Terra Firma, he stood silent. When Mr. Morgan inquired if it was a landfill or a coal company, Mr. Burton had already executed the Notice of Relationship, and owed a duty to disclose the identity to Mr. Morgan. Mr. Burton never informed Appellants of this information, and in omitting to disclose this information, breached his duty to the Morgans.

B. Dispute over obligations under Notice is genuine issue of material fact in dispute.

Although the duties are expressly set forth, Terra Firma disputes such duty was owed to Appellants. In contrast, Appellants maintain that the language places an affirmative duty to disclose upon Mr. Burton, Terra Firma’s agent. By its very nature, the disagreement over the duty imposed by this Notice creates an issue of material fact that needs to be resolved by a finder of fact.

In the Court’s Order, focus is only placed upon whether Mr. Russell informed Mr. Burton about the “intended use of the property.” Order, page 7, ¶ 3. The Order never makes a finding about

whether Mr. Burton personally knew (1) the true identity of the purchaser, or (2) the intended use of the property. In fact, the record in this matter demonstrates that Mr. Burton had full knowledge. As reflected by the Supplemental Designation, arguments, and Appellants' post-judgment motion, the record indicates that William Burton had actual knowledge that Consol was the true buyer of the property. This knowledge is most clearly evidenced by the Steptoe & Johnson check for the retainer fee given to Mr. Burton for payment of the first bill and listing his client as Consol.

As has been previously discussed, the record clearly reflects that Appellants' knowledge of the identity of the purchaser would have affected the value of the purchase price. This is reflected in Appellants' testimony, as well as Terra Firma's decision to form a shell company in order to purchase "all of the acreage in the most expeditious and economical fashion." (Terra Firma Response to [Appellants'] Interrogatory No. 5).

Further, while Appellants maintain that the "identity" and "intended use" were material facts to be disclosed, and did fall within Mr. Burton's affirmative duties to the Morgans, any assertion by Terra Firma that attempts to deny such duty is negated by Mr. Russell's signature on the Notice. By executing the Notice with the Morgans, Terra Firma had full knowledge of the additional duties imposed upon Mr. Burton, and the breach of those duties when he failed to disclose the information both prior to closing and at the closing.

Accordingly, this breach of the duty to disclose the identity as well as the intended use of the property constituted fraud and/or inequitable conduct by Terra Firma. Each of these were facts known to Mr. Burton that materially affected the value or desirability of the property. Further, Mr. Burton was the real estate agent for Terra Firma, and Terra Firma is responsible for the actions or inactions of its agents. Therefore, there exists clear, convincing evidence that reformation is appropriate because there exists evidence of two mistakes of information by the Morgans and

inequitable conduct by Terra Firma. See Syl. Pt. 1, Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961).

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, AND THE FINDINGS OF FACT ARE CONTRADICTED BY THE RECORD.

Finally, while Appellants do not specifically challenge the Court's reliance upon Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961), and Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308 (2004), Appellants do maintain that the record and evidence in this matter do not support the findings and specific conclusions adopted in this matter. In particular, Appellants would note the following Findings of Fact included within the Circuit Court's Order which are contradicted by the record:

(25) The Morgans do not assert that they would not have sold to Consol Energy, Inc., or that the possibility the land would be mined for coal would have altered their decision to sell the Subject Property.

Order, ¶ 25, pg. 9.

This finding is clearly in dispute and contradicted by the record. As reflected in Appellants' Supplemental Designation, Vickie Morgan testified that if she and her husband had known "that it was a coal company buying our property that we would never sell for the price we did." V. Morgan Deposition of April 20, 2006, page 21, lines 9-12. See also Robert Morgan Deposition of April 20, 2006, page 91, lines 18- 24, in which Mr. Morgan testified that he specifically asked during the closing about whether it was a landfill or coal company buying the property. At the very least, his testimony implies that it was not a done deal until this question was answered.

(37) As to the second element, the Morgans have failed to produce evidence establishing that the identity of the buyer and/or the intended use of the Subject Property was material to their decision to sell the Subject Property to Terra Firma. Any alleged misrepresentation or alleged failure to reveal an undisclosed principal cannot be

characterized as material misrepresentations because Terra Firma received no notice or indication whatsoever that these issues were material to the Morgans' decision to sell the Subject Property.

Order, ¶ 37, pg. 11.

As reflected in the prior paragraph, evidence clearly exists in the record in contradiction of this finding. Mr. Morgan's repeated statement about "not signing" until his question about the identity was answered clearly supports the premise that the identity and purpose were both material facts to him.

