

APPEAL NO. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

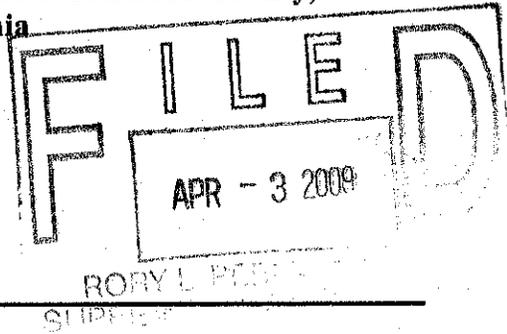
Appellants,

v.

Civil Action No.: 06-C-282
Circuit Court Judge David H. Sanders
Circuit Court of Jefferson County,
West Virginia

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

Appellees.



RESPONSE BRIEF OF APPELLEE, MARTIN & SEIBERT, L.C.

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On August 21, 2006, Stanley W. Dunn, Jr. and Katherine B. Dunn (the "Dunns") filed an eight-count complaint in the Circuit Court of Jefferson County, West Virginia. See Complaint. Their complaint asserted claims against Douglas S. Rockwell ("Mr. Rockwell"), Carol Rockwell ("Mrs. Rockwell"), and Martin & Seibert, L.C. ("Martin & Seibert"). Against Martin & Seibert, the Dunns asserted claims of *respondeat superior* and negligent supervision. The Dunns subsequently amended their complaint and added two more counts, one of which asserted a claim against Martin & Seibert for an alleged breach of fiduciary duty based on the *Rules of Professional Conduct*. See Amendments by Interlineation to Plaintiffs' Complaint.

On April 16, 2007, the Dunns moved for partial summary judgment on the issue of liability as to all defendants. See Plaintiffs' Motion for Partial Summary Judgment. At the request of Mr. and Mrs. Rockwell, the circuit court held an emergency hearing on May 11, 2007 and subsequently entered an order dated May 14, 2007. The circuit court continued the trial of this matter, disposed of several motions not related to the Dunns' appeal, and established an additional briefing schedule on the Dunns' Motion for Partial Summary Judgment.

On May 31, 2007, Martin & Seibert filed its Memorandum in Opposition to the Dunns' Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment based on the statute of limitations. See Martin & Seibert's Cross Motion for Summary Judgment. On May 31, 2007, Mr. and Mrs. Rockwell filed their Opposition to the Dunns' Motion for Partial Summary Judgment. See Rockwell Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

On June 15, 2007, the Dunns replied in support of their Motion for Partial Summary Judgment and responded in opposition to Martin & Seibert's Cross-Motion for Summary Judgment. See Plaintiffs' Response to Martin & Seibert's Opposition to their Motion for Partial

Summary Judgment and their Opposition to Martin & Seibert's Cross-Motion for Summary Judgment. To this pleading, the Dunns attached an unexecuted document entitled "Extension Agreement" which was dated the "___ day of ___, 2005" that contains numerous blanks and an Affidavit executed by Stanley Dunn. Even though they had been served with several discovery requests to which the blank extension agreement was responsive and each testified at their depositions that they had produced all documents prepared by Mr. Rockwell, the Dunns did not produce the blank extension agreement until after Martin & Seibert raised the statute of limitations issue in its Cross-Motion for Summary Judgment. Accordingly, on June 25, 2007, the Appellees jointly moved to exclude this late-disclosed document or to re-open discovery prior to the circuit court ruling on the pending motions for summary judgment.¹

On August 17, 2007, the circuit court denied the Dunns' Motion for Partial Summary Judgment. See Order Denying Plaintiffs' Motion for Partial Summary Judgment. The circuit court found that facts were in dispute "as to the propriety of the land acquisition and the specific parcel of land that was to be acquired by Defendants." See Id. The circuit court also found a dispute between Plaintiffs' allegations that Martin & Seibert was liable to them upon theories of *respondeat superior*, negligent supervision, and breach of fiduciary duty/breach of the *Rules of Professional Conduct* and Mr. Rockwell's testimony that all of the actions he took in furtherance of the subject land purchase were taken in his personal capacity and not in his capacity as an attorney with Martin & Seibert. See Id.

Before receiving a ruling on its Cross-Motion for Summary Judgment, Martin & Seibert filed a Renewed Motion for Summary Judgment on October 2, 2007. See Martin & Seibert's

¹ On October 24, 2007, the circuit court entered an order which resolved, by agreement of the parties, the Appellees' joint motion. Pursuant to this order, the Dunns' depositions were re-convened on January 24, 2008.

Renewed Motion for Summary Judgment. On October 17, 2007, the Rockwell Defendants agreed with Martin & Seibert that the Dunns' claims were time-barred. See Rockwell Defendants' Limited Opposition to Martin & Seibert's Renewed Motion for Summary Judgment. On October 18, 2007, the Dunns opposed Martin & Seibert's Renewed Motion for Summary Judgment. See Plaintiffs' Opposition to Martin & Seibert's Renewed Motion for Summary Judgment.

On March 6, 2008, the circuit court entered its Order Denying Defendants' Renewed Motion for Summary Judgment. See Order Denying Defendant's Renewed Motion for Summary Judgment. The circuit court found that there was "a disputed issue of fact, to wit: the dispute concerning the unsigned blank 2005 Extension Agreement and its posture in this matter." See Id. The circuit court also found that "with respect to Martin & Seibert's additional assertions for summary judgment . . . there are genuine issues of fact relative to each respective assertion. . ." See Id.

On March 10, 2008, the Rockwell Defendants asked the circuit court to clarify which of the parties' summary judgment motions was denied in its March 6, 2008 Order. On March 14, 2008, the circuit court entered an Amended Order Denying Martin & Seibert's Renewed Motion for Summary Judgment, clarifying that its March 6, 2008 Order denied the Renewed Motion for Summary Judgment filed by Martin & Seibert. See Amended Order Denying Martin & Seibert's Renewed Motion for Summary Judgment.

On March 14, 2008, Martin & Seibert filed its Motion to Alter or Amend the circuit court's March 6, 2008 Order. See Martin & Seibert's Motion to Alter or Amend Judgment. Alternatively, pursuant to W.Va. R. Civ. P. 54(b), Martin & Seibert requested that the circuit court make additional findings to facilitate appellate review. On April 15, 2008, the Dunns filed their Opposition to Martin & Seibert's Motion to Alter/Amend the Denial of Summary

Judgment. See Plaintiffs' Opposition to Martin & Seibert's Motion to Alter or Amend. On April 17, 2008, Martin & Seibert filed its Reply Memorandum in Support of its Motion to Alter or Amend Judgment or, in the Alternative, for Additional Findings. See Martin & Seibert's Reply Memorandum in Support of Motion to Alter or Amend.

On April 21, 2008, the circuit court heard oral argument on Martin & Seibert's Motion to Alter or Amend. Thereafter, at the circuit court's request, all original transcripts of the depositions of Mr. and Mrs. Dunn and Mrs. and Mrs. Rockwell were filed with the court and available to it prior to its decision on Martin & Seibert's Motion to Alter or Amend. On June 16, 2008, the circuit court entered its order altering and amending its March 6, 2008 and March 14, 2008 orders. The circuit court's June 16, 2008 order dismissed all of the Dunns' claims against Martin & Seibert both on statute of limitations grounds and on the merits. See Order Granting Martin & Seibert's Motion to Alter or Amend.

On August 6, 2008, the circuit court entered an agreed order which amended its June 16, 2008 order to include the requisite Rule 54(b) language to make clear that the judgment in favor of Martin & Seibert was final for purposes of appeal. See Agreed Order Amending Order Granting Motion to Alter or Amend.

On October 14, 2008, the Dunns filed their petition for appeal. Martin & Seibert filed its response to the Dunns' petition on November 12, 2008. This Court accepted the Dunns' appeal on January 29, 2009. The Dunns filed the Appellant's Brief on March 4, 2009. Martin & Seibert received the Appellant's Brief on March 7, 2009. Martin & Seibert, by counsel, Christopher K. Robertson and Wendy G. Adkins of Jackson Kelly PLLC, now timely submits the Brief of Appellee, Martin & Seibert, L.C., pursuant to W.Va. R. App. P. 10.

II. COUNTER-STATEMENT OF THE FACTS OF THE CASE²

Martin & Seibert employed Mr. Rockwell as an attorney until Mr. Rockwell retired on April 1, 2004. See D. Rockwell Depo. at 13, 19, 40. Martin & Seibert has never employed Mrs. Rockwell. See MS - C. Rockwell Depo. at 66.

Mrs. Rockwell purchased a piece of real estate from Hugh N. Hoover (“Hoover”) by a Deed dated May 17, 2001 (“the Three Acre Parcel”). See MS – C. Rockwell Depo. at 24. The Three Acre Parcel is located along the Shenandoah River in Jefferson County, West Virginia. Id.

