

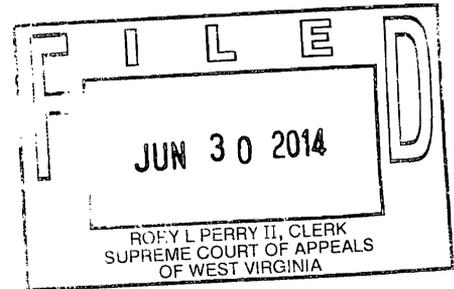
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 14-0291**

CHARLES J. EVANS,  
CYNTHIA B. EVANS and  
OBIE WOODS, and WAYNE  
CLIBURN, LUCY CLIBURN,  
and SERGIO BAEZ and  
PETER CALDERON and  
MIKE HOLLANDSWORTH,  
VIVIAN HOLLANDSWORTH,  
and JAN JERGE and JAMES  
CARROLL, JR. and FRED A  
LIVESAY and JIM MACKEY,  
SHAYNA MACKEY,  
and PETER DEL CIOPPO  
and JEAN MILLARD,  
MICHELLE MILLARD and  
STEPHEN RICE, LAUREEN  
RICE and LON FOUNTAIN,  
LOUISE FOUNTAIN and  
MICHAEL ROBEY, LORRI  
ROBEY, ROBERT  
SCHLOSSBERG, HELENE  
SCHLOSSBERG,  
SALVATORE ZAMBRI,  
MARY ZAMBRI, JOSEPH  
ZAMBRI, ANTHONY ZAMBRI,  
and ZAMBRI ENTERPRISES,  
LLC, a Maryland limited  
liability company, and  
ROBERT AMICO, BEVERLY  
AMICO, and JOSEPH KIM,  
PETITIONERS,

vs.

UNITED BANK, INC., a  
West Virginia corporation,  
STAN MCQUADE, individually,  
and d/b/a MCQUADE  
APPRAISAL SERVICES,  
RESPONDENTS



Appeal from a Final Order of the Circuit  
Court of Monroe County (09-C-94)

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**PETITIONERS' BRIEF**

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PETITIONERS,

vs. No. 14-0291

UNITED BANK, INC., a  
West Virginia corporation,  
STAN MCQUADE, individually,  
and d/b/a MCQUADE  
APPRAISAL SERVICES,  
RESPONDENTS.

**PETITIONERS' BRIEF**

Comes now your Petitioners, by and through counsel, John H. Bryan and for their  
Petitioners' Brief respectfully submits the following.

**PETITIONERS' ASSIGNMENTS OF ERROR**

- I. Whether the Circuit Court erred in dismissing Petitioners' claims under Rule 12(b)(6) where Petitioners alleged in the Second Amended Complaint that they were unaware that they were victims of bank and appraisal fraud until after the inception of Monroe County civil action 09-C-94 and therefore within the applicable statute of limitations for their claims?
- II. Whether the Circuit Court erred in dismissing the Petitioners' claims under Rule 12(b)(6) based on taking "judicial notice" of a prior civil action involving tax assessment appeals which were prosecuted by the developers of Walnut Springs Mountain Reserve development, using the developers' attorneys - who are and were also Respondent United Bank, Inc.'s attorneys - where the individual Petitioners had no involvement other than the use of their names by the developers and their attorneys?
- III. Whether the Circuit Court erred in dismissing the Petitioners' claims for breach of implied covenant of good faith and fair dealing on the grounds that there is no tort cause of action for violation of the implied duty of good faith and fair dealing in West Virginia?
- IV. Whether the Circuit Court erred in dismissing the Petitioners' claims for detrimental reliance under Rule 12(b)(6) on the basis that the claims were

merely a restatement of the fraud claim, but where Petitioners' fraud claim has been dismissed?

### **STATEMENT OF THE CASE**

The civil action *sub judice* surrounds a residential development in Monroe County, West Virginia named Walnut Springs Mountain Reserve. The development, which quickly found its way into the paid-advertising pages of the Washington Post and Farm and Ranch "magazine", was headed by a mysterious developer from Las Vegas operating under multiple names and identities, who partnered with a Washington D.C. trial lawyer. The Walnut Springs development was unusual in that it was located in Monroe County, West Virginia - a rural county with low population, low property values and no similar subdivisions. The development quickly attracted potential buyers from the suburbs of Washington D.C., and elsewhere, looking to invest in beautiful mountain real estate subdivision properties. See Second Amended Complaint (Appendix at 68) at paragraphs 25-27, 28-29, 56, 57. Fast-forward nine, or so, years later and the property is mostly vacant, overgrown and bank-owned - amid a federal criminal investigation surrounding the development financing. Almost all of the original lot purchasers have suffered foreclosure, or are stuck with real estate that has little, to no, market value. See Second Amended Complaint at paragraphs 133-35 (Appendix at 116-17).

