

NO. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

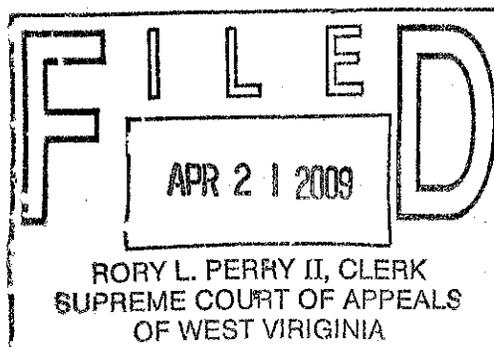
STANLEY W. DUNN, JR., and
KATHERINE B. DUNN,

Plaintiffs Below/Appellants,

v.

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

Defendants Below/Appellees.



**REPLY BRIEF ON BEHALF OF THE APPELLANTS, STANLEY W. DUNN, JR. AND
KATHERINE B. DUNN, IN SUPPORT OF THEIR PETITION FOR APPEAL¹**

James A. Varner, Sr. (WV State Bar # 3853)
Debra Tedeschi Herron (WV State Bar #6501)
McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035

William Francis Xavier Becker (State Bar #5238)
PNC Bank Building
260 East Jefferson Street, Second Floor
Rockville, MD 20850
Telephone: (301) 340-6966
Facsimile: (301) 309-6653
Co-Counsel for Appellants

¹ Although each of the Appellees, Carol Rockwell and Martin & Seibert, L.C., filed separate responses to the Brief On Behalf of the Appellants Stanley W. Dunn, Jr. and Kathleen B. Dunn, In Support of Their Petition for Appeal, the Appellants, in the interest of judicial economy and brevity, will address both responses in one reply.

TABLE OF CONTENTS

STATEMENT OF FACTS 1

DISCUSSION 4

 I. The Course of Conduct of Concealment Committed By the Counselor and his
 Co-Conspirator Precludes the Invocation of the Defenses of Laches and
 Limitations. 4

 II. Monetary Damages and Equitable Relief Are Both Warranted. 7

 III. The Absence of Awareness or Benefit Does Not Relieve the Master for the
 Wrongdoings of His Servant. 9

 IV. The Subsequently Discovered Wrongs, Even with the Intervening Retirement
 of the Wrongdoer, Does Not Insulate the Master from the Wrongs Committed
 by the Servant During the Term of His Employment. 13

PRAYER FOR RELIEF 13

TABLE OF AUTHORITIES

CASES

Bailey v. Vaughan,
178 W.Va. 371, 359 S.E.2d 599 (1987) 6

Bostic v. Amoco Oil Co.,
553 F.2d 329 (4th Cir. 1977) 9

Gaither v. City Hosp., Inc.,
199 W. Va. 706, 487 S.E.2d 901 (1997) 4

Gregory's Adm'r. v. Ohio River R. Co., 37 W. Va. 606, 16 S.E. 819 (1893),
overruled in part on other grounds,
State v. Bragg, 140 W. Va. 585, 87 S.E. 689 (1955) 0 W. Va. 585, 87 10

McCoy v. Miller,
213 W. Va. 161, 578 S.E.2d 355 (2003) 4, 5

Office of Disciplinary Counsel v. Battistelli,
193 W.Va. 629, 457 S.E.2d 652 (1995) 11

Petrelli Coal Co. v. Petrelli,
99 W.Va. 72, 127 S.E. 915 (1925) 8

Politino v. Azzon, Inc.,
212 W. Va. 200, 569 S.E.2d 447 (2002) 9

The Committee on Legal Ethics of the West Virginia State Bar v. Cometti,
189 W.Va. 262, 430 S.E.2d 320 (1993) 12

U.S.A. v. Colton,
231 F.3d 890 (4th Cir. 2000) 6

OTHER AUTHORITIES

16 Am. Jur. 2d *Conspiracy* § 66 9

37 Am. Jur. 2d *Fraud and Deceit* § 314 9

66 Am. Jur. 2d *Reformation of Instruments* §58 7

Blackstone's Commentaries on the Law,
Gavit, Bernard C. (Editor), p. 182 (Washington Law Book Co. 1941) 10

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

STATEMENT OF FACTS

In her statement of facts, Carol Rockwell recites a series of “facts,” noted in docket entry 00658, which she claims to be undisputed. Missing, however, from the Carol Rockwell statement of facts is any reference to the basis for such facts, or reference to any document, other than the docket entry 00658, which supports the unverified assertion.

