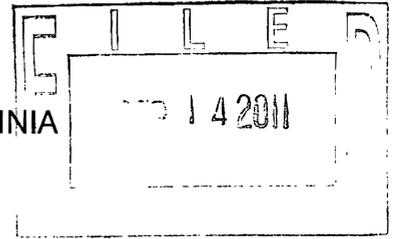


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 11-0595



RAYMOND A. HINERMAN, SR., and
BARBARA B. HINERMAN, husband
and wife, Plaintiffs below,

Petitioners

v.)

Appeal from a final order
of the Circuit Court of Monongalia
County (10-C-896)

RICHARD A. RODRIGUEZ and
RITA C. RODRIGUEZ, husband
and wife, Defendants below,

Respondents

RESPONDENTS' BRIEF

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THE RESPONDENTS SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

There are several factual issues that have not been brought to the Supreme Court's attention that may have an influence on the outcome of this Petition for appeal.

The lower court's Order Granting Partial Summary Judgment to the Defendants and Denying the Plaintiffs' Motion for Partial Summary Judgment, entered on March 4, 2011, was not a final order. The title of the order is reasonable evidence that all of the claims the Petitioners raised have not been resolved.

Neither Richard A. Rodriguez nor Rita C. Rodriguez never met or spoke or communicated with Petitioners during the sales negotiations or disclosure of the water leak. Record at 114, Richard A. Rodriguez Affidavit; Record at 117, Rita C. Rodriguez Affidavit.

Rita C. Rodriguez discovered and disclosed the water leak to Kathy Martin of KLM Properties on December 19, 2010. A.R. at 115, Rita C. Rodriguez Affidavit, Paragraph 9. Richard A. Rodriguez was never in the house after July 2010, and has no knowledge of the water leak or its disclosure. A.R. Richard A. Rodriguez at 114 Affidavit, Paragraph 5.

The Morgantown Real Estate Board's Uniform Real Estate Purchase Agreement (Purchase Agreement) is not ambiguous. The Petitioners have never alleged that the Purchase Agreement was ambiguous, and they agree "it is controlling." Petitioners' Brief at 15. Therefore, it was not the right or province of the lower court to alter, pervert, or destroy the clear meaning and intent of the parties, as expressed in unambiguous language in their written contract, or to make a new or different contract for them.

Syllabus Point 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1963).

Other purchasers had signed a “backup” contract to purchase the Respondents’ house at the time the Petitioners were attempting to close the sale of the residence. A.R. at 4, Complaint, Paragraph 16. This fact is important because the Petitioners have made statements that they are entitled to damages because the “fair market value” of the residence was reduced as a result of the minor water leak. That position is not supported by the Petitioners’ Complaint: there was “another Buyer willing to pay more than the contracted sale price for said property.” *Id.* Moreover, based on belief, the threat of the backup purchasers buying the house if the Petitioners did not purchase it, before their date to purchase the house expired, motivated the Petitioners to close the sale quickly.

The “wet carpet” damage to the house was “not substantial.” A.R. at 27, Chris Barnum letter to Raymond Hinerman, December 22, 2010.

A statement made on the record by the Petitioners’ counsel disclosed that a loose downspout may have caused the unsubstantial leak. A.R. at 134.

The Rodriguezes had the toy storage room, with the wet carpet, professionally dried at their expense immediately after the water leak was discovered. A.R. at 118, Rita C. Rodriguez’s Affidavit, Paragraph 11.

On October 21, 2010, the Petitioners reported to Kathy Martin at KLM Properties that they completed a preliminary title examination after the Purchase Agreement was signed. A.R. at 123, Raymond Hinerman letter to Kathy Martin, October 21, 2010. Although Attorney Hinerman found unpaid 2010 real estate property taxes were due, he

suggested the issue “was not a problem” as the taxes could be paid through a deduction to the purchase price at closing, if necessary. *Id.* Thus, they were aware that there were no liens or encumbrances on the property.

SUMMARY OF ARGUMENT

The Order granting the Respondents partial summary judgment was not a final order and the Petitioners’ appeal is untimely.

The Petitioners received a general warranty deed to the Respondents’ real estate, and the real estate was transferred free and clear of liens and encumbrances.

The Respondents’ position on this appeal is that the lower court properly granted them partial summary judgment as a matter of law on the Petitioners’ breach of contract and fraud claims. The breach of contract claim was founded on the Respondents’ “refusing to correct the leak” that was found and disclosed to the Petitioners before the closing of the sale. The Purchase Agreement specifically stated in Paragraph 25 that the “Seller will make no repairs.” The breach of contract claim was properly dismissed as a matter of law because the “no repair” language in the unambiguous Purchase Agreement established the rights of the parties concerning the repair of damages.

The Petitioners’ fraud claim stated that the Respondents committed fraud by “concealing [the leak] and preventing the Buyers from a meaningful inspection of the [basement] room” that was used to store toys. The lower court properly granted the Respondents summary judgment as a matter of law on the fraud claim, because the water leak was disclosed before the sale closed. The Petitioners received an extension of the closing date to permit them to make an informed decision if they still wanted to

purchase the house with the knowledge of the leak and the “no repair” language in the Purchase Agreement.

The Petitioners’ motion for partial summary judgment on their argument that they were entitled to recover monetary damages for diminution of the house’s value because of the water leak was properly denied. Basically, if the Purchase Agreement prevented the Respondents from making repairs, couching the repairs cost as damages for diminution of value was also prohibited as a matter of law. Additionally, there is no language in the Purchase Agreement that permits the Petitioners to recover monetary damages absent a Respondent’s breach of the terms of the Purchase Agreement, and the “risk of loss” provision limits their recovery to insurance proceeds.

The lower court, in its discretion, correctly denied the Respondents’ motion to continue the motion for summary judgment to conduct discovery. Discovery would not have altered the “no repair” language contained in Paragraph 25 of the Purchase Agreement, nor would it have altered the fact that the water leak was disclosed before the real estate closing, and thus, the Respondents could not have committed fraud for failing to disclose the water leak.

The circuit court, in its discretion, correctly denied the Respondents’ motion to stay the litigation of the surviving claim. Rule 62 of the West Virginia Rules of Civil Procedure states that a judge “may” grant a stay.

The Petitioners’ motion to alter or amend the judgment to overturn the lower court’s grant of partial summary judgment was properly denied on the same grounds on which the motion was originally granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents agree with the Petitioners that oral argument is not required in this case, and they also agree that a Memorandum Decision is appropriate.

ARGUMENT

The Record in this case will permit the Supreme Court to uphold the lower court's grant of partial summary judgment, or its *de novo* review will permit it to uphold the grant of partial summary judgment on the numerous grounds that are manifest in the Record. *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997). The lower court's reasoning and order granting partial summary judgment provided clear notice to the parties and to the Supreme Court for the rationale it applied in granting the motion for partial summary judgment. A.R. at 175, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011, page 28, ("I thought I just did that [put specific oral findings of fact and conclusions of law] on the record."); A.R. at 241, Order Granting Partial Summary Judgment to the Defendant, and Denying the Plaintiffs' Motion for Partial Summary Judgment. The lower court did not have to make elaborate findings; its findings only had to be meaningful. *Id.*

It is emphasized that the issues subject to the motion for summary judgment in this case were primarily legal rather than factual. Therefore, "[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Payne v. Weston*, 195 W.Va. 502, 506, 466 S.E.2d 161, 165 (1995).

I. THE PETITIONERS' APPEAL IS UNTIMELY BECAUSE A FINAL ORDER HAS NOT BEEN ENTERED IN THE CASE BECAUSE A CLAIM REMAINS TO BE DETERMINED.

The threshold issue in this petition for appeal is whether the Order Granting Partial Summary Judgment to the Defendants, and Denying the Plaintiffs' Motion for Partial Summary Judgment originating this appeal is a final appealable order. The Petitioners have argued that the order granting partial summary judgment was a final order. The Respondents disagree, and suggest that the Petitioners' boat claim, which survived the motion for summary judgment, must be resolved by an order before an appeal is proper.

West Virginia Code § 58-5-1 (1925) mandates that appeals may only be taken from final decisions of a circuit court. This "rule of finality," which generally is mandatory and jurisdictional, is designed to prohibit piecemeal appellate review of trial court decisions that do not terminate the litigation. *James M.B. v. Carolyn M.*, 193 W.Va. 289, 292, 456 S.E.2d 16, 19 (1985). A lower court's decision is final only if it ends the litigation on the merits and leaves nothing for the circuit court to do but execute the judgment. *Id.* In *Hinerman*, the boat issue survived the motion for summary judgment and remains to be resolved on its merits.

