

NO. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

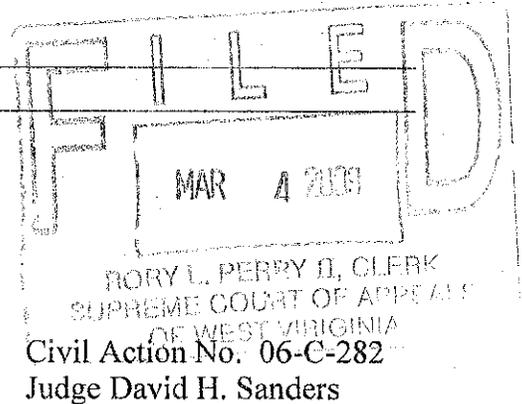
STANLEY W. DUNN, JR., and
KATHERINE B. DUNN,

Appellants,

v.

CAROL ROCKWELL, and
MARTIN & SEIBERT, L.C.,

Appellees.



**BRIEF ON BEHALF OF THE APPELLANTS, STANLEY W. DUNN, JR. AND
KATHERINE B. DUNN, IN SUPPORT OF THEIR PETITION FOR APPEAL**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATEMENT OF THE KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

A civil action was commenced on the 21st of August, 2006, in the Circuit Court for Jefferson County, West Virginia, on behalf of Stanley and Katherine Dunn against their former attorney, Douglas S. Rockwell; his spouse, Carol; and his former employer, the Martin & Seibert law firm.

The complaint and its Amendments by Interlineation (16 April 2007) allege ten (10) causes of action. They are:

1. Civil Conspiracy;
2. Rescission, Cancellation and Reformation of a Deed;
3. Misappropriation and Conversion;
4. Fraud;
5. Unjust Enrichment;
6. Professional Negligence;
7. Vicarious Liability-*Respondeat Superior* as to Martin & Seibert;
8. Negligent Supervision of an Employee by the Defendant Martin & Seibert;
9. Breach of Fiduciary Duty by Douglas S. Rockwell - Assisted by Carol Rockwell; and
10. Breach of Fiduciary Duty of Martin & Seibert to Clients of the Firm.

The parties engaged in voluminous discovery on the issues presented. In April 2007, the plaintiffs filed a motion for partial summary judgment on the issue of liability as to all defendants. Each of the defendants filed responses in opposition to the plaintiffs' motion. In June 2007, the plaintiffs filed a response in opposition to the memoranda of the defendants.

By Order entered August 17, 2007, the Circuit Court of Jefferson County, West Virginia denied the plaintiffs' motion holding that,

[t]he facts are disputed by the parties as to the propriety of the land acquisition and the specific parcel of land that was to be acquired by Defendants. However, plaintiff does indicate that Mr. Dunn did orally grant to Douglas Rockwell permission to "round-off" the

existing residential lot. Thus, both parties dispute the material facts surrounding this conveyance. (Emphasis added.)

See August 17, 2007 Order.

Moreover, the Court's Order also provides,

[p]laintiffs also allege that Martin & Seibert, L.C. is liable to them for Mr. Rockwell's alleged professional negligence upon a theory of respondeat superior, as a result of its negligent supervision of Mr. Rockwell and as a result of its breach of fiduciary duty/breach of the Rules of Professional Conduct.

However, Mr. Rockwell acknowledges during his deposition that all of the actions that he took in furtherance of this land purchase were taken in his personal capacity, and not in his capacity as an attorney with Martin & Seibert.

WHEREUPON, the Court finds that there are manifold issues material to the determination of the present case in dispute.

ACCORDINGLY it is hereby **ORDERED** and **ADJUDGED** that Plaintiff's Partial Motion for Summary Judgment on Liability as to each of the defendants is denied.

See August 17, 2007 Order.

In May 2007, Martin & Seibert filed its motion for summary judgment with the Court. Both Douglas and Carol Rockwell also filed motions for summary judgment at that time. The plaintiffs filed their response to said motions in June 2007. In August 2007, the plaintiffs filed a supplement to their opposition to the defendants' motions for summary judgment.

In October 2007, Martin & Seibert, L.C. filed its renewed motion for summary judgment. The plaintiffs filed a response in opposition to this motion. Also in October 2007, the plaintiffs filed a supplemental memorandum of law addressing Martin & Seibert's and the other defendants' motions for summary judgment. Martin & Seibert filed a reply to the plaintiffs' position in November 2007.

Also in November 2007, the plaintiffs filed their second supplement in response to Carol Rockwell's motion for summary judgment and their rebuttal to the reply memorandum for summary judgment of Martin & Seibert. In January 2008, both Douglas S. Rockwell and Carol Rockwell filed

separate motions for summary judgment with the Court. On the 14th of February, 2008, plaintiffs filed their response to the Rockwell defendants' motions.

By Order entered March 6, 2008, the Circuit Court of Jefferson County denied all of the defendants' renewed motions for summary judgment. Specifically, the Court's March 6, 2008 Order contains a section titled "II. Material Facts in Dispute."

Ultimately, the Court held,

[i]n following the above-referenced standard for a motion for summary judgment, this Court finds that there is a genuine issue of fact to be tried in this matter, to wit: the dispute concerning the unsigned document entitled "Extension Agreement" and its posture in this matter. Similarly, in regards to Defendant's Martin & Seibert, additional assertions for summary judgment this Court finds that there are genuine issues of fact in dispute relative to each respective assertion, and inquiry regarding these facts is desirable to clarify the application of law in this matter.

See March 6, 2008 Order (emphasis added).

Furthermore, by Order entered March 11, 2008, the circuit court amended its March 6, 2008 Order denying the defendants' motions for summary judgment once again finding that,

[i]n following the above-referenced standard for a motion for summary judgment, this Court finds that there is a genuine issue of fact to be tried in this matter, to wit: the dispute concerning the unsigned document entitled "Extension Agreement" and its posture in this matter. Similarly, in regards to Defendant's Martin & Seibert, additional assertions for summary judgment this Court finds that there are genuine issues of fact in dispute relative to each respective assertion, and inquiry regarding these facts is desirable to clarify the application of law in this matter.

See March 11, 2008 Amended Order.

On March 14, 2008, Martin & Seibert filed a Motion to Alter/Amend the Judgment of March 6, 2008 reasserting its original basis for its motion for summary judgment. The plaintiffs filed an opposition to the Martin & Seibert request to alter/amend the March 6, 2008 Order. In late March 2008, Douglas S. Rockwell once again filed a motion for summary judgment. The plaintiffs filed a response in opposition to Douglas S. Rockwell's motion for summary judgment. In April 2008,

the plaintiffs filed a supplemental opposition to the motions for summary judgment submitted on behalf of the Rockwell defendants. Moreover, based upon statements from the Court, the plaintiffs filed a supplement to alter/amend the announced decision to grant summary judgment on behalf of Carol Rockwell. The plaintiffs supplemented this memorandum in April 2008.

By Order entered June 16, 2008, the Court granted Martin & Seibert's motion for summary judgment. In its Order, amongst other findings, the Court totally reversed its earlier decision to deny summary judgment to Martin & Seibert and made the following finding:

[t]he Plaintiffs have admitted that they knew of Mrs. Rockwell's acquisition of the real estate in dispute no later than September 29, 2003. *See Katherine Dunn Depo.*, p. 64; *Stanley Dunn Depo.* pp. 34-36; 43; 74, 111. Yet, Plaintiffs failed to file suit until August 21, 2006 -- after expiration of the applicable statute of limitations.

See June 16, 2008 Order.

Thereafter, at the request of the parties, by Order entered August 4, 2008, the circuit court entered an Agreed Order Amending Order Granting Summary Judgment for Purposes of An Immediate Appeal and Staying Trial Proceedings. *See August 4, 2008 Order.* This Amended Order contained the requisite Rule 54(b) language, so as to render the circuit court's order granting summary judgment to Martin & Seibert a final order. Specifically, said Order provided,

Specifically, the Court FINDS as follows:

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court makes an express determination that there is no just reason for delay and directs entry of judgment in favor of the defendant, Martin & Seibert.

To the extent that the foregoing rulings of this Court with respect to the Rule 54(b) certification are adverse to any party herein, the exceptions and objections of said party are hereby noted and preserved.

See August 4, 2008 Order.