Hoover and his sister, Diana Hoover Gray (“Gray”) owned farmland which adjoined the Three Acre Parcel (“Hoover Farmland”). When Stanley Dunn (“Mr. Dunn”) became interested in purchasing the Hoover Farmland, he asked his friend, Mr. Rockwell, to draft an option agreement concerning the property. See MS - S. Dunn Depo. at 14, 17, 117. Mr. Rockwell prepared the option agreement (“the 2002 Option”) for the purchase of the Hoover Farmland requested by Mr. Dunn, but included numerous blanks to be completed by the parties. See Id. at 17, 19-20; see also MS – Exhibit 2. According to Mr. Dunn, Mr. Rockwell’s preparation of this document for him “was probably handled outside the office.” See MS - S. Dunn Depo. at 117.

Mr. Dunn and Hoover completed the blanks and executed the 2002 Option on June 27, 2002. See MS – S. Dunn Depo. at 117-118; see also MS – Exhibit 2. Pursuant to the 2002 Option, Mr. Dunn paid \$20,000.00 to Hoover and Gray for an option to purchase “460 acres more or less by survey” in Kabletown District for \$6,000.00 per acre. See MS - Exhibit 2.

² At the circuit court’s request, all original transcripts of the depositions of Mr. and Mrs. Dunn and Mrs. and Mrs. Rockwell were filed with the court and available to it prior to its decision on Martin & Seibert’s Motion to Alter or Amend. Nevertheless, for this Court’s convenience, most of the citations to deposition transcripts and exhibits herein reference attachments to Martin & Seibert’s Memorandum in Support of its Renewed Motion for Summary Judgment (“MS”) and to Martin & Seibert’s Reply Memorandum in Support of its Motion to Alter or Amend Judgment (“MR”). Where deposition testimony cited herein was not specifically referenced in one of these pleadings, it is cited by direct reference to the transcript filed with the circuit court and available to said court when it rendered its decision on Martin & Seibert’s Motion to Alter or Amend.

Pursuant to its terms, the 2002 Option expired "twelve (12) months from the date of this document" (*to wit*, on June 27, 2003) unless it was extended. Id.

"Wanting to protect their investment," the Rockwells became interested in purchasing additional property to compliment the Three Acre Parcel. See MS - C. Rockwell Depo. at 30-31. Because some of the land that they wanted to purchase was subject to Mr. Dunn's 2002 Option, Mr. Rockwell approached Mr. Dunn to determine whether he would consent to the Rockwells' purchase of the additional acreage. See MS - D. Rockwell Depo. at 112-113. Mr. Dunn consented to Mr. Rockwell's request to purchase property which was subject to the 2002 Option. See MS - S. Dunn Depo. at 86-87. Mr. Rockwell then approached Hoover about purchasing property which was subject Mr. Dunn's 2002 Option. See MS - D. Rockwell Depo. at 132. Because Mr. Rockwell was inquiring about property which was subject to Mr. Dunn's 2002 Option, Hoover contacted Mr. Dunn, and Mr. Dunn instructed Hoover to "go ahead and give him [Mr. Rockwell] what he asked for." See MS - S. Dunn Depo. at 36.

Mr. Rockwell then commissioned Peter Lorenzen to survey the additional acreage that the Rockwells desired to purchase from Hoover and Gray. See MS - C. Rockwell Depo. at 38-39. Mr. Lorenzen prepared a final Plat of Merger showing the additional acreage dated December 19, 2002. See MS - Exhibit 3. On December 27, 2002, Mrs. Rockwell purchased from Hoover and Gray 6.87 acres of real estate adjacent to the Three Acre Parcel. See Id. Included in the additional acreage acquired by Mrs. Rockwell on December 27, 2002 is a "pipestem" or "dog leg" shaped strip of land which fronts the Shenandoah River. See MS - Exhibit 3; see also MS - K. Dunn Depo. at 60; see also MS - S. Dunn Depo. at 111. While Mr. Dunn admits that he consented to the Rockwells' acquisition of real estate which was subject to his 2002 Option, he maintains that he did not consent to their acquisition of the "pipestem" or

“dog leg” strip of land which fronts the Shenandoah River. See MS - S. Dunn Depo. at 86-87, 111; see also MR - S. Dunn Depo. at 35-36.

All of the actions Mr. Rockwell took to facilitate his wife’s purchase of the disputed property were taken in his personal capacity and not in his capacity as an attorney with Martin & Seibert. See MS - D. Rockwell Depo. at 184-185, 188-190, 193. Although Mr. Rockwell facilitated his wife’s purchase of the disputed property while he was employed by Martin & Seibert, he did not open a client file regarding it. See MS - Exhibit 6, Affidavit of Walter M. Jones, III; see also MR - Exhibit 3. Since no client file was created, no conflict of interest determination was made, and no professional time or related expenses were recorded by Mr. Rockwell or billed to his spouse. See Id. Martin & Seibert had no knowledge of Mr. Rockwell’s alleged facilitation of his wife’s purchase of the disputed property until it was threatened with the filing of this lawsuit in June or July of 2006. See Id.

After Mrs. Rockwell purchased the disputed property, including the “pipestem” or “dog leg” shaped strip of land which fronts the Shenandoah River, Mr. Rockwell prepared a document for Mr. Dunn which extended the expiration date of the 2002 Option to August 1, 2003 (the “Extension”). See MS – Exhibit 4. The 2002 Option and the Extension expired before Mr. Dunn purchased any real estate from Hoover. See Id. At Mr. Dunn’s request, Mr. Rockwell then prepared another option agreement for Mr. Dunn dated August 1, 2003 (“the 2003 Option”). See MS - S. Dunn Depo. at 28-29; see also MS – Exhibit 5. The 2003 Option described the property subject to it differently than the 2002 Option, increased the per acre price to \$6,500.00 per acre, and remained open for twenty-four months. Id. On October 27, 2005 and after the 2003 Option expired, Mr. Dunn purchased the Hoover Farmland from Hoover and Gray. See MS - Exhibit 7.

Mr. Rockwell prepared the 2002 Option, the Extension, and the 2003 Option while he was employed by Martin & Seibert. See MS - Walter M. Jones, III Depo. at 90-91. Martin & Seibert's records, however, show that Mr. Dunn was a client of the firm on only two occasions. See MS - Jones Depo. at 90. Neither occasion related to the preparation of the 2002 Option, the Extension, or the 2003 Option. See MS - Jones Depo. at 68, 90. Mr. Rockwell prepared the 2002 Option, the Extension, and the 2003 Option without opening a Martin & Seibert client file and without the firm's knowledge. See MS - Jones Depo. at 90; see also MS - Exhibit 6, Jones Affidavit. No professional time or expenses were recorded by Mr. Rockwell or billed to Mr. Dunn and Martin & Seibert had no knowledge of Mr. Rockwell's personal dealings with Mr. Dunn concerning the Hoover Farmland until Mr. Dunn threatened the filing of this lawsuit in June or July of 2006. See MS- Exhibit 6, Jones Affidavit. According to Mr. Dunn, although Mr. Rockwell provided him with legal services regarding the Hoover Farmland, Mr. Dunn knew that Mr. Rockwell was doing so independently of Martin & Seibert. See MR - S. Dunn Depo. at 143.

After drafting the August 2003 Option, the only legal work Mr. Rockwell performed for either Mr. Dunn or his wife related to Mr. Dunn's sale of Dolly Vardin Farm, real estate located in a different part of Jefferson County than the property at issue in this lawsuit. See MS - S. Dunn Depo. at 55-56, 127. However, the Dunns later produced an unsigned document entitled "Extension Agreement" which is dated the "___ day of ___, 2005" and which contained numerous blanks to be completed with material information by the parties. See MS - Exhibit 8. Mr. Dunn testified by affidavit that Mr. Rockwell prepared the incomplete and unexecuted 2005 Extension Agreement for him in the Spring of 2005. See MS - Exhibit 9.

The Dunns have never contended that the 2002 Option, the Extension, the 2003 Option, or any other document Mr. Rockwell prepared for them was negligently or otherwise inadequately prepared. See D. Rockwell Depo. at 183-184. Instead, all of their claims in this

lawsuit arise from Mrs. Rockwell's December 27, 2002 purchase of the disputed real estate and Mr. Rockwell's facilitation of her purchase. See MS – K. Dunn Depo. at 60-62.

According to both Mr. and Mrs. Dunn, before September 29, 2003, Hoover contacted Mr. Dunn about the potential sale of other real estate which was subject to Mr. Dunn's Option. See MR - S. Dunn Depo. at 35-36; see also MR - K. Dunn Depo. at 62-64. During that conversation, 2003, Hoover told Mr. Dunn that he had already sold the "pipestem" or "dog leg" shaped strip of property which fronted the Shenandoah River to the Rockwells. See MS - S. Dunn Depo. at 35-36, 74; see also MS - K. Dunn Depo. at 62-64.

The Dunns knew of Mrs. Rockwell's purchase of the disputed property, including the "pipestem" or "dog leg" shaped strip of land which fronts the Shenandoah River, before September 29, 2003. See MS - K. Dunn Depo. at 62-64; see also MS - S. Dunn Depo. at 35-36; 74; 111. By September 29, 2003, the Dunns knew that something was wrong and believed that that one or both of the Rockwells had wrongfully acquired the disputed property. See MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 131; see also S. Dunn Continued Depo. at 130. The Dunns also knew that they may have a potential claim against Mr. Rockwell. Id.; see also S. Dunn Continued Depo. at 17-19.

