

NO. 33908

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

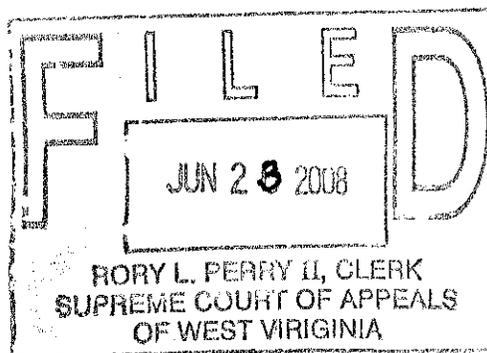
TERRA FIRMA COMPANY, a West
Virginia company and wholly-owned
subsidiary of CONSOL ENERGY, INC.,
a Delaware corporation,

Appellees,

v.

ROBERT MORGAN and
VICKIE MORGAN, husband
and wife,

Appellants.



REPLY BRIEF OF APPELLANTS

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COME NOW Appellants Robert and Vickie Morgan (“Appellants”) in further support of their appeal, and in reply to the brief filed on behalf of Appellee Terra Firma Company (“Appellee” or “Terra Firma”), do state as follows:

DISCUSSION OF LAW

I. KIDD V. MULL APPLIES TO FRAUDULENT PURCHASER AND SHOULD CONTROL THIS MATTER.

While the factual disputes negating summary judgment continue to be reflected in the Appellee’s brief, the essence of this case is whether a misrepresenting purchaser will be held to the same holdings pronounced in Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308 (2004). In Kidd, this Honorable Court reversed a Circuit Court’s granting of summary judgment because genuine issues of material fact existed as to misrepresentations made by the seller’s employee/agent to induce the buyer of real estate. In particular, this Honorable Court held that the issue as to whether the sellers’ agent was a broker and owed a duty to toward the buyers were a genuine issue of material fact warranting reversal of summary judgment. Id. at 160, 595 S.E.2d at 317.

Similarly, in the case *sub judice*, the Morgans assert that the buyer (Terra Firma) made misrepresentations to induce the Appellants to sell their farm land. The misrepresentations arise from an *affirmative duty* owed to the Morgans “to disclose all facts known to the agent materially affecting the value or desirability of the property.” Although the Appellee disputes application of this affirmative duty, they have nonetheless agreed that Kidd v. Mull is controlling authority in this matter.

Yet, in an attempt to evade the specific syllabi of Kidd warranting reversal of summary judgment, the Appellee directs this Honorable Court to adopt a South Carolina case with an opposite result. Finley v. Dalton, 164 S.E.2d 763 (S.C. 1968). In Finley, the Supreme Court of South

Carolina upheld dismissal of a Complaint for recession of a deed based upon alleged fraudulent misrepresentations on the part of the buyer as to the intended use of the property. The Court deemed that the intended use was immaterial to the overall sale of the property.

While Appellee asserts that this is dispositive of the case *sub judice*, the factual predicates between Finley and the Morgans are different. Contrary to the argument of Appellee, the Morgans did inquire as to the identity and intended use of the property. This was most directly reflected in the inquiry made at the closing this matter. While the Appellee disputes this allegation and fact as not being material, the Morgans did make a clear inquiry as to the identity and intended use of the property prior to transferring the deed.

Further, this Honorable Court has already held that inequitable conduct/misrepresentations can give rise to reformation of the purchase price. Kidd v. Mull, *supra*, Staker v. Reese, 82 W.Va. 764, 97 S.E.2d 641 (1918):

Where one is induced to make a sale of his property for an inadequate price by false and fraudulent representations of the purchaser, the measure of his damages for such fraud and deceit is the difference between the amount received by him for the property and the actual value thereof at the time.

Syl. Pt. 3, Staker v. Reese, *supra*.

In Staker, the Court upheld a civil action for damages arising out the sale of shareholder assets to a buyer that made fraudulent representations about the intended use and value of the assets. Similarly, this Honorable Court employed similar reasoning to application of this principle to reformation of a deed when it adopted Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961), and Kidd.