Subsequent to the entry of the amended order rendering the grant of summary judgment in favor of Martin & Seibert final, the circuit court, by Order entered August 13, 2008, granted

summary judgment in favor of the defendant, Carol Rockwell. It is this order, and the order of June 16, 2008, granting summary judgment to Martin & Seibert -- based solely on the expiration of the two-year period of limitations -- which are the predicate decisions to which this appeal is addressed.¹

Incorporating the inaccurate findings of fact and conclusions of law from the Order granting summary judgment in favor of Martin & Seibert, the circuit court once again, **without new facts or evidence**, reversed its previous order denying summary judgment to Carol Rockwell, due to disputed facts, and dismissed the plaintiffs' claims against Carol Rockwell finding that the plaintiffs' claims were time-barred by the applicable statute of limitations. *See August 13, 2008 Order.*

For purposes of clarity, thereafter, the plaintiffs requested that the circuit court amend the August 13, 2008 Order in favor of Carol Rockwell and incorporate the requisite Rule 54(b) language into the Order, unequivocally rendering the same a final order for purposes of appeal. Various of the defendants objected to the plaintiffs' request, but, by the nature of the Order, the plaintiffs' appeal this ruling as well. Specifically, in granting Carol Rockwell's motion for summary judgment, the circuit court ruled,

[t]he defendant, Carol Rockwell's Motion for Summary Judgment is **GRANTED** and the Plaintiffs' suit against said Defendant is **DISMISSED** with prejudice.

See August 13, 2008 Order. Accordingly, the plaintiffs appeal this ruling of the circuit court as well.

STATEMENT OF FACTS

Stanley and Katherine Dunn were long time friends and clients of Douglas S. Rockwell, Esquire, a member of the Bar of the State of West Virginia. It is undisputed that the Dunns were clients of Douglas S. Rockwell while he was employed as an attorney with the defendant, Martin & Seibert.

¹ The circuit court has not, as of this date, issued an Order as to the Douglas S. Rockwell request for partial summary judgment.

Stanley and Katherine Dunn sought the legal assistance and guidance of Douglas S. Rockwell, Esquire to secure an Option to Purchase a large tract of farm land in Jefferson County, West Virginia. The owners of this large tract of land were Hugh Hoover and his sister, Dianna Gray. (Hereinafter individually and collectively the original owners and sellers of the large tract of land shall be referred to as "Hoover," while the real property may be referred to as "the Hoover tract.")

A series of three options was prepared by Douglas S. Rockwell, Esquire -- in his capacity as the attorney for the Dunns and at least two of which were prepared while Douglas S. Rockwell was an employee of the Martin & Seibert law firm.

In 2002, Douglas S. Rockwell sought and received oral permission from Stanley Dunn only to purchase some acreage within the Hoover tract. The stated objective, according to Douglas S. Rockwell, was to 'square up' the Rockwell residential lot, which was occupied by Douglas and his spouse, Carol Rockwell. Simply stated, the Rockwell residential lot is surrounded on three (3) sides by the Hoover tract. The fourth side of the original 3.0 acre Rockwell residential lot fronts the Shenandoah River.

In December 2002, Douglas S. Rockwell hired Peter Lorenzen, a licensed West Virginia land surveyor, to prepare a survey of the ground the Rockwells wished to purchase from Hoover. At that time, all of the Hoover tract was subject to the Dunn Option to Purchase.

The parcel the Rockwells designated and purchased from Hoover was 6.87 acres. The 6.87 acre parcel was paid for by two checks: one from Carol Rockwell and one from Douglas S. Rockwell. The 6.87 acre addition to the Rockwell residential lot was titled solely in the name of Carol Rockwell, as was the original 3.0 acre Rockwell residential lot. (See Deed from Hoover to Carol Rockwell dated 27 December 2002, the accompanying Plat of Merger and the two checks for the purchase price).

The closing on the Rockwells' acquisition of the 6.87 acre additional lot was handled through the Martin & Seibert offices in Charles Town, West Virginia, in December 2002. The Dunns were not present at the closing, nor were they invited to attend.

At no time did Douglas S. Rockwell or Carol Rockwell ever present to Stanley or Katherine Dunn a copy of a survey of the 6.87 acre parcel that was merged with the Rockwell residential lot of 3.0 acres.

At no time did Douglas S. Rockwell advise his clients, Stanley and Katherine Dunn, *in writing* of the precise size and location of the 6.87 acre parcel acquired by the Rockwells from Hoover.

At no time did Douglas S. Rockwell seek and/or obtain *written consent* from Stanley and Katherine Dunn to acquire this 6.87 acre parcel.

At no time did Douglas S. Rockwell advise his clients, Stanley and Katherine Dunn, to seek independent advice regarding this transaction.

At no time did Douglas S. Rockwell walk the 6.87 acre parcel with the Dunns.

At no time did Douglas S. Rockwell deliver a copy of the plat of merger for the 6.87 acres to the Dunns.

At no time did Douglas S. Rockwell mail a copy of the plat of merger of the 6.87 acre tract to the Dunns.

At no time did Douglas S. Rockwell advise his clients, Stanley and Katherine Dunn, during the March 2003 preparation of an Extension to the earlier Dunn Option to Purchase, which extension was executed by Dunn and Hoover, that the Hoover tract was now 6.87 acres smaller or that a portion of the ground Carol Rockwell acquired from the Hoover tract fronted the Shenandoah River. **In fact, at no time prior to the purchase, or after its acquisition, did Douglas S. Rockwell or Carol Rockwell provide the Dunns any information as to the precise size or location of the purchased tract.**

By Douglas S. Rockwell's own admission, at no time during the discussions with Stanley Dunn about the property and the options, did Douglas S. Rockwell ever advise Stanley Dunn that he was no longer an attorney or that he was no longer acting under the umbrella of Martin & Seibert. By his own admission, Douglas S. Rockwell provided services to the Dunns under the umbrella of Martin & Seibert through the years.

Martin & Seibert and Douglas S. Rockwell contend that Douglas S. Rockwell left the active practice of law in March/April 2004. However, upon questioning, Douglas S. Rockwell admitted that he was acting as an attorney at the time the options were being discussed and the designations were being made by him. During the spring of 2005, according to Stanley Dunn, he commissioned Douglas S. Rockwell, as his attorney, to prepare an Extension Agreement relating to the Option to Purchase the remaining parcel of the Hoover tract. The Extension Agreement was never executed.

By late 2005 (October-November), the Dunns were financially prepared to exercise their Option to Purchase the Hoover tract. At that time, Hoover commissioned a survey for the remainder of the Hoover tract. The purpose of this survey was to calculate the precise acreage to be conveyed by Hoover to Dunn, thereby establishing the purchase price (number of acres times the per acre price).

The closing on the remainder of the Hoover tract on behalf of the Dunns was handled by John C. Skinner, Esquire of Charles Town, West Virginia. The closing occurred in the fall of 2005. It was John C. Skinner, Esquire who presented to Stanley Dunn a copy of the deed of 27 December 2002 between Hoover and Carol Rockwell for the 6.87 acre tract. It was only at the Fall 2005 presentment to Stanley Dunn of the deed between Hoover and Carol Rockwell that Stanley Dunn learned of the precise size and location of the Carol Rockwell acquisition.

Immediately upon learning of the precise size and location of the 6.87 acre parcel, Stanley Dunn, through a series of correspondence in April 2006 and a personal visit to the Rockwells' home,

attempted to address the Rockwell land acquisition. These attempts by the Dunns to have the Rockwells return the dog leg portion of the parcel were refused by the Rockwells.

The underlying suit, filed on the 21st of August, 2006, followed.

It is imperative to note that the Dunns exercised their Option to Purchase the Hoover tract in late 2005.

ASSIGNMENTS OF ERROR

- I. **The Circuit Court Committed Error in Finding That the Plaintiffs are Without Any Triable Issues of Fact Regarding the Application of the Statute of Limitations as to Their Claims Against Martin & Seibert and Carol Rockwell.**
- II. **The Spouse of an Attorney, Who is a Knowing and Participating Instrumentality and the Beneficiary of the Acts of Professional Negligence and Fraud Committed by the Attorney upon His Client, is Equally Liable for the Wrongs Committed by the Attorney. In Addition, the Conveyance of the Real Property to the Spouse as a Result of Such Wrongful Conduct is Subject to Rescission.**
- III. **The Circuit Court Misapplied the "Continuous Representation" Doctrine.**
- IV. **The Circuit Court Erred in Finding That the Plaintiffs' Claims Against Martin & Seibert Lack Factual Merit.**

STANDARD OF REVIEW

This Petition for Appeal is before this Court upon the Orders of the circuit court granting summary judgment in favor of Martin & Seibert² and Carol Rockwell³ on the basis of the two-year statute of limitations.

The standard of review for this Court is that of *de novo* review. See *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). As such, 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

² See Order dated June 16, 2008.

³ See August 13, 2008 Order.

desirable to clarify the application of the law to those facts. *See Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1967). *See also Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826, 830 (2004).