The Supreme Court has long adhered to the principle that it will not decide cases piecemeal, because all of the matters involved in a case should be disposed of by a final order adjudicating all of the claims. Syllabus, *Wilcher v. Riverton Coal Company, Inc.*, 156 W.Va. 501, 194 S.E.2d 660 (1973). The *Wilcher* Syllabus is still valid law. After all of the claims are finally disposed of, the final judgment may be appealed to the

Supreme Court without the necessity of it deciding multiple appeals before all of the claims are resolved. *Id. at 508.*

Importantly, the “finality rule” preserves the autonomy of the trial court by minimizing appellate interference, ensuring that the role of the appellate court will be one of review rather than one of intervention. *James M.B. v. Carolyn M.*, 193 W.Va. 289, 292, 456 S.E.2d 16, 19 (1985).

Applying these rules to the Hinerman order, the Petitioners’ claim that the boat was to be given to them if they purchased the house continues to be litigated. Therefore, the order is not final because the litigation has not ended on its merits as to all of the claims.

The Petitioners rely on *Durm v. Hecks*, 184 W.Va. 562, 401 S.E.2d 908 (1991) as supporting their belief that the grant of partial summary judgment was a final order. *Durm* interprets Rule 54(b) of the West Virginia Rules of Civil Procedure as permitting an interlocutory appeal if the circuit court’s order “approximates a final order in its nature or effect.” Syllabus Point 1, *Durm*. *Durm* involved a plaintiff’s slip and fall in a common area of a shopping center, which resulted in a suit against multiple parties. *Id. at 564*, 910. The circuit court granted summary judgment to one of the parties, and the plaintiff appealed the ruling. *Id.* The Supreme Court held that the lower court fully resolved the plaintiff’s claims against the one defendant when it granted it summary judgment on all of the claims that had been made against it, and thus, the order was “final in its nature and effect.” *Id. at 913*. This was a logical outcome, because all of the claims against the one defendant were completely resolved and it promoted judicial economy to permit the appeal to proceed. The Hinerman facts differ from *Durm*’s.

In their First Amended Complaint, the Petitioners alleged that the Four Winds boat owned by the Rodriguezes was to be given to them as part of their house purchase. A.R. at 61. This claim survived the motion for summary judgment. Consequently, the order granting summary judgment does not approximate a final order in its nature or effect because a claim survives. Where multiple claims are involved, a trial court should not attempt to enter a final judgment until all of the claims have been fully adjudicated. Syllabus, *Wilcher v. Riverton Coal Company, Inc.*, 156 W.Va. 501, 194 S.E.2d 660 (1973). This is a reasonable position for the Supreme Court to take in the Hinerman case, where an unresolved claim remains in active litigation.

However, the Supreme Court narrowed its liberal *Durm* approach to appeals prosecuted under Rule 54(b). The Supreme Court determined that the preferable approach for any litigant involved in an appeal “in which the order that could be interlocutory less than all the issues in an action” is to request the circuit court apply a Rule 54(b) certification to the order. *Province v. Province*, 196 W.Va. 473, 473 S.E.2d 894 (1996). If the litigant wishing to appeal persuades the circuit court that an order is final under Rule 54(b), the circuit court should support its conclusion by clearly and cogently expressing its reasoning on all facets of the case, including the factual and legal determinations that support its reasoning. *Id.*

Nevertheless, the Petitioners did not avail themselves of this “preferred approach,” and now there is a question that requires Supreme Court intervention to resolve. The Respondents should not be penalized by enduring multiple appeals as a result of the Petitioners’ failure to request that the lower court make a *Province* determination of the Rule 54(b) status of its order.

The “finality rule” protects civil litigants by reducing the ability of litigants to wear down their opponents by repeated, expensive appellate proceedings. *James M.B. v. Carolyn M.*, 193 W.Va. 289, 292, 456 S.E.2d 16, 19 (1985). Without question, the Petitioners will prosecute multiple appeals involving every claim they have unless the Supreme Court dismisses their current appeal by finding that it does not have appellate jurisdiction, as there is not a final order disposing of all of the Petitioners’ claims against the Rodriguezes.

An interpretation of Rule 54 would be reviewed *de novo*, however a Rule 54 ruling was not requested by the Petitioners. Under W.Va. Code §58-5-1, which is a statutory mandate, the review of the issue of finality, which revolves around the surviving claim, would be *de novo*. *Province v. Province*, 196 W.Va. 473, 473 S.E.2d 894 (1996).

II. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE PETITIONERS’ MOTION FOR A STAY PURSUANT TO RULE 62(H) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

Following the lower court’s grant of partial summary judgment on the Petitioners’ breach of contract and fraud allegations, they moved to stay the proceeding during their appeal of the grant of partial summary judgment. The lower court denied the motion following the Respondents’ objection to the stay. A.R. at 175 page 27, Transcript of Hearing on Petitioners’ Motion to Continue and Motion for Summary Judgment and Defendants’ Motion for Summary Judgment, February 2, 2011.

The lower court’s refusal to grant the stay was not an error. Rule 62 of the West Virginia Rules of Civil Procedure addresses stays of proceedings “to enforce a judgment.” The Petitioner cited Rule 62(h) as requiring a stay in their case pending

their appeal of the partial summary judgment order. Rule 62(h) only applies to the stay of a case after “the court has ordered a final judgment under the conditions stated in Rule 54(b). As discussed in Section I of this brief, the lower court’s grant of partial summary judgment was not a final order. Therefore, since the grant of partial summary judgment was not a final order as a result of the pending boat claim, a mechanism to stay the surviving claim was not available under Rule 62(h).

Furthermore, even if the order granting partial summary judgment was a final order, the court does not have to grant a stay under Rule 62(h). After a court has ordered a Rule 54(b) final judgment, “the court may stay the enforcement of that judgment until the entering of a subsequent judgment” Rule 62(h). Therefore, the court has the Rule 62(h) discretion to deny a stay, even if the order was final.

A stay was also prevented by the Rule 62(a) language that prevents a stay of “an interlocutory order in an action” Since the order granting partial summary judgment is an interlocutory order, Rule 62(a) did not permit a stay.

Rule 62(i) also grants a circuit court the discretion to stay a case “pending application for appeal.” Again, a court “may stay the issuance of execution upon a judgment . . . ,” which is discretionary language.

Unfortunately, there is a dearth of legal authority in West Virginia for determining whether to grant or deny a Rule 62 discretionary stay. However, the United States District Court for the Southern District of West Virginia has applied criteria from a long line of federal cases to determine if a case should be stayed. See *Chempower v. Robert McAlpine*, 849 F.Supp. 459 (SD W.Va. 1994). The Southern District Court

applied the following criteria, cited at page 462 of the *Chempower* decision, for determining if a Rule 62 stay should be granted:

- (1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) Whether the applicant will be irreparably injured absent a stay;
- (3) Whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) Where the public interest lies.

Applying the *Chempower* factors to the Hinerman facts, the Petitioners have certainly not made a strong showing that they are likely to succeed on the merits, as the lower court correctly determined the Respondents did not breach the contract or commit fraud. The Petitioners were not “irreparably injured” or harmed in any manner when their stay was not granted. The issuance of the stay would have substantially injured the Respondents because it would have postponed their litigation of the surviving claim, which, if the appeal is denied, would have interrupted and needlessly extended the annoyance, inconvenience, and expense of the litigation for many months.

In summary, the *Chempower* factors fully support the lower court’s denial of the Petitioners’ motion to stay the litigation of the surviving claim.

Based on the discretionary language in Rule 62, an abuse of discretion is the standard for appellate review.

III. THE CIRCUIT COURT DID NOT ERR BY DENYING THE PETITIONERS’ REQUEST THAT THE RESPONDENTS DELIVER A GENERAL WARRANTY DEED, FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES TO THE PETITIONERS.

The Petitioners received a general warranty deed at the closing, which provided them with the best warranty of title that a grantor can provide in West Virginia.

However, the Petitioners interpret the Sales Agreement as requiring that they receive a

deed “containing covenants of GENERAL WARRANTY, free and clear of all liens and encumbrances.” A.R. at 19, Plaintiffs’ Motion For Preliminary Injunction And Memorandum of Law In Support Of Motion For Preliminary Injunction. At the closing, the Respondents provided them a general warranty deed to property that was free and clear of all liens and encumbrances. Chris Barnum, the Respondents’ real estate attorney, agreed to provide an affidavit at closing that stated there were no mechanics’ liens on the property, and that no one had worked on the property in the last 120 days who were unpaid for their work. Transcript of Hearing on Plaintiffs’ Motion for a Preliminary Injunction and Defendants’ Motion to Dismiss at 17.