The difference between the Walnut Springs development and other failed developments across the country is that the Walnut Springs development grew out of an act of bank and appraisal fraud which was only known to the developers, United Bank and the appraisers, and which was only discovered during the litigation of the action *sub judice*. This was essentially a bank-run real estate pyramid scheme, initiated with the help of a United Bank Vice President who is now sitting in federal prison, with each sale

being justified by prior sales in the development and with almost all sales being one hundred percent, or more, financed by United Bank. When you trace each sale back to the ultimate source, which you can only do by comparing the appraisals for all lot sales, you find a mysterious transaction involving a woman named Chaya Schonberger.

This 2005 transaction supposedly justified a per acre value of \$50,000.00 per acre. See Second Amended Complaint at paragraph 54 (Appendix at 80). This transaction was used as a “comp”, or comparable sale in the appraisals, and to justify financing, for almost all of the early development lot sales to innocent third party purchasers. Not only were they told by developers that the 2005 \$50,000.00 per acre sale was legitimate, but it was used as a “comp” on their own appraisals. As more and more sales to innocent purchasers occurred, then the earlier sales, which were based on the Schonberger transaction, then became the “comps” in the appraisals. Thus, the pyramid gradually spread out, but the sales, financed for unprecedented per acre values for Monroe County, West Virginia, were all resting on the 2005 Schonberger transaction. See Second Amended Complaint at paragraph 55 (Appendix at 81).

The problem with the 2005 Schonberger transaction is that it never occurred. Chaya Schonberger is actually the mother of Las Vegas developer Dan “Berg” - one of the two developers of the Walnut Springs development. See Second Amended Complaint at paragraph 37 (Appendix at 76). His real name is Daniel Schonberger. See Id. at 26 (Appendix at 73). The sale, which supposedly consisted of \$294,000.00 being paid in exchange for 5.88 acres, no-so-coincidentally equalled out to a per acre value of exactly \$50,000.00. Although the sale never occurred, it was cleverly disguised. There was an appraisal prepared and signed by the Respondent appraisers. However, the

appraisal misidentified the deed book and page number, making the appraisal seem legitimate and at the same time be completely untraceable since the referenced deed was the original deed for the bulk of the Walnut Springs property. In reality, the 5.88 acre lot supposedly purchased by Schonberger never came out of that parcel and was never actually owned by the Walnut Springs development. See Id. at paragraphs 45-52, 54 (Appendix at 78-80).

There was actual money which exchanged hands. At the same time as the supposed sale of the 5.88 acre lot, a construction loan was taken out through United Bank and disgraced Vice President / Loan Officer Leon Cooper. It just happened to be that Mr. Cooper had a limit of \$300,000.00 for which he could solely approve loans. Cooper approved the construction loan for a house to be constructed on a 5.88 acre parcel in the Walnut Springs subdivision. See Id. at paragraphs 34, 48 (Appendix at 75, 78).

In reality, Chaya Schonberger did own the 5.88 acre lot, and ultimately owned the home which was constructed there. The problem is that the lot was never owned by Walnut Springs. Chaya Schonberger, actually Dan Berg using his mother's name, owned the lot from the beginning, having purchased it from a third party in 2004. That property was originally 67.5 acres adjoining the Walnut Springs development and was held in Chaya Schonberger's name from the beginning. See Id. at paragraphs 51-52 (Appendix at 79-80). In the developer's partnership agreement, it mentioned the 67.5 acres and that it was owned by Berg and exempt from the agreement's "corporate opportunity clause". See Id. at paragraph 39 (Appendix at 76).

On or about October 12, 2004, Chaya Schonberger, by and through her son using a power of attorney, conveyed two five acre parcels to two individuals who were employees of the development. These sales indicated a per acre value of \$15,000.00 per acre. See Id. at paragraphs 41-43 (Appendix at 76-77). On May 12, 2005, Chaya Schonberger conveyed her remaining 57.5 acres into an LLC owned by the developers. The deed from that conveyance excepted 5.88 acres from the conveyance to remain in the name of Chaya Schonberger. At that time the 5.88 acre parcel was designated as "Walnut Springs Mountain Reserve Phase 1 Lot 1" and was listed in the books as having been a sale of 5.88 acres for the consideration of \$294,000.00. See Id. at paragraphs 44-45, 49-50 (Appendix at 77-79).