In reaching a decision on summary judgment, the circuit court is not to weigh the evidence. Nor is the circuit court permitted to determine the truth of the matter. Rather, the circuit court is to simply determine whether there is a genuine issue of fact for trial. *See Painter, supra*. In the instant civil action, the circuit court improperly weighed the evidence, relied upon disputed facts, and, without the benefit of new evidence, reversed its initial rulings that the issues between the parties were replete with disputed facts.

POINTS AND AUTHORITIES

I. The Circuit Court Committed Error in Finding That the Plaintiffs are Without Any Triable Issues of Fact Regarding the Application of the Statute of Limitations as to Their Claims Against Martin & Seibert and Carol Rockwell.

27 Am. Jur. 2d *Equity* § 194 26

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DISCUSSION

I. The Circuit Court Committed Error in Finding That the Plaintiffs are Without Any Triable Issues of Fact Regarding the Application of the Statute of Limitations as to Their Claims Against Martin & Seibert and Carol Rockwell.

An earlier order of the Circuit Court for Jefferson County, dated the 17th of August, 2007, denied the plaintiffs’ motion for partial summary judgment. In denying the plaintiffs’ request for partial summary judgment, the circuit court noted the following to be material facts in dispute:

[t]he facts are disputed by the parties as to the propriety of the land acquisition and the specific parcel of land that was to be acquired by Defendants. However, plaintiff does indicate that Mr. Dunn did orally grant to Douglas Rockwell permission to ‘round-off’ the existing Rockwell residential lot. Thus both parties dispute the material facts surrounding this conveyance. (Emphasis added.)

See Order Denying Plaintiffs’ Motion for Partial Summary Judgment, 17 August 2007, p. 2.

In addition the circuit court noted as to the facts in dispute:

[p]laintiffs also allege that Martin & Seibert, L.C. is liable to them for Mr. Rockwell’s alleged professional negligence upon a theory of respondeat superior, as a result of its negligent supervision of Mr. Rockwell and as a result of its breach of fiduciary duty/breach of the Rules of Professional Conduct.

However, Mr. Rockwell acknowledged during his deposition that all of the actions that he took in furtherance of this land purchase were

taken in his personal capacity, and not in his capacity as an attorney with Martin & Seibert.

WHEREUPON, the Court finds that there are manifold issues material to the determination of the present case in dispute.⁴

See Order Denying Plaintiffs' Motion for Partial Summary Judgment, 17 August 2007, p. 2.

Notwithstanding that no new facts were developed contrary to this initial ruling, the circuit court reversed this decision and granted the requests for summary judgment of Martin & Seibert and Carol Rockwell, finding that the plaintiffs' claims were barred by the applicable two-year statute of limitations.⁵

The circuit court has, in this instance, committed reversible error. Stanley and Katherine Dunn, as the plaintiffs and the non-moving parties against whom summary judgment has been granted, have clearly and unequivocally established 'more than a mere scintilla of evidence'⁶ to preclude the entry of summary judgment. In fact, the "undisputed" evidence relied upon by the circuit court in granting both motions for summary judgment has been contradicted on multiple occasions by the plaintiffs. Moreover, the "undisputed" evidence relied upon by the circuit court did not change between the time of the circuit court's denial of Martin & Seibert's and Carol Rockwell's motions for summary judgment and its subsequent June and August 2008 Orders granting summary judgment in favor of these defendants.

⁴ Clearly, the Court in noting this material fact in dispute, was referencing the exhibit of the deed conveying the property to Carol Rockwell, which accompanied the Plaintiffs' Motion for Partial Summary Judgment. The Motion was dated the 16th of April 2007.

The exhibit of the deed at p. 2 notes in italic-styled print the following: *This Document Prepared by Douglas S. Rockwell, Esq. Martin & Seibert, L.C. 104 W. Congress Street – Charles Town, WV 25415.* This exhibit clearly contradicts the deposition testimony of Douglas S. Rockwell, which was relied upon by the circuit court in granting summary judgment. *See June 16, 2008 Order.*

⁵ *See W. Va. Code § 55-2-12 (2008).*

⁶ *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 62, 543 S.E.2d 338, 343 (2000).

The granting of summary judgment by the circuit court in favor of Martin & Seibert and Carol Rockwell on the basis of the expiration of the two-year period in which an injured party is to commence their claim is significantly flawed.

In addressing the statute of limitations, this Court has routinely held that summary judgment is appropriate only when there is no question of fact regarding the knowledge of the plaintiff of his claims against the defendant. *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). It is undisputed that the two-year limitation period is an affirmative defense. As such, the defense is suitable for presentation before the ultimate trier of the facts, that being, the jury. As this Court noted in the decision of *McCoy v. Miller*, 213 W. Va. 161, 578 S.E.2d 355, 361 (2003), "... many cases will require a jury to resolve the issue of when a plaintiff discovered his or her injury ..." *Ibid.*

"In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." *Trafalgar H. Constr., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002). Unlike the fact pattern in *McCoy*, the instant case is not a circumstance when the client, Stanley Dunn, was *instantly and immediately* aware of the injury sustained. (*McCoy* involved a patient's claim against a treating physician for the resulting staph infection from a separated sternum which occurred during a double coronary bypass surgery).

In this instance, the Dunns' discovery of the injury, the loss of the acreage sustained, is a question of fact in dispute and, therefore, one for determination from within the sole and exclusive province of the jury. *See* 4 Am. Jur. *Trials, Solving Statutes of Limitations Problems* § 441.

Within the Order granting summary judgment to Martin & Seibert and incorporated by reference in the Order granting summary judgment to Carol Rockwell, the circuit court found as an undisputed fact that the "[p]laintiffs knew of Mrs. Rockwell's purchase of the disputed real estate no later than September 29, 2003." *See June 16, 2008 Order (citing Katherine Dunn Depo. p. 64;*

Stanley Dunn Depo. pp. 34-36; 43; 74, 111.)⁷ Relying upon this “undisputed” fact, the court concluded that,

[i]t appears the plaintiffs knew of Mrs. Rockwell’s acquisition of the disputed property no later than September 29, 2003. Because the Dunns knew of Mrs. Rockwell’s acquisition of the disputed property on or before September 29, 2003, their claims accrued under the “discovery rule” on that date and became time-barred on September 30, 2005. (Citations omitted.)

See June 16, 2008 Order. This “undisputed” fact and improper reliance is clearly contradicted by the evidence.

As has been stated, the plaintiffs orally granted to Douglas S. Rockwell permission to ‘square up’ the existing Rockwell residential lot. Thus, both parties knew of the acquisition of real property. However, as was also recognized by the circuit court and supported by the testimony of the Dunns, *the Dunns were unaware of the precise size and location of the acquired property.* The only “undisputed” evidence is that the Dunns were not made aware of the precise size and location of the parcel acquired by Carol Rockwell until the fall of 2005, when they were presented with a copy of the December 27, 2002 deed between Hoover and Carol Rockwell for the 6.87 acre parcel.

In its conclusions of law, the circuit court noted that the “discovery rule” does not eliminate the affirmative duty that the law imposes upon a plaintiff to discover or make inquiry to discern additional facts about his injury when placed on notice of the possibility of wrongdoing. *McCoy v. Miller*, 213 W. Va. 161, 165, 578 S.E.2d 355, 359 (2003). This application of the discovery rule, however, is misplaced in light of *McCoy, supra*, wherein the plaintiff must be placed on notice of the possible wrongdoing. *See McCoy*, 578 S.E.2d at 359. The circuit court failed in its ruling when it classified Carol Rockwell’s acquisition of the property as the notice of the possibility of the wrongdoing.

⁷ At the request of the circuit court, the deposition transcripts of the parties’ depositions were made available to the court for its consideration in the motions for summary judgment.

The plaintiffs do not dispute that permission was given to Douglas S. Rockwell to “square up” the parcel. However, it was only after the Dunns were made aware of the precise size and location of the parcel in the fall of 2005, that they were made aware of the possibility of a wrongdoing, thus triggering the “discovery rule.” Moreover, the circuit court concluded that the Dunns had an affirmative duty to further and fully investigate the facts surrounding the potential breach of duty. *See June 16, 2008 Order*. Taking the circuit court’s ruling literally, such an affirmative action on behalf of the Dunns would have required the Dunns to set aside the confidence and trust they placed in their counsel and question the details of the “squaring up” sought in the acquisition.

The two-year period of limitations is not applicable to an action such as this, that is, an action based upon and one seeking an equitable form of relief,⁸ that being, rescission of the deed conveying the disputed parcel of 6.87 acres to Carol Rockwell due to the acts of fraud and misappropriation committed by her spouse, Douglas S. Rockwell, an attorney employed by Martin & Seibert at the time of the commission of the wrongs. “Statutes of limitations are not applicable in equity to subjects of exclusively equitable cognizance. Matters pertaining to fiduciary relationships [i.e., attorney-client] come within the rule.” *Vorholt v. One Valley Bank*, 201 W. Va. 480, 498 S.E.2d 241, 244 (1997) (citing *Syl. Pt. 3, Felsenheld v. Bloch Bros. Tobacco Co.*, 119 W. Va. 167, 192 S.E. 545 (1937)).