The Petitioners’ October 21, 2010 letter to KLM Properties’ Kathy Martin confirms that they had completed a preliminary title examination, and they were satisfied with the title to the Rodriguez property. A.R. at 123. While they noted that the 2010 real estate taxes were unpaid, that was “not a problem” because the taxes could be “deducted from the sellers sale proceeds.” *Id.* The significance of the letter is that there were no liens or encumbrances filed against the property, and counsel for the Petitioners was aware of that fact as early as October 21, 2010.

Not only were there no liens or encumbrances on the property as of October 21, 2010, there were no liens or encumbrances on the property on the date of closing. Nevertheless, the Petitioners believe that somehow they received less title to the property than the Purchase Agreement requires. Conversely, the Respondents believe that the language required them to provide a deed with covenants of general warranty, and to convey the property free of liens and encumbrances, which they did.

In conclusion, there is not a legal issue surrounding the deed language that impacts this case in any manner. Since a general warranty deed is the best title guarantee that a grantee can receive, the extra language is superfluous. The Petitioners received the exact warranty of title that was required, and they also received property that was free of liens and encumbrances. The review of a lower court's interpretation of a statute or a pure question of law is subject to a *de novo* review. *Howell v. Goode*, 223 W. Va. 387, 674 S.E.2nd 248, (2009).

IV. THE CIRCUIT COURT DID NOT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIM, AS THE UNAMBIGUOUS UNIFORM REAL ESTATE PURCHASE AGREEMENT FULLY SUPPORTS THE LOWER COURT'S DECISION.

The facts in this case are straightforward. One fact of paramount importance to the resolution of this case is that the Purchase Agreement contract is not ambiguous: “[t]he Purchase Agreement is controlling, and the Circuit Court misconstrued it” Petitioners’ Brief at 15. Furthermore, the Petitioners never argued that the Purchase Agreement was ambiguous in the lower court proceedings. Therefore, the language contained in the four corners of the Purchase Agreement established the rights of the parties and guided the lower court’s analysis of the parties’ legal positions. An unambiguous contract, such as the Purchase Agreement, required that the lower court construe it according to its plain and natural meaning. *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161, 166 (1985).

A. PARAGRAPH 25 OF THE PURCHASE AGREEMENT CONTAINS THE LANGUAGE THAT REQUIRED THE COURT TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF CONTRACT ACTION AS A MATTER OF SUBSTANTIVE CONTRACT LAW.

The Petitioners' cause of action for breach of the Purchase Agreement was correctly dismissed. Paragraph 25 of the Purchase Agreement absolutely establishes that the sellers did not before closing, and did not after closing, have a responsibility to make any repairs to the house at issue in this litigation. There is no ambiguity in the Purchase Agreement's language "[i]t is understood that this Property is being sold "as is" and Seller will make no repairs." A.R. at 12, Paragraph 25 of the Purchase Agreement. The "Seller will make no repairs" language is an absolute defense to the Petitioners' claims that the Rodriguezes breached the contract because they refused to repair the water leak damage. In fact, Rita C. Rodriguez had the wet carpet professionally dried. A.R. at 118, Rita C. Rodriguez Affidavit, Paragraph 11.

Simply stated, the Rodriguezes did not have to make repairs, or to pay for repairs for any reason, no matter who disclosed a defect, when it was disclosed, how it was disclosed, where the defect was located, or when the repair was to be made. Consequently, the Rodriguezes did not breach the contract for refusing to do what the Purchase Agreement clearly stated they would not do.

There are other grounds that the lower court considered in granting summary judgment on the breach of contract issue. For example, Christopher Barnum's December 22, 2010 letter to the Petitioners confirmed the December 21, 2010 wet carpet disclosure. A.R. at 27. Mr. Barnum's letter also informed the Petitioners that the Rodriguezes would not "make any repairs at their expense." *Id.* This language

communicates the fact that the Rodriguezes were not going to expend any funds to resolve the water issue if the Petitioners decided to purchase the house.

B. THE PETITIONERS' WAIVER OF THEIR CONTRACTUAL RIGHT TO DEMAND REPAIRS SUPPORTED THE LOWER COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM.

Paragraph 12(F) of the Uniform Purchase Agreement contains waiver of repair language that was invoked by the Hinermans' failure to have the house professionally inspected. The Paragraph 12(F) language supports the Rodriguezes' position in the motion for summary judgment process that the Petitioners' failure to inspect required them to "to accept the property in its present condition."

Section 12(F) of the Agreement reads as follows:

BUYER shall have the right, at BUYER'S expense, to have inspection(s) of the Property for structural physical and mechanical components, environmental, and geological, and for such other purposes as determined by the BUYER. Written notice of the findings will be reported to SELLER and the SELLER'S Agent on or Before October 27, 2010 ****See item #25**. Failure to inspect and/or report to SELLER and to SELLER'S Agent within the specified time shall be deemed a waiver of the BUYER'S right to inspect and to request repairs, and BUYER agrees to accept the Property in its present condition.

The types of inspection referenced in Section 12(F) can only mean inspections by professionals with experience in the referenced technical disciplines. However, the Petitioners did not have the property professionally inspected at their expense to determine if the house was in an acceptable condition. Petitioners' Brief at 20. In fact, even after Chris Barnum told the Petitioners the house may not be acceptable to them, following the December 21, 2010 disclosure of the leak, they still waived their right to have the house inspected to determine the cause and the extent of the water leak. A.R. at 27, Chris Barnum letter to Raymond Hinerman, December 22, 2010. Under

Paragraph 12(F), they waived their right to request repairs after the leak was discovered and disclosed by Rita C. Rodriguez on December 19, 2010. A.R. at 118, Rita C.

Rodriguez Affidavit, Paragraph 9. Therefore, the waiver supports the lower court's grant of summary judgment as a matter of law on the breach of contract claim.

Furthermore, their failure to have professional inspections of the structural, mechanical, environmental, and geological conditions required that they accept the house in its "present condition." The "present condition" language that applies after a failure to inspect totally negates the Petitioners repeated argument that they accepted the house "as is" on October 5, 2010. Clearly, they accepted the house in its "present condition" when they decided to not have the house inspected by professionals, and they made the same decision after the leak was disclosed. The Petitioners accepted the house in its present condition months after the Purchase Agreement was signed.

In summary, the lower court correctly applied the procedural law of Rule 56 and substantive contract law to the allegation that the Respondents breached the contract when it dismissed the breach of contract claim. The specific Paragraph 25 and Paragraph 12(F) Purchase Agreement language absolutely prevents the Petitioners from prevailing on their allegation that the Purchase Agreement was breached by the Rodriguezes "refusing to correct the [water] leak." A.R. at 60, First Amended Complaint. Therefore, summary judgment was appropriate "where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995). Since the Petitioners cannot prove the breach of contract element for failing to repair the water leak, the lower court's dismissal as a matter of law was correct.

A circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

V. THE RESPONDENTS DID NOT COMMIT A FRAUDULENT ACT BY CONCEALING THE SMALL WATER LEAK THAT THEY ACTUALLY DISCLOSED, NOR DID THEY PREVENT THE BUYERS FROM A MEANINGFUL INSPECTION OF THE ROOM WHICH WAS DAMAGED BY THE WATER LEAK.

The Petitioners' cause of action for fraud failed as a matter of law and of common sense. While tort causes of action are not generally subject to a motion for summary judgment, "when one coalesces the proof with the necessary elements of the cause of action, summary judgment is appropriate. *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451, 461 (1995). Summary judgment was appropriate on the Petitioners' fraud claim.

The Petitioners alleged in Paragraph 8 of their First Amended Complaint that the Rodriguezes "committed fraud by concealing [the water leak] and preventing the Buyers from a meaningful inspection of the room which was damaged by the water leak until approximately one (1) week before the final closing but just one day before the Sellers unilaterally postponed the second of three closing dates." A.R. at 60, First Amended Complaint, Paragraph 8. This allegation is without merit.

It is important that the Respondents never met, talked to, or communicated with the Petitioners during the sales process. Record at 114, Richard A. Rodriguez Affidavit, Paragraph 5; Record at 117, Rita C. Rodriguez Affidavit, Paragraph 5.

First, the Respondents disclosed the water leak and unilaterally continued the closing to permit the Petitioners time to investigate the wet carpet. A.R. at 27, Christopher A. Barnum letter to Raymond Hinerman, December 22, 2010. Second, the Respondents reside in Michigan; they could not have interfered with the Petitioners

inspection of the Morgantown, West Virginia, house when they had not been in the house since July and August of 2010. A.R. at 114, Richard A. Rodriguez Affidavit, Paragraph 5; A.R. at 117, Rita C. Rodriguez Affidavit, Paragraph 5. In fact, they interfered on the Petitioners' behalf when Chris Barnum wrote to the Petitioners suggesting that they not buy the house without a meaningful inspection of the wet carpet so they could make an "informed decision" on whether or not to buy the house.