Despite Carol Rockwell’s claim to the contrary, the June 27, 2002 Option did not expire, but rather, by the conduct and subsequent agreements of the parties, the June 27, 2002 Option was extended. Moreover, Hugh Hoover (“Hoover”), despite Carol Rockwell’s statement to the contrary, did not refuse to sign another extension agreement, nor did Hoover insist upon a new option agreement with different terms, including an increase in the price per acre.

The accurate factual background is found within the last Hugh Hoover affidavit, which states:

[t]hat throughout the time periods of the various Option Agreements between me and my sister, Dianne L. Gray, with Stanley W. Dunn, Jr., I did not press or seek to strictly enforce any due dates as mentioned in the Agreements. The reason was that I was willing to work with Mr. Dunn and his wife for their purchase of the property.

See February 15, 2008 Affidavit of Hugh Hoover, ¶ 1² Thus, Hugh Hoover never refused to sign an extension agreement as stated by Carol Rockwell. Such an assertion by Carol Rockwell is not supported by the facts.

Moreover, despite Carol Rockwell’s unsupported “undisputed fact,” it was Stanley Dunn who insisted on the increased price per acre, represent as increased consideration for the extended option. This position is fully consistent with the previous increase per acre piece from \$5,500.00 to \$6,000.00 which Stanley Dunn described as being done “to keep his [Mr. Hoover’s] attention and

² This Affidavit of Hugh Hoover was executed by Hugh Hoover after review by his counsel, John Dorsey, Esquire, as contrasted with those earlier Hoover affidavits prepared by counsel for Carol Rockwell.

keep my contract going to do a like-kind trade, and land seemed to be getting more valuable and people were making offers all of the county.” *See p. 52 of the January 8, 2007 Deposition of Stanley Dunn.*

Although skirted by Carol Rockwell, what is undisputed is that the fact that the 6.87 acre tract which she ultimately secured was included in the series of option agreements between the Dunns and Hoover. In order get around the improper extraction of the 6.87 acre tract, Carol Rockwell, despite Hoover’s statements to the contrary, insists that the June 27, 2002 Option “expired” and a new option was created on August 25, 2003. According to Carol Rockwell’s theory of the case, when the August 2003 Option was created, the 6.87 acre tract had been removed. Thus, Carol Rockwell offers the unsupported proposition that the August 2003 Option did not include the 6.87 acre tract.

This “undisputed fact” is clearly inaccurate in light of Hoover’s testimony wherein in he stated, “[t]hat throughout the time periods of the various Option Agreements between me and my sister, Dianne L. Gray, with Stanley W. Dunn, Jr., I did not press or seek to strictly enforce any due dates as mentioned in the Agreements. The reason was that I was willing to work with Mr. Dunn and his wife for their purchase of the property.” *See February 15, 2008 Affidavit of Hugh Hoover,* ¶ 1.

Carol Rockwell’s use of the selectively chosen verb “expire” is simply her theory of the case in which she seeks to avoid accountability for her own wrongful conduct. Such a theory is artfully inaccurate. Rather, the facts present a circumstance of a series of sequential option agreements always requiring full disclosure by Douglas S. Rockwell of precisely what land he had extracted. By using the verb “expire,” Carol Rockwell seeks to deftly deny the affirmative duty due of her co-conspirator, Douglas S. Rockwell, to fully disclose in writing to his client, Stanley Durnn, that the larger tract subject to the sequential option agreements was now 6.87 acres less.

This affirmative duty due of the lawyer to fully disclose in writing that which he has done, contrary to the interest of his client, cannot simply be avoided with the arrival of an expiration date on an option agreement prepared by the wrongdoing attorney.

In a further attempt to justify her actions, Carol Rockwell suggests that it is undisputed that the “inside red lines” on the map attached to the June 27, 2002 Option Agreement ran along the inboard side of the Rockwell right-of-way and did not include the land adjoining the riverbank. However, the red-line map was done in the very beginning of negotiations between the Dunns and Hoover. At that time, these non-surveyors did not know the exact location of the boundary of the property near the riverbank. In further negotiations about the rough hillside, Hoover informed Dunn that the road along red line of map was only a right away and Dunn would be purchasing all the way to the river. This is consistent with Hoover’s Affidavit regarding the 6.87 acre tract. According to Hoover,

[m]y sister and I sold a parcel of real estate to Carol K. Rockwell by deed dated December 27, 2002, and recorded in the Office of the Clerk of the County Commission of Jefferson County, West Virginia, in Deed Book 968, at Page 708. This parcel was described in a plat attached to the aforesaid deed, and contained 6.87 acres, more or less. I did not know the exact lines along or near the Shenandoah River until I saw the plat attached to the deed that I signed on December 27, 2002. At least a portion, and perhaps all, of this parcel was subject o the Option Agreement dated June 27, 2002, with Stanley W. Dunn, Jr., prior to my conveyance to Carol K. Rockwell on December 27, 2002....