Additionally, there have been multiple jurisdictions which have reached a conclusion different than Finley. One of the most illustrative and similar point cases to the case *sub judice* is Ash Grove Lime & Portland Cement Co. v. White, 238 S.W.2d 368 (Mo. 1956). In Ash Grove,

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the Missouri Court ordered rescission of a contract for the sale of a 258-acre dairy farm, where the purchaser's agent fraudulently concealed the identity of the purchaser and its intended use of the farm. In that matter, the agent informed the seller that it would be used for cattle, when in fact the purchaser was the owner and operator of a quarry that wanted to purchase the defendant's farm for additional rock reserves.¹

In ordering rescission, the Court rejected the buyer's contention that its agent's statements had nothing to do with the purchase of the property. In so holding, the Court stated that the statements amounted at least to constructive fraud which prevented specific enforcement of the contract, and overall rescission. Interestingly, there was also a claim in that the agent owed only silence. However, the Court reiterated

If in addition to the party's silence there is any statement, even any word or act on his part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent.

Id. at 1118 (internal citations omitted).

For the same reasons expressed in Staker and Ash Grove, this Honorable Court should similarly reverse the Circuit Court's granting of summary judgment in this matter. The Morgans have presented genuine issues of material fact relative to inequitable conduct/misrepresentations by Terra Firma's agent which are material to the value and desirability of the property. Kidd v. Mull should be held to apply to fraudulent representations of purchasers, and summary judgment in this matter should be reversed.

¹ A good annotation of other jurisdiction holdings can be found at Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 A.L.R.3d 1369 (1971).

II. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DUTY TO DISCLOSE AND RELATED MISREPRESENTATIONS BY BURTON.

In this matter, the parties generally agree that in order to warrant reformation, the Morgans must establish fraud and/or inequitable conduct on the part of Terra Firma. Lusher v. Sparks, 146 W.Va. 795, 122 S.E.2d 609 (1961). The Morgans maintain that the inequitable conduct/fraud in this matter arises from misrepresentations by Terra Firma's agent, William Burton.² More particularly, Appellants maintain that Mr. Burton made the following misrepresentations: (1) At time of first offer, Mr. Burton misrepresented identity and intent of buyer; and (2) at closing, Mr. Burton failed to correct a misrepresentation about identity and intent upon inquiry of Mr. Morgan.

While each could give rise to a cause of action, they collectively reflect a purposeful intent to misrepresent the identity and intended use of the property.

(A) Misrepresentation at time of initial offer.

With respect to the first misrepresentation, Ms. Kincaid (realtor for the Morgans) testified in her deposition that Mr. Burton volunteered to her that the buyer were a group of lawyers. Specifically, she stated:

To the best of my recollection, Bill Burton called me, I do not know the date, and told me he had an offer to purchase. When he brought me the offer, he told me that it was from - - - people usually tell me a little bit about the buyer - - - he told me it was Terra Firma Corporation. I asked him about who they were and he said that it was some lawyers purchasing property, I believe, to the best of my knowledge, that's what I understood.

² The Appellees do not appear to challenge that William Burton was an agent of Terra Firma. See Appellee Brief at pg. 2. ("Terra Firma worked through its agent William Burton...")

Deposition of Nancy Kincaid, pg. 19: lines 5 -12.³

While Ms. Kincaid never performed any search about the owner nor investigated its accuracy, the truth was that the actual buyer was Consol Coal. Appellee maintains that this representation was speculation on the part of Ms. Kincaid, and that "Mr. Burton's recollection was that he was unaware of Terra Firma's identity or intended use" of the property.

This assertion is disputed by the Morgans. As has previously been produced, the claimed lack of knowledge is contradicted by at least two sets of documents: (1) check stubs (one of which was his retainer); and (2) letter from Burton to Jim Russell (Terra Firma) regarding inquiries by a potential seller about the intended use of the property. (See letter attached hereto as "Exhibit A")

While the check stubs referencing the client as Consolidated Coal speaks for themselves, the letter additionally negates the claim of Mr. Burton. First, it demonstrates that the identity and intended use of the property is a material issue. Indeed, this materiality is supported by Consol's admitted decision to form a separate company 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).

This begs the question: Had the identity and intended use of the property not be a material factor affecting the value and desirability of the land, then why form a separate company to conceal

³ Ms. Kincaid was asked several more times about her understanding throughout the deposition. See e.g. p.106:lines 12-18. However, during the course of the deposition the questions centered upon her understanding of who the buyers were as a result of the conversation with Burton, and she did state that this was her speculation.

the identity?⁴ The answer is that Consol knew that the value and willingness to sell the property would be affected by a "coal company" as the buyer.