Despite their belief that the Rockwells had wrongfully acquired the disputed property and their knowledge of their potential claim against the Rockwells, the Dunns did not investigate Mrs. Rockwell's acquisition of the disputed real estate in September of 2003. See MR – K. Dunn Continued Depo. at 60-61; see also MR - S. Dunn Continued Depo. at 131-132. Rather, the Dunns consciously decided not to take any action concerning Mrs. Rockwell's purchase of the disputed real estate until after they purchased the Hoover Farmland. See MR - S. Dunn Continued Depo. at 131. As Mr. Dunn explained, "I thought the Statute of Limitations ran for three years and I thought I was good." See S. Dunn Continued Depo. at 18.

The Dunns filed this lawsuit on August 21, 2006 – almost three years after they knew “something was wrong” regarding Mrs. Rockwell’s purchase of the disputed real estate and more than two years after Mr. Rockwell retired from Martin & Seibert. See MS - K. Dunn Depo. at 64; see also MS - S. Dunn Depo. at 74, 111; see also MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 131; see also S. Dunn Continued Depo. at 17-19, 130; see also D. Rockwell Depo. at 13, 19, 40. Neither the Rockwells nor Martin & Seibert took any action which prevented or delayed their filing of this lawsuit. See MS - K. Dunn Depo. at 68-69, 81; see also MS - S. Dunn Depo. at 81-82, 128.

III. RESPONSE TO ASSIGNMENTS OF ERROR

- A. THE UNDISPUTED FACTS MATERIAL TO THE TIMELINESS OF THE DUNNS' CLAIMS ESTABLISH THAT BY SEPTEMBER 29, 2003, THE DUNNS KNEW "SOMETHING WAS WRONG." BECAUSE THE DUNNS WAITED ALMOST THREE YEARS BEFORE FILING SUIT, THE CIRCUIT COURT DID NOT ERR BY FINDING THAT THEIR CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS AND GRANTING SUMMARY JUDGMENT IN FAVOR OF MARTIN & SEIBERT.
- B. EVEN IF THE DUNNS ARE GIVEN THE BENEFIT OF THE "CONTINUOUS REPRESENTATION" DOCTRINE, THEIR CLAIMS AGAINST MARTIN & SEIBERT ACCRUED ON APRIL 1, 2004 WHEN MR. ROCKWELL RETIRED FROM THE FIRM. THE CIRCUIT COURT DID NOT ERR FINDING THE "CONTINUOUS REPRESENTATION" DOCTRINE DOES NOT SAVE THE DUNNS' CLAIMS AGAINST MARTIN & SEIBERT FROM BEING TIME-BARRED.
- C. THE UNDISPUTED FACTS MATERIAL TO THE MERITS OF THE DUNNS' CLAIMS AGAINST MARTIN & SEIBERT ESTABLISH THAT THE ACTIONS TAKEN BY MR. ROCKWELL TO FACILITATE HIS WIFE'S PURCHASE OF THE DISPUTED REAL ESTATE WERE TAKEN IN HIS PERSONAL CAPACITY AND THAT MR. DUNN KNEW THAT MR. ROCKWELL ACTED INDEPENDENT OF MARTIN & SEIBERT WHEN PROVIDING LEGAL SERVICES TO HIM CONCERNING THE HOOVER FARMLAND. THUS, THE CIRCUIT COURT DID NOT ERR BY FINDING THAT THE DUNNS' CLAIMS AGAINST MARTIN & SEIBERT FAIL AS A MATTER OF LAW.

IV. ARGUMENT

The Dunns seek reversal of an Order issued on June 16, 2008 by the Honorable David H. Sanders, granting Martin & Seibert's Motion to Alter or Amend. In its June 16, 2008 Order, the circuit court amended its prior orders and granted summary judgment in favor of Martin &

Seibert on statute of limitations grounds as well as on the merits of the Dunns' claims. "A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Further, the same de novo standard of review applies to the resolution of a Rule 59(e) motion to alter or amend:

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus point 1, Wickland v. American Travellers Life Insurance Co., 204 W.Va. 430, 513 S.E.2d 657 (1998)." Syllabus point 2, Bowers v. Wurzburg, 205 W.Va. 450, 519 S.E.2d 148 (1999).

Syl. Pt. 1, Alden v. Harpers Ferry Police Civil Serv. Comm'n, 543 S.E.2d 364 (W.Va. 2001).

The facts material to the timeliness of the Dunns' claims against Martin & Seibert are not in dispute. By no later than September 29, 2003, the Dunns knew that "something was wrong" and knew that they may have a dispute with the Rockwells concerning Mrs. Rockwell's purchase of the disputed real estate, including the "pipestem" or "dog leg" shaped strip of land which fronts the Shenandoah River. Because the Dunns' claims as filed in August 2006 are time-barred by a two-year statute of limitations, the circuit court did not err by amending its prior orders and granting summary judgment in favor of Martin & Seibert.

The facts material to the merits of the Dunns' claims against Martin & Seibert are also not in dispute. All of the actions taken by Mr. Rockwell to facilitate Mrs. Rockwell's purchase of the disputed real estate were taken in his personal capacity. Furthermore, although Mr. Rockwell provided legal services to Mr. Dunn regarding the Hoover Farmland, Mr. Dunn knew that Mr. Rockwell did so independently of Martin & Seibert. Therefore, the circuit court also properly entered summary judgment in favor of Martin & Seibert on the merits of the Dunns' claims of *respondeat superior*, negligent supervision, and breach of fiduciary duty/breach of the *Rules of Professional Conduct*.

Because the circuit court properly entered summary judgment in favor of Martin & Seibert, the circuit court's Order issued on June 16, 2008 by the Honorable David H. Sanders, granting Martin & Seibert's Motion to Alter or Amend its March 6, 2008 order as amended by its March 14, 2008 order denying Martin & Seibert's Renewed Motion for Summary Judgment, should be affirmed.

A. THE UNDISPUTED FACTS MATERIAL TO THE TIMELINESS OF THE DUNNS' CLAIMS ESTABLISH THAT BY SEPTEMBER 29, 2003, THE DUNNS KNEW "SOMETHING WAS WRONG." BECAUSE THE DUNNS WAITED ALMOST THREE YEARS BEFORE FILING SUIT, THE CIRCUIT COURT DID NOT ERR BY FINDING THAT THEIR CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS AND GRANTING SUMMARY JUDGMENT IN FAVOR OF MARTIN & SEIBERT.

The circuit court did not err in finding the Dunns' claims against Martin & Seibert were time-barred because the undisputed facts establish that by September 29, 2003, the Dunns knew that "something was wrong" and they knew that they may have a dispute with the Rockwells concerning Mrs. Rockwell's purchase of the disputed real estate. A two-year statute of limitations governs the Dunns' claims of *respondeat superior* liability, negligent supervision and breach of fiduciary duty arising from the *Rules of Professional Conduct* asserted against Martin & Seibert in this case. See W.Va. Code § 55-2-12; see also Trafaglar House Constr., Inc. v. ZMM, Inc., 567 S.E.2d 294, 299 (W.Va. 2002); Vorholt v. One Valley Bank, 498 S.E.2d 241, 237 (W.Va. 1997); Keyser Canning Co. v. Klots Throwing Co., 118 S.E. 521 (W.Va. 1923).

The Dunns contend that they are seeking only equitable relief, specifically rescission of the deed conveying the disputed parcel of 6.87 acres to Mrs. Rockwell, and, therefore, the two-year limitations period does not apply to their claims. See Appellant's Brief at 17. It is clear, however, that the relief the Dunns seek from Martin & Seibert is monetary damages. Because

the Dunns seek monetary damages from Martin & Seibert, the doctrine of laches does not apply and instead the timeliness of their claims is measured by the applicable statute of limitations. Bank of Mill Creek v. Elk Horn Coal Corp., 57 S.E.2d 736 (W. Va. 1950); Clark v. Gruber, 82 S.E. 338 (W.Va. 1914).

In tort actions, the statute of limitations begins to run when a tort occurs. Syl. Pt. 3, Cart v. Marcum, 423 S.E.2d 644, 645 (W.Va. 1992). Statutes of limitation, however, are subject to the “discovery rule,” which this Court developed to ensure that all plaintiffs who exercise due diligence will have a reasonable opportunity to discover their claims. Cart, 423 S.E.2d at 674 (emphasis added). Under the “discovery rule,” the limitations period is tolled until a plaintiff knows, or by the exercise of reasonable diligence should know that (a) he is injured, (b) the identity of the wrongdoer, and (c) a causal connection between the acts or omissions of the alleged tortfeasor and his injury. In re Hearing Losses I, 539 S.E.2d 112, 117 (W.Va. 2000); Syl. Pt. 4, Gaither v. City Hospital, Inc., 487 S.E.2d 901 (W.Va. 1997). In applying the “discovery rule,” this Court “did not eliminate the affirmative duty the law imposes on 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, 578 S.E.2d 355, 360 (W.Va. 2003)(emphasis added). This Court has repeatedly held that in determining when the statute of limitations begins to run, the plaintiff does not need to know the particular nature of his injury. Rather, “the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the particular nature of the injury.” Goodwin v. Bayer Corporation, 624 S.E.2d 562, 568 (W.Va. 2005); see also Harrison v. Davis, 478 S.E.2d 104 (W.Va. 1996); McCoy, 578 S.E.2d at 360. According to this Court, this is “bedrock precedent.” Goodwin, 624 S.E.2d at 568.