Even if the two-year period of limitations were to apply to the circumstances at hand, a point which is not conceded in the slightest by the Dunns, the circuit court did not appreciate the distinction between an awareness by the Dunns of the acquisition of a parcel by Carol Rockwell as contrasted with the Dunns’ discovery of the wrong (that being, the precise size and location of the parcel) which took place with its acquisition.

⁸ “Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.” *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S. Ct. 582, 584 (1946).

In fact, to permit this summary judgment decision to stand and to relieve the employer (Martin & Seibert) and the employee's agent (Carol Rockwell) of any liability on the basis of the two-year period of limitations,

[w]ould not only be subversive of good morals, but contrary to the plainest principles of justice, to permit one practicing a fraud and then concealing it, to plead the statute, when, in fact, the injured party did not know, and could not with reasonable diligence have discovered the fraud.

Piper v. Jenkins, 207 Md. 308, 317, 113 A.2d 919 (1955) (citing *Wear v. Skinner*, 46 Md. 257, 267 (1897)): The fallacy of the position advanced by both Martin & Seibert and Carol Rockwell is that at no time did the primary wrongdoer, Douglas S. Rockwell, ever satisfy his ***affirmative obligation due to his clients to disclose in writing*** precisely what he had done.

Since the Dunns are the losing party to this summary judgment decision, all reasonable inferences are to be drawn in their favor. From the perspective of the Dunns, Douglas S. Rockwell was always acting on their behalf from within the Martin & Seibert organization.

QUESTION [by Mr. Becker]: At all times in which you were consulting with Mr. Rockwell, regardless of the location, were you consulting with him in his capacity as a licensed attorney for the State of West Virginia?

ANSWER [by Stanley Dunn]: Yes, I need his legal advice on things.

Deposition of Stanley Dunn, 8 January 2007 at p. 138. As within the Opposition to Motions for Summary Judgment bearing a certificate of service date of 14 February 2008.

Stated more directly, even if Stanley and Katherine Dunn were aware that Carol Rockwell acquired a parcel of real property in September 2003, Stanley and Katherine Dunn were not aware of the precise size and location of the 6.87 acre parcel acquired until the fall of 2005.

In addition, and most importantly, Douglas S. Rockwell, the attorney for the Dunns, had an *affirmative duty to disclose in writing* the extent of his self-dealing. In order to absolve of such wrongful self-dealing,

[i]t is incumbent upon the attorney to fully disclose the nature of his interest to the client, including its possible adverse effect on the client. The client should also be given an opportunity to seek independent advice. Finally, the client must then consent to the attorney's participation in such adverse interest.

Comm. Leg. Ethics of the W. Va. St. Bar v. Cometti, 189 W. Va. 262, 430 S.E.2d 320, 325 (1993) (emphasis added) (other citations omitted).

This breach of an affirmative duty constitutes the fraudulent concealment that tolls any limitations period, if such a defensive principle applies to the circumstances at hand. "Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar*, 567 S.E.2d at 300 (citing *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852, 857 (1991)).

The circuit court completely ignored the controlling law in its ruling, as the court, taking testimony out of context, found that none of the defendants took any action to prevent or delay plaintiffs' filing of this suit. See *June 16, 2008 Order*. This, however, ignores the undisputed facts and duty that at no time did Douglas S. Rockwell or Carol Rockwell ever present a copy of the survey/plat of merger to Stanley or Katherine Dunn.

At no time did Douglas S. Rockwell advise his clients, Stanley and Katherine Dunn, *in writing* of the precise size and location of the ground acquired by the Rockwells from Hoover.

At no time did Douglas S. Rockwell seek and/or obtain *written consent* from Stanley and Katherine Dunn for this purchase.

At no time did Douglas S. Rockwell walk the 6.87 acre parcel with the Dunns.

At no time did Douglas S. Rockwell deliver a copy of the plat to the Dunns. In fact, Douglas S. Rockwell never even mailed a copy of the plat of the 6.87 acre tract to the Dunns.

When preparing the Extension to the earlier Dunn Option to Purchase in March of 2003, which Extension was executed by Dunn and Hoover, Douglas S. Rockwell never advised his clients, Stanley and Katherine Dunn, that the Hoover tract was now 6.87 acres smaller and that this portion

of the removed ground from the Hoover tract fronted the Shenandoah River. In fact, at no time prior to the purchase, or after its acquisition, did Douglas S. Rockwell or Carol Rockwell provide the Dunns any information as to the precise size or location of the 6.87 acres the Rockwells extracted. These facts, alone, are sufficient to toll the statute of limitations.

The undisputed evidence presented to the circuit court was that it was only in the fall of 2005, as the Dunns prepared and proceeded to close on the remaining 400 + acres of the Hoover tract,⁹ that the precise size and location of the parcel was disclosed to the Dunns by their successor counsel, John C. Skinner, Esquire of Charles Town. As counsel to Stanley and Katherine Dunn, Douglas S. Rockwell *repeatedly* failed to disclose to his clients precisely what he extracted, in his wife's name, from within the Hoover tract. Decisions of this Court "have broadened the application of 'the discovery rule.'" *McCoy*, 578 S.E.2d at 358 (citing *Gaither*, 487 S.E.2d 901 and *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001)).

Stanley and Katherine Dunn have consistently acknowledged that Stanley Dunn did give Douglas S. Rockwell oral permission to acquire some ground from within the Hoover tract, of which the entire tract was subject to the Dunn Option to Purchase. The circuit court recognized this as a disputed fact as to the parcel's shape in denying the Dunns' request for partial summary judgment.¹⁰

The precise size and location of the parcel remains a material fact in dispute. *See Order denying the Dunn Motion for Partial Summary Judgment entered August 17, 2007*. As such, the

⁹ In August 2005, the Dunns completed the "first half" of a § 1033 exchange. Thereafter, the Hoover tract was designated as the comparable property to be acquired. At that time a precise survey of the remainder of the Hoover tract was commissioned, thereby establishing the gross acquisition price (a set dollar amount per acre times the number of acres) for the Hoover tract.

The Hoover to Dunn deed, prepared by John K. Dorsey, Esquire of Charles Town, West Virginia, is dated the 27th day of October, 2005; however, the grantors' signatures are notarized on the 15th day of November, 2005. The aggregate acreage appears to be 472.14 acres. *See January 8, 2007 Deposition of Stanley Dunn, Exhibit 10A*.

¹⁰ The Dunns' Motion for Partial Summary Judgment was filed on the 17th day of April 2007. It was denied by the circuit court by Order dated the 17th day of August, 2007, wherein the circuit court acknowledged the disputed facts between the parties.

dispute as to the discovery of this fact by the Dunns presents a triable issue. This precludes summary judgment, especially one based upon the flawed application of the two-year period of limitations, in favor of Martin & Seibert and Carol Rockwell.

It is only with the discovery of the wrong and its resulting injury suffered by Stanley and Katherine Dunn that any running of the two-year limitations period in which to initiate their cause of action would commence. The discovery of the fraud is entirely distinct from the existence of the fraud. *Piper*, 207 Md. at 316.

Any period of limitations, if applicable at all, is tolled until the injured party “discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury.” *See Davey v. Est. of Haggerty*, 219 W. Va. 453, 637 S.E.2d 350, 354 (2006) (citing *Gaither*, 487 S.E.2d 901). The defendants seek to gain yardage by arguing that the Dunns, with the awareness of the Carol Rockwell acquisition of a tract in September 2003, were obligated to “see for themselves” from the public land records of Jefferson County just precisely what amount of ground was acquired and its exact location. Such an obligation does not rest upon the Dunns. Moreover, such a position is contrary to the holding of this court in *Davey v. Estate. of Haggerty*, 219 W. Va. 453, 637 S.E.2d 350 (2006).

In *Davey*, the plaintiffs moved onto a portion of the plaintiff wife’s family land with the consent of her late father’s estate and made some major improvements to the land. *Id.* at 351-352. A few years later, the plaintiff wife’s mother filed with the county clerk for entry into probate a document she claimed was the last will of the late father. *Id.* at 352. The plaintiffs maintained that they were not provided with notice of this filing. *Id.* Under the document filed, the mother was the only beneficiary to the estate. *Id.* The plaintiffs stated they only found out about the document when they received a letter demanding they vacate the property. *Id.* The plaintiffs did not discover until about two years after receiving this letter that the purported will, dated two years prior to the manufacture of the paper on which it was written, was fraudulent. *Id.*

After discovery that the will could not have been written on its purported date of execution, the plaintiffs filed a declaratory judgment action seeking a declaration that the will supposedly written by the plaintiff wife's father was fraudulent. *Id.* Although the estate presented no evidence to dispute the fraudulent nature of the document, the trial court found that the applicable statutes of limitations had passed and granted summary judgment to the estate. *Id.* On appeal, this Court found that the trial court incorrectly charged the plaintiffs with a duty to know or discover that the will was filed with the county clerk. *Id.* at 353-354. This Court then found that the trial court's ruling resulted in an "inherent unfairness" by denying the plaintiffs the opportunity to question the fraudulent document. *Id.* at 355-356. This same application and result should be made in the instant civil action.