Second, the letter to Mr. Russell reflects that Mr. Burton had made inquiry prior to the Morgan sale about the intended use of these properties. While the letter does not specify that the Morgans property on this letter, it clearly reveals that at some point in time prior to the offer on the Morgan property Mr. Burton knew that he was buying a large grouping of property.

He also knew, or reasonably should have knowledge by virtue of the land that he was buying, that the Morgan property was in the center of the 3,050 acres of contiguous property that needed to be purchased.

B. Misrepresentations at Closing still Material.

However, lest there be any doubt about the materiality of the identity and intent, Mr. Morgan expressly inquired at the closing about whether this was a coal company buying this property. Upon that inquiry, Mr. Burton said nothing. He further said nothing when a misrepresentation was stated to Mr. Morgan in answer to his inquiry. There can be no dispute that at this closing, Mr. Burton knew the identity and intent of the buyer was material to this real estate sale.

In an attempt to circumvent this issue, the Appellee maintains that since the contract had been signed, the statement at closing has no effect. In contrast, Appellants disagree with the characterization that the closing is a mere formality. A real estate contract contains multiple conditions precedent to be met in order to transfer the deed over to the buyer. At the time of closing, the deed had not been transferred to Terra Firma, and thus "legal title" still remained with the Morgans. While

⁴ Appellee's Brief goes in great detail to prove that they were legal to form a separate company. However, as pointed out in Appellee's brief, Appellants do not assert that they were precluded from doing so. Rather, Appellants assert that they erred in making misrepresentations about their true identity when specific inquiry was made by Appellants and/or their real estate agent. This is what was improper and what gives rise to this civil action for reformation.

it is possible Terra Firma could have sought specific enforcement of the contract had Mr. Morgan walked away at the closing, Appellee would still have to account for the application of the Notice as part of the contract.

Surprisingly, the Circuit Court and the underlying motion for summary judgment, fail to discuss that the Notice of Agency Relationship was to be considered part of the overall offer and contract. As admitted by Mr. Burton, the Notice of the Agency Relationship was part of the agreement and addenda.

- Q. The Addendum to the Purchase Agreement was part of that offer, correct?
- A. The addendum, any addendum to the purchase agreement was part of the offer, that addendum, personal property addendum, as well as the Notice of Agency Relationship.

Deposition of William Burton, p. 16, lines 6 -11.

In fact, every offer that was sent to the Morgans included a new Notice of Agency Relationship. Even more directly, the first offer that was rejected expressly marked that the Notice of Agency was part of the overall purchase agreement (See first offer attached hereto as "**Exhibit B**"). However, subsequent agreements, including the accepted agreement, fail to contain any markings in this section. Notwithstanding, the addenda and Notices are still treated as part of the overall agreement. Therefore, if this Notice is deemed to be part of this contract, then the obligations would continue to run as a condition precedent to transfer of the deed. In that respect, the inquiry of Mr. Morgan was very material at closing, and the misrepresentation about the identity and intended use of the property would be genuine issue of material fact.

However, should the Appellants be in error as to the applicability of the Notice to the contract, the Morgans still assert that Mr. Morgan owed a continuing duty to disclose at the time of the closing. The duty did not stop simply by the signing of the contract.

Accordingly, the duty to disclose still existed at the time of the contract and was material to the overall transfer of the deed. The misrepresentations at the closing constituted inequitable conduct warranting reformation of the purchase price.

C. Confidentiality limited by express affirmative duty.

Although the Appellee continues to oppose the notion that their agent, William Burton, had such knowledge of the true identity and/or intent of Terra Firma (even though his check stubs reflect payment for Consolidated Coal), the Appellee alternatively argues that he could not disclose this confidential information.

In fact, the Appellee's Brief relies heavily upon this wall of confidentiality in order to refute the duties expressly set forth in the Notice of Agency Relationship. However, the Appellee fails to cite the full language immediately following the duties regarding confidentiality. Specifically, the language states:

The agent is not obligated to reveal to either party any confidential information obtained from the other party *which does not involve the affirmative duties set forth above.*

Notice of Agency Relationship (emphasis added).

Thus, despite the claimed assertion of confidentiality, the Notice expressly reflects that Mr. Burton undertook an affirmative duty to the Morgans to disclose matters that materially affect the value and desirability of the property. This would negate the claim of confidentiality now being asserted with respect to the need to hide the identity of the buyer. This is especially true when a specific inquiry is made about the identity and intended use of the property.