Id.

Reduced to the most elementary logic, the Rodriguezes could not commit fraud for not revealing the water leak when they revealed it.

A. IF THE PETITIONERS WERE PLEADING THAT THE RESPONDENTS, AS VENDORS, WERE AWARE OF THE WATER LEAK IN THE HOUSE AND INTENTIONALLY CONCEALED IT, THE LOWER COURT PROPERLY GRANTED THE MOTION FOR SUMMARY JUDGMENT ON THE FRAUD CAUSE OF ACTION.

There is no question that the leak was disclosed to the Petitioners before they purchased the house. A.R. at 60, Paragraph 8, First Amended Complaint. Therefore, West Virginia law will not hold Mr. and Mrs. Rodriguez responsible for the fraudulent concealment of a latent defect existing at their house. The concealment of the water leak and the prevention of a meaningful inspection of the room where the leak occurred was the exact and only fraudulent act that the Petitioners allege caused their damages. Notwithstanding the Petitioners' belief that the following cases do not apply to the facts, it is logical to conclude that West Virginia case law addressing the intentional concealment of a defect in a house is applicable to the cause of action.

The rule of law applicable to the Petitioners' fraud claim against Mr. and Mrs.

Rodriguez is: "where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser." *Logue v. Flanagan*, 213 W.Va. 552, 584 S.E.2d 186, 189 (2003) *citing with approval* *Syllabus Thacker v. Tyree*, 171 W.Va. 110, 112, 297 S.E.2d 885, 888 (1982). Thus, the vendor of a home who fails to disclose a defect will give the purchaser a cause of action for fraud. *Id.* The rule of law supports the lower court's grant of summary judgment on the fraud cause of action under its *Logue v. Flanagan* analysis. A.R. at 197, Order Granting Partial Summary Judgment to the Defendants, and Denying the Plaintiffs' Motion for Partial Summary Judgment; A.R. at 175 pages 21-23 (the lower court's oral findings of fact and conclusions of law).

Logue involved the sale of real estate which had an allegedly defective septic system. However, the vendors stated in a disclosure that the property included a septic system, which implied an operable system that complied with health department requirements. *Logue* at 188. After the sale closed, the purchasers were informed the septic system was an "improper system." *Id.* The purchasers sued for the vendors' fraudulent concealment of the defect. *Id.* The Mineral County Circuit Court granted the defendants summary judgment because of "as is" language contained in the sales contract, which it believed placed the burden of the defective septic system on the purchasers. *Id.* at 187.

The *Logue* Court reversed the circuit court's grant of summary judgment to the vendors, because they "arguably knew of the true conditions" of the defective septic

system, but “did not disclose the information” to the purchasers. *Id.* at 191. Since a jury could reasonably conclude the vendor concealed facts that it had a duty to disclose regarding the condition of the site, summary judgment was inappropriate. *Id.*

The lower court correctly granted summary judgment on the Petitioners’ fraud cause of action based on the *Logue* case. The lower court’s *Logue* analysis led it to the inescapable conclusion that the *Thacker* holding was fatal to the Petitioners’ fraud cause of action at the summary judgment stage. This rule is in the conjunctive, and all of the conditions have to be met for a purchaser to have a cause of action against a vendor. *Thacker*, 171 W.Va. 110, 112, 277 S.E.2d 885 (1992).

What did the Record disclose at the summary judgment stage of the case? The Rodriguezes, as the vendors, were unaware of the water leak until December 19, 2010, and Rita C. Rodriguez disclosed it immediately when she discovered the condition. A.R. at 114, Richard A. Rodriguez Affidavit, Paragraph 6; Record at 117, Rita C. Rodriguez Affidavit, Paragraphs 6 and 9. In fact, Raymond Hinerman acknowledged to attorney Scott Johnson that he did not believe the Rodriguezes knew of the water intrusion. A.R. at 127, Attorney Scott Johnson’s Affidavit, December 27, 2011. Significantly, the Petitioners never challenged the accuracy of Attorney Johnson’s Affidavit at any time. *Id.* The water damage in the basement toy storage room was not substantial; it consisted of “wet carpet.” A.R. at 27, Chris Barnum letter to Raymond Hinerman, December 22, 2010. The water leak had been disclosed and the Petitioners were aware of the water leak before they purchased the house. A.R. at 2, Complaint. The Petitioners did not make a “reasonably diligent inspection,” nor did they hire professionals to make a reasonably diligent inspection. A.R. 175, Transcript of Hearing

On Plaintiffs' Motion To Continue And Motion For Summary Judgment and Defendants' Motion For Summary Judgment at 19 (we were in the room but couldn't inspect it because it was full of toys); *Id.* at 16 ("we" did in fact make an inspection with the Realtor). Had the Hinermans had the house inspected by a professional, the defect would not have been latent, because any competent inspector would have easily found the patent wet carpet. Consequently, the Petitioners could not, as a matter of law, have resisted the motion for summary judgment because the Record disclosed all of the information contained in the previous paragraph to the lower court before it granted the motion for summary judgment. All of the Record facts in the previous paragraph were in the Record as affirmative evidence that negated essential elements of the Petitioners' fraud claim. *Gentry v. Magnum*, 195 W.Va. 512, 466 W.E.2d 171 (1995).

The Rodriguezes argued the *Thacker* Syllabus to show that there were no genuine issues of material fact concerning the *Thacker* elements. The Petitioners did not meet their burden to contradict the Record facts by pointing to a specific material fact(s) or case law demonstrating that there is a trial worthy issue on their fraud claim. *Gentry v. Mangum*, 195 W.Va. 512,466 S.E.2d 171 (1995). They could not meet their burden because the material facts discussed above were in the Record, and summary judgment was appropriate "where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The Petitioners could not deny the disclosure of the water leak; therefore they could not establish a material fact contradicting the fact that the Respondents met their "duty to disclose the same [defects or conditions] to the purchaser. See *Thacker* at 112, 888.

In summary, under the *Logue* and *Thacker* holdings, the lower court's grant of summary judgment must be confirmed. The Petitioners could not demonstrate that there were genuine issues of material fact that controverted the water leak disclosure, which that had to raise to prove an essential element of a *Thacker* cause of action. Therefore, the Rodriguezes were "entitled to judgment as a matter of law" on the Petitioners' fraud cause of action. Rule 56(c), West Virginia Rules of Civil Procedure.

B. IF THE PETITIONERS WERE ALLEGING A TRADITIONAL FRAUD CLAIM, IT WAS PROPERLY RESOLVED BY THE LOWER COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT.

In their motion for partial summary judgment, A.R. at 93, the Respondents noted that if the Petitioners' were alleging a traditional fraud claim, they should have, but did not, plead the following essential elements: (1) the act claimed to be fraudulent was the act of the defendant or induced by him; (2) the act was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) the plaintiff was damaged because he relied on it. *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 425 S.E.2d 144, 148 (1992). The Petitioners were placed on notice that their causes of action lacked the above elements when the Respondents filed their motion to dismiss. A.R. at 44, Richard A. Rodriguez's and Rita C. Rodriguez's Motion To Dismiss The Plaintiffs' Complaint And To Deny The Motion For Injunctive Relief. Nevertheless, the Petitioners subsequently filed their First Amended Complaint and their Second Amended Complaint without setting forth the elements of their causes of action.

Actual fraud consists of intentional deception to induce another to part with property. *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 285 S.E.2d 679 (1981).

The fraud elements must be proven by clear and convincing evidence. *C. W Dev., Inc. v. Structures, Inc. of W Va.*, 185 W.Va. 462, 408 S.E.2d 41 (1991). This high burden of proof cannot be met in this case, because the Purchase Agreement and the Record demonstrate that the Petitioners did not raise a genuine issue of material fact related to the fraud claim in their response to the motion for summary judgment.

Since “the circumstances constituting fraud . . . shall be stated with particularity,” it is difficult to determine how the circumstances of the Petitioners’ case could have been specifically pleaded when the First Amended Complaint did not contain the elements of an intentional fraudulent cause of action. Rule 9(b), West Virginia Rules of Civil Procedure; A.R. at 60, First Amended Complaint, Paragraph 3. Particularity is required for a fraud pleading because of the gravity of the allegation. *Hager v. Exxon Corp.*, 161 W.Va. 278, 241 S.E.2d 920 (1978). The failure to plead a fraud cause of action with particularity inhibits full review of the substance of the claim of fraud on appeal from a grant of summary judgment, and it prohibits proof of the cause of action at trial. *Croston v. Emax Oil Co.*, 195 W.Va. 86, 464 S.E.2d 728 (1995).