See February 15, 2008 Affidavit of Hugh Hoover, ¶ 8; emphasis added.

In further support of her “statements of fact,” Carol Rockwell references the earlier Affidavits of Hugh Hoover and his sister, Dianna Gray. It should be noted with much emphasis that these separate affidavits were prepared by Carol Rockwell’s counsel. More importantly, however, the statements upon which Carol Rockwell relies to support her entitlement to summary judgment are inconsistent with the later affidavit of Hugh Hoover. As such, these statements most definitely create material issues of disputed material fact, thus rendering summary judgment inappropriate.

DISCUSSION

I. The Course of Conduct of Concealment Committed By the Counselor and his Co-Conspirator Precludes the Invocation of the Defenses of Laches and Limitations.

In support of the granting of summary judgment in their favor, Carol Rockwell and Martin & Seibert argue that all of the Appellants' claims are barred by the applicable two-year statute of limitations. According to Carol Rockwell, the Appellants' cause of action was barred as of December, 2004. Within the same argument, Carol Rockwell asserts that, at the very latest, the statute of limitations expired in September, 2005, as the Dunns knew of the "approximate location" of the Rockwell purchase at that time. *See Brief of Appellee Carol Rockwell, p. 20.*

Martin & Seibert, in its response, makes the same argument, noting that the Dunns knew, at that time, that "something was wrong." *See Response Brief of Appellee, Martin & Seibert, L.C., pp. 12, 15, 17, 18, 19, 20, 22, 23, and 24.* Thus, according to the Appellees, the Dunns' claims are barred by the applicable statute of limitations.

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). 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.*³

Utilizing the words of Carol Rockwell, claiming that the Dunns knew only of the "approximate location" of the Rockwell purchase in 2003, Carol Rockwell insists that because of this awareness, the statute of limitations began to run at that time, thus expiring in 2005. The distracting technique of the Appellees to divert attention away from the affirmative duty of the

³ The Circuit Court is not to weigh the evidence and determine the truth of the matter. *See Kasserman and Bowman, PLLC v. Cline*, ___ W.Va. ___, ___ S.E.2d ___, 2009 W.Va. LEXIS 20, No. 34140, slip op. at p. 4 (27 March 2009).

attorney to fully disclose in writing to the client all of the adequate information about the transaction cannot be utilized now to inhibit the presentation of the Appellants' claims, when the complete information about the misappropriation was not fully disclosed.

In fact, in their respective briefs, the Appellees fail to dispute those material facts about the acquisition that Douglas S. Rockwell did not disclose. 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 property acquired by the Rockwells*. See June 16, 2008 Order. In fact, Carol Rockwell recognized that the Dunns knew only of the approximate location of the property. Yet, according to Carol Rockwell's position, such approximation is enough to warrant an absolute summary judgment in her favor.

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. Note the acquiring parties, the Rockwells, never informed the Dunns of this material fact, that being, the precise size and location of the parcel the Rockwells acquired. Thus, at the very least, the statute of limitations could not begin to run until the fall, 2005, when the Dunns first learned of the precise size and location of the 6.87 acre tract.

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). 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 fully disclose in writing*

precisely what he had done. As noted by this Court, "... we believe, that in special circumstances, the common law of this state should recognize a fiduciary duty to disclose material information..." *Bailey v. Vaughan*, 178 W.Va. 371, 359 S.E.2d 599, 600 (1987) (failure of a director to disclose material issues regarding the value of corporate shares, which precluded summary judgment).

There is no more special circumstance than an attorney-client relationship. As such, the Dunns should not be required to go behind their trusted advisor and long time friend's back and ask the question: What have you done to me? Nor, should the Dunns be required to affirmatively take action to identify what Rockwell had done. In essence, the Appellees and the circuit court would have this Court shift the affirmative duty of the attorney to fully disclose in writing all adequate information about his self dealing with the client to a duty now imposed upon the clients, the Dunns, to determine how and when they were wronged by their own attorney.