When applying this “bedrock precedent,” the only relevant question as to the timeliness of the Dunns’ claims is when did the Dunns discover or when should they have reasonably discovered that “something was wrong” concerning Mrs. Rockwell’s purchase of the disputed real estate. On appeal, the Dunns ignore their own admissions that by September 29, 2003, they knew that “something was wrong” and that they had a potential dispute with the Rockwells concerning Mrs. Rockwell’s purchase of the disputed real estate, including the “pipestem” or “dog leg” shaped strip of land which fronts the Shenandoah River. See MS - K. Dunn Depo. at 64; MS - S. Dunn Depo. at 36, 43, 74, 111; MR - K. Dunn Continued Depo. at 60; MR - S. Dunn Continued Depo. at 131. Instead of addressing their admissions, the Dunns emphasize that no new facts were presented to the circuit court in Martin & Seibert’s motion to alter or amend judgment. See Appellant’s Brief at 13-14. They contend that the facts on which the circuit court relied to deny their motion for partial summary judgment also preclude the entry of summary judgment in favor of Martin & Seibert. Id. Their argument fails because the facts which resulted in the denial of the Dunns’ summary judgment motion are not “material” to the issues raised by Martin & Seibert’s Renewed Motion for Summary Judgment and its Motion to Alter or Amend.

Summary judgment “shall be rendered” when it is shown that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” W.Va. R. Civ. P. 56(c) (2009)(emphasis added). The “mere existence of a scintilla of evidence” favoring the nonmoving party will not prevent entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). To withstand a motion for summary judgment, the nonmoving party must offer evidence from which “a fair-minded jury could return a verdict for the [party].” Id. Such evidence must consist of facts which are material, meaning that the facts might affect the outcome of the suit under applicable law, as well as genuine, meaning that they create fair doubt rather than encourage mere speculation. Anderson, 477 U.S. at 248. Whether a

factual dispute is “material” depends upon the substantive law governing the case: “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Anderson, 477 U.S. at 248; Williams v. Precision Coil, Inc., 459 S.E.2d 329, 337 n.13 (W.Va. 1995). A non-moving party cannot create a genuine issue of material fact through mere speculation or contention. Belcher v. Wal-Mart Stores, Inc., 568 S.E.2d 19, 28 (W.Va. 2002).

The facts which the circuit court found to be in dispute and precluded the entry of summary judgment in favor of the Dunns, to-wit: “the propriety of the land acquisition and the specific parcel of land that was to be acquired by Defendants,” are not “material” to the timeliness of the Dunns’ claims against Martin & Seibert. Similarly, a dispute between the Dunns’ allegations that Martin & Seibert, L.C. is liable under the doctrine of *respondeat superior*, for negligent supervision, and for breach of fiduciary duty/breach of the *Rules of Professional Conduct* and Mr. Rockwell’s uncontroverted testimony is not relevant or “material” to the timeliness of the Dunns’ claims.³ The Dunns’ admissions that by September 29, 2003, they believed the Rockwells had wrongfully acquired the disputed property, knew “something was wrong,” and knew they may have a potential dispute with the Rockwells arising from Mrs. Rockwell’s purchase of the disputed property (including the “pipestem” or “dog leg” strip of

³ Furthermore, as discussed *infra* at 29-31, absent proof, the Dunns’ allegations that Martin & Seibert is liable to them under the doctrine of *respondeat superior*, for negligent supervision, and for breach of fiduciary duty/breach of the *Rules of Professional Conduct* do not create a genuine issue of fact. A non-moving party cannot create a genuine issue of material fact through mere speculation or contention. Belcher, 568 S.E.2d at 28. This is particularly true given that the Dunns’ allegations are directly refuted by Mr. Rockwell’s undisputed testimony and by Mr. Dunn’s admission that he knew that the legal services Mr. Rockwell was providing him regarding the Hoover Farmland were being provided independent of Martin & Seibert. See MS - D. Rockwell Depo. at 184-185, 188, 189-190, 193; see also MR - S. Dunn Depo. at 143.

land that fronts the Shenandoah River) are the only facts “material” to the timeliness of the Dunns’ claims against Martin & Seibert. See MR - K. Dunn Continued Depo. at 60-61; see also MR - S. Dunn Continued Depo. at 18-19, 35-36, 74, 111, 131-132; see also MS - K. Dunn Depo. at 64; see also MS. – S. Dunn Depo. at 35-36, 74, 111; see also S. Dunn Continued Depo. at 18-19. Because these material facts regarding the timeliness of the Dunns’ claims are undisputed, the circuit court’s decision granting summary judgment was appropriate.

The Dunns contend that the circuit court misapplied the “discovery rule” because, unlike the fact pattern in McCoy, 578 S.E.2 at 355, 359-360, they were not instantly and immediately aware of their injury. See Appellant’s Brief at 15-17. Specifically, they assert that their claims did not accrue until they knew the precise size and location of the additional acreage acquired by Mrs. Rockwell. Id. The Dunns’ position, however, is not supported by applicable West Virginia law.

As discussed *supra* at 13-15, the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong, and not when he or she knows of the particular nature of the injury. Goodwin, 624 S.E.2d at 568; McCoy, 578 S.E.2d at 360. By September 29, 2003 the Dunns knew “something was wrong.” See MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 131; see also S. Dunn Continued Depo. at 130. Moreover, by September 29, 2003, the Dunns believed that one of the Rockwells, or both of them, had wrongfully acquired the disputed property (including the “pipestem” or “dog leg” shaped strip of land which fronts the Shenandoah River) and knew that they had a potential dispute with the Rockwells concerning it. See MR - S. Dunn Continued Depo. at 131; see also S. Dunn Continued Depo. at 18-19. Thus, under the “discovery rule” as applied in West Virginia, the Dunns’ claims against Martin & Seibert accrued no later than September 29, 2003 because by then they knew that “something was wrong.”

Attempting to avoid the operation of the “discovery rule,” the Dunns also assert throughout their Brief that they did not know the precise size and location of the additional acreage acquired by Mrs. Rockwell until they actually purchased the Hoover Farmland in the Fall of 2005. Deposition testimony provided by the Dunns, however, establishes that they knew by September 29, 2003 that the property purchased by Mr. or Mrs. Rockwell included the “pipestem” or “dog leg” shaped portion which fronts the Shenandoah River. In this regard, before September 29, 2003, Hoover contacted Mr. Dunn about a potential sale of other real estate which was subject to Mr. Dunn’s Option. See MR - S. Dunn Depo. at 35-36; see also MR - K. Dunn Depo. at 62, 64. During this conversation, Mr. Dunn told Hoover that he did not wish to sell the strip of land which fronts the Shenandoah River. Id. Hoover responded by telling Mr. Dunn that he had already sold the “pipestem” or “dog leg” shaped portion of property which fronts the Shenandoah River to the Rockwells. Id.; see also MS - S. Dunn Depo. at 74; see also MS - K. Dunn Depo. at 64. The undisputed facts show that the Dunns knew of the Rockwell purchase of the disputed property, including the “pipestem” or “dog leg” shaped strip of land which fronts the Shenandoah River, before September 29, 2003. See MS - K. Dunn Depo. at 64; see also MS - S. Dunn Depo. at 36; 43; 74; 111.

Although the Dunns contend the circuit court failed to appreciate the distinction between their awareness of Mrs. Rockwell’s acquisition of real estate and their awareness of a potential dispute with the Rockwells, the undisputed evidence establishes that no distinction exists between the Dunns’ discovery of Mrs. Rockwell’s purchase of the “pipestem” or “dog leg” shaped strip of property which fronts the Shenandoah River and their awareness that “something was wrong” so as to toll the date their claims accrued to after September 29, 2003. Thus, even under the Dunns’ misapplication of the “discovery rule,” their claims against Martin & Seibert accrued no later than September 29, 2003 because by then the Dunns were aware that the

property purchased by Mr. or Mrs. Rockwell included the “pipestem” or “dog leg” shaped portion which fronts the Shenandoah River.

Apparently resorting to the *Rules of Professional Conduct* to manufacture a duty of care, the Dunns also claim that Mr. Rockwell fraudulently concealed the wrongs he allegedly perpetrated on them by failing to: advise in writing the precise size and location of the real estate acquired by Mrs. Rockwell, seek or obtain their written consent to the purchase, walk the parcel the Rockwells wished to acquire with Mr. Dunn before they acquired it, provide them with a plat of the parcel acquired by Mrs. Rockwell, and advise them that the Hoover Farmland was 6.87 acres smaller when he prepared the Extension for Mr. Dunn in March of 2003.⁴ See Appellant’s Brief at 19-23. While these alleged failures by Mr. Rockwell may or may not be “material” to the merits of certain claims the Dunns assert against Mr. Rockwell, these alleged failures do not prohibit the entry of summary judgment on statute of limitations grounds given the Dunns’ repeated acknowledgements that by September 29, 2003, they knew “something was wrong.” See MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 131-132; see also S. Dunn Continued Depo. at 18-19.