Therefore, the 5.88 acres actually did exist. \$300,000.00 did actually exchange hands. Chaya Schonberger did actually own the 5.88 acres. However, there was no sale of 5.88 acres for the amount of \$294,000.00. The only real transaction that occurred was that a \$300,000.00 house was built for Chaya Schonberger on 5.88 acres she already owned as a payoff for her involvement in a real estate scam. It was revealed to the Petitioners in 2014 by federal criminal investigators that this fraud was revealed, in writing, by attorneys representing Jonathan Halperin - the trial attorney developer - to United Bank in 2005. Mr. Halperin acknowledged to Petitioners' counsel that this was the case, but declined to provide a copy of the document. Instead of advising their customers and prospective customers of the fraud, United Bank said nothing, and continued to finance the development using appraisals which were supported by the Schonberger fraud. See Petitioners' Motion to Alter or Amend

Judgment, or in the Alternative Motion for Relief From Judgment at paragraphs 5-6 (Appendix at 255-56).

The Schonberger fraud was known only by the developers, United Bank, and the Respondent appraisers. The first individual outside those parties to discover the Schonberger fraud was the Petitioners' counsel. In late 2009 and early 2010, Petitioners' counsel, then representing only Charles and Cynthia Evans, issued a subpoena to the Respondent appraisers out of a companion case against the developers, Monroe County Civil Action 09-C-93, seeking copies of all appraisals of lots in the Walnut Springs development. Upon receiving the original appraisals, and after dozens and dozens of hours comparing appraisals and related documents, Petitioners' counsel was able to discover the fraud which occurred. There was no other person in the world at that time in early 2010, outside the Respondents and the developers, who had knowledge of the fraud. *See id.* at paragraph 3 (Appendix at 255); *see also* Second Amended Complaint (Appendix at 68) at paragraphs 60, 63, 69-70, 75-76, 83, 85-87, 92-93, 97-98, 102-103, 108-109, 112, 115-117, 119-123, 125-126, 128-129, 131-132 (alleging that each respective petitioner was unaware of the fraud due to the fact that the appraisals concealed or withheld identifying information and that only the defendants and developers could have been aware of this fact).

Petitioners' counsel amended the Complaint to include the newly-discovered information and informed other lot purchasers of the existence of the litigation and provided them with a copy of the Amended Complaint and its' allegations. *See, e.g.,*

Amended Complaint (Appendix at 20).<sup>12</sup> Thus, when the Petitioners stated in the Second Amended Complaint, which joined them as parties along with the Evans, that they had no knowledge of the fraud until after the inception of Civil Action 09-C-94 that fraud had occurred, they are referring to the first amended pleadings themselves as the source of their discovery. There is no possible way that the Petitioners could have known of, or discovered, the fraud prior to the drafting and filing of the pleadings in the case *sub judice*, particularly the Amended Complaint.

Ultimately however, the Circuit Court concluded that since the Petitioners' names and lots were used by the developers in 2007 pursuant to a tax assessment appeals, they should have known or discovered the fraud since they were at that time were arguing that the lots were actually worth less than the assessment values given to them by the county. The 2007 tax assessment appeals, which ultimately led to an opinion by this Court, were prosecuted by the Walnut Springs developers and their attorneys, who also happen to be from the same law firm who represents United Bank, in the names of the lot owners, and in their own name. However, the lot owners did not retain the attorneys and did not prosecute, or have any involvement in, the case other than by perhaps agreeing to the use of their names. Most importantly, as this Court is aware from the opinion issued in that case, the Schonberger fraud was never disclosed, or discovered by any individual during that 2007 litigation. The 2007 litigation had

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<sup>1</sup> This was performed at the suggestion of the circuit court that other landowners may want to join the litigation. The communications were cleared in advance by the Office of Disciplinary Counsel and were property marked as "advertising material".

<sup>2</sup> Wayne Cliburn, Lucy Cliburn and Obie Woods were named as plaintiffs in the Amended Complaint due to the fact that they contacted Petitioners' counsel after having been contacted by Charles and Cynthia Evans in early to mid 2010 and sought to be included in the litigation. The remaining Petitioners were named as Plaintiffs in the Second Amended Complaint.

absolutely nothing to do with the allegations in the action *sub judice* other than they both involved some of the same parties and the same real estate. See, e.g., Mountain America, LLC v. Huffman, 687 S.E.2d 768 (W. Va. 2009).