This breach of an affirmative duty due of Douglas S. Rockwell constitutes the fraudulent concealment that tolls any limitations period. Although silence as to a material fact (nondisclosure), without an independent disclosure duty,⁴ usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does. *U.S.A. v. Colton*, 231 F.3d 890 (4th Cir. 2000) *citing Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388, 9 S.Ct. 101, 32 L.Ed.439 (1888).

As noted in detail within page 7 of the Appellants' initial brief, at no time did Douglas S. Rockwell fulfill his affirmative duty in writing to his clients regarding disclosure of the precise size and location of the ground acquired by the Rockwells from Hoover. As counsel to Stanley and Katherine Dunn, Douglas S. Rockwell *repeatedly* failed to fully disclose to his clients precisely what he extracted, in his wife's name, from within the Hoover tract.

⁴ Without any question, the attorney-client relationship existed between the Dunns and Douglas S. Rockwell. Rockwell's duty to fully disclose in writing all material facts to his clients, the Dunns, about the transaction is absolute. There shall be no shortcuts to this on the basis of an awareness of "appropriate location" of the parcel, or an awareness that "something was wrong."

In response to the Dunns' argument, Martin & Seibert contends that for the first time, the Dunns argue that the statute of limitations did not begin running until they actually exercised their Option in November, 2005. The application of the statute of limitations has been argued in this case at length. Thus, the argument that the Dunns have raised the same for the first time must be disregarded.

Given the arguments noted above, as well as those expressed fully in the Appellants' initial brief, the Orders of the circuit court granting summary judgment in favor of Carol Rockwell and Martin & Seibert must be reversed.

II. Monetary Damages and Equitable Relief Are Both Warranted.

It is without question that the tort claims asserted by the Dunns contain claims for monetary relief in the form of both compensatory and punitive damages. It is also without question, that the Dunns seek equitable relief for the reformation of the Rockwells' ill-gotten 6.87 acre parcel. "Following the general rule, to be entitled to reform a deed one must be a party to or in privity with a party to the deed. Applying the rule, a suit to reform a deed may be brought by the grantor, the grantee, or the mortgagee. Those in privity with the original parties are entitled to reformation, if circumstances have not intervened rendering such relief inequitable." 66 Am. Jur. 2d *Reformation of Instruments* §58.

In support of her argument that the Dunns cannot sustain their equitable claims, Carol Rockwell asserts that the Dunns were not even parties to the deed which they seek to rescind or reform. It is without question that the Dunns were in direct privity with the Hoovers (the grantors) with their option agreements at the time that the Rockwell deed was executed. In fact, as acknowledged by Carol Rockwell, Douglas S. Rockwell sought permission for Stanley Dunn to "square off" his property. Such permission, in and of itself, constitutes the recognition that the Rockwell acquisition of the 6.87 acre parcel was exclusively through the Dunn option, with the Dunns being in direct privity with Hoover and Gray.

In further support of her opposition to rescission, Carol Rockwell asserts that rescission is not proper as the Hoovers are not parties to the instant civil action, thus preventing the Court from being able to restore the parties to their original position. This is not the case. In the instant civil action, Hoover can be restored to his position, as he maintains the consideration for the 6.87 acre parcel. The Dunns, who were to obtain the 6.87 acre parcel pursuant to the Option Agreement by way of the equitable remedy of rescission, would be returned the land as intended. Douglas S. Rockwell should not be permitted to take advantage of his own wrongdoing, nor, should he be permitted to benefit from that wrongdoing. As noted by this Court in *Petrelli Coal Co. v. Petrelli*, 99 W.Va. 72, 127 S.E. 915 (1925), a promoter may be compelled to disgorge the fruits of his fraudulent transaction.

The Appellees' argument against reformation also fails because the Dunns are in direct privity with Hoover. Given this direct privity, it is not required that Hoover be made a party to the reformation as proper relief can be afforded to Dunns as the party in direct privity with the Grantor. Despite arguments to the contrary, Carol Rockwell acknowledges that rescission and damages are permitted under controlling West Virginia law when fraud is proven by a plaintiff. Carol Rockwell argues, however, that there is no evidence to support a claim for fraud against her. Such an assertion is incorrect.