At all times the Dunns had no reason to suspect that their own attorney would engage in such extensive self-dealing contrary to their interests. Douglas S. Rockwell, in a surprising moment of candor, admits he never informed the Dunns *in writing* of the precise parcel that he extracted from the Hoover tract.

QUESTION [by Mr. Becker]: Do I assume from your answer that you did not walk the property with Stanley Dunn?

ANSWER [Rockwell]: Stanley and I did not physically walk along the area that I was gesturing at that time.

Q: Did you ever provide him in writing with a disclosure of the area that you intended to acquire from Hoover under the Dunn option?

A: I never handed to Stanley Dunn a written description of the property that was acquired.

Q: Did you ever inform him in writing of the opportunity to consult with independent counsel as to the acquisition of the 6.87 acre parcel?

A: No. I did not think it was necessary.

Deposition of Douglas S. Rockwell, at p. 14; Extracted from the Plaintiffs' Motion for Partial Summary Judgment of 17 April 2007.

Furthermore, the lack of awareness on the part of the Dunns as to the precise size and location of the parcel acquired, even if noted within the exhibit that accompanied the Carol Rockwell deed that was part of the public land records, does not require the Dunns to 'see for themselves' what was done and does not affect the Dunns' right of action or claim to equitable relief. *See Martin v. S. Bluefield Land Co.*, 81 W. Va. 62, 94 S.E. 493, 497 (1917). A client has no obligation to go behind the workings of his own attorney, supposedly being undertaken on behalf of the client. It is only with the discovery of the wrong that any limitation period begins to run. Limitations do not commence with the commission of the wrongful act. *See Mumford v. Staton, Whaley & Price*, 254 Md. 697, 255 A.2d. 359 (1969) (grant of summary judgment on the basis of limitations for a title report letter in 1954, when the cause of action did not commence until 1965 was in error).

The conduct of Douglas S. Rockwell from the time of his wife's acquisition of the 6.87 acre parcel on the 27th of December 2002 until the full disclosure of the precise size and location of the parcel by John C. Skinner, Esquire, to Stanley Dunn in the fall of 2005 indicates a pattern of concealment by Douglas S. Rockwell, which prevented Stanley and Katherine Dunn from being actually aware of the wrong inflicted upon them by their own attorney and their resulting injury.

By repeatedly failing to fully disclose in writing the precise size and location of the parcel acquired by Carol Rockwell, Douglas S. Rockwell was able to conceal this fact from the time of its acquisition in December 2002 until the fall of 2005. At no time during the preparation of the

successive option agreements for use by Stanley Dunn with Hoover¹¹ did Douglas S. Rockwell indicate that Carol Rockwell's December 2002 acquisition of a portion of the Hoover tract decreased the size of the tract Dunn was to acquire by 6.87 acres.

In this case, emphasis must be made of the fact that at all times pertinent to the events taking place, Douglas S. Rockwell was the attorney for Stanley and Katherine Dunn. Any absence of a written retainer agreement or engagement letter does not negate the fact of the relationship in this case. "The relationship of an attorney and client is a matter of contract, expressed or implied." *State ex rel DeFrances v. Bedell*, 191 W. Va. 513, 446 S.E.2d 906, 910 (1994). The absence of compensation does not negate the fact of the relationship. *Ibid.* See also *Keenan v. Scott*, 64 W. Va. 137, 144, 61 S.E. 806, 809 (1908).

Actions taken by Douglas S. Rockwell prevented Stanley and Katherine Dunn from knowing the specifics of the wrong that Douglas S. Rockwell committed upon the Dunns. Thus, the absence of the Dunns' discovery of what Douglas S. Rockwell did, prevented the commencement of the

¹¹ See Option Agreement of 27 June 2002, Martin & Seibert Exhibit No. 3, and the Extension Agreement March 2003, Martin & Seibert Exhibit No. 4, prepared by Douglas S. Rockwell by way of the support staff of his employer, Martin & Seibert. The tag lines that appear on Exhibits 3 and 4 begin with the letter N and were recovered from the Martin & Seibert computer system.

QUESTION [by Mr. Becker]: Let me ask you to look at the notice [for the deposition]. I think you have it in front of you.

ANSWER [by Walter Jones]: Yes, sir...

Q: Are you able to read or interpret or provide a layman's explanation for those two tag lines that are noted within paragraph number one?

A: Sure.

Q: Okay.

A: These were documents which were filed in the Charles Town office, which were captured on the server, which was designated as the N tribe.

Deposition of Walter Jones, at pp. 106-107 and as within the Plaintiffs' Response and Opposition to the Defendants' Request for Summary Judgment Filed on 15 June 2007.

running of the limitations period until the fall of 2005. *See Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992).

During the course of his representation of the Dunns, Douglas S. Rockwell prepared a series of three options regarding the Dunns purchase of the Hoover tract. It is important to note that the Dunns did not exercise their option to purchase the Hoover tract until November, 2005, when they were prepared to complete the tax-free exchange. Thus, while the Dunns had the option to purchase the Hoover tract, the Dunns did not acquire the tract until November, 2005. Accordingly, the statute of limitations could not begin to run until the Dunns had actually been damaged.

While the Dunns were in possession of the Option to Purchase, in 2002, Douglas S. Rockwell sought and received oral permission from Stanley Dunn only to purchase some acreage within the Hoover tract. In that regard, Douglas S. Rockwell advised the Dunns and Hoover that he would take care of everything for the Rockwell acquisition. Moreover, while Carol Rockwell contends that the 6.87 acre tract was not subject to the option, the same is clearly contradictory to the request by Douglas S. Rockwell from Dunn wherein he sought permission to purchase the tract from the Dunns. The Rockwells simply cannot have it both ways. Either they recognized that the Dunns had the option to purchase the tract, thus seeking the Dunns' permission to purchase, or the 6.87 acre tract was not subject to the Option. Given their actions, however, statements to the contrary, the Rockwells, in seeking permission from the Dunns for the purchase, clearly recognized that the 6.87 acre tract was subject to their option.

The Dunns' position regarding the 6.87 acre tract and its being included within the series of option agreements with the Hoovers is consistent with the position of Hugh Hoover. Specifically, Hoover stated, "[t]hat throughout the time periods of the earlier Option Agreements between me and my sister, Dianne L. Gray, with Stanley Dunn, Jr., I did not press or seek to strictly enforce any due dates as mentioned in the agreement. The reason was that I was willing to work with the Mr. Dunn and his wife for the purchase of the property." *See February 15, 2008 Affidavit of Hugh Hoover*, ¶ 1.

Moreover, according to Hoover, he did not reserve unto himself any portion of the 6.87 acre parcel. “I did not give any specific thought to the exact location of the lines and I did not intentionally reserve any portion of the 6.87 acre parcel from the June 27, 2002 Option Agreement when I entered that option agreement.” *See February 15, 2008 Affidavit of Hugh Hoover*, ¶ 8.

As the attorney for Stanley and Katherine Dunn, Douglas S. Rockwell serves as a fiduciary of the highest nature, calling for the utmost good faith and diligence on the part of the attorney. *Del. CWC Liquidation Corp. v. Martin*, 213 W. Va. 617, 584 S.E.2d 473, 478 (2003). *See also Natl. Fed. of the Blind of Cal., Inc. v. Carson*, 30 Cal. App. 4th 300, 35 Cal. Rptr. 2d 557 (1994). “Integrity and honor are critical components of a lawyer’s character as are a sense of duty and fairness.” *Law. Disc. Bd. v. Artimez*, 208 W. Va. 288, 540 S.E.2d 156, 164 (2000) (citing *In Re Brown*, 166 W. Va. 226, 232, 273 S.E.2d 567 (1980)).

Having obtained permission to “round off” or “square up”¹² the Rockwell residential lot, Douglas S. Rockwell cannot escape the affirmative obligation to disclose in writing the precise extent of his own self-dealing contrary to the interests of his client. A lawyer who engages in a transaction with his client at a minimum must assure the arrangement satisfies the West Virginia Rules of Professional Conduct, such as Rule 1.8. *See Law. Disc. Bd. v. King*, 221 W. Va. 66, 650 S.E.2d 165, 168 (2007). It is the failure of Douglas S. Rockwell to meet this definitive standard and his affirmative acts of concealment that permit all of the plaintiffs’ causes of action to proceed.