(40) Any reliance by the Morgans on the alleged misrepresentation by the unidentified party to the closing is irrelevant because the statement had no bearing on the Morgans' decision to sale (sic) the property to Terra Firma. That decision was made and rendered legally enforceable by the execution of the Real Estate Purchase Agreement approximately six weeks earlier. The deed signing at closing constituted a mere formality of the previously executed contract.

Order, ¶ 40, pg. 11.

As with Paragraphs 25 and 37, the testimony and record clearly indicates otherwise. Both Mr. and Mrs. Morgan indicate that the identity and use of the property affected the decision to sell. This information was contained in the record and Appellants further designated and supplemented the record following oral arguments on the motion.

(22) Because Mr. Burton received no notice whatsoever that Terra Firma's intended use of the property was material to the Morgans' decision to sell the Subject Property, and because Mr. Burton made no misrepresentations regarding Terra Firma's intended use of the property, he did not violate the duties imposed upon him by the "Notice of Agency Relationship."

Order, ¶ 22, pg. 9.

Mr. Burton did make misrepresentations to the Morgans. He had actual knowledge about the true identity of the purchaser (Consol) and failed to disclose that to the Morgans, **both at the**

closing and prior to the closing, in breach of the Notice. Indeed, Mr. Burton included the affirmative duties of the Notice with the purchase agreement, and thereby assumed those duties as part of the purchase agreement. This duty to disclose were asserted prior to the signature of the purchase agreement (it was provided as part of the first rejected offer) and continued up until the closing. Therefore, Mr. Burton, as an agent of Terra Firma, had a duty to disclose the identity and intended purchase of the property for Consol before the closing.

Again, Terra Firma disputes and challenges these factual disputes within the record. However, this again supports Appellants' argument that genuine issues of material fact exist which need to be decided by a jury. Contrary to the finding of the Circuit Court, the record in this matter is materially in dispute, and unable to be decided without the circuit court making factual determinations on disputed evidence. These factual determinations exceed the scope of the Circuit Court's consideration of a motion for summary judgment. "A court does not have a right to 'try issues of fact; a determination can only be made as to whether there are issues to be tried.'" Via v. Beckett, 217 W.Va. 348, 357, 617 S.E.2d 895, 904 (*Albright, J. dissenting*) citing Hanlon v. Chambers, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995).

Accordingly, the record in this matter does not support the Circuit Court's granting of summary judgment in this matter.

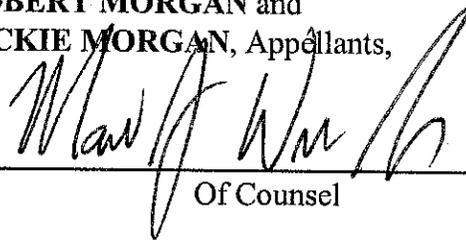
Conclusion

WHEREFORE, for all the foregoing reasons, and any that Court deems fair, just and reasonable, Appellants pray this Honorable Court will reverse the Order of the Circuit Court of Monongalia County, West Virginia, and remand this matter back for trial, and for such further relief as this Honorable Court deems fair and appropriate.

Respectfully submitted,

**ROBERT MORGAN and
VICKIE MORGAN, Appellants,**

By



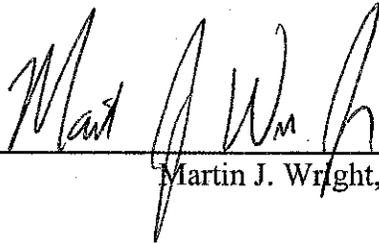
Of Counsel

**Arch W. Riley, Esq. (WVSB #3106)
Martin J. Wright, Jr., Esq. (WVSB #8622)
BAILEY, RILEY, BUCH & HARMAN, L.C.
900 Riley Building
P. O. Box 631
Wheeling, WV 26003
Telephone: (304) 232-6675
Facsimile: (304) 232-9897
Counsel for Appellants**

CERTIFICATE OF SERVICE

Service of the foregoing *Appellants' Brief* was made this 5th day of May, 2008, by forwarding a true copy thereof via regular United States mail, postage prepaid, to counsel for the Respondent addressed as follows:

Kimberly S. Croyle, Esq.
Bowles, Rice, McDavid, Graff & Love, LLP
7000 Hampton Center, Suite K
Morgantown, WV 26505
Facsimile: (304) 285-2526



Martin J. Wright, Jr.