The limited evidence on which the Dunns rely for their claim of fraudulent concealment also does not rise to the level of “a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship.” Gaither, 487 S.E.2d at 901-07; Cart, 423 S.E.2d at 644. Rather, the undisputed evidence gives rise to a strong showing that the Dunns not only knew “something was wrong” by September 29, 2003, but also they knew that they may have a dispute with the Rockwells concerning the real estate the Rockwells had purchased from Hoover and that part of the additional acreage which the Rockwells acquired included the “pipestem” or “dog leg” strip of land which fronts the Shenandoah River. See MS - S. Dunn

⁴ The Dunns do not assert a fraudulent concealment claim against Martin & Seibert.

Depo. at 74; see also S. Dunn Depo. at 44-45, 75; see also MS - K. Dunn Depo. at 64. Moreover, the Dunns testified that none of the defendants took any action which prevented or delayed their filing of this lawsuit. See MS - K. Dunn Depo. at 68-69; see also MS - S. Dunn Depo. at 81-82, 128. Given the undisputed evidence, even if one assumes that Mr. Rockwell tried to fraudulently conceal the harms visited upon the Dunns (something which Martin & Seibert denies), his efforts obviously failed as the Dunns had sufficient knowledge to start the running of the statute of limitations no later than September 29, 2003.

Because they knew that "something was wrong" and that they may have a potential dispute with the Rockwells by September of 2003, the Dunns also had an affirmative duty to discover or make inquiry to discern additional facts about their alleged injury. See McCoy, 578 S.E.2d at 359. They could have easily ascertained the precise size and location of Mrs. Rockwell's purchase by inquiring of Hoover, Gray, or Mr. or Mrs. Rockwell. If any or all of these avenues failed, they could have easily obtained information concerning the Rockwell acquisition by consulting county land records. With any meaningful inquiry, the Dunns could have easily learned the details of Mrs. Rockwell's purchase shortly after they became aware of it September of 2003.

By emphasizing Mr. Rockwell's alleged failure to disclose his wife's purchase of the disputed property, the Dunns attempt to divert this Court's attention from their failure to further investigate the Rockwells' acquisition of the property in dispute once they learned that something was wrong. See MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 131-132. Despite knowing that "something was wrong" in September of 2003, Mr. Dunn consciously decided "that it would be best if I let it alone until we got possession of the Hoover Farm." See MR - S. Dunn Continued Depo. at 131. As Mr. Dunn explained, "I thought the Statute of Limitations ran for three years and I thought I was good."

See S. Dunn Continued Depo. at 18. The Dunns' claims are time-barred not because of their misplaced trust in Mr. Rockwell, but because of their conscious decision to "let it alone" until they purchased the Hoover Farmland.

For the first time on appeal, the Dunns argue that the statute of limitations did not begin running until they actually exercised their Option in November 2005. See Appellant's Brief at 25. Thus, according to the Dunns, they were not damaged until they acted on their Option. *Id.* Apart from the fact that Mr. Dunn's Option and the rights he had under it expired before the Dunns purchased the Hoover Farmland, this argument only surfaced for the first time in the Dunns' appeal brief, having not been previously raised in the circuit court or in their petition for appeal. Generally, non-jurisdictional questions that have not been decided at the circuit court level and are first raised on appeal should not be considered. Whitlow v. Bd. of Educ. of Kanawha County, 438 S.E.2d 15, 18 (W.Va. 1993).

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Whitlow, 438 S.E.2d at 18. Thus, the Dunns are not entitled now, on appeal, to assert new arguments.

The Dunns' new argument nevertheless fails because the "discovery rule" applies to the discovery of an injury, not to the discovery of later consequences of that injury. See generally Goodwin, 624 S.E.2d at 568-69. Later damages may result, but the statute of limitations begins to run anew as each item of damage is incurred. *Id.*

Apparently relying on the *Rules of Professional Conduct* to provide a standard of care, the Dunns allege that Mr. Rockwell failed to fulfill an obligation imposed on him as their counsel to disclose in writing the precise extent of his own alleged self-dealing contrary to their interests. See Complaint. Further, even though Mr. Dunn admittedly knew that Mr. Rockwell was acting independently of Martin & Seibert when he assisted him, the Dunns also allege that as Mr. Rockwell's employer, Martin & Seibert is vicariously liable for Mr. Rockwell's alleged failures and is independently liable for negligently supervising Mr. Rockwell. If these allegations are accepted as true, the Dunns were injured and suffered damages when Mr. Rockwell failed to disclose to them his facilitation of his wife's purchase of the disputed property and when Martin & Seibert allegedly failed to adequately supervise Mr. Rockwell. If accepted as true, these claims allege injuries occurring on or about December 27, 2002 arising from the Dunns' loss of the "pipestem" or "dog leg" strip of land which fronts the Shenandoah River. That the Dunns eventually purchased the Hoover Farmland in November 2005 does not change the character of their initial injury. It may, however, have given the Dunns an additional remedy, ie., the remedy of rescission, if they had joined Hoover and Gray as parties to this lawsuit.

The facts material to the application of the statute of limitations issue are not in dispute. By September 29, 2003, the Dunns knew (a) that they had been injured or that "something was wrong" (by losing the disputed real estate including the "pipestem" or "dogleg" strip of land which fronts the Shenandoah River), (b) the identity of the supposed wrongdoer (the Rockwells and Martin & Seibert), and (c) a causal connection between the acts or omissions of the alleged tortfeasors and their injury (Mr. Rockwell's alleged failure to adequately disclose and Martin & Seibert's alleged failed to adequately supervise causing the Dunns' losses). See MS - K. Dunn Depo. at 62-64; see also MS - S. Dunn Depo. at 36; 43, 74, 111; see MR - K. Dunn Continued

Depo. at 60; see also MR - S. Dunn Continued Depo. at 35-36, 131; see also S. Dunn Continued Depo. at 18-19. Thus, when applying the “discovery rule”, the Dunns’ claims accrued on September 29, 2003 when they admittedly became aware of the wrong allegedly perpetrated against them. Despite their knowledge, the Dunns waited until August 21, 2006 -- almost three years after they first learned that they had allegedly been wronged -- before they filed suit. See Complaint. Accordingly, their claims became time-barred on September 30, 2005, and the circuit court did not err by entering summary judgment in favor of Martin & Seibert on statute of limitations grounds.

B. EVEN IF THE DUNNS ARE GIVEN THE BENEFIT OF THE “CONTINUOUS REPRESENTATION” DOCTRINE, THEIR CLAIMS AGAINST MARTIN & SEIBERT ACCRUED ON APRIL 1, 2004 WHEN MR. ROCKWELL RETIRED FROM THE FIRM. THE CIRCUIT COURT DID NOT ERR FINDING THE “CONTINUOUS REPRESENTATION” DOCTRINE DOES NOT SAVE THE DUNNS’ CLAIMS AGAINST MARTIN & SEIBERT FROM BEING TIME-BARRED.

In response to Martin & Seibert’s Cross-Motion for Summary Judgment, the Dunns produced the incomplete and unexecuted 2005 Extension in an effort to toll the statute of limitations until the Spring 2005. In its March 6, 2008 Order, the circuit court found a genuine issue of material fact “concerning the unsigned document entitled ‘Extension Agreement’ and its posture in this matter.” See Order Denying Defendant’s Renewed Motion for Summary Judgment. Presumably, the circuit court found the dispute concerning the incomplete and unexecuted 2005 Extension to involve a genuine issue of material fact because the document, for the first time, raised the issue of “continuous representation” in this action.

Before the circuit court, the Dunns submitted the 2005 Extension in an effort to save their untimely claims from dismissal in reliance on the “continuous representation” doctrine. However, on appeal, the Dunns contend that the “continuous representation” doctrine is

immaterial to their claims against Martin & Seibert. See Appellant's Brief at 32. Perhaps they have changed their position because they recognize that: (1) they do not assert a legal malpractice claim against Martin & Seibert in this action, and (2) this Court has previously noted that the "continuous representation" doctrine only applies to legal malpractice claims. Smith v. Stacy, 482 S.E.2d 115, 124 (W.Va. 1996); Vansickle v. Kohout, 599 S.E.2d 856, 859 (W.Va. 2004).

The Dunns assert that Martin & Seibert cannot escape liability for the actions of Mr. Rockwell during his employment with the firm because they contend they did not discover Mr. Rockwell's alleged wrongs until after his departure from the firm. Id. The Dunns' argument mistakenly blurs the facts material to the merits of their *respondeat superior* claim and the facts material to the timeliness of their claims against Martin & Seibert. They again ignore their deposition testimony acknowledging that by September 29, 2003, they knew that Mrs. Rockwell had purchased the disputed real estate including the "pipestem" or "dog leg" strip of land which fronts the Shenandoah River and that by then, they knew "something was wrong." See MS - K. Dunn Depo. at 62, 64; see also MS - S. Dunn Depo. at 74; 111; see also MR - K. Dunn Continued Depo. at 60; see also MR - S. Dunn Continued Depo. at 35-36, 131; see also S. Dunn Continued Depo. at 18-19. They also ignore the undisputed fact that despite knowing of the wrong allegedly perpetrated on them, they chose to do nothing for almost three more years. Id. Accordingly, if one accepts the Dunns' position that the "continuous representation" doctrine is immaterial to the timeliness of their claims against Martin & Seibert, then the Dunns' claims accrued no later than September 29, 2003 when they knew that "something was wrong."