From the onset, beginning with the filing of their complaint, the Dunns asserted that all of the actions taken by the defendant, Douglas S. Rockwell, were done with the knowledge, participation and on behalf of Carol K. Rockwell. Moreover, the Dunns asserted that Carol K. Rockwell benefitted from the actions of Douglas S. Rockwell. See *Plaintiffs' Complaint*, ¶¶16-18. In addition, Count I of the Plaintiffs' Complaint sets forth the civil conspiracy claims against Carol Rockwell. The instrumentality of the attorney's fraud, Carol Rockwell, shall not escape liability for her husband's wrongdoing, when she acted in concert with such wrongdoing. These claims may include the claim for breach of fiduciary duty against Carol Rockwell.

In the instant civil action, 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 only with 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 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. See *Bostic v. Amoco Oil Co.*, 553 F.2d 329 (4th Cir. 1977). These same facts should permit the Dunns' claim of unjust enrichment to move forward. Accordingly, the circuit court's Orders granting summary judgment to the defendants should be reversed.

III. The Absence of Awareness or Benefit Does Not Relieve the Master for the Wrongdoings of His Servant.

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. "The principal is responsible for his agent's fraud or misrepresentation even though he may have personally received no benefits therefrom, and it is of no consequence that the agent acts entirely for his own purposes and commits a fraud solely for his own benefit, if it is within the actual or apparent scope of his employment." 37 Am. Jur. 2d *Fraud and Deceit* § 314.

Interpreting the master's responsibility, it has been noted, "in all such cases, the master may frequently be a loser by the trust reposed in his servant, but never can be a gainer, nor shelter himself

from punishment by laying the blame on his servant. The reason of this is, that the wrong done by his servant is looked upon in law as the wrong of the master himself, and it is a rule, that no man shall take advantage of his own wrong.” *Blackstone’s Commentaries on the Law*, Gavit, Bernard C. (Editor), p. 182 (Washington Law Book Co. 1941).

As recognized by Martin & Seibert, 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). Martin & Seibert takes a new tact, however, in their response brief. The theory asserted that Douglas S. Rockwell’s actions were outside the scope of his employment as an attorney. Since Martin & Seibert did not directly benefit from the wrongdoing, Martin & Seibert asserts that the doctrine of *respondeat superior* is inapplicable to the firm, and thus the firm is immune from liability.

As has been noted, 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.

It is undisputed that the deed to the property at issue 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.” This deed, dated December 27, 2002, is the deed to the 6.87 acre parcel at issue. It is also undisputed that the closing on the 6.87 acre parcel purchased by funds from Carol Rockwell and Douglas Rockwell (by two separate checks; one from each Rockwell) was handled

through the Martin & Seibert offices in Charles Town, West Virginia, and occurred in December 2002.

Despite these undisputed facts, Martin & Seibert contends that Rockwell's actions cannot be attributed to the law firm as there is no evidence that Rockwell's actions in obtaining the 6.87 acre parcel or preparing the option agreements were in furtherance of Martin & Seibert's business. The liability of the master can occur when the servant's actions are within the real or the apparent scope of the master's business. It is without question that Douglas S. Rockwell was performing legal services for the Dunns. It is undisputed that Douglas S. Rockwell was utilizing the infrastructure of Martin & Seibert at the time of those services. Thus, regardless of Martin & Seibert's contentions, Douglas S. Rockwell was acting within the real and/or apparent authority of Martin & Seibert from the Dunns' perspective.

Martin & Seibert argues that although during the time of the preparation of documents by Douglas S. Rockwell for the Dunns, Douglas S. Rockwell was employed by Martin & Seibert, Douglas S. Rockwell's actions were independent of Martin & Seibert. According to Stanley Dunn, however, at no point in time during the preparation of the Option Agreements did Douglas S. Rockwell disavow his relationship with Martin & Seibert. *See p. 136 of the January 8, 2007 Deposition of Stanley Dunn.* Martin & Seibert's arguments that Douglas S. Rockwell's actions are outside the scope of his employment create the material facts in dispute which prohibit the entry of summary judgment in favor of Martin & Seibert. Accordingly, the Order of the circuit court so finding, should be reversed, permitting the Dunns to present their case to a jury.

The acts of a conflict of interest between an attorney and his client are "closely scrutinized for any unfairness of the attorney's part." *Office of Disciplinary Counsel v. Battistelli*, 193 W.Va. 629, 457 S.E.2d 652, 660 (1995). The absence of files, billings or direct benefit does not absolve the master, Martin & Seibert, when the conduct of self dealing between their attorney/employee and the client occurred from within the firm's offices, the wrong was accomplished with the master's

support staff and when the central document, the deed, clearly bears the law firm's name and address. It is this clear lack of supervision which renders the master, Martin & Seibert, liable for the wrongdoings of their servant, Douglas S. Rockwell. The servant's individual acquisition of the parcel is not an excuse or absolution for the master's liability. 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.