The Petitioners in this case merely pleaded their opinion and speculation that the Rodriguezes knew that the basement had a small water leak, and then intentionally concealed the water leak from them. Therefore, without pleading the elements of common law fraud, nor applying them to their allegation that the Rodriguezes concealed the leak, the Petitioners could not meet their burden to resist the motion for summary judgment by showing the existence of a genuine issue of material fact to controvert the fact that the leak was disclosed and there was no “intentional deception to induce” the Respondents to “part with their property [purchase price].”

In summary, the Rodriguezes filed their motion for summary judgment, and the Petitioners were forced to meet their burden of proving there were genuine issues of material fact relevant to each element their grave fraud claim.

A circuit court's entry of summary judgment on the fraud claim is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VI. A CONTINUANCE TO CONDUCT DISCOVERY WAS NOT REQUIRED IN THIS CASE BECAUSE THE FOUR CORNERS OF THE CONTRACT REQUIRED THE DISMISSAL OF THE CONTRACT CLAIM, AND THERE WAS NO CONCEALMENT OF THE WATER LEAK, WHICH REQUIRED THE DISMISSAL OF THE FRAUD CLAIM.

The Petitioners' argument that they needed to conduct discovery to resist the motion for summary judgment is incorrect. Discovery will not (1) alter the language contained in the four corners of the Purchase Agreement, (2) alter the fact that the water leak was disclosed, (3) alter the content of Richard A. Rodriguez's and Rita C. Rodriguez's affidavits, (4) alter the content of Christopher Barnum's December 22, 2010 letter, (5) alter the fact that the Petitioners bought the house with actual knowledge of the water leak, or, (6) alter the fact that the house was not professionally inspected. Based on these and other facts, the lower court did not abuse its discretion when it granted partial summary judgment without permitting the Petitioners to conduct discovery.

A continuance to conduct discovery was unnecessary for two reasons. First, the Petitioners signed the Purchase Agreement on October 5, 2010 that established the rights of the parties. The plain language of the Agreement placed them on notice that the Rodriguez family would "make no repairs" if defects in the house were discovered during inspections. A.R. at 25, Purchase Agreement, Paragraph 25. The Purchase Agreement also placed them on notice of the remedies they were entitled to pursue.

Second, the Petitioners admit that they were told there was a water leak in the basement of the house prior to their pre-closing walk through inspection. A.R. at 59, First Amended Complaint, Paragraph 5. Again, Chris Barnum, the Rodriguezes' real estate attorney, wrote to the Petitioners on December 22, 2010 to confirm the water infiltration, and to inform them that they should have the cause of the leak investigated prior to purchasing the house. A.R. at 27. Inexplicably, the Petitioners rejected the offer to continue the sales process to investigate the leak and to have a professional inspection, which would have permitted an informed decision on whether or not to purchase the house. They simply bought the house on December 29, 2010 without inquiring as to the cause of, or the extent, of the leak.

These two fact patterns meet the Respondents' burden of showing, "by pointing out to the lower court," that there is an absence of evidence to support the nonmoving party's case, because the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

To obtain a Rule 56(f) continuance to conduct discovery after the Respondents revealed there was a lack of a showing concerning their elements, the Petitioners were required to (1) articulate some plausible basis for the belief that specified "discoverable" material fact likely exist that have become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Harrison v. Davis*, 197 W.Va. 651, 478

S.E.2d 104 (1996). The Petitioners did not meet the first three requirements to permit them to obtain a continuance to conduct discovery.

The Petitioners' failure to meet the *Harrison* requirements is based on their failure to identify specific potentially discoverable material facts that raise genuine issues for trial concerning the elements of their two causes of action. Again, material facts are those necessary to establish the elements of a party's cause of action. *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The *Williams* cite is why the Petitioners' failure to plead the elements of their causes of action is so important to their motion for a continuance to conduct discovery. They cannot raise specific material facts related to the elements of their causes of action when they did not plead the elements. Thus, the Petitioners cannot meet their burden to resist a motion for summary judgment at any stage of this litigation, including trial.

In the Petitioners' Rule 56(f) Affidavit in support of their motion for a continuance, they write that "there are issues of fact, which include, but are not limited to the following [list]". A.R. at 132. However, the facts must be **specific discoverable material facts** under the *Harrison* requirements. The Affidavit does not "articulate some plausible basis for the belief that specified "discoverable" material fact likely exist". The Affidavit does not demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material. Therefore, the Petitioners' Rule 56(f) Affidavit does not provide the information necessary under *Harrison* to obtain a continuance to conduct discovery, and they "deviated from the Rule 56(f) affidavit requirement at their peril ". *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872, 882 (1996).

A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). A jury could not return a verdict for the Petitioners because they have not pleaded any elements for them to prove. Therefore, they could not prove any breach of contract element, nor any element of fraud claim.

Summary judgment procedure has evolved; it is no longer a disfavored procedural shortcut, but is an integral part of the rules of civil procedure designed to strike at the heart of a claim to provide a speedy determination of legal issues. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The Petitioners' First Amended Complaint and its lack of elements for its causes of action is an example that illustrates the necessity of striking at the heart of a meritless claim. Based on the Record that was before the lower court at the time it granted partial summary judgment, its denial of a stay to conduct discovery was not an abuse of its discretion.

The denial of a continuance is reviewed for an abuse of discretion, and the lower court's decision should not be disturbed unless there is a clear showing of an abuse of discretion. *State v. Judy*, 179 W.Va. 734, 372 S.E.2d 796 (1988).

VII. THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED THE PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF THE HOUSE'S LOSS OF VALUE.

The Petitioners' claim that they are entitled to damages for diminution in the house's value is erroneous. To prevail, they must show that the Purchase Agreement (1) permits a monetary recovery under the facts of the sales transaction, and (2) that the agreement does not prohibit a monetary recovery. They did not, and cannot, meet

either burden, because the Respondents raised three Purchase Agreement provisions that prevent a monetary recovery, which is contrary to the Petitioners statement in their Brief that the Rodriguezes did not respond to the loss in value claim in their motion for summary judgment. Petitioners' Brief at 24.

The Rodriguezes argued in the motion for summary judgment hearing that the Petitioners cannot recover monetary damages for the water leak. A.R. at 175 page 20, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011. Paragraph 6 of the Purchase Agreement, the "risk of loss provision," completely forecloses the Petitioners' attempt of a monetary recovery.

In the Purchase Agreement's Paragraph 6, the risk of loss provision plainly states the relief that is available if the property is damaged before closing. "If the improvements are destroyed or damaged . . . before closing, BUYER may terminate the purchase agreement" and recover the earnest money deposit. In the alternative, if the buyer does not terminate the agreement, "the BUYER shall be entitled to the property and any insurance proceeds payable on account of the damage" Therefore, the Petitioners had two options after the leak was disclosed. They could terminate the agreement, or they could purchase the property and recover any insurance proceeds available to pay for the damage. These are their only two remedies.

However, they could have protected their insurable interest in the house with insurance coverage. The general rule is that both parties to an executory contract for the sale of real property have an insurable interest. Syllabus Point 3, *Bryant v. Williston*, 177 W.Va. 120, 130 S.E.2d 748 (1986). In response to the Respondents'

Paragraph 6 argument, the Petitioners admitted in the motion for summary judgment hearing that they had an insurable interest in the house, but did not insure the property. A.R. at 175 page 21, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011, ("I probably had an insurable interest, but I didn't insure it"). The Rodriguezes did not file an insurance claim because the wet carpet was quickly, easily and inexpensively dried at their expense by professionals. A.R. at 118, Rita C. Rodriguez Affidavit, Paragraph 11.

Paragraph 12(F) in the purchase agreement also prevents a monetary damage recovery. The Respondents raised the Paragraph 12(F) argument early in this litigation in their motion to dismiss, which was incorporated by reference into their motion for summary judgment. A.R. at 50, Richard A. Rodriguezes and Rita C. Rodriguezes Motion to Dismiss the Plaintiffs' Complaint and to Deny Their Motion for Injunctive Relief; A.R. at 90 (the Rodriguezes are incorporating the motion to dismiss by reference into this motion for summary judgment). Paragraph 12(F) was also raised in the Respondents' motion for summary judgment.

Paragraph 12(H) of the Purchase Agreement contains waiver of repair language for a buyer's failure to inspect the various systems contained in a house they are purchasing. The intent of Paragraph 12(F) is that the inspections will be conducted by professionals in the necessary technical disciplines, because Paragraph 12(E) requires the buyer "to promptly pay any inspection fees ordered by the Buyer." A.R. at 9, Purchase Agreement, Paragraphs 12(F) and 12(E).