Even though they suggest that the "continuous representation" doctrine is immaterial to their claims against Martin & Seibert, the Dunns continue to rely upon the general proposition that the statute of limitations in a medical or legal malpractice action is tolled until the

professional relationship terminates. Syl. Pt. 6, Smith v. Stacy, 482 S.E.2d 115 (W.Va. 1996); Forshey v. Jackson, M.D., 2008 W.Va. LEXIS (Nov. 19, 2008). Given the factual nature of the Dunns' claim, it is doubtful whether the continuous representation doctrine even applies to them.

The continuous representation doctrine is an adaptation of the "continuous treatment" rule applied in the medical malpractice forum and is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice and providing uninterrupted service to the client. Smith, 482 S.E.2d at 120. It is also designed to prevent the attorney from defeating the client's cause of action through delay. Id. at 121.

All of the Dunns' claims in this lawsuit arise from Mrs. Rockwell's December 27, 2002 purchase of the disputed real estate and Mr. Rockwell's facilitation of her purchase. See MS — K. Dunn Depo. at 60-62. None of the Dunns' claims arise from an error attributed to Mr. Rockwell which Mr. Rockwell may have needed additional time to correct or which he may have needed additional time to minimize its effects. Accordingly, this is not a case where extending the statute of limitations was necessary to avoid disrupting the attorney-client relationship to allow Mr. Rockwell to attempt to correct an alleged error. Likewise, this case is not one where the attorney-client relationship was in need of protection to enable Mr. Rockwell to remedy the effects of his actions and provide uninterrupted service to Mr. Dunn. By September 29, 2003, when the Dunns discovered the Rockwell acquisition of the disputed real estate which they believed to be wrongful and knew that they had a potential dispute with the Rockwells about it, the relationship of trust between attorney and client effectively ended. Because the policy reasons underlying the application of the continuous representation doctrine are absent here, it is doubtful whether the "continuous representation" doctrine applies to the Dunns' claims.

Nevertheless, to the extent they seek to rely on the “continuous representation” doctrine, the Dunns ignore the critical fact that Mr. Rockwell’s employment with Martin & Seibert ended on March 31, 2004. See D. Rockwell Depo. at 13, 19, 40. The “continuous representation” doctrine does not toll the limitations period against a former law firm when an attorney leaves the firm and takes a client with him. Beal Bank, SSB v. Arter & Hadden, LLP, et al., 167 P.3d 666, 667 (Cal. 2007). Thus, to the extent that Martin & Seibert may have had an unknowing professional relationship with Mr. Dunn via Mr. Rockwell’s representation of Mr. Dunn, that relationship ended when Mr. Rockwell retired from the firm on April 1, 2004 and took Mr. Dunn with him as a client.⁵

Similar to West Virginia law, California law tolls the statute of limitations for attorney malpractice claims during an attorney’s continued representation of the client in the matter in which the alleged malpractice occurred. Beal Bank, SSB., 167 P.3d at 667. When tolling a statute of limitations for a legal malpractice claim, a balance must be struck between “the interests of clients, who should not be prevented from obtaining relief when they could not have become aware of professional negligence, and attorneys, who in order to obtain malpractice coverage needed some definite outside limitations period.” Id. at 671. The purposes of the “continuous representation” exception are “to avoid disruption of the attorney-client relationship by a lawsuit while enabling an attorney to correct or minimize an apparent error, and to prevent

⁵ In asserting a professional relationship with Martin & Seibert, the Dunns ignore the undisputed facts which establish that: (1) all actions taken by Mr. Rockwell to facilitate Mrs. Rockwell’s purchase of the disputed property were taken in his personal capacity; (2) Martin & Seibert had no knowledge of Mr. Rockwell’s alleged facilitation of his wife’s purchase of the disputed property until it was threatened with the filing of this lawsuit in 2006; and (3) Mr. Dunn knew that although Mr. Rockwell provided him with legal services regarding the Hoover Farmland, Mr. Dunn knew that he did so independently of Martin & Seibert. See MS - D. Rockwell Depo. at 184-185, 188-190, 193; MS - Exhibit 6, Affidavit of Walter M. Jones, III; MR - S. Dunn Depo. at 143. These undisputed facts establish that none of the actions taken by Mr. Rockwell as their counsel may be attributed to Martin & Seibert.

an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.” Id. Where an attorney has left a firm and taken a client with him, these purposes of the “continuous representation” doctrine are minimally implicated. In Beal Bank, the California Supreme Court specifically concluded:

When a lawyer leaves a firm and takes a client with him, the firm’s representation of the client ceases. There is no risk the firm will attempt to run out the clock on the statute of limitations by offering reassurances and blandishments about the state of the case. Conversely, the firm loses all ability to mitigate any damages to the client. Nor is there any ongoing firm-client relationship to disrupt.

Id.

Significantly, if a former attorney’s continued representation of a former client tolls the statute of limitations for an action against a firm, “exposure would extend indefinitely based on forces outside of the firm’s control,” and the uncertainty would lead to significant consequences concerning the cost and availability of liability insurance to law firms. Id. at 672. Limiting the exposure of former firms, however, will encourage current counsel to be forthright concerning any subsequent acts of malpractice as he will be forced to bear responsibility for those errors alone. Id. at 673. Thus, the Supreme Court of California held that after an attorney has left a firm and has taken a client with him, any continued representation by that attorney does not toll the statute of limitations for any claims against his former firm. Id. at 667.

Although Beal Bank is only persuasive authority, the policy concerns addressed by the California Supreme Court also apply to this action. As it had no control over the actions taken by Mr. Rockwell in his personal capacity to facilitate Mrs. Rockwell’s purchase of the disputed property, Martin & Seibert also had no control over Mr. Rockwell’s actions taken after he left its employment on April 1, 2004. Thus, Martin & Seibert had no ability to mitigate any damages caused by the alleged actions of Mr. Rockwell. Even if an unknown professional relationship existed between the Dunns and Martin & Seibert during Mr. Rockwell’s employment with the

firm, no such relationship continued with Martin & Seibert after Mr. Rockwell left the firm. Thus, a lawsuit between the Dunns and Martin & Seibert would not disrupt any client-firm or client-attorney relationship to the detriment of the legal representation being provided to the Dunns. Accordingly, the “continuous representation” doctrine should not be used to toll the statute of limitations applicable to the Dunns’ claims against Martin & Seibert after Mr. Rockwell’s retirement from the firm on April 1, 2004.

As a matter of law, regardless of whether Martin & Seibert employed Mr. Rockwell when he facilitated his wife’s purchase of the disputed real estate, no act or omission of Mr. Rockwell occurring after April 1, 2004 can be properly attributed to Martin & Seibert for purposes of tolling the statute of limitations. Even if Mr. Rockwell prepared the 2005 Extension Agreement, he did so more than a year after he retired from Martin & Seibert on April 1, 2004. See MS – Exhibit 9; see also D. Rockwell Depo. at 13, 19, 40. Thus, Mr. Rockwell’s alleged continued representation of Mr. Dunn more than a year after he left the firm can not be properly attributed to Martin & Seibert. Accordingly, the circuit court properly concluded that the “continuous representation” doctrine does not save the Dunns’ claims from being time-barred.

Applying the “discovery rule,” the Dunns’ claims accrued no later than September 29, 2003 and became time-barred on September 30, 2005. If the Dunns are given the benefit of the “continuous representation” doctrine, their claims against Martin & Seibert accrued on April 1, 2004 when Mr. Rockwell retired from the firm and became time-barred on April 2, 2006. Consequently, regardless of how the situation is viewed, the result is the same: the Dunns’ claims against Martin & Seibert are time-barred. Because the Dunns’ claims were filed more than two years after Mr. Rockwell retired from the firm, the circuit court correctly granted Martin & Seibert’s motion to alter or amend its March 6, 2008 order.

C. THE UNDISPUTED FACTS MATERIAL TO THE MERITS OF THE DUNNS' CLAIMS AGAINST MARTIN & SEIBERT ESTABLISH THAT THE ACTIONS TAKEN BY MR. ROCKWELL TO FACILITATE HIS WIFE'S PURCHASE OF THE DISPUTED REAL ESTATE WERE TAKEN IN HIS PERSONAL CAPACITY AND THAT MR. DUNN KNEW THAT MR. ROCKWELL ACTED INDEPENDENT OF MARTIN & SEIBERT WHEN PROVIDING LEGAL SERVICES TO HIM CONCERNING THE HOOVER FARMLAND. THUS, THE CIRCUIT COURT DID NOT ERR BY FINDING THAT THE DUNNS' CLAIMS AGAINST MARTIN & SEIBERT FAIL AS A MATTER OF LAW.

The Dunns have asserted three claims against Martin & Seibert in this action: (1) *respondeat superior*, (2) negligent supervision, and (3) breach of fiduciary duty arising from *Rules of Professional Conduct*. Although it did not need to reach the merits of the Dunns' claims against Martin & Seibert because all claims are barred by the statute of limitations, the circuit court nevertheless properly granted summary judgment in favor of Martin & Seibert on the merits of the Dunns' claims as the material facts are undisputed.

