

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

**RODNEY MILLS, Defendant Below,**

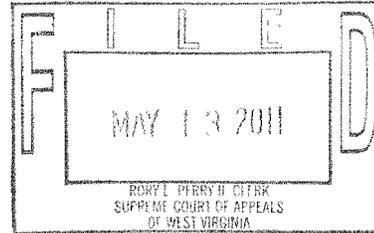
**Petitioner,**

**vs.**

**No. 11-0254**

**DAN RYAN BUILDERS, RAYMOND ENRIGHT,  
AND JACQUELYN ENRIGHT, Plaintiffs Below,**

**Respondents.**



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**PETITIONER'S BRIEF**

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**RODNEY MILLS,**  
By Counsel:

Kenneth J. Ford (WV State Bar # 8066)  
100 Mahogany Court  
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(304)261-2849

**TABLE OF AUTHORITIES**

**Cases**

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**PETITIONER'S BRIEF**

COMES NOW the Petitioner, Rodney Mills, by and through his counsel, Kenneth J. Ford, and petitions this Honorable Court to award a new trial in the above referenced matter for all of the following reasons:

**ASSIGNMENTS OF ERROR**

1. The trial court below erred in refusing to set aside its Order Granting Summary Judgment as there was no lack of good faith on the part of the Petitioner and no prejudice to the moving party below. This Court should review this issue as the Defendant exhibited no bad faith whatsoever and was unable to defend himself in any way at the trial in this matter. Moreover, this Court has previously held that where there is no bad faith on the non-moving party, then summary judgment should be set aside.

2. At trial in this matter, the trial court below prohibited the Defendant from providing evidence of fraudulent documents submitted by the Plaintiffs. This Court should review this matter

as this prohibition denied the Defendant its right to cross examine the Plaintiffs' representatives and properly attack their credibility.

3. The trial court below prohibited the Defendant from calling witnesses with respect to the above referenced fraudulent documents as well as witnesses with respect to the proper valuation of the residence at issue herein. This Court should review this error as the testimony referenced herein spoke directly to damages and therefore, even assuming arguendo, that the granting of summary judgment was appropriate, the witnesses should have been permitted to testify as the Plaintiffs alleged that the value of the residences at issue were harmed by the Defendant's alleged conduct.

4. The trial court below erred in denying the Petitioner's Motion for Disqualification of Counsel for conflict of interest.

5. The trial court below erred in permitting counsel for the Plaintiffs below to state to the jury that the Petitioner, Rodney Mills, had personally intimidated potential buyers of Dan Ryan property when all evidence presented was contrary to that statement.

#### **PARTIES**

1. The Petitioner, Rodney Mills, is a West Virginia resident and is the Defendant in the civil action styled *Dan Ryan Builders, Inc., Raymond Enright and Jacquelyn Enright, Plaintiffs v. Rodney Mills, Defendant*, Civil Action No. 09-C-982, Circuit Court of Berkeley County, West Virginia.

2. Respondent Dan Ryan Builders is a Maryland Corporation authorized to do business in West Virginia and Raymond ad Jacquelyn Enright are West Virginia residents and are the Plaintiffs in the civil action styled *Dan Ryan Builders, Inc., Raymond Enright and Jacquelyn Enright, Plaintiffs v. Rodney Mills, Defendant*, Civil Action No. 09-C-982, Circuit Court of Berkeley

County, West Virginia.

**STATEMENT OF THE CASE**

1. This matter arises out of alleged conduct of the Defendant below in a dispute over a right of way through the property of the Plaintiffs below. The attorney for the Plaintiffs below is a member of a law firm which previously performed services for the Defendant below in the drafting of the deed at issue in the case below. As a result, the Defendant filed a Motion to Disqualify Counsel on or about January 8, 2010. The trial court below denied said motion and permitted counsel to proceed despite this conflict.