### **SUMMARY OF ARGUMENT**

The Circuit Court erred in depriving the Petitioners' of their day in court. They are innocent victims who were defrauded by a real estate scam. The scam could not have been perpetrated against them without the involvement of United Bank and the McQuade appraisers. By dismissing their lawsuit on the grounds of statute of limitations, the Court has deprived them of their right to seek civil damages against the responsible parties based purely on a technicality rather than for substantive reasons. This result is unfortunate given the fact that, according to the Circuit Court, the statute of limitations had already run before Charles and Cynthia Evans ever retained counsel in 2009 - and of course before their counsel discovered the fraud which occurred. For our justice system to tell innocent investors and retirees that although they were scammed, there's nothing they can do about it, is wrong. The "discovery rule" governing the application of the statute of limitations has been misapplied in the case *sub judice*. The Circuit Court should be overturned and the action should be remanded for further proceedings.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners seek an oral argument in conformance with Rule 20 because Assignment of Error No. III involves an unsettled area of conflicting case law.

### **ARGUMENT**

## I. THE DISCOVERY RULE

The Circuit Court erred in dismissing the Petitioners' claims pursuant to Rule 12(b)(6) on statute of limitations grounds because the Petitioners alleged in the Second Amended Complaint that they neither knew, nor should have known, that fraud had occurred.

In the Second Amended Complaint, the Petitioners allege facts which show that the discovery rule applies. Each of the respective plaintiffs allege within the Complaint that they were unaware until the initiation of this litigation that the fraud had occurred, and that with regard to the Defendants' appraisals, that the "appraisals contained information which was camouflaged and nearly devoid of identifying information . . ." and that "[o]nly the bank, the appraisers, and Walnut Springs Mountain Reserve ("WSMR") could have known of the fraud and misconduct which occurred." See, e.g., Second Amended Complaint (Appendix at 68) at paragraphs 60, 63, 69-70, 75-76, 83, 85-87, 92-93, 97-98, 102-103, 108-109, 112, 115-117, 119-123, 125-126, 128-129, 131-132.

Petitioners each expressly alleged in the Second Amended Complaint that they were unaware of the fraud until the litigation *sub judice* began, and that the reason they were unaware is because the Defendants attempted to conceal the fraud which took place. The fraud was only discovered when Petitioners' counsel came into possession of copies of all the Walnut Springs appraisals submitted by Respondent McQuade, and that the details were first learned by the Petitioners when they actually read the Amended Complaint.

By 2007, some of the Petitioners *may* have known that they had suffered damage and injury, but they had no idea that their injuries were caused by the tortious acts of the Defendants. Furthermore, the real estate market didn't start to crash until 2008, which caused the scam, like many other scams across the country, to fall apart. Moreover, the Petitioners allege that they had no idea about the fraudulent appraisals - nor about the fraudulent Schonberger transaction. Petitioners argue that the bank, the appraisers, and WSMR knew about the tortious acts which had occurred and that there were no disclosures, or even hints, revealed to the Petitioners.

As was recently clarified in Dunn v. Rockwell, 689 S.E.2d 258 (W.V. 2009), "[i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Syl. Pt. 3, *Id.* (citing Syl. Pt. 4 Gaither v. City Hosp., Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997)). The "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition to its application. Syl. Pt. 2, Dunn v. Rockwell, 689 S.E.2d 258 (W.V. 2009).

Only identification of the applicable statute of limitations period is a question of law. The remaining issues surrounding application of the "discovery rule" are questions of fact, to be resolved by the jury. Syl. Pt. 5, Dunn v. Rockwell, 689 S.E.2d 258 (W.V. 2009). As such, dismissal on statute of limitations grounds, especially on a motion to dismiss, is improper. In their motions to dismiss, Respondents cited Travis v. Alcon

Industries, Inc., 202 W. Va. 369, 504 S.E.2d 419 (1998) to stand for the argument that the statute begins to run on the date of the last conduct. However, Travis is a 1998 case and it is distinguishable from the present situation. The “discovery rule” as it is now applied was clarified in 2009. In Dunn v. Rockwell, 689 S.E.2d 258 (W.V. 2009), the Court made it clear that “[i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. Syl. Pt. 4, id.

In their Syllabus Point 5, the Court took the analysis one step further, overruling Cart v. Marcum, 188 W. Va. 241, 423 S.E.2d 644 (1992) and its progeny (holding that a cause of action accrues when a tort occurs and that mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations unless defendant prevents plaintiff from knowing), and held that:

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of Gaither v. City Hosp., Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action.

Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing

the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Syl. Pt. 5, Dunn v. Rockwell, 689 S.E.2d 258 (W.V. 2009).

Whether the “discovery rule” acts to include or exclude the Plaintiffs’ claims is an issue of fact for the jury. the Petitioners made sufficient allegations so as to invoke the discovery rule and to initiate the tolling of the statute of limitations until well after the filing of Monroe County Civil Action 09-C-94. Whether or not the Petitioners are correct is an issue of fact for the jury. The only issue as a matter of law is what underlying statute applies. It is undisputed that the underlying statute is two years. The Circuit Court did invoke the discovery rule. See February 27, 2014 Order at pages 7-8 (Appendix at 248-49). However, the Court arbitrarily initiated the statute for a date which is factually different from the allegations made by the Petitioners in the Second Amended Complaint.