Where the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, then the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Williams, 459 S.E.2d 329. A party opposing a summary judgment motion may not rest upon the allegations contained in his pleadings, but rather must carry his burden to set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson, 477 U.S. 242; Celotex Corp. v. Catrett, 477 U.S. 317 (1986). As a result, summary judgment cannot be defeated on the basis of factual assertions contained in the brief of

the party opposing a motion for summary judgment and mere general allegations will not prevent the award of summary judgment. Guthrie v. Northwestern Mutual Life Insurance Company, 208 S.E.2d 60 (W.Va. 1974); Johnson v. McKee Baking Company, 398 F. Supp. 201 (W.Va. 1975), aff'd, 532 F.2d 750 (4th Cir. 1976).

The mere contention that issues are disputable is not sufficient to deter the trial court from the award of summary judgment. Brady v. Reiner, 198 S.E.2d 812 (W.Va. 1973), overruled on other grounds, Board of Church Extension v. Eads, 230 S.E.2d 911 (W.Va. 1976). Evidence opposing a summary judgment motion must consist of facts which are material, meaning that they might affect the outcome of the suit under applicable law, as well as genuine, meaning that they create fair doubt rather than encourage mere speculation. Panrell v. UMW, 872 F. Supp. 1502 (N.D. W.Va. 1995). General allegations and mere speculation will not defeat a summary judgment motion. Panrell, 872 F. Supp. 1502; Johnson, 398 F. Supp. 201 (W.D. Va. 1975), aff'd, 532 F.2d 750 (4th Cir. 1976); CSX Transp., Inc., v. Madison Group, Inc., 42 F. Supp. 2d 624 (S. D. W.Va. 1999). A party opposing summary judgment must therefore offer more than a mere "scintilla of evidence," and must produce evidence sufficient for a reasonable jury to find in the non-moving party's favor. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

When considering a motion for summary judgment, a court must draw all permissible inferences from the underlying facts in the light most favorable to the nonmoving party. Matsushita, 475 U.S. at 587-88. Permissible inferences must be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture. See Anderson, 477 U.S. at 248- 252; see also Belcher, 568 S.E.2d at 28. Thus, to withstand such a motion, the nonmoving party must offer evidence from which "a fair-minded jury could return a verdict for the [party]." Anderson, 477 U.S. at 252.

A party opposing summary judgment must therefore satisfy its burden by offering more than a mere "scintilla" of evidence on which a reasonable jury could rely and find in its favor. Anderson, 477 U.S. at 252. As a result, an apparent dispute is not "genuine" within the contemplation of the summary judgment rule unless the non-movant's theory of the case is supported by sufficient evidence to permit a reasonable jury to find the facts in its favor. Anderson, 47 U.S. at 248-49.

The Dunns contend that the circuit court misinterpreted the evidence proffered by Martin & Seibert and totally ignored the undisputed evidence supporting their claims. See Appellant's Brief at 33-36. The totality of the evidence which the Dunns claim the circuit court ignored consists of the deed Mr. Rockwell prepared for his wife's purchase of the disputed real estate stating the "deed was prepared by Douglas S. Rockwell of Martin & Seibert" and the closing for Mrs. Rockwell's purchase of the disputed real estate occurring at the offices of Martin & Seibert in Charles Town, West Virginia. See Id. From these facts, one could easily and reasonably infer that Martin & Seibert employed Mr. Rockwell during the relevant time period, something which Martin & Seibert has never disputed. But an employment relationship between Mr. Rockwell and Martin & Seibert alone is insufficient to give rise to vicarious liability.

The doctrine of *respondeat superior* derives from the proposition that one who expects to obtain advantage from an act which is done for him by another must answer for an injury sustained by a third person as a result of that act. Wills v. Montfair Gas Coal Co., 138 S.E. 749 (W.Va. 1927). An employer is liable for the tortious acts of an employee committed while the employee is acting within the scope of his employment. Gregory v. Ohio River R. Co., 16 S.E. 819 (W.Va. 1893), overruled in part on other grounds by, State v. Bragg, 87 S.E.2d 689 (W.Va. 1955). An employer is not, however, liable for the tortious acts of an employee which are performed outside the scope of his employment. Pruitt v. Watson, 138 S.E. 331 (W.Va. 1927).

Accordingly, the fundamental rule in West Virginia is that a principal is liable for the tortious acts of its agent if: 1) the alleged agent was, in fact, an agent of the principal at the time of the commission of the tort, and 2) the agent was acting within the scope of his employment when he committed the tort. Barath v. Performance Trucking Co., Inc., 424 S.E.2d 602, 605 (W.Va. 1992). The scope of employment includes any conduct by an officer, agent, or employee in the furtherance of the employer's business. Travis v. Alcon Laboratories, Inc., 504 S.E.2d 419, 431 (W.Va. 1998). The undisputed material facts fail to establish that Mr. Rockwell's facilitation of his wife's purchase of the disputed real estate occurred in furtherance of the business of Martin & Seibert.

Mr. Rockwell admits that all the actions he took to facilitate his wife's purchase of the disputed real estate were taken in his personal capacity. See MS - D. Rockwell Depo. at 184-185, 188-190, 193. Although Mr. Rockwell facilitated his wife's purchase of the disputed real estate while he was employed by Martin & Seibert, he did not open a client file regarding her purchase of it. See MS - Exhibit 6, Affidavit of Walter M. Jones, III. Since no client file was created, no matter conflict of interest determination was made and no professional time or related expenses were recorded by Mr. Rockwell or billed to his spouse. See Id. Martin & Seibert had no knowledge of Mr. Rockwell's alleged facilitation of his wife's purchase of the disputed real estate until it was threatened with the filing of this lawsuit in June or July of 2006. See Id.

With regard to his representation of Mr. Dunn, Mr. Rockwell prepared the 2002 Option, the Extension, and the 2003 Option while he was employed by Martin & Seibert. See MS - Walter M. Jones, III Depo. at 91. Martin & Seibert's records, however, show that Mr. Dunn was a client of the firm on only two occasions. See MS - Jones Depo. at 90. Neither occasion related to the preparation of the 2002 Option, the Extension, or the 2003 Option. See MS - Jones Depo. at 29, 68, 90. Mr. Rockwell prepared the 2002 Option, the Extension, and the 2003 Option

without opening a Martin & Seibert client file and without the firm's knowledge. See MS - Jones Depo. at 90; see also MS - Exhibit 6, Jones Affidavit. No professional time or expenses were recorded by Mr. Rockwell or billed to Mr. Dunn. See MS- Exhibit 6, Jones Affidavit. Martin & Seibert had no knowledge of Mr. Rockwell's personal dealings with Mr. Dunn concerning the Hoover Farmland until Mr. Dunn threatened the filing of this lawsuit in June or July of 2006. Id. Significantly, although he received legal services from Mr. Rockwell concerning the Hoover Farmland, Mr. Dunn knew that Mr. Rockwell was providing these services independently of Martin & Seibert. See MR - S. Dunn Depo. at 143.

The Dunns nevertheless assert that the circuit court relied on incorrect facts, apparently those provided by Mr. Rockwell at his deposition and Mr. Jones in his affidavit, to improperly conclude that their claims were without merit. See Appellant's Brief at 34-35. In an effort to address Mr. Rockwell's undisputed testimony which refutes their *respondeat superior* claim, the Dunns offer nothing more than an allegation that Mr. Rockwell's testimony is "self serving." Id. Testimony of a former employee which implicates himself and exonerates his former employer can hardly be reasonably characterized as "self-serving." Nevertheless, in response to Mr. Rockwell's testimony, the Dunns offer only unsubstantiated speculation and conjecture and still advance no evidence to demonstrate that Mr. Rockwell's facilitation of his wife's purchase of the disputed real estate somehow benefitted his employer, Martin & Seibert.

The Dunns also ignore Mr. Dunns' acknowledgement that, although Mr. Rockwell provided him with legal services regarding the Hoover Farmland, Mr. Dunn knew that Mr. Rockwell was doing so independently of Martin & Seibert. See MR - S. Dunn Depo. at 143. The deposition testimony of Mr. Rockwell and Mr. Dunn demonstrate that the actions taken by Mr. Rockwell in representing Mr. Dunn concerning the Hoover property were not taken in furtherance of Martin & Seibert's business. The undisputed evidence also makes clear that Mr.

Rockwell's facilitation of his wife's purchase of the disputed property was not taken in furtherance of Martin & Seibert's business. Accordingly, the mere "scintilla of evidence" relied on by the Dunns in this appeal cannot defeat summary judgment. Therefore, the circuit court properly granted summary judgment in favor of Martin & Seibert on the merits of the Dunns' *respondeat superior* claim.