2. Subsequently, the Plaintiffs below filed a Motion for Summary Judgment on June 7, 2010. The sole basis for said Motion was the Defendant's failure to respond to Requests for Admissions allegedly served upon defense counsel. (See Appendix, Exhibit A).

3. Counsel for Petitioner certified to the lower court that he did not receive said Requests for Admissions. Moreover, defense counsel did not receive the Plaintiffs' Motion for Summary Judgment.<sup>1</sup> (See Defendant's Motion to Set Aside Summary, Appendix, Exhibit B).

4. Moreover, Plaintiffs' counsel claims on its certificate of service that the Motion for Summary Judgment was hand delivered upon counsel for Petitioner. However, Petitioner's counsel no longer had his office at the address listed on the certificate of service. Therefore, there is absolutely no possible way that hand delivery could have been made as alleged by the Plaintiffs as Petitioner's counsel was no longer at the address in any way. (See Appendix, Exhibit B).

5. As a result, it is clear that the Petitioner did not receive the Motion at issue herein.

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<sup>1</sup> It is important to note that Plaintiffs' counsel acknowledged that the Motion for Summary Judgment was returned as undeliverable. Therefore, there is no dispute that Defendant did not receive the Motion,

6. On July 27, 2010, this Court entered an Order granting the Plaintiffs' Motion for Summary Judgment which dismissed any counterclaim of the Petitioner as well as granted summary judgment on all issues of liability claimed by the Plaintiffs below. As a result, the Respondent ruled that the trial would proceed only to determine the amount of damages owed by Petitioner. (See Appendix, Exhibit "C").

7. Subsequently, Petitioner's counsel learned of the entry of the Order and obtained the Discovery Requests for the first time as an exhibit to the Motion from the Circuit Clerk's office after searching the court file. The Petitioner then filed a Motion to Set Aside the aforementioned summary judgment. (See Appendix, Exhibit B).

8. The Respondent conducted a hearing on September 27, 2010 for argument with respect to the Petitioners' Motion to Set Aside. (See Transcript, Appendix Exhibit D).

9. After hearing argument, the Respondent entered an Order denying Defendant's Motion to Set Aside erroneously based upon the allegation that there was no legal basis to set aside. The Respondent scheduled this matter for a trial on damages for December 14, 2010. (See Appendix, Exhibit E).

10. Trial in this matter was conducted on December 14, 2010 through December 16, 2010. During the trial of this matter, the trial court below committed several errors in presiding over said trial effectively denying the Defendant below a fair trial. As a result, the jury rendered a verdict against the Defendant below finding for both compensatory and punitive damages. (See Transcript of Trial, Appendix, Exhibit H).

## SUMMARY OF ARGUMENT

This matter turns on whether it is appropriate to fail to excuse the failure to timely respond to requests for admissions when there is no dispute that the Petitioner was responsible in any way for the failure to timely respond. Rather, the Respondent trial court below granted summary judgment based solely upon said failure and refused to set aside said summary judgment. Moreover, there is no proper evidence that there would have been any prejudice to the Plaintiffs should summary judgment have been set aside. This assignment of error is sufficient to grant a new trial. However, should the Court wish to further examine additional assignments of error, the trial court refused to acknowledge that a conflict of interest existed with the representation of the Plaintiffs below by their counsel, Tracy Rohrbaugh, Esquire. In addition, at the trial of this action, the trial court made repeated errors, including but not limited to, prohibiting the Defendant from providing evidence of fraudulent documents submitted by the Plaintiffs to the Planning Commission of Berkeley County, thus denying the Defendant below his right to cross examine the Plaintiffs' representatives and properly attack their credibility. In addition, the trial court below prohibited the Defendant from calling witnesses with respect to the above referenced fraudulent documents as well as witnesses with respect to the proper valuation of the residence at issue herein. The Court wrongfully characterized this testimony as expert testimony and wrongfully excluded the same. However, the testimony referenced herein spoke directly to damages and therefore, even assuming arguendo, that the granting of summary judgment was appropriate, the witnesses should have been permitted to testify as the Plaintiffs alleged that the value of the residences at issue were harmed by the Defendant's alleged conduct. Moreover, the testimony of these witnesses were not expert in nature, but rather, factual or permissible opinion testimony pursuant to Rule 701 of the West

Virginia Rules of Evidence.