Dismissal can only be proper under Rule 12(b)(6) if:

. . . no claim for relief can be granted under any legal theory. All the pleader is required to do is to set forth sufficient information to outline the elements of his claim. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. The standard required to overcome the motion is a liberal one, requiring a light burden of proof.

John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978).

Moreover, for purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true. Id. The trial

court, in appraising the sufficiency of a complaint on a motion under subdivision (b)(6) of this rule, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Here, the Circuit Court agreed that the discovery rule applied, but then improperly decided an issue of fact in initiating the tolling of the statute in 2007 rather than 2010. In doing so, the Court failed to construe the complaint in the light most favorable to the Petitioners, and failed to take the Petitioners' allegations as true.

## II. JUDICIAL NOTICE

The Circuit Court erred in dismissing the Petitioners' claims under Rule 12(b)(6) based on taking judicial notice that the Petitioners were involved in a prior civil action involving tax assessment appeals and therefore knew, or should have known, that fraud occurred, that Respondents engaged in it, and that their conduct had a causal relationship to their injuries.

In dismissing the Petitioners' claims, the Circuit Court held that:

In the Second Amended Complaint, the Plaintiffs allege that they could not have known of their causes of action until the institution of the present action because the Defendants camouflaged information contained in appraisals requested by United and prepared by the McQuades.

Assuming those allegations to be true, the Court finds that Plaintiffs, by the exercise of reasonable diligence, should have known of their claims no later than the date of their hearing before the Monroe County Board of Equalization and Review. First, the Plaintiffs claimed before the Board that their tax assessments exceeded the true and actual value of their property. Second, the fair market value of Plaintiffs' property is the basis of Plaintiffs' claims against Defendants in this civil action. Third, the Plaintiffs' were represented by counsel and retained a certified general real estate appraiser in connection with their challenges. Fourth, although the Plaintiffs did not present evidence of the fair market value of their respective properties at the hearing, the Plaintiffs had the means to determine the fair market value at that time and should have known that

the land they purchased was overvalued. Last, knowing that their land was overvalued, a reasonable person would have inquired as to the identity and conduct of the parties involved in the sales of their property, i.e., the Defendants.

See February 27, 2014 Order at pages 7-8 (Appendix at 248-49).

The Petitioners do not dispute that the Circuit Court had the legal power to take judicial notice of the fact that at least some of the petitioners had previously appealed their tax assessments, and that the developers' attorneys appealed the case on behalf of Mountain America, LLC, i.e., themselves, resulting in an opinion being issued by this Court. The Petitioners dispute the Circuit Court's conclusion that the prior litigation has any relevance to the allegations in the action currently *sub judice* other than the identities of the real estate involved and possibly some of the petitioners. The Circuit Court overemphasized the relevance of the litigation, and ultimate decision, in Mountain America, LLC v. Huffman, 687 S.E.2d 768 (W. Va. 2009).

The only named petitioner in Mountain America, LLC was Mountain America, LLC, the Walnut Springs developers, who were represented by their attorneys from Bowles Rice McDavid Graff & Love law firm. Bowles Rice McDavid Graff & Love also happens to be a law firm that represents Respondent United Bank. See, e.g., Lehman v. United Bank, Inc., 228 W. Va. 202, 719 S.E.2d 370 (W. Va. 2011) (wherein United Bank is being represented by the said law firm in an unrelated case). The same law firm represented United Bank in filing a "Motion to Quash Subpoena for United Bank, Inc." in Monroe County Civil Action 09-C-93, the companion case filed against the developers, Mountain America, LLC, et al.

This Court noted in the Mountain America, LLC opinion that, "some four months after the appeal was filed, it is impossible to pick up the court file and determine the

name of the Appellants or the tax parcels in question.” Id. 719 S.E.2d at 777. This Court further noted that “[a] review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10.” Id.

The Circuit Court mischaracterized the Petitioners’ claims as merely people who are upset that they overpaid for real estate. That is not the case. The Petitioners are upset because they were defrauded. They were induced to buy into a fraudulent real estate scheme. The Petitioners are victims in the same way that the clients of Bernie Madoff are victims. They were sold an investment that could never be recouped due to the fact that it was based on fraud. It’s not about a dispute over value. It’s about the fact that they never would have invested in the first place had they known about the fraud. The allegations in the Second Amended Complaint are very specific. There are 203 paragraphs. To state that this fraud was described with particularity would be an understatement. Fraud occurred and the Petitioners can prove it if they are given access to the courtroom.