Addressing the breach of fiduciary duty claim, the Dunns' claim is not premised solely upon Rockwell's violations of the Rules of Professional Responsibility. Rather, the Dunns contend that the disciplinary rules are the minimum guidelines on which to judge an attorney's conduct. As noted by this court,

[m]ost courts hold that the prohibition against an attorney entering into a transaction with his client is designed to preclude the attorney from acquiring an interest adverse to the client, which would violate the fiduciary duty owed by an attorney toward a client.

The Committee on Legal Ethics of the West Virginia State Bar v. Cometti, 189 W.Va. 262, 430 S.E.2d 320 (1993). Within the Dunns' Amended Complaint, reference to the Rules of Professional Conduct was made to set forth the minimum standards under which the attorney's conduct must be measured. At no point did the Dunns limit their allegations to violations of the Rules of Professional Conduct. Rather, the Dunns utilized the rules to set forth the minimum standards due of Rockwell and Martin & Seibert to the Dunns. Thus, Martin & Seibert's arguments to the contrary should be disregarded.

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.** 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.

IV. The Subsequently Discovered Wrongs, Even with the Intervening Retirement of the Wrongdoer, Does Not Insulate the Master from the Wrongs Committed by the Servant During the Term of His Employment.

Twisting the Dunns' arguments, Martin & Seibert contends that the Dunns have changed their position regarding the application of the continuous representation doctrine to Martin & Seibert.⁵ The Dunns have consistently maintained that 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 Dunns.

In their argument, Martin & Seibert seeks to utilize Douglas S. Rockwell's retirement from their firm to sever the employer/employee relationship, while simultaneously severing Martin & Seibert's liability to the Dunns. The discontinuance of the employer/employee relationship does not shelter the employer from liability when the wrongs occurred during the employee's term of employment, but were only subsequently discovered. It is due to the employment relationship of Douglas S. Rockwell that the employer, Martin & Seibert, is liable. As such, Rockwell's severance of his relationship with Martin & Seibert does not sever Martin & Seibert's liability to the innocent and totally unaware third party, the Dunns.

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

⁵ Please note: Stanley Dunn, with his affidavit of June 12, 2007, produced an unused Extension Agreement which Mr. Dunn credits Douglas S. Rockwell with its production in the spring of 2005. This fact is disputed by the Rockwells. Due to the dispute about this material fact, entry of summary judgment on such a basis is improper.

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 21st day of April, 2009.

**Appellants, STANLEY W. DUNN, JR. and
KATHERINE DUNN, By Counsel:**

Debra T. Herron By SAV #10227
James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)

McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100

William Francis Xavier Becker By SAV #10227
William Francis Xavier Becker (State Bar #5238)
PNC Bank Building
260 East Jefferson Street, Second Floor
Rockville, MD 20850
Telephone: (301) 340-6966

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of April, 2009, I served the foregoing "***Reply 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:

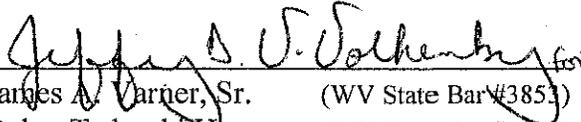
Gregory H. Schillace, Esquire
Schillace Law Office
230 West Pike Street, Suite 303
P. O. Box 1526
Clarksburg, WV 26302
Co-Counsel for Douglas S. Rockwell

Robert D. Aitcheson, Esquire
Aitcheson Law Office
208 North George Street
P. O. Box 750
Charles Town, WV 25414
Counsel for Carol K. Rockwell

William Francis Xavier Becker, Esquire
PNC Bank Building
260 East Jefferson Street, Second Floor
Rockville, MD 20850
Co-Counsel for Plaintiffs

Kathy Santa Barbara, Esquire
Santa Barbara Law Offices
518 West Stephen Street
Martinsburg, WV 25401
Co-Counsel for Douglas S. Rockwell

Christopher K. Robertson, Esquire
Jackson Kelly PLLC
310 West Burke Street
P. O. Box 1068
Martinsburg, WV 25402
Counsel for Martin & Seibert, L. C.


James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501) DTH

McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035