**STATEMENT REGARDING ORAL ARGUMENT**

The Petitioner states that he feels that in light of the complex and numerous legal arguments, the Petitioner requests oral argument on the issues above. However, since there appears to be settled case law on the issues set forth, Rule 19 argument is the appropriate method.

**ARGUMENT**

- I. **The trial court below erred in refusing to set aside its Order Granting Summary Judgment as there was no lack of good faith on the part of the Petitioner and no prejudice to the moving party below.**

As stated more fully in the Statement of the Case above, this matter arises out of the lower Court's granting of summary judgment based solely upon the failure to timely respond to Requests for Admissions. The Motion for Summary Judgment was granted on the basis of this Court's ruling in *Dingess-Rum Coal Co. v. Lewis*, 170 W.Va. 534, 295 S.E.2d 25 (1982). In that case, this Court held that untimely responses to requests for Admissions shall be excused provided there is no lack of good faith and the untimely response will not prejudice the opposing party. *Dingess-Rum Coal Co. v. Lewis*, 170 W.Va. 534, 295 S.E.2d 25 (1982). The Petitioner argued that there clearly was no lack of good faith on the part of the Petitioner as he never was in receipt of the Discovery Requests. Moreover, Petitioner argued that setting aside the Motion for Summary Judgment will not prejudice the Plaintiffs. The Plaintiffs have already obtained a temporary injunction that will remain in effect for the time period allotted to properly deal with discovery issues in this matter. Therefore, there is no prejudice to the Plaintiffs. Despite this exception carved out by this Court in *Dingess-Rum*, the court below specifically ruled that there was "no legal basis on which the Court

can . . . set aside the Order granting summary judgment.” Therefore, the lower court refused to acknowledge the clear exception laid out by this Court in *Dingess-Rum*. As a result, this statement alone shows an abuse of power on the part of the lower court below.

In addition, the court below held that there would be prejudice to the Plaintiffs below should she set aside the Order of Summary Judgment. However, this alleged prejudice was based on bald assertions made by Plaintiffs’ counsel with respect to Plaintiff Enright. It is important to note that the Enright was not present at the hearing. It is also important to note that no affidavit was attached to the Plaintiffs response to the Petitioner’s Motion to Set Aside describing said alleged prejudice. In fact, there was no mention of such prejudice in Plaintiffs’ response. Rather, the court below simply allowed, over Petitioner’s objection, bald assertions by Plaintiffs’ counsel of this alleged prejudice without any opportunity for the Petitioner to delve further into the issue.

Although there is no reliable evidence of prejudice to the Plaintiffs below, there is most certainly prejudice to the Petitioner should the Summary Judgment not be set aside. The Petitioner essentially loses any defense to any claim as well as his counterclaims against the Plaintiffs. Moreover, many of the matters deemed admitted by this Court were specifically denied by the Petitioner during testimony in the previously held hearing on the Plaintiffs’ request for temporary injunction. This Court has expressed a preference to have cases determined on their merits rather than by default and has given a liberal construction to Rule 60(b). *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979). Material issues of fact are very present in the instant action. The Petitioner cannot be punished for his failure to respond to Requests for Admissions which he never received. This Court has held that granting judgment as a sanction is to be utilized in a very limited fashion and only as a last resort. *McDaniel v. Romano*, 190 S.E.2d

8 (1972); *Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127 (1985). In this matter, there clearly was no reason to resort to this sanction as there is no credible evidence of prejudice. Therefore, the trial court below clearly erred in utilizing the overreaching sanction of granting of judgment. By refusing to grant the Petitioner's Motion to Set Aside summary judgment, the Petitioner has been denied the ability to properly respond to the allegations against him and therefore, can provide no defense.