The Petitioners had the contractual right to pay to have the house inspected for anything and for everything, but they never did so at their obvious peril. Their failure to have the house inspected was a “waiver of BUYER’S right to inspection and to request repairs, and BUYER agrees to accept the Property in its present condition.” *Id.*

Although the Petitioners did not discover the water leak because they did not have the house inspected, Rita C. Rodriguez discovered and disclosed the water leak to them prior to closing. Once the leak was disclosed to them, the Hinermans were limited to two remedies under Paragraph 12(F). They could have terminated the agreement because “BUYER is not satisfied with the results of such inspections.” *Id.* at 12(F)(1). In the alternative, the Hinermans could, and did, ask the Rodriguezes to repair the water leak, but Paragraph 25 of the Purchase Agreement excluded the requirement of making repairs. *Id.* at 12(F)(2).

There are three options contained in Paragraph 12(F)(2) that apply to how repair issues can be resolved. Paragraph 12(F)(2)(C) permitted the Rodriguezes to refuse to repair the water leak. *Id.* Paragraph 12(F)(B) permitted the parties to negotiate the cost of repairs to be made by the seller. *Id.* Following the Respondents’ denial that they were required to pay for the water leak repair, the only remaining option available to the Petitioners permitted the “BUYER to terminate this Agreement” and to recover their earnest money deposit. *Id.* Paragraph 12(F)(2)(C).

Instead of rescinding the Purchase Agreement and recovering their earnest money deposit, the Petitioners ignored their specific Paragraph 12(F) contractual remedies, bought the house with actual knowledge of the water leak, and decided to sue the Rodriguezes for fraud and breach of contract. In effect, the Petitioners ignored

their contractual remedies and unreasonably attempted to collect monetary damages for diminution in value, a remedy that was not available to them.

Consequently, Paragraph 12(F) also supports the lower court's denial of the Petitioners' motion for partial summary judgment to permit them to recover diminution in value damages.

On pages 6 and 7 of their motion for summary judgment, the Respondents again addressed the issue of monetary damages raised in their First Amended Complaint. The Respondents argued that the Petitioners are not entitled to monetary damages to repair the leak as they requested in their First Amended Complaint. A.R. at 175, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011, Page 92. The Rodriguezes reasoned that if the Purchase Agreement did not require them to make repairs, the clear intent of Paragraph 25 precludes their having to pay for repairs to the house at any time. *Id.* It is illogical to argue otherwise; if the Rodriguezes were willing to expend extra money to correct a defective condition discovered in the house, before or after closing, they would not have modified the standard form Morgantown Board of Realtors Uniform Real Estate Purchase Agreement with the supplemental "no repairs" condition.

The Rodriguezes compromised the house's sales price by \$400,000.00 as a result of the Petitioners' purchase offers. A.R. at 155, Addendum to Listing Agreement. However, because of the significant reduction in the sales price, they insisted on the Paragraph 25 language that they would not incur expenses if further conditions were discovered that required repairs. Plainly stated, the Petitioners bought the house for a

very fair price, and because of the Rodriguezes' compromised sales price, they could not finance repairs. A.R. at 115, Richard A. Rodriguez Affidavit, Paragraph 7; A.R. at 118, Rita C. Rodriguez's Affidavit, Paragraph 8. Importantly, the Petitioners' signed the Purchase Agreement without objecting to the language establishing that there would be no repairs of any condition found in the house.

Section 25 of the Purchase Agreement was quoted in its entirety in the Respondents' motion to dismiss, and was incorporated by reference into the Respondents' motion for summary judgment. Record at 47 and 50. While there was no specific argument in the motion for summary judgment, Section 25 permitted the Petitioners to "have inspections as stated in item #12 and 13 and if not satisfied with inspections may void this contract with earnest money returned to Buyer." Since the Petitioners were not satisfied with the results of their pre-closing walk through inspection, they were entitled to void the contract and recover their earnest money deposit. Therefore, the Petitioners' waived their right to a monetary recovery when they ignored their singular option to void the contract after they reported they were dissatisfied with their inspection.

In summary, for the Petitioners to prevail on their entitlement to monetary damages would require the Court to ignore the plain meaning of the wording of Paragraphs 6, 12(F), and 25 of the Purchase Agreement, which would be contrary to the general rule that prohibits the interpretation of unambiguous language contained in a written contract. *Warner v. Haught, Inc.*, 174 W.Va. 772, 329 S.E.2d 88 (1985). Moreover, the lower court would also have to ignore the obvious: you cannot recover

damages for a breach of contract when there is no breach, nor can you recover damages for a fraudulent concealment when there is no concealment.

A circuit court's denial of a motion for summary judgment is reviewed *de novo*.

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VIII. THE LOWER COURT DID NOT ERR WHEN IT DENIED THE PETITIONERS' MOTION TO ALTER OR AMEND ITS JUDGMENT [STYLED BY THE PETIONERS AS A MOTION FOR RECONSIDERATION].

The only issue the Petitioners raised in their motion for partial summary judgment and in their motion to reconsider was "who is responsible for the loss of the fair market value of the house" after the Uniform Real Estate Purchase Agreement was signed, but before the sale was closed on December 30, 2010. A.R. at 175, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011 at 18 (We are absolutely entitled to summary judgment for diminution in value); A.R. at 188, Memorandum in Support of Motion to Set Aside in Part, Proposed Court Order of February 2, 2011, Granting Defendants' Motion for Summary Judgment Regarding the House at 3960 Eastlake Drive, Morgantown, WV. The Petitioners' misplaced argument on this issue is that although the Petitioners cannot require the Sellers to repair any damage to the house that existed prior to October 5, 2010, the day the Petitioners signed the Purchase Agreement, they can recover money to repair damage from the Respondents after the closing, because the water leak damaged the house and reduced its value after the Purchase Agreement was entered into. A.R. at 62, First Amended Complaint, Section III Paragraph 1.

In summary, the Rodriguezes filed their motion for summary judgment, and the Petitioners were forced to meet their burden of proving there were genuine issues of material fact relevant to each element their grave fraud claim.

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A continuance to conduct discovery was unnecessary for two reasons. First, the Petitioners signed the Purchase Agreement on October 5, 2010 that established the rights of the parties. The plain language of the Agreement placed them on notice that the Rodriguez family would "make no repairs" if defects in the house were discovered during inspections. A.R. at 25, Purchase Agreement, Paragraph 25. The Purchase Agreement also placed them on notice of the remedies they were entitled to pursue.

Second, the Petitioners admit that they were told there was a water leak in the basement of the house prior to their pre-closing walk through inspection. A.R. at 59, First Amended Complaint, Paragraph 5. Again, Chris Barnum, the Rodriguezes' real estate attorney, wrote to the Petitioners on December 22, 2010 to confirm the water infiltration, and to inform them that they should have the cause of the leak investigated prior to purchasing the house. A.R. at 27. Inexplicably, the Petitioners rejected the offer to continue the sales process to investigate the leak and to have a professional inspection, which would have permitted an informed decision on whether or not to purchase the house. They simply bought the house on December 29, 2010 without inquiring as to the cause of, or the extent, of the leak.

These two fact patterns meet the Respondents' burden of showing, "by pointing out to the lower court," that there is an absence of evidence to support the nonmoving party's case, because the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

To obtain a Rule 56(f) continuance to conduct discovery after the Respondents revealed there was a lack of a showing concerning their elements, the Petitioners were required to (1) articulate some plausible basis for the belief that specified "discoverable" material fact likely exist that have become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Harrison v. Davis*, 197 W.Va. 651, 478

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The Petitioners' failure to meet the *Harrison* requirements is based on their failure to identify specific potentially discoverable material facts that raise genuine issues for trial concerning the elements of their two causes of action. Again, material facts are those necessary to establish the elements of a party's cause of action. *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The *Williams* cite is why the Petitioners' failure to plead the elements of their causes of action is so important to their motion for a continuance to conduct discovery. They cannot raise specific material facts related to the elements of their causes of action when they did not plead the elements. Thus, the Petitioners cannot meet their burden to resist a motion for summary judgment at any stage of this litigation, including trial.

In the Petitioners' Rule 56(f) Affidavit in support of their motion for a continuance, they write that "there are issues of fact, which include, but are not limited to the following [list]". A.R. at 132. However, the facts must be **specific discoverable material facts** under the *Harrison* requirements. The Affidavit does not "articulate some plausible basis for the belief that specified "discoverable" material fact likely exist". The Affidavit does not demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material. Therefore, the Petitioners' Rule 56(f) Affidavit does not provide the information necessary under *Harrison* to obtain a continuance to conduct discovery, and they "deviated from the Rule 56(f) affidavit requirement at their peril ". *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872, 882 (1996).

A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). A jury could not return a verdict for the Petitioners because they have not pleaded any elements for them to prove. Therefore, they could not prove any breach of contract element, nor any element of fraud claim.