With the two successive extensions to the original option agreement, all of which were prepared by Douglas S. Rockwell, as the attorney for the Dunns, Douglas S. Rockwell never informed the Dunns, in writing, that the remainder of the Hoover tract was now 6.87 acres smaller. In fact, Douglas S. Rockwell has acknowledged that he never disclosed to Stanley Dunn the plat of

¹² *See, for example, Stanley Dunn’s deposition of January 8, 2007 at pp. 40, 41.*

the 6.87 acre parcel, which Douglas S. Rockwell commissioned and which was an exhibit to the deed conveying the parcel from Hoover to Carol Rockwell.

Martin & Seibert, the employer of Douglas S. Rockwell, cannot escape liability notwithstanding the employee's departure from employment, if the wrong had yet to be discovered by the injured party. Particularly in matters pertaining to a fiduciary relationship, such as an attorney-client relationship, limitations is not the measuring standard. *See 27 Am. Jur. 2d Equity § 194.*

Neither Martin & Seibert nor Carol Rockwell should be permitted to escape accountability when the wrongful conduct was committed by an employee, with the assistance of his spouse, all the while supposedly acting as a fiduciary of the highest order servicing the needs of his client, and while utilizing the infrastructure of the law firm and its Charles Town offices.

The mere passage of time does not relieve a master, Martin & Seibert, and a fellow co-conspirator, Carol Rockwell, from the wrongs of the employee, Douglas S. Rockwell, especially when the employee, Douglas S. Rockwell, breaches the affirmative duty due to the client, the Dunns, to precisely disclose the extent of the attorney's self-dealing contrary to the client's interests. Moreover, one cannot ignore the critical fact that the Dunns did not acquire the Hoover tract, less the 6.87 acre tract, until November, 2005. Thus, while Carol Rockwell and Martin & Seibert argue to the Court that the statute of limitations for the Dunns' claims expired in September, 2005, at that time, the Dunns possessed an option to purchase, but did not obtain the title to the land in question, less the 6.87 acre tract, until November, 2005. Thus, at the very least, Dunns cause of action could not have accrued until that time.

Given the circuit court's reliance upon inaccurate and disputed facts, as noted above, the plaintiffs respectfully request that this Court reverse the orders of the circuit court granting summary judgment in favor of Martin & Seibert and Carol Rockwell on the application of the statute of limitations. The most recent decisions of the circuit court in granting summary judgment constitute

a complete reversal of its previous orders wherein the circuit court expressly noted disputed issues and facts between the parties. Yet, without the benefit of newly discovered facts or evidence, the circuit court reversed its decision. As the application of the discovery rule and the applicability of the statute of limitations have long been held by this Court to be questions of fact for the jury when the evidence is less than clear, the plaintiffs should receive the benefit of the inferences and the circuit court's orders granting summary judgment should be reversed.

II. The Spouse of an Attorney, Who is a Knowing and Participating Instrumentality and the Beneficiary of the Acts of Professional Negligence and Fraud Committed by the Attorney upon His Client, is Equally Liable for the Wrongs Committed by the Attorney. In Addition, the Conveyance of the Real Property to the Spouse as a Result of Such Wrongful Conduct is Subject to Rescission.

The instrumentality of the attorney's fraud, Carol Rockwell, does not escape liability for her husband's wrongdoing simply because time has elapsed from the commission of the wrong. Nor does Carol Rockwell escape liability in the context of a civil complaint because she may be beyond the jurisdiction of any professional licensing authority.

A co-conspirator is fully liable for the acts of her fellow conspirator. Here, without question, the tortious conduct of misappropriation and conversion of the real property from Hoover to Rockwell has been completed as evidenced by the deed procured by Douglas S. Rockwell which vests title in Carol Rockwell. All conspirators may be joined as party defendants in the action. 16 Am. Jur. 2d *Conspiracy* § 66. Between Douglas and Carol Rockwell there existed a combination of two individuals who by their concerted action accomplished an unlawful purpose by a wrongful means. See *Politino v. Azzon, Inc.*, 212 W. Va. 200, 569 S.E.2d 447 (2002) (citing 15A *Corpus Juris Secundum*, *Conspiracy* § 1(1)). It is the deliberate combination of the two wrongdoers, Douglas and Carol Rockwell to accomplish a wrongful objective that has extracted and diverted the 6.87 acre parcel from the Dunns.

The continued concealment of this fact, that being, the precise size and location of the parcel acquired and titled solely in the name of Carol Rockwell, by Douglas S. Rockwell from the Dunns was successful for three (3) years. All of this was accomplished with the knowing and willing participation of Carol Rockwell. Here, liability of all of the co-conspirators exists to the injured party, the Dunns. "It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable." *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 1614 (2000) (other citation omitted).

Carol Rockwell was the agent or instrumentality of the fraud, self-dealing and misappropriation orchestrated by Douglas S. Rockwell.

An agent who . . . knowingly assists in the commission of tortious fraud . . . by his principal . . . is subject to liability in tort to the injured person *Restatement, Agency 2d §347*.

Examining the issue of reformation in accordance with representations made by a vendor on behalf of himself and his wife, this Court in *Lusher v. Sparks*, 146 W. Va. 795, 122 S.E.2d 609 (1961) noted that where the wife permits the husband to act as her agent and receives consideration thereof, she is bound by false or fraudulent representations made by her husband as her agent. *Id.* at 807; 122 S.E.2d at 616. In addition, any limitation period against the members of the conspiracy only begins to run when the injured party discovers that the wrongs have been committed. Moreover, as noted above, as the Dunns did not acquire the Hoover tract, less the 6.87 acres until November, 2005, the statute of limitations could not have begun to run until that time.

The circuit court's entry of summary judgment in favor of Carol Rockwell is predicated only on the basis of the expiration of the two-year period of limitations in which the plaintiffs were to commence their cause of action.

As stated *ante*, the circuit court's application and calculation of such a time frame in which to commence this action¹³ was in error. Reversal of the grant of summary judgment in favor of Carol Rockwell is warranted.

The fact that Carol Rockwell is not a licensed attorney does not absolve her of liability as a co-conspirator with an attorney. This is a civil proceeding for damages and the equitable form of relief of rescission of a deed.¹⁴ The wrongs of the conspiracy have been properly plead against all of the conspirators. Carol Rockwell remains liable to the Dunns in the context of this civil proceeding even though she may be beyond the jurisdiction of any attorney licensing authority.

As noted above, Carol Rockwell is the grantee of the 6.87 acre tract. The 6.87 acre parcel was paid for with funds of Carol Rockwell and Douglas Rockwell. It is undisputed that Carol Rockwell acquired this tract with full awareness of the efforts of her agent/co-conspirator, Douglas S. Rockwell. Douglas S. Rockwell was in direct privity with the primary and preferred grantee, Stanley and Katherine Dunn. As a part of her argument in favor of summary judgment, Carol Rockwell argues that rescission is not an appropriate remedy.

As noted by this Court, it is an established exception to the general rule that a court may reform a deed to property where, there has been a mutual mistake by the parties, or a mistake by one party and fraud or other inequitable conduct by the other party. *See Terra Firma Co. v. Morgan*, 2008 W. Va. LEXIS 119 (W.Va. Dec. 12, 2008), [citing *Nutter v. Brown*, 51 W.Va. 509, 42 S.E. 661

¹³ The filing date of the Dunn suit was the 21st day of August 2006, approximately nine (9) months after the discovery of the precise wrong committed upon them by their former counsel, Douglas S. Rockwell and approximately nine (9) months after the Dunns' acquisition of the Hoover tract.

¹⁴ Where fraud is charged and proven, equity will set aside all transactions founded thereon, whatever means may be employed in procuring them, and, in considering the case, will take into account all of the circumstances. *Furlong v. Sanford*, 87 Va. 506, 12 S.E. 1048 (1891), as noted in Michies, *Rescission, Cancellation and Reformation*, § 12. For a discussion of the breach of fiduciary duty of a director of a corporation who fails to disclose to a minority shareholder material information affecting the stock's value and rescission being an available remedy, see *Bailey v. Vaughan*, 178 W. Va. 371, 359 S.E.2d 599 (1987). See also *Terra Firma Co. v. Morgan*, 2008 W. Va. LEXIS 119 (Dec. 12, 2008) (recognizing the jurisdiction of equity to reform written instruments where there is a mutual mistake, mistake on one side and fraud or inequitable conduct on the other).