In Mountain America, LLC v. Huffman, 687 S.E.2d 768 (W. Va. 2009), there was no indication to anyone reading the opinion, such as the Petitioners, that fraud, or any misconduct, had occurred involving either the developers or the Respondents. Chief Justice Benjamin, writing for the Court, characterized Mountain America’s claims as having nothing to do with the Petitioner’s allegations *sub judice*:

Specifically, the Appellants assert that the tax assessments are excessive and unequal as compared to the 2007 tax assessments of the property of other taxpayers in Monroe County, and that the assessments are the result of the Assessor’s improper and discriminatory methods in violation

of the Appellant's rights to equal and uniform taxation under the West Virginia Constitution and in violation of the Appellant's rights to equal protection of the law under the United States Constitution.

Id. at 773. The opinion's discussion of Mountain America's arguments centered on due process and equal protection. This Court noted that there was no evidence in the record to suggest that the lots in Walnut Springs were excessively valued by the Monroe County Tax Assessor:

Mountain America had the burden of proving that the Assessor's valuation was excessive, but it did not offer any evidence of the true and actual value of the residual property. At the hearing before the County Commission, Mountain America did not offer an appraiser's opinion of the value of its residue, any evidence as to what it paid to purchase this residue, or any evidence as to the listing price for any of the unsold residue property.

Id. at 786.

This Court noted that the calculated unit price per acre as determined by the Assessor was \$29,236.00 and that as an accommodation to the landowners, the Assessor lowered the amount to \$26,900.00 by striking the two highest sales and the two lowest sales out of the development - which was properly determined by the Assessor to be based on "market value" and "true and actual value." Id. This Court found no abuse of the Assessor's discretion and affirmed the circuit court's order affirming the County Commission's decision upholding the assessment. Id.

The Circuit Court concluded that because the Petitioners, or at least some of the landowners, were involved in the tax litigation, they "should have known that the land they purchased was overvalued," and that "knowing that their land was overvalued, a reasonable person would have inquired as to the identity and conduct of the parties involved in the sales of their property, i.e., the Defendants." *See* February 27, 2014

Order at pages 7-8 (Appendix at 248-49). However, there was no evidence of record presented to this Court in Mountain America, LLC that the subject properties were overvalued. A reasonable person would read that opinion to stand for the fact that, even after years of litigation and mountains of attorney fees, the properties were determined to be legitimately valued at \$29,236.00, more or less. There was no discussion in Mountain America, LLC of fraud, or falsified appraisals, or Chaya Schonberger, or Leon Cooper, or the fact that at least one of the developers is using a pseudonym - which is not surprising given the fact that it was litigated by the developers.

Mountain America, LLC was about challenging tax assessments and methodology. There were no allegations, or representations, that the landowners overpaid for their properties. They were challenging the increase of assessments from being minimal one year, to being increased exponentially the next. The central component of the case *sub judice* is that the Petitioners never paid real market value for their properties because the market was fabricated - a fact which was never revealed in the 2007 tax assessment appeals. It was never revealed because the primary perpetrators of the fraud, the developers, were prosecuting the litigation. Thus, this case is not about the value then versus the value now. It's about buying a fake investment. The Petitioners were conveyed lots which have a *value*. However, that value is not the investment they thought they were purchasing. In reality, the real estate was likely worth what United Bank's own appraiser secretly appraised it at for an as-is bank value: \$2,000.00. See Second Amended Complaint at paragraph 54 (Appendix at 80). But for the fraud and concealment, the Petitioners would not have invested in the first place.

During the 2007 tax appeals, there was no discussion regarding the legitimacy of the Walnut Springs development. Its legitimacy was assumed by everyone at that time, including this Court. The Petitioners had no legal right or opportunity to view and compare all of the Walnut Springs appraisals, which was the only way to discover the fraud. They could have hired their own appraiser. However, the appraiser just would have performed a current appraisal, and in doing so would look for recent "comps" and would find none - or he or she would have to look at similar developments in surrounding counties and would take some photos and draw up a report. There would be no way for an independent appraiser to discover the fraud.

The Petitioners could have hired a private investigator. Without the ability to subpoena records from the McQuade appraisers, the private investigator would have no ability to discover the fraud. They were, at that time, technically represented by an attorney. However, their attorney was actually retained by the developers who had engaged in the fraud. Presumably the developers did not reveal the fraud to the attorney, who would have been ethically required to disclose that fraud to the Petitioners. Presumably, if the attorney had any reason to believe that fraud had occurred and that United Bank was a possible participant in that fraud, he would have taken the appropriate ethical actions since his firm also represents United Bank. However that did not happen. If "their" attorney for the 2007 litigation did not, or could not, discover the fraud, the Petitioners cannot be expected to have reasonably done what their seasoned attorney was unable to do.