Summary judgment procedure has evolved; it is no longer a disfavored procedural shortcut, but is an integral part of the rules of civil procedure designed to strike at the heart of a claim to provide a speedy determination of legal issues. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The Petitioners' First Amended Complaint and its lack of elements for its causes of action is an example that illustrates the necessity of striking at the heart of a meritless claim. Based on the Record that was before the lower court at the time it granted partial summary judgment, its denial of a stay to conduct discovery was not an abuse of its discretion.

The denial of a continuance is reviewed for an abuse of discretion, and the lower court's decision should not be disturbed unless there is a clear showing of an abuse of discretion. *State v. Judy*, 179 W.Va. 734, 372 S.E.2d 796 (1988).

VII. THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED THE PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF THE HOUSE'S LOSS OF VALUE.

The Petitioners' claim that they are entitled to damages for diminution in the house's value is erroneous. To prevail, they must show that the Purchase Agreement (1) permits a monetary recovery under the facts of the sales transaction, and (2) that the agreement does not prohibit a monetary recovery. They did not, and cannot, meet

either burden, because the Respondents raised three Purchase Agreement provisions that prevent a monetary recovery, which is contrary to the Petitioners statement in their Brief that the Rodriguezes did not respond to the loss in value claim in their motion for summary judgment. Petitioners' Brief at 24.

The Rodriguezes argued in the motion for summary judgment hearing that the Petitioners cannot recover monetary damages for the water leak. A.R. at 175 page 20, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011. Paragraph 6 of the Purchase Agreement, the "risk of loss provision," completely forecloses the Petitioners' attempt of a monetary recovery.

In the Purchase Agreement's Paragraph 6, the risk of loss provision plainly states the relief that is available if the property is damaged before closing. "If the improvements are destroyed or damaged . . . before closing, BUYER may terminate the purchase agreement" and recover the earnest money deposit. In the alternative, if the buyer does not terminate the agreement, "the BUYER shall be entitled to the property and any insurance proceeds payable on account of the damage" Therefore, the Petitioners had two options after the leak was disclosed. They could terminate the agreement, or they could purchase the property and recover any insurance proceeds available to pay for the damage. These are their only two remedies.

However, they could have protected their insurable interest in the house with insurance coverage. The general rule is that both parties to an executory contract for the sale of real property have an insurable interest. Syllabus Point 3, *Bryant v. Williston*, 177 W.Va. 120, 130 S.E.2d 748 (1986). In response to the Respondents'

Paragraph 6 argument, the Petitioners admitted in the motion for summary judgment hearing that they had an insurable interest in the house, but did not insure the property. A.R. at 175 page 21, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011, ("I probably had an insurable interest, but I didn't insure it"). The Rodriguezes did not file an insurance claim because the wet carpet was quickly, easily and inexpensively dried at their expense by professionals. A.R. at 118, Rita C. Rodriguez Affidavit, Paragraph 11.

Paragraph 12(F) in the purchase agreement also prevents a monetary damage recovery. The Respondents raised the Paragraph 12(F) argument early in this litigation in their motion to dismiss, which was incorporated by reference into their motion for summary judgment. A.R. at 50, Richard A. Rodriguezes and Rita C. Rodriguezes Motion to Dismiss the Plaintiffs' Complaint and to Deny Their Motion for Injunctive Relief; A.R. at 90 (the Rodriguezes are incorporating the motion to dismiss by reference into this motion for summary judgment). Paragraph 12(F) was also raised in the Respondents' motion for summary judgment.

Paragraph 12(H) of the Purchase Agreement contains waiver of repair language for a buyer's failure to inspect the various systems contained in a house they are purchasing. The intent of Paragraph 12(F) is that the inspections will be conducted by professionals in the necessary technical disciplines, because Paragraph 12(E) requires the buyer "to promptly pay any inspection fees ordered by the Buyer." A.R. at 9, Purchase Agreement, Paragraphs 12(F) and 12(E).

The Petitioners had the contractual right to pay to have the house inspected for anything and for everything, but they never did so at their obvious peril. Their failure to have the house inspected was a “waiver of BUYER’S right to inspection and to request repairs, and BUYER agrees to accept the Property in its present condition.” *Id.*

Although the Petitioners did not discover the water leak because they did not have the house inspected, Rita C. Rodriguez discovered and disclosed the water leak to them prior to closing. Once the leak was disclosed to them, the Hinermans were limited to two remedies under Paragraph 12(F). They could have terminated the agreement because “BUYER is not satisfied with the results of such inspections.” *Id.* at 12(F)(1). In the alternative, the Hinermans could, and did, ask the Rodriguezes to repair the water leak, but Paragraph 25 of the Purchase Agreement excluded the requirement of making repairs. *Id.* at 12(F)(2).

There are three options contained in Paragraph 12(F)(2) that apply to how repair issues can be resolved. Paragraph 12(F)(2)(C) permitted the Rodriguezes to refuse to repair the water leak. *Id.* Paragraph 12(F)(B) permitted the parties to negotiate the cost of repairs to be made by the seller. *Id.* Following the Respondents’ denial that they were required to pay for the water leak repair, the only remaining option available to the Petitioners permitted the “BUYER to terminate this Agreement” and to recover their earnest money deposit. *Id.* Paragraph 12(F)(2)(C).

Instead of rescinding the Purchase Agreement and recovering their earnest money deposit, the Petitioners ignored their specific Paragraph 12(F) contractual remedies, bought the house with actual knowledge of the water leak, and decided to sue the Rodriguezes for fraud and breach of contract. In effect, the Petitioners ignored

their contractual remedies and unreasonably attempted to collect monetary damages for diminution in value, a remedy that was not available to them.

Consequently, Paragraph 12(F) also supports the lower court's denial of the Petitioners' motion for partial summary judgment to permit them to recover diminution in value damages.

On pages 6 and 7 of their motion for summary judgment, the Respondents again addressed the issue of monetary damages raised in their First Amended Complaint. The Respondents argued that the Petitioners are not entitled to monetary damages to repair the leak as they requested in their First Amended Complaint. A.R. at 175, Transcript of Hearing on Petitioners' Motion to Continue and Motion for Summary Judgment and Defendants' Motion for Summary Judgment, February 2, 2011, Page 92. The Rodriguezes reasoned that if the Purchase Agreement did not require them to make repairs, the clear intent of Paragraph 25 precludes their having to pay for repairs to the house at any time. *Id.* It is illogical to argue otherwise; if the Rodriguezes were willing to expend extra money to correct a defective condition discovered in the house, before or after closing, they would not have modified the standard form Morgantown Board of Realtors Uniform Real Estate Purchase Agreement with the supplemental "no repairs" condition.

The Rodriguezes compromised the house's sales price by \$400,000.00 as a result of the Petitioners' purchase offers. A.R. at 155, Addendum to Listing Agreement. However, because of the significant reduction in the sales price, they insisted on the Paragraph 25 language that they would not incur expenses if further conditions were discovered that required repairs. Plainly stated, the Petitioners bought the house for a

very fair price, and because of the Rodriguezes' compromised sales price, they could not finance repairs. A.R. at 115, Richard A. Rodriguez Affidavit, Paragraph 7; A.R. at 118, Rita C. Rodriguez's Affidavit, Paragraph 8. Importantly, the Petitioners' signed the Purchase Agreement without objecting to the language establishing that there would be no repairs of any condition found in the house.

Section 25 of the Purchase Agreement was quoted in its entirety in the Respondents' motion to dismiss, and was incorporated by reference into the Respondents' motion for summary judgment. Record at 47 and 50. While there was no specific argument in the motion for summary judgment, Section 25 permitted the Petitioners to "have inspections as stated in item #12 and 13 and if not satisfied with inspections may void this contract with earnest money returned to Buyer." Since the Petitioners were not satisfied with the results of their pre-closing walk through inspection, they were entitled to void the contract and recover their earnest money deposit. Therefore, the Petitioners' waived their right to a monetary recovery when they ignored their singular option to void the contract after they reported they were dissatisfied with their inspection.

In summary, for the Petitioners to prevail on their entitlement to monetary damages would require the Court to ignore the plain meaning of the wording of Paragraphs 6, 12(F), and 25 of the Purchase Agreement, which would be contrary to the general rule that prohibits the interpretation of unambiguous language contained in a written contract. *Warner v. Haught, Inc.*, 174 W.Va. 772, 329 S.E.2d 88 (1985). Moreover, the lower court would also have to ignore the obvious: you cannot recover

damages for a breach of contract when there is no breach, nor can you recover damages for a fraudulent concealment when there is no concealment.

A circuit court's denial of a motion for summary judgment is reviewed *de novo*.
Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VIII. THE LOWER COURT DID NOT ERR WHEN IT DENIED THE PETITIONERS' MOTION TO ALTER OR AMEND ITS JUDGMENT [STYLED BY THE PETIONERS AS A MOTION FOR RECONSIDERATION].