The Dunns may not properly seek to hold Martin & Seibert liable for failing to adequately supervise Mr. Rockwell's actions in a purely personal transaction which Martin & Seibert had no reason to monitor. With regard to the Dunns' negligent supervision claim, an employer may be liable for negligent supervision only if (1) an employee committed a wrongful act resulting in injury to a plaintiff; (2) prior to the act, the employer knew or had reason to know of the employee's propensity for the particular conduct in question and (3) the employer failed to take reasonably prudent steps to prevent the subsequent negligent conduct of the employee. See Keyser Canning Co. vs. Klots Throwing Co., 118 S.E. 521, 527 (W.Va. 1923); see also Smith v. First Union National Bank, 202 F.3d. 234, 249-50 (4th Cir. 2000). Mr. Rockwell conceded that the actions taken by him to facilitate his wife's purchase of the disputed property were taken in a personal capacity. See MS – D. Rockwell Depo. at 184-85, 188-90, 193. Mr. Dunn also conceded that when Mr. Rockwell provided him with legal services regarding the Hoover Farmland, he understood that Mr. Rockwell was acting independently of Martin & Seibert. See MR - S. Dunn Depo. at 143. Martin & Seibert had no knowledge of Mr. Rockwell's alleged facilitation of his wife's purchase of the disputed real estate until it was threatened with the filing of this lawsuit in June or July of 2006. See MS- Exhibit 6, Jones Affidavit. Martin & Seibert also had no knowledge of Mr. Rockwell's personal dealings with Mr. Dunn concerning the property referred to in this lawsuit until it was threatened with the filing of this lawsuit in June or

July of 2006. Id. Thus, the undisputed evidence which defeats the Dunns' *respondeat superior* claim also defeats the Dunns' negligent supervision claim.

Furthermore, during his more than six year tenure with the firm, not once did Martin & Seibert receive a complaint about Mr. Rockwell's performance. See MS - Jones Depo. at 93. Absent such knowledge, the firm cannot properly be held liable for allegedly negligently supervising Mr. Rockwell. See Smith v. First Union National Bank, 202 F.3d 234 (4th Cir. 2000). In the case *sub judice*, the undisputed facts fail to establish that Martin & Seibert knew or had reason to know of Mr. Rockwell's alleged propensity to behave in a negligent or otherwise wrongful manner before the Dunns' claimed injury. The undisputed facts also fail to establish that Martin & Seibert could have or should have known that a conflict could develop between Mr. Rockwell and Mr. Dunn - - as a firm client. Therefore, the circuit court properly granted summary judgment in favor of Martin & Seibert on the Dunns' negligent supervision claim.

A similar analysis applies to the Dunns' claim of breach of the breach of fiduciary duty arising from the *Rules of Professional Conduct* ("*Rules*"). The Dunns claim that Martin & Seibert breached Rule 5.1 of the *Rules* and a supposed fiduciary duty owed to them by failing to properly supervise Mr. Rockwell to insure his compliance with Rule 1.8 of the *Rules*. They make this claim even though, as discussed above, Martin & Seibert had no knowledge of the actions it supposedly needed to supervise. Rule 5.1 imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers to oversee the conduct of lawyers within the firm or organization, but does so without introducing vicarious liability to a law firm. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998 229 (1999); Model Rules of Professional Conduct R. 5.1 cmt. [7] (2002) ("[w]hether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules"); see also In re

Anonymous, 552 S.E.2d 10 (S.C.2001) (Rule 5.1 violation does not involve issue of vicarious liability); Stewart v. Coffman, 748 P.2d 579 (Utah Ct.App.1988) (rejecting argument that Rule 5.1 creates vicarious liability for shareholder lawyers).

Before even reaching Rule 5.1 and the issue of vicarious liability, however, it must be noted that the *Rules* do not give rise to a private cause of action. The *Rules* were promulgated and adopted by the Supreme Court of Appeals on June 30, 1988, and became effective on or after January 1, 1989. The *Rules* “define proper conduct for purposes of professional discipline.” See Rules, Scope. “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” Id.

Importantly, the *Rules* also state:

Violation of a Rule should **not** give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are . . . **not** designed to be a basis for civil liability . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

See Rules, Scope (emphasis added).

In Delaware CWC Corp. v. Martin, 584 S.E.2d 473, 479 (W.Va. 2003), this Court commented on the distinction between conduct which violates the *Rules* and conduct which gives rise to civil liability. Commenting on an attorney’s duty to perform all acts necessary to protect, conserve, and advance his client’s interests, the court stated, “[a]n attorney who deviates from this duty is subject to disciplinary action, see Rules of Professional Conduct, and/or civil liability, the latter of which may be pursued only by a client injured by his counsel’s negligence or malfeasance.” In Clark v. Druckman, 624 S.E.2d 864, 868 (W.Va. 2005), the Court reiterated that deviation from the *Rules*, by itself, is not a basis for civil liability and, for civil liability to

attach, negligence or malfeasance must be proven.⁶ Therefore, in West Virginia, an alleged violation of an ethics rule is not an independent basis for a cause of action or for the imposition of civil liability. Consequently, because the Dunns' claim for breach of fiduciary duty/breach of the *Rules of Professional Conduct* has no legal basis, the circuit court properly granted summary judgment in favor of Martin & Seibert on it. But even if it had a legal basis, it would still fail for lack of proof for the same reason that the Dunns' negligent supervision claim fails.

V. PRAYER FOR RELIEF

The undisputed facts material to the timeliness of the Dunns' claims establish that by September 29, 2003 the Dunns were aware "something was wrong" and that they had a potential

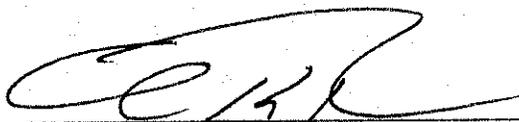
⁶ West Virginia's recognition that the violation of a rule of ethics is not, by itself, a basis for civil liability is consistent with other jurisdictions. See Astarte, Inc. v. Pac. Indus. Sys., Inc., 865 F.Supp. 693 (D. Colo. 1994) (under Colorado law, ethics codes for lawyers neither prescribe civil liability standards nor create private causes of action); Coleman v. Hicks, 433 S.E.2d 621 (Ga. 1993) (rejecting attempt to base legal malpractice claim upon allegation that lawyers' excessive fees violated Code of Professional Conduct); Nagy v. Beckley, 578 N.E.2d 1134 (Ill. App. Ct. 1991) (no cause of action for "ethical malpractice" separate from legal malpractice claim; ethics rules are not an "independent form of tort liability"); Baxt v. Liloia, 714 A.2d 271 (N.J. 1998) (declining to hold that Rules of Professional Conduct "in themselves create a duty or that a violation of the [Rules], standing alone, can form the basis for a cause of action"); Maritrans G.P. Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992) ("simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable, in damages or for injunctive relief"); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) (conduct that violates Code does not necessarily breach a duty to the client and therefore will not necessarily constitute actionable malpractice); see also Schatz v. Rosenberg, 943 F.2d 485 (4th Cir.1991) (rejecting securities fraud claim based upon law firm's failure to either withdraw from representing client or to disclose his financial misrepresentations to plaintiff investors and stating "the ethical rules do not create a duty of disclosure.... [P]laintiffs cannot base a securities fraud or other misrepresentation claim on a violation of an ethical rule."); Gagne v. Vaccaro, 766 A.2d 416 (Conn. 2001) (violation of ethics rule does not create presumption that legal duty was breached); Smith v. Bateman Graham P.A., 680 So.2d 497 (Fla. Dist. Ct. App.1996) (lawyer's alleged unethical conduct in soliciting clients of firm from which he was resigning could not be basis for injunction against further solicitation); see also Wilbourn v. Stennett, Wilkinson & Ward, 687 So.2d 1205 (Miss. 1996) (affirming summary judgment for defendants and stating "The Code of Professional Conduct is not used as a measuring stick to determine civil liability for legal malpractice. It is incumbent [upon the plaintiff] to show the harm and resulting damage from the harm to establish liability.")

dispute with the Rockwells regarding Mrs. Rockwell's purchase of the disputed property, including the "pipestem" or "dog leg" strip of land which fronts the Shenandoah River. Thus, the Dunns' claims against Martin & Seibert are barred by the statute of limitations. The undisputed facts material to the merits of the Dunns' claims against Martin & Seibert also establish that the actions taken by Mr. Rockwell to facilitate his wife's purchase of the disputed property were taken in his personal capacity and that although Mr. Rockwell may have provided Mr. Dunn with legal services regarding the Hoover Farmland, Mr. Dunn knew that Mr. Rockwell was doing so independently of Martin & Seibert. Thus, the Dunns' claims against Martin & Seibert fail as a matter of law. Therefore, Martin & Seibert requests that the circuit court's June 16, 2008 Order granting Martin & Seibert's Motion to Alter or Amend its March 6, 2008 order as amended by its March 14, 2008 order denying Martin & Seibert's Renewed Motion for Summary Judgment be affirmed.

Respectfully Submitted,

MARTIN & SEIBERT, L.C.

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APPEAL NO. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

v.

Civil Action No.: 06-C-282
Circuit Court Judge David H. Sanders
Circuit Court of Jefferson County,
West Virginia

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

Appellees.

CERTIFICATE OF SERVICE

The undersigned, Counsel for the Defendant, Martin & Seibert, L.C., does hereby certify that on this 2nd day of April, 2009, he did serve the foregoing **RESPONSE BRIEF OF APPELLEE, MARTIN & SEIBERT, L.C.**, upon the below named persons by placing a true copy of the same in the United States mail, postage pre-paid, addressed as follows:

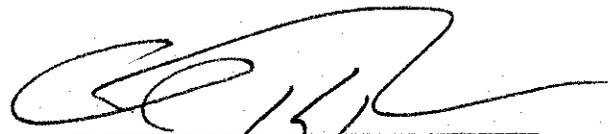
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