Furthermore, Plaintiffs' counsel argued that counsel for Petitioner did not exercise reasonable diligence in order to be aware of the Motion for Summary Judgment. Plaintiffs' counsel argued that this alleged lack of diligence should be attributed to the Petitioner. As a result, the Plaintiffs argued that the Motion to Set Aside should be denied. The Court accepted this argument. However, contrary to the position of the Plaintiffs below, this Court has dealt with a case with respect to a failure of counsel to exercise reasonable diligence. In *Davis v. Sheppe*, 187 W.Va. 194, 417 S.E.2d 113 (1992), this Court dealt with a case where counsel failed to exercise reasonable diligence in remaining in contact with court's case management office with respect to trial scheduling information. Moreover, counsel in *Davis* did not receive the Order dismissing the case and the same had been entered for months prior to any action to set aside the same pursuant to Rule 60(b). *Id.* at 195, 417 S.E.2d at 114. Despite these factors, this Court specifically held that Rule 60(b) was still available to set aside the dismissal order in that case and remanded the case for consideration of the same. *Id.* at 198, 417 S.E.2d at 117.

In this matter, there is no doubt that any error in untimely responding to Requests for Admissions was not attributable to the Petitioner himself, but rather should be attributed solely to Petitioner's counsel. At the relevant times in this matter, Petitioner's counsel was in the process of moving offices. As a result, there may have been a lack of diligence by Petitioner's counsel in

apprizing the counsel for Plaintiff's below of the change of address. As a result of this, the Petitioner never knew about either the Requests for Admissions or the Motion for Summary Judgment until after the entry of the Order for Summary Judgment at issue herein. Therefore, it is undisputed that Petitioner did nothing wrong in this matter and any potential wrongdoing is as a result of counsel's failure to properly keep opposing counsel apprized of a change in address.<sup>2</sup> Therefore, the only possible wrongdoing to be held against the Petitioner in upholding the trial court below's granting of summary judgment is by attributing a lack of diligence by his counsel. As stated above, this Court has dealt with the issue of attributing actions of counsel to clients in *Davis*. By applying the ruling in *Davis*, it is clear that the Order of the Court below stating that there is no legal basis for setting aside the Order of Summary Judgment is erroneous. A lack of diligence by counsel is not to be blindly attributed to the client when the client had no reason to be apprized of the situation. That is exactly the case in the instant matter and the Order of Summary Judgment should be reversed and the trial court below should be instructed to conduct a new trial in this matter permitting all defenses and counterclaims to be litigated fully.

**II. The trial court below erred in prohibiting the Defendant from providing evidence of fraudulent documents submitted by the Plaintiffs.**

At the trial of this matter, the Petitioner attempted to offer into evidence documents which were fraudulently submitted to the Planning Commission of Berkeley County. The Defendant stated that this evidence was irrelevant as it did not directly speak to damages. The trial court below sustained the aforesaid objection. First, as stated more fully above, the Court should have set aside

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<sup>2</sup> The Petitioner has filed a complaint with the Office of Disciplinary Counsel with respect to this matter as a result of this matter.

the Order of Summary Judgment and therefore, the trial should have been on all issues, both liability and damages. However, even if it were proper for the Petitioner to be limited to evidence of damages, the trial court erred in refusing to permit the evidence of fraudulent documents as they were simply being presented to attack the credibility of the Plaintiff below, Dan Ryan Builders. This Court has held that it is permissible to submit otherwise irrelevant evidence to impeach witnesses and attack credibility. *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771. Therefore, the trial court's refusal to permit said evidence to be presented to the jury infringed upon the Petitioner's ability to properly attack the credibility of the representatives of the Plaintiff below. As a result, the jury was not able to properly judge the credibility of the Plaintiff. Therefore, the verdict was impermissibly prejudiced against the Petitioner as he was denied the opportunity to properly defend himself and the improper jury verdict resulted.