The only issue the Petitioners raised in their motion for partial summary judgment and in their motion to reconsider was “who is responsible for the loss of the fair market value of the house” after the Uniform Real Estate Purchase Agreement was signed, but before the sale was closed on December 30, 2010. A.R. at 175, Transcript of Hearing on Petitioners’ Motion to Continue and Motion for Summary Judgment and Defendants’ Motion for Summary Judgment, February 2, 2011 at 18 (We are absolutely entitled to summary judgment for diminution in value); A.R. at 188, Memorandum in Support of Motion to Set Aside in Part, Proposed Court Order of February 2, 2011, Granting Defendants’ Motion for Summary Judgment Regarding the House at 3960 Eastlake Drive, Morgantown, WV. The Petitioners’ misplaced argument on this issue is that although the Petitioners cannot require the Sellers to repair any damage to the house that existed prior to October 5, 2010, the day the Petitioners signed the Purchase Agreement, they can recover money to repair damage from the Respondents after the closing, because the water leak damaged the house and reduced its value after the Purchase Agreement was entered into. A.R. at 62, First Amended Complaint, Section III Paragraph 1.

The Petitioners cited Section 4, Paragraph 3 as one of two reasons for their legal argument to alter or amend the judgment. A.R. at 185, Motion to Set Aside in Part, Proposed Court Order of February 2, 2011, Granting Defendants' Motion For Summary Judgment Regarding the House at 3960 Eastlake Drive, Morgantown, WV. That is incorrect, because Section 4, Paragraph 3 of the Purchase Agreement severely limits the situations in which monetary damages may be recovered, and actually prevents a monetary recovery unless the Seller "defaults" [breaches] under the terms of the Purchase Agreement.

A. THE ONLY REMEDY CONTAINED IN THE UNIFORM REAL ESTATE PURCHASE AGREEMENT THAT PERMITS A BUYER TO RECOVER MONETARY DAMAGES IS NOT APPLICABLE UNDER THE FACTS OF THIS CASE.

The Respondents first raised this issue in their motion to alter or amend the grant of summary judgment. Normally, only materials which were included in the pretrial record and that would have been admissible evidence may be considered when ruling on a motion for summary judgment. *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). Assuming out of caution that the lower court could have considered this issue during the Petitioners' motion to alter or amend its grant of partial summary judgment, the Respondents will address the issue.

Section 4, Paragraph 3 of the Purchase Agreement states that a buyer can pursue every remedy available, which would include monetary damages, "[i]f the Seller defaults in the performance of any of the obligations imposed by the terms hereof, the SELLER shall return the earnest money deposited and the Buyer may treat this Agreement as null and void and either (1) demand reimbursement from the SELLER for all out-of-pocket expenses incurred by BUYER, . . . or (2) pursue any and all remedies

available to BUYER against SELLER as a result of such default.” Consequently, the Petitioners can only recover monetary damages if the Rodriguez family defaulted in an obligation they were required to perform under the Purchase Agreement.

In its Findings of Fact and Conclusions of Law, the Court properly found that the Rodriguezes did not breach the Purchase Agreement because Paragraph 25 of the document clearly states the Rodriguezes will not make any repairs to the house. Logically, it follows that the Court properly determined that they did not default in a contractual obligation. Consequently, and contrary to the Petitioners’ position, monetary damages are not available under Section 4 in the absence of the sellers’ default.

Moreover, there is a further precondition to the Buyer [Petitioners] recovering monetary damages. The Section 4, Paragraph 3 language is in the conjunctive; only if the Seller defaults **and** returns the earnest money deposit, can Petitioners choose their remedy. The Purchasers never asked that the earnest money be returned. Clearly, the monetary recovery language does not apply where the sale is consummated, because there are two Purchase Agreement preconditions to the Buyers’ option to seek a monetary recovery: (1) a default by the Seller, **and** (2) the Sellers’ return of the earnest money deposit.

B. THE PETITIONERS’ CITATION OF THE 1985 CASE OF *BRYANT V. WILLISTON* AS SUPPORTING THEIR CLAIM FOR MONETAY DAMAGES IS INCORRECT: THE HOLDING OF THE CASE ACTUALLY SUPPORTS THE LOWER COURT’S GRANT OF PARTIAL SUMMARY JUDGMENT TO THE DEFENDANTS.

Following the lower court granting the Respondents partial summary judgment on February 2, 2011, the Petitioners informed the lower court by letter on February 24, 2011, that the case of *Bryant v. Williston*, 177 W.Va. 120, 130 S.E.2d 748 (1986)

supported their motion for partial summary judgment. Assuming that the lower court could have considered this case during the Petitioners' motion to alter or amend its grant of partial summary judgment, the Respondents will address the *Bryant* case. Again, the norm is that only materials which were included in the pretrial record and that would have been admissible evidence may be considered when ruling on a motion for summary judgment. *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). Thus, the lower court should have had the *Bryant* case before it at the time of its ruling for it to be considered in ruling on the motion for summary judgment.

Bryant involved the risk of loss incurred before the closing of an executory real estate contract. Following extensive water damage to the building while the sale was pending, the purchaser asked the seller to correct the water leak or to permit the contract to be rescinded and to return the earnest money deposit. The seller declined both offers, and sold the property to a third party at a lesser price than the first sale. The attempted purchaser then sued the vendor "for rescission of the contract and the return of the down payment." *Bryant* at 750.

In their February 24, 2011 letter communication to the Court, the Petitioners reported that *Bryant* notes "the vendor is responsible for the loss for failing to deliver real property in the condition that it was in, in spite of an "as is" clause." He then stated the case "holds that the Buyer is entitled to an adjustment in the purchase price if the Buyer goes through with the sale." That is a misstatement; his quotation is not the *Bryant* holding, and the two *Bryant* provisions the Petitioners cited are the Supreme

Court's general discussion. Furthermore, language in the *Bryant* contract differs from the Purchase Agreement's language.

The issue in *Bryant* was the "remedy where the risk of loss is on the vendor and damage has been done to the building." *Bryant* at 753. The Supreme Court determine the above issue with this holding: "[u]nder the particular facts of this [*Bryant*] case, we conclude that where a contract places the risk of loss on the vendor and insubstantial damage to the property occurs without the fault of either party, the purchaser may recover his down payment where the vendor refuses to repair the damage or to give an abatement in the purchase price." *Bryant* at 753. Therefore, the holding in *Bryant* provides the Petitioners with exactly the same remedy that they have in the Purchase Agreement: rescission of the Purchase Agreement with the return of the buyers' down payment! A.R. at 7, Purchase Agreement Paragraph 6; A.R. at 9, Purchase Agreement Paragraph 12(F); A.R. at 12, Purchase Agreement Paragraph 25.

Furthermore, the *Bryant* facts are distinguishable from the facts of the *Hinerman* case. *Bryant's* risk of loss provision places the risk of loss on the seller, which differs from the Purchase Agreement's risk of loss provision, which also puts the risk of loss on the seller. However, as discussed *supra* in Section VII at page 28, the Purchase Agreement's plain language limits a risk of loss recovery to "available insurance coverage." A.R. at 8, Purchase Agreement, Paragraph 6.

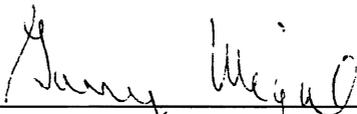
In summary, the *Bryant* holding agrees with the ultimate outcome reached by Paragraph 6 of the Purchase Agreement, but for different reasons. The Rodriguezes refused to repair the damage, and they refused to lower the purchase price. Therefore, applying both the *Bryant* holding and the provisions of the Purchase Agreement to the

facts, the Petitioners' only viable remedy was limited to rescinding the Purchase Agreement and recovering their earnest money deposit.

A motion to reconsider is reviewed for an abuse of discretion. *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

CONCLUSION

The Respondents request the following relief. The grant of partial summary judgment was not a final order and the appeal should be dismissed. The Deed granted the Petitioners a general warranty of title, which is sufficient. The Monongalia County Circuit Court's grant of partial summary judgment to the Respondents on the Petitioners' breach of contract claim and fraud claim should be confirmed, because the lower court's granting the motion as a matter of law was correct when the facts were applied to the terms of the Purchase Agreement and the law. Likewise, the lower court's denial of partial summary judgment for the Petitioners should be confirmed, as should its denial of the motions to continue to permit discovery and the motion to stay the litigation pending the appeal.



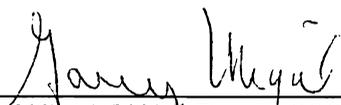
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CERTIFICATE OF SERVICE

I, Gary S. Wigal, certify that on September 13, 2011, I served a copy of the
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