Overall, therefore, there is a material factual dispute as to whether William Burton was aware of the identity of the principal and/or intended use of the property and failed to disclose this information upon inquiry of Robert Morgan and/or during the first offer to Ms. Kincaid. On its face,

these factual disputes rest upon who the trier of fact believes to be more accurate. However, this is not the inquiry to be made during summary judgment.

“The question cannot be resolved on this record unless you accept the testimony of party and ignore the testimony of another party. This is not the type of determination to be made on a motion for summary judgment.”

Lengyel v. Lint, 167 W.Va. 272, 281, 280 S.E.2d 66, 71 (1981).

The presence of these genuine issues of material fact with respect to the misrepresentations and inequitable conduct of Terra Firma warrant reversal of summary judgment. By granting summary judgment, the Circuit Court committed error and the judgment should be reversed.

III. MORGANS ABLE TO RELY UPON REPRESENTATION OF BUYER'S AGENT AND DO NOT HAVE A DUTY TO INVESTIGATE.

In their brief, Appellees cite the court to Simmons v. Looney, 24 S.E. 677, 678 (W.Va. 1896), as justification for the Circuit Court's Findings of Fact ¶¶ 29, and 31, and also for rejection of the Morgans' claim for unilateral mistake. In particular, the Appellee maintains that in order to warrant unilateral mistake, the Morgans have to prove that “the mistake could not have been discovered through reasonable diligence.” Appellee Brief at pg. 16. This, however, is contradicted by Syllabus Point 2 of Staker v. Reese, 82 W.Va. 764, 97 S.E.2d 641 (1918):

One to whom a representation has been made as an inducement to enter into a contract has a right to rely upon it as true *quoad* the maker, without making inquiry or investigation to determine the truth thereof.

Syl. Pt. 8, Kidd v. Mull, *supra*, citing Syl. Pt. 2, Staker v. Reese, *supra*.

Indeed, one of the primary holdings in Kidd was rejection of an independent duty to investigate a representation made by one seeking to induce another into a contract. Yet, the Circuit Court's findings make such a duty upon the Morgans:

- (29) To meet the legal definition of “mistake” called for by Lusher, the Morgans' mistake or ignorance of fact regarding Terra Firma's corporate structure and

intended use of the property must be material, and such that the Morgans could not have discovered the facts through reasonable diligence. Simmons v. Looney, 24 S.E. 677, 678 (W.Va. 1896);

- (31) The record is devoid of any inquiries directed by the Morgans to Terra Firma regarding Terra Firma's corporate structure and intended use of the property prior to the execution of the Real Estate Purchase Agreement. The Morgans did not demonstrate "reasonable diligence" to cure their ignorance of fact with regard to the issues they now raise. Simmons, 24 S.E. at 678.

Order, ¶ 29, 31, page 10.

The Appellee further argues in its brief that "because the Morgans failed to make these inquiries prior to entering into an enforceable contract...they cannot now assert that they demonstrated reasonable diligence with regard to those issues." Appellee's Brief, p. 17.

Aside from being in complete contravention of Staker and Kidd, the argument is also factually incorrect. As discussed in Appellants initial Brief (p. 14 -16), the Morgans had made a unilateral mistake as to the actual buyer and the intended use of the property. The mistake flowed from information given to them by their real estate agent Ms. Kincaid. She had informed them that it was a group of lawyers that intended to do land development. Ms. Kincaid had gained this understanding from Mr. Burton during the initial offer. Whether her testimony is correct, the fact still remains that the Morgans had a justifiable mistake as to the identity and intended use.

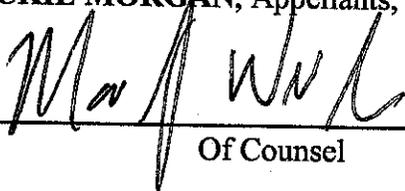
Yet, despite the fact that Consol had created a shell company to hide all direct reference to itself, the Appellee still maintains that the Morgans fail as a matter of law because they failed to perform their own investigation as to the true identity of the purchaser. This argument should be rejected. The Staker and Kidd cases stand for the exact opposite proposition, and their holdings should be held applicable in this matter.

Conclusion

WHEREFORE, for all the foregoing reasons, and those previously asserted in Appellants prior Brief, 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  _____
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CERTIFICATE OF SERVICE

Service of the foregoing *Reply Brief of Appellants* was made this 23 day of June, 2008,
by forwarding a true copy thereof via regular United States mail, postage prepaid, to counsel for the
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