**III. The trial court below erred in prohibiting the Defendant from calling witnesses with respect to the above referenced fraudulent documents as well as witnesses with respect to the proper valuation of the residence at issue herein.**

The Petitioner attempted to call witnesses to testify as to the value of the properties at issue herein. The trial court below refused to permit said witnesses to testify as she stated that such testimony was not relevant to the issue of damages and also that such testimony would rise to the level of expert testimony and said witness was not disclosed as an expert. First, the testimony intended to be offered was to directly dispute the claims of the Plaintiffs below of the lowering in value of the properties at issue. The Plaintiffs were permitted to testify as to their perceived value of the home in order to determine alleged loss of profits. However, the trial court refused to permit

any testimony contrary to said statements. Obviously, if the Plaintiffs below are claiming alleged diminishment of the value of property as an element of their damages, then testimony directly related to the value of said property is relevant to the issue of damages. Therefore, even if you assume that it was appropriate to limit the trial in this matter to the issue of damages, the testimony intended to be offered by the Petitioner is wholly relevant.

Next, the trial court erroneously characterized the testimony to be offered as expert testimony. Rather, the witness intended to be called was a realtor that had simply looked up the original list price as well as the eventual sale price of the property at issue. Therefore, she would simply testify as to factual listings which she had looked up from public record materials. Despite being informed of the nature of the proposed testimony, the trial court refused to permit the Petitioner to call any witness with respect to the valuation of the property at issue. Essentially, the judge practically instructed the jury to consider only the alleged valuation submitted by the Plaintiff below. As a result, the Petitioner was denied any right to refute this valuation and resulted in reversible error. Moreover, any characterization of this testimony as expert information was wrong. At most, it would be characterized as permissible opinion testimony by a lay witness pursuant to Rule 701 of the West Virginia Rules of Evidence. This Court has consistently expressed the preference to permit this type of testimony. *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695; *Hatcher v. McBride*, 221 W. Va. 5, 650 S.E.2d 104. Therefore, the trial court erred in refusing to permit the Petitioner from calling witnesses to testify as to valuation of the properties at issue.

**IV. The trial court below erred in denying the Petitioner's Motion for Disqualification of Counsel for conflict of interest.**

On or about January 8, 2010, the Petitioner filed a Motion to Disqualify Counsel for Plaintiffs below based upon a conflict of interest based upon the prior legal work done for the Petitioner by counsel for Plaintiffs below with respect to the right of way at issue. As stated above, this matter arises out of the rights and use of a fifty foot right of way set forth in a deed of easement and exchange entered into on or about July 31, 2003 between the Defendant and the Harvey-Trumbower Development Company. The Plaintiffs below were in no way involved in the aforementioned deed. The Plaintiffs below sought to limit the rights and use of the aforementioned right of way and alleged damages arising out of alleged conduct of the Petitioner with respect to said right of way. Therefore, counsel for the Plaintiffs below now takes a position directly adverse to the creation of the right of way. The Deed of Easement and Exchange was prepared by an attorney employed by the law firm of Bowles Rice McDavid Graff & Love LLP, namely Michael B. Keller, Esq. Counsel for the Plaintiffs below is a partner in the law firm of Bowles Rice McDavid Graff & Love LLP. As a result, there is a direct conflict between the current representation and the previous work done by the law firm of Bowles Rice McDavid Graff & Love LLP.

This Court has held that where there has been a previous representation by a member of a law firm, then other members of the law firm are excluded from representing clients in an adversarial position to said clients unless it is an entirely different subject matter to which there is absolutely no relation or there is a waiver of conflict from the previous client. *Committee on Legal Ethics v. Frame*, 189 W. Va. 641, 433 S.E.2d 579. It is beyond dispute that the subject matter is related to the current action as the work previously done by the law firm of Bowles Rice McDavid

Graff & Love LLP created the right of way at issue in the instant matter. Moreover, there has most certainly been no waiver of conflict as evidenced by the fact that the Petitioner filed a Motion to Disqualify Counsel at the outset of this matter. Therefore, the trial court below committed reversible error by failing to grant the Petitioner's Motion to Disqualify Counsel at the outset of this case.