(1902). As noted above, the Dunns have asserted a cause of action for fraud against the defendants. Thus, at the very least, should the Dunns be able to establish the essential elements of their fraud cause of action, rescission is an appropriate remedy available to them. Moreover, it is the diversion of the 6.87 acre parcel by the attorney for the party, Douglas S. Rockwell, with the assistance of Carol Rockwell, that enables the 6.87 acre tract to now be properly redirected to the intended grantee/the innocent victims, Stanley and Katherine Dunn. In this instance, Douglas S. Rockwell should not be permitted to hide behind his spouse, Carol Rockwell. Consistently, Carol Rockwell should not be permitted to hide behind Douglas S. Rockwell for her involvement in the acquisition of the 6.87 acre parcel.

III. The Circuit Court Misapplied the “Continuous Representation” Doctrine.

In its final examination of the statute of limitations, the circuit court held that the plaintiffs failed to offer any proof that the “continuous representation” doctrine should be applied to toll the statute of limitations on their claims against Martin & Seibert. *See June 16, 2008 Order*. This conclusion of law, however, completely ignores the plaintiffs’ argument and evidence that it was not until the fall of 2005 that the plaintiffs were made aware of the size and location of the parcel that Carol Rockwell acquired from the Hoovers, through the actions of Douglas S. Rockwell¹⁵ and being when the Dunns actually acquired the tract from the Hoovers.

Examining the continuous representation doctrine in the context of a medical malpractice claim, recently, this Court in *Forshey v. Jackson, M.D.*, 2008 W.Va. LEXIS 97 (Nov. 19, 2008) held,

[w]e are persuaded that the continuous medical treatment doctrine should be adopted for determining the date of injury where such date is not identifiable due to the nature of the medical treatment received. Therefore, based upon the foregoing, we now hold that, under the continuous medical treatment doctrine, when a patient is injured due to negligence that occurred during a continuous course of medical treatment, and due to the continuous nature of the treatment is unable

¹⁵ For a complete discussion of the application of the discovery rule, *see* Section above.

to ascertain the precise date of the injury, the statute of limitations will begin to run on the last date of treatment.

Id. This position is consistent with this Court's holding in *Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996) wherein the Court opined that under the continuous representation doctrine, the statute of limitations in a legal malpractice claim is tolled until the professional relationship terminates with respect to the matter underlying the representation. *Id.* Moreover, as will be discussed more fully below, the "continuous representation" doctrine is immaterial to the claims against Martin & Seibert as it is undisputed that the actions of Douglas S. Rockwell occurred during the course of his employment with Martin & Seibert.

While the circuit court relies upon its finding of the inapplicability of the "continuous representation" doctrine to dismiss the plaintiffs' claims against Martin & Seibert, Martin & Seibert cannot escape liability for Douglas S. Rockwell's actions during his employ, notwithstanding Douglas S. Rockwell's subsequent departure from employment, if the wrongs had yet to be discovered by the injured party. Particularly in matters pertaining to a fiduciary relationship, such as an attorney-client relationship, limitations is not the measuring standard. *See* 27 Am. Jur. 2d *Equity* § 194.

"[] where a lawyer has represented a client with respect to a wide variety of matters, over a substantial period of time, the court is likely to be disinclined to find that the client acted unreasonably in assuming that her lawyer would serve on a continuing basis unless and until the lawyer gives notice of withdrawal." Flamm, Richard E., *Lawyer Disqualification: Conflicts of Interests and Other Bases*, § 14.6 (Banks and Jordon Law Pub. Co., 2003) *citing* ABA Model Rule 1.3, Comment: "Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer ceases to do so." *Cf. Allendale Mut. Ins. Co v. Excess Ins. Co. Ltd.*, 1995 U. S. Dist. LEXIS 19882 at *15 (D. R. I. 1995) ("Lack of activity alone does not end

the representation...It is patently obvious to an reputable attorney that until the client discharges the attorney and/or the attorney properly withdraws from the matter or the legal work requested is completed, the client continues to be represented by that attorney.”) In the instant civil action, although outside the employ of Martin & Seibert, as late as 2005, Douglas S. Rockwell sent a bill to Stanley Dunn for services rendered in connection with the § 1033 exchange. *See January 11, 2007 Deposition of Douglas S. Rockwell, Exhibit 5.*

Finally, after the Dunns instituted suit in this case, Douglas S. Rockwell sent a letter to Mr. Dunn advising him about the mediation process. This letter was sent while Douglas S. Rockwell and the Dunns were being represented by counsel. Thus, even after the filing of the civil action, Douglas S. Rockwell was continuing to advise the Dunns about the legal processes. *See January 8, 2007 Deposition of Douglas S. Rockwell, Exhibit 9.*

In this regard, the circuit court should not permit Martin & Seibert to escape accountability by declining the application of the “continuous representation” doctrine, when the wrongful conduct was committed by an employee, Douglas S. Rockwell, with the assistance of his spouse, all the while supposedly acting as a fiduciary of the highest order servicing the needs of his client, Stanley Dunn, and while utilizing the infrastructure of the law firm and its Charles Town offices. For these reasons, and applying all reasonable inferences to the plaintiffs, the circuit court’s order granting summary judgment to Martin & Seibert should be reversed.

IV. The Circuit Court Erred in Finding That the Plaintiffs’ Claims Against Martin & Seibert Lack Factual Merit.

Rejecting the plaintiffs’ claims against Martin & Seibert, the circuit court misinterpreted the evidence supplied by the defendants and totally ignored the undisputed evidence in favor of the plaintiffs. Relying upon incorrect facts, the circuit court improperly concluded that the plaintiffs’ claims against Martin & Seibert lack factual merit.

As has long been held in West Virginia, under the doctrine of *respondeat superior*, an employer may be held liable for the negligent acts of an employee committed while the employee is acting within the scope of his employment. *Gregory's Adm'r. v. Ohio River R. Co.*, 37 W. Va. 606, 16 S.E. 819, 821 (1893), *overruled in part on other grounds*, *State v. Bragg*, 140 W. Va. 585, 87 S.E. 689 (1955). An employer is not, however, liable for the negligent acts of an employee that are performed outside of the scope of his employment. *Pruitt v. Watson*, 103 W. Va. 627, 38 S.E. 331, 333 (1927).

Rendering its decision to grant summary judgment in favor of Martin & Seibert, the circuit court found that the actions of Douglas S. Rockwell, in furtherance of his wife's purchase of the disputed real estate, were conducted in his personal capacity. *See June 16, 2008 Order*. The circuit court referred to the self-serving deposition testimony of Douglas S. Rockwell in support of its finding. It is undisputed that Douglas S. Rockwell was an employee of Martin & Seibert during the time frame pertinent herein, specifically, 2002 through 2004. In fact, the circuit court found that Martin & Seibert employed Douglas S. Rockwell from January 31, 1998 until March 31, 2004, when Mr. Rockwell retired. *See June 16, 2008 Order*. Thus, there is no question that Douglas S. Rockwell was an employee of Martin & Seibert at the time of his wrongful actions in this case.

Relying upon the self-serving testimony of Mr. Rockwell that he was acting in his personal capacity, despite his employment with Martin & Seibert, the Court completely ignored the deed to the property at issue, wherein, it is clearly and unambiguously stated, "[t]his document prepared by Douglas S. Rockwell, Esq., Martin & Seibert, L.C., 104 W. Congress Street - Charles Town, WV 25414." *See Exhibit A*. This deed, dated December 27, 2002, is the deed to the 6.87 acre parcel at issue. The circuit court was presented with this deed in support of the plaintiffs' motion for summary judgment filed in April 2007.

The circuit court totally ignored the fact that the deed at issue states that it was prepared by Douglas S. Rockwell, Esquire, Martin & Seibert. Despite the deed at issue clearly stating that the

deed was prepared by Douglas S. Rockwell, Esquire of Martin & Seibert. Instead, the circuit court accepted the self-serving testimony of Douglas S. Rockwell, wherein he stated that all of his actions relating to the transfer of property to his wife, Carol Rockwell, were in his personal capacity. Given the clear dispute as to these material facts, the circuit court should not have become the arbiter of such factual disputes and rendered summary judgment in favor of one party. Rather, the circuit court must present the disputed facts to the ultimate arbiter, the jury. *Wheeling Kitchen Equip. Co., Inc. v. R&R Sewing Ctr. Inc.*, 154 W. Va. 715, 179 S.E.2d 587 (1971). See also *Painter*, 451 S.E.2d 755.

Compounding the error on this issue, the circuit court held, “[h]e [Rockwell] did not take any such actions in his capacity as an attorney with Martin & Seibert.” See *June 16, 2008 Order*. Once again, relying upon Douglas S. Rockwell’s self-serving testimony, the circuit court totally ignored the undisputed evidence that Douglas S. Rockwell prepared the deed in his capacity as an attorney working for Martin & Seibert, as clearly written on the deed to the disputed property. In reaching this ruling, the circuit court also ignored the fact that the closing on the 6.87 acre parcel purchased by Carol Rockwell was handled through the Martin & Seibert offices in Charles Town, West Virginia, and occurred in December 2002.