The action *sub judice* is not about overpaying for real estate. It's about a couple of very shady developers teaming up with an equally shady bank loan officer, and using

his exclusive, and apparently corrupt appraiser, and fabricating lot sales in order to kick start a development that took land worth maybe \$2,000.00 per acre according to United Bank's own August 23, 2005 appraisal by Darrel Rolston, and selling it only months later for \$50,000.00 per acre and more - all financed one hundred percent through United Bank. See Second Amended Complaint at paragraph 54 (Appendix at 80). While the purchasers may have realized that the property taxes were not going to be as low as was represented to them prior to purchasing, there is no evidence to indicate they had, or could have had, any knowledge regarding the falsified appraisals and the Schonberger fraud. To charge them with that knowledge and responsibility is to effectively deprive them of equal protection under the law.

### III. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

The Circuit Court erred in dismissing Petitioners' claims for breach of the implied covenant of good faith and fair dealing under the conclusion that no such tort cause of action exists under West Virginia law.

West Virginia has recognized, both by statute, and by case law, that "every contract that is entered into by two parties imposes an obligation of good faith on both parties in its performance and/or enforcement." McGinnis v. Cayton, 173 W. Va. 102, 312 S.E.2d 765 (1984); W. Va. Code 46-1-203. Most recently, the West Virginia Supreme Court of Appeals noted that:

Another basic tenant of contract law is that the parties approach the contracting process act with good faith and the intent to deal fairly. As summarized by one authority, "there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ."

Caperton v. A.T. Massey Coal Co., Inc., 223 W. Va. 624, 679 S.E.2d 223 (2008),  
*reversed on other grounds*; (citing 17A Am. Jur. 2d *Contracts* § 370).

The courts have most thoroughly dealt with this cause of action in the context of bad faith insurance claims. They have held that a third party claimant has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing due to the lack of privity of contract, but that due to the existing privity of contract, an insurance company owes this duty to its insured and a cause of action will lie if a breach of this duty occurs. Elmore v. State Farm Mutual Ins. Co., 202 W. Va. 430, 504 S.E.2d 893 (1998).

The Circuit Court concluded that the federal courts in West Virginia have opined that an implied covenant of good faith and fair dealing does not exist in West Virginia. The Court correctly noted that the federal district courts have based this opinion on one sentence included in the decision of Highmark W. Virginia, Inc. v. Jamie, 221 W. Va. 487, 492, 655 S.E.2d 509, 514 (2007):

In that regard, while we recognize that it has been held that an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim, Stand Energy Corp. v. Columbia Gas Transmission, 373 F.Supp. 2d 631, 644 (S.D. W.Va. 2005), and that “[a]n implied contract and an express one covering the identical subject matter cannot exist at the same time,” syl. pt. 3, in part, Rosenbaum v. Price Construction Company, 117 W. Va. 160, 184 S.E. 261 (1936), the allegations of Count 3 construed in the light favorable to the appellant demonstrate that, while inartfully drafted as a claim upon an implied covenant, Count 3 is, in reality, a breach of contract claim covering matters not identical to those specified in Counts 1 and 2.

Highmark, 655 S.E.2d at 514.

Such reliance is problematic. In Highmark, the Court ultimately held that the cause of action for breach of the implied covenant of good faith and fair dealing would

proceed under the guise of breach of contract since there was already a breach of contract claim which did not contain identical allegations. Highmark did not hold that there is no independent cause of action for breach of implied covenant of good faith and fair dealing. The issue was not addressed equivocally one way or the other. The Court only dedicated one sentence to the issue, noting that a federal district court memorandum had found that the cause of action does not independently exist.

Examining the 2005 Memorandum Opinion and Order from the Southern District of West Virginia, which was cited both in the Highmark opinion and by the Circuit Court in dismissing the Petitioners' claims, shows that the District Court was relying solely on its' own prior opinions and other Fourth Circuit jurisdictions rather than West Virginia:

Defendants argue that West Virginia law does not recognize an independent cause of action for a breach of duty of good faith and fair dealing separate and apart from a breach of contract claim. Although this Court cannot find any cases in West Virginia directly on point with the present case, this Court held in Hoffmaster v. Guiffrida, 630 F.Supp. 1289 (S.D.W.Va. 1986), that "[t]he law ... implies a covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract." *Id.* at 1290.