**V. The trial court below erred in permitting counsel for the Plaintiffs below to state to the jury that the Petitioner, Rodney Mills, had personally intimidated potential buyers of Dan Ryan property when all evidence presented was contrary to that statement.**

During the trial of this matter, the counsel for the Plaintiffs below repeatedly referenced that the Petitioner personally intimidated potential buyers for the property owned by Respondent Dan Ryan Builders. However, an examination of the transcript illustrates that no such evidence was ever presented to the jury. However, despite the objections of the Petitioner, the trial court below permitted such statements to be made to the jury in this matter. This created substantial prejudice against the Petitioner at the trial of this matter and resulted in an extremely unfavorable verdict which included punitive damages. Obviously, allegations of intentional intimidation speak directly to the factors considered in awarding punitive damages. Therefore, this allowance by the trial court is likely to have been directly responsible for the verdict in this matter,

The only evidence presented at the trial of this matter to support alleged intimidation of potential buyers as alleged by the Plaintiffs below was an alleged potential buyer of the Dan Ryan property, Alexandra Mulvey. However, upon direct examination, Ms. Mulvey testified as to actions of an individual not party to these proceedings. Never did she reference any actions taken by the

Petitioner, Rodney Mills. In fact, upon cross examination, Ms. Mulvey testified that she had never even laid eyes on Mr. Mills. She stated that she had never spoken with him and never had any contact with him whatsoever. The Plaintiffs below offered no other evidence of alleged intimidation of potential buyers. Therefore, the only witness to support these bald accusations was a witness who had never seen the Petitioner. As a result, it is clear that the allegations of intimidation were not supported by evidence. However, the trial court below permitted counsel for Plaintiffs below to repeatedly state that Mr. Mills had personally intimidated potential buyers causing damages. This Court has held that statements made by counsel in their opening and closing to the jury must be supported by evidence in the trial. *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288. However, despite this clear rule of law, the trial court below permitted Ms. Rohrbaugh to repeatedly remark that the Petitioner intimidated potential buyers of the Dan Ryan property. As stated more fully above, this is clearly not supported by any evidence whatsoever in the trial of this matter. As a result, the trial court committed reversible error as these statements assuredly prejudiced the jury against the Petitioner resulting in an unfavorable verdict.

#### **PRAYER FOR RELIEF**

WHEREFORE, the Petitioner, Rodney Mills, prays for the following relief:

- a. That Rodney Mills' Petition for Appeal be accepted for filing;
- b. That this Honorable Court remand this matter to the trial court with instructions to set aside the previously entered Order of Summary Judgment and conduct a new trial in this matter permitting all defenses and counterclaims to be litigated fully;
- c. That this Honorable Court remand this matter to the trial court with instructions that

the law firm of Bowles Rice McDavid Graff & Love LLP is disqualified from representing the Plaintiffs below in this matter as a result of the clear conflict of interest.

D. Such other relief as this Honorable Court deems necessary, appropriate or proper.

RODNEY MILLS  
By counsel



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Kenneth J. Ford, Esq.  
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**CERTIFICATE OF SERVICE**

I, Kenneth J. Ford, counsel for Petitioner, do hereby certify that I have served a true copy of the attached PETITIONER'S BRIEF upon the following named counsel for Respondents by hand delivery the 12<sup>th</sup> day of May, 2011.

Tracey Rohrbaugh, Esq.  
Bowles Rice McDavid Graff & Love LLP  
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Post Office Drawer 1419  
Martinsburg, WV 25402

  
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Kenneth J. Ford