Relying upon these inaccurate facts, the circuit court concluded that there was no controversy regarding the factual merits of plaintiffs’ *respondeat superior* claim. As noted above, this is clearly error, as the undisputed facts clearly displayed on a document prepared by Douglas S. Rockwell establish that Douglas S. Rockwell prepared the deed in his capacity as an attorney with Martin & Seibert. Moreover, it is undisputed that Douglas S. Rockwell was employed by Martin & Seibert when he prepared an Extension to the earlier Dunn Option to Purchase in March of 2003, which Extension was executed by Dunn and Hoover. See *June 16, 2008 Order*. It is also undisputed that at no time in preparing this Extension did Douglas S. Rockwell advise his clients, Stanley and Katherine Dunn that the Hoover tract was now 6.87 acres smaller and that a portion of this ground which had been removed from the Hoover tract fronted the Shenandoah River.

One could assume that if Douglas S. Rockwell had been truly acting in his personal capacity, as adopted as true by the circuit court, Douglas S. Rockwell would not have noted in a publicly-filed document, the December 27, 2002 deed, that the deed was prepared by Douglas S. Rockwell, Esquire of Martin & Seibert. Rather, Douglas S. Rockwell, if truly acting in his personal capacity, would not have listed the business address of Martin & Seibert, but would have listed his personal address. This, however, is not the case.

Moreover, until March/April 2004, Douglas S. Rockwell was an employee of Martin & Seibert.¹⁶ A review of this evidence, clearly permits the plaintiffs' claims to be presented to the jury, as, at a minimum, questions of fact exist as to the capacity in which Douglas S. Rockwell acted when the 6.87 acre parcel was acquired.

The circuit court then addressed the plaintiffs' claims for negligent supervision and breach of fiduciary duty. Concluding that the plaintiffs are were unable to satisfy the requisite elements of their causes of action, the circuit court held the undisputed evidence to be that Martin & Seibert did not know and had no reason to know of Douglas S. Rockwell's private real estate dealings with Stanley Dunn or of Douglas S. Rockwell's purported facilitation of his wife's acquisition of the disputed real estate until the firm was threatened with the filing of this lawsuit in June or July of 2006. *See June 16, 2008 Order.*

This conclusion, however, wholly ignores the evidence before the circuit court which clearly and unequivocally states that Douglas S. Rockwell prepared the deed to the parcel at issue while employed at Martin & Seibert, as clearly noted on the publicly-filed document. The circuit court

¹⁶

QUESTION [by Mr. Becker]: Would you agree with me that in 2002 until probably 2004, Douglas Rockwell was an employee of the Martin & Seibert firm?

ANSWER [by Walter Jones]: I would.

Deposition of Walter Jones at p. 14, as from within the Plaintiffs' Response and Opposition to the Defendants' Request for Summary Judgment, pp. 11-12, filed 15 June 2007.

further ignores the fact that the closing on the 6.87 acre parcel was conducted at Martin & Seibert's offices in Charles Town, West Virginia. Given the lack of knowledge by Martin & Seibert as to Douglas S. Rockwell's actions, the circuit court concluded that Martin & Seibert therefore had no opportunity or ability to supervise or control Douglas S. Rockwell's actions, resulting in the dismissal of the negligent supervision claim. *See June 16, 2008 Order*. This holding by the circuit court, however, is clearly in error in light of the incorrect facts upon which the circuit court relied to reach its decision.

It is this same analysis that the circuit court incorrectly applied to the plaintiffs' breach of fiduciary duty claims. As the attorney for Stanley and Katherine Dunn, Douglas S. Rockwell should not engage in conduct which is dishonest, fraudulent, deceitful and contrary to the duty to represent the interest of his clients first. *See Law. Disc. Bd. v. Coleman*, 219 W. Va. 790, 639 S.E.2d 882 (2006).

A transaction such as this, or should one say a transgression such as this, must be subject to close scrutiny for any unfairness on the attorney's part. *See Off. of Disc. Counsel v. Battistelli*, 193 W. Va. 629, 457 S.E.2d 652, 660 (1995).¹⁷

Having obtained permission to "round off" or "square up" the Rockwell residential lot, Douglas S. Rockwell cannot escape the affirmative obligation *to disclose in writing* the precise extent of his own self-dealing contrary to the interests of his client. A lawyer who engages in a transaction with his client at a minimum must assure the arrangement satisfies the West Virginia Rules of Professional Conduct, such as Rule 1.8. *See King*, 650 S.E.2d at 168.

The disciplinary rules are the minimum guidelines on which to judge an attorney's conduct. *See Cometti*, 430 S.E.2d at 329 (*citing Comm. on Leg. Ethics v. Tatterson*, 173 W. Va. 613, 319

¹⁷ The *Battistelli* case also stands for the principle that this conduct by an attorney, such as unsecured loans from the client without advising the client to consult with another attorney, warranted the attorney's temporary suspension pending the outcome of the disciplinary proceeding.

S.E.2d 381 (1984)). It is the failure of Douglas S. Rockwell to meet this definitive standard and his affirmative acts of concealment that permit all of the plaintiffs' causes of action to proceed.

As noted by the American Bar Association, "[a] lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. *Compendium of Professional Responsibility: Rules and Standards*, Comment [1] to Rule 1.8, American Bar Association, 2008; emphasis added. Moreover, "[u]nder the Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interest at the expense of the client. Moreover, the lawyer must obtain the client's informed consent." *Ibid.*, Comment [3]; emphasis added.

With the two successive extensions to the original option agreement, all of which were prepared by Douglas S. Rockwell, the attorney for the Dunns, Douglas S. Rockwell never informed the Dunns, in writing, that the remainder of the Hoover tract was now 6.87 acres smaller. In fact, Douglas S. Rockwell has acknowledged that he never disclosed to Stanley Dunn the plat of the 6.87 acre parcel which Douglas S. Rockwell commissioned and which was an exhibit to the deed conveying the parcel from Hoover to Carol Rockwell.

Moreover, Martin & Seibert, as the employer of Douglas S. Rockwell, cannot escape liability notwithstanding the employee's departure from employment, if the wrong had yet to be discovered by the injured party, but was committed during the course of Douglas S. Rockwell's employment with Martin & Seibert. Neither Martin & Seibert, nor Carol Rockwell should be permitted to escape accountability when the wrongful conduct was committed by an employee, with the assistance of his spouse, all the while supposedly acting as a fiduciary of the highest order servicing the needs of his client, and while utilizing the infrastructure of the law firm and its Charles Town offices.

The true test of the liability of a master for a tort committed by his servant is whether the servant was engaged in his master's business. The wrongs complained of herein were committed, without question, while Douglas S. Rockwell was employed by Martin & Seibert and from within the offices of the employer.

The wrongful acts of Douglas S. Rockwell, committed while employed with Martin & Seibert, are incidental to the business objectives of Martin & Seibert. The wrongful acts of Douglas S. Rockwell were not wholly external or independent of the Martin & Seibert business operations. Any lack of awareness by Martin & Seibert of wrongful acts of Douglas S. Rockwell does not relieve Martin & Seibert of liability for it was Martin & Seibert who set forth and provided the supporting infrastructure for the wayward employee.

Application of controlling West Virginia law to the disputed facts herein, may lead a trier of fact to a different conclusion than the one summarily reached by the circuit court. Given the circuit court's reliance upon disputed and often inaccurate facts, the plaintiffs respectfully request that this Honorable Court reverse the decision of the circuit court granting summary judgment in favor of Martin & Seibert.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing and for all the reasons set forth above, the Petitioners herein, plaintiffs Stanley W. Dunn, Jr. and Katherine B. Dunn, respectfully request this Honorable Court enter an Order reversing the Circuit Court of Jefferson County, West Virginia's June 16, 2008 "Order Granting Defendant Martin & Seibert's Motion to Amend Judgment and Entering Summary Judgment on Each of Plaintiff's Claims Against Martin & Seibert," and its August 13, 2008 "Order

Granting Defendant Carol Rockwell Summary Judgment” and remand the case to the Circuit Court of Jefferson County, West Virginia with instructions.

Respectfully submitted this the 4th day of March, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on the 4th day of March, 2009, I served the foregoing "***Brief on Behalf of the Appellants, Stanley W. Dunn, Jr. and Katherine B. Dunn, in Support of Their Petition for Appeal***" upon all counsel of record by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as follows:

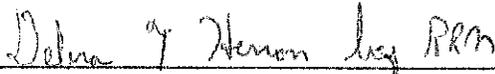
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