In other jurisdictions, this implied covenant is subsumed in the contract claim and cannot be pled as an independent cause of action. See, e.g., Estrin v. Natural Answers, Inc., 103 Fed. Appx. 702, 705, 2004 WL 1444956 at \*3 (4th Cir. 2004) (unpublished) (finding the district court did not err in dismissing a counterclaim for a breach of good faith and fair dealing because a separate claim is not recognized under Maryland law); Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Tech. Fin. Group, Inc., 299 F.Supp.2d 505, 518 (D. Md. 2004) (finding that under Michigan law a plaintiff may state a claim for breach of contract based upon an implied duty of good faith and fair dealing, but a breach of that "duty does not supply an independent cause of action where the plaintiff already is alleging breach of contract"); RoTec Serv., Inc. v. Encompass Serv., Inc. 359 S.C. 467, 597 S.E.2d 881, 883-84 (2004) (agreeing with courts interpreting Georgia, Illinois, New York, and South Dakota laws that state an implied covenant of good faith and fair dealing does not provide an independent cause of action that is separate and apart from a breach of contract claim).

Given these cases and this Court's prior consistent pronouncement in Hoffmaster, the Court agrees with Defendants and DISMISSES Plaintiffs' independent cause of action for good faith and fair dealing.

Stand Energy Corp. v. Columbia Gas Transmission, 373 F.Supp. 2d 631, 644 (S.D. W.Va. 2005). Indeed, not one West Virginia case was cited in the Stand Energy Corp. opinion to support the conclusion that West Virginia does not recognize an independent cause of action for an implied covenant of good faith and fair dealing.

To the contrary of the federal district court conclusions, the history of West Virginia jurisprudence has allowed a tort cause of action for violation of the implied duty of good faith and fair dealing. *See, e.g., Elmore v. State Farm Mutual Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998) (recognizing the independent cognizable cause of action by an insured against their insurance carrier for common law breach of fiduciary duty and for common law breach of the implied covenant of good faith and fair dealing).

The Circuit Court erred in dismissing the Petitioners' claims because neither Highmark, nor the federal district court opinions contains a basis for the Court's conclusion that there is no cause of action for breach of implied covenant of good faith and fair dealing under West Virginia common law.

#### IV. DETRIMENTAL RELIANCE

The Circuit Court erred in dismissing the Petitioners' claims for detrimental reliance pursuant to Rule 12(b)(6) for the same reasons that the Court erred in dismissed the fraud claim.

To the extent that the detrimental reliance claim is a restatement of the fraud claim, or another count for fraud, the Petitioners reassert their arguments against the dismissal of the fraud claim as were argued *supra*.

Moreover, the Circuit Court ruled that the statute of limitations for fraud expired prior to the Petitioners becoming aware of the fact that they were victims of fraud. The Petitioners argue that the “discovery rule” has been misapplied and that therefore their claims were filed within the statute of limitations period. However, in the event that they are indeed time-barred from prosecuting their tort claims, including fraud, the Petitioners should be entitled to equitable relief.

### **CONCLUSION**

The Circuit Court erred in dismissing the Petitioners’ claims on statute of limitations grounds. The Court misapplied the initiation of the discovery rule to a date upon which it would have been impossible for any of the Petitioners to acquire the necessary knowledge to know that they should sue, whom to sue, and why they should sue. To conclude that the Petitioners knew, or reasonably should have known that they were fraud victims due to a tax assessment challenge by Mountain America, LLC and certain like-situated property owners, where there was no disclosure or discovery of fraud, is to reward the commission and concealment of fraud. Additionally, the Circuit Court ruled in dismissing the Petitioners’ claims for breach of the implied covenant of good faith and fair dealing and detrimental reliance.

The Petitioners urge this Honorable Court to overturn the February 27, 2014 Order from the Circuit Court of Monroe County and to remand this case for further proceedings.

**CHARLES J. EVANS, CYNTHIA  
B. EVANS and OBIE WOODS,  
and WAYNE CLIBURN and LUCY  
CLIBURN, and SERGIO BAEZ,  
and PETER CALDERON and  
MIKE HOLLANDSWORTH,**

VIVIAN HOLLANDSWORTH, and  
JAN JERGE and JAMES  
CARROLL, JR. and FREDA  
LIVESAY and JIM MACKEY,  
SHAYNA MACKEY,  
and PETER DEL CIOPPO  
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**CERTIFICATE OF SERVICE**

I, John H. Bryan, hereby certify that a true and exact copy of the foregoing  
Petitioners' Brief and Appendix to Petitioners' Brief has been served upon the  
Respondents by sending the same via U.S. Mail, postage prepaid, to:

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Dated this the 30th day of June, 2014.



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JOHN H. BRYAN