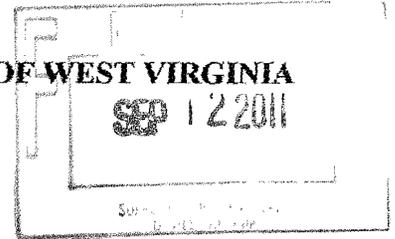


IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA



RODNEY MILLS, Defendant Below,

Petitioner,

vs.

No. 11-0254

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

Respondents.

**PETITIONER'S REPLY BRIEF
TO RESPONSE TO PETITION FOR APPEAL**

RODNEY MILLS,
By Counsel:

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S RESPONSE TO PETITION

COMES NOW the Petitioner, Rodney Mills, by and through his counsel, Kenneth J. Ford, and as his Reply to Respondent's Response to Petition for Appeal does state the following:

RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

In the Statement of the Case contained within their Response to the Petition for Appeal, the Respondent makes misstatements of fact. First, the Respondents attempt to focus upon the fact that the Petitioner is "not the owner of the aforementioned easement." However, this mere statement is misleading in and of itself. It is important to note that although it is technically correct that the Respondents are both 50% owners of the actual land described in the deed of Easement and Exchange, the reality is that the Petitioner is actually the owner of a right of way through said property.¹ SR000035-SR000040. Therefore, this cause of action arises directly out of the alleged

¹ It is also important to note that prior to this matter proceeding to trial, Dan Ryan Builders sold the property they owned to a party not involved in this action. Therefore, the Respondents statement that they both own a 50% stake in the property at issue is not wholly accurate.

improper use of the right of way clearly owned by Mr. Mills as shown above. The Respondents alleged that Mr. Mills somehow inappropriately entered onto the Respondent's land and caused damage to the Respondents by doing so. However, it is important to note that at no time did the Respondents present any evidence that Mr. Mills ever traversed outside of the 50 foot right of way both parties have agreed exist. In response to these allegations, the Petitioner filed a counterclaim alleging among other things, that Dan Ryan Builders presented falsified and inaccurate documents to the Planning Commission in the construction of the house located at one of the subject properties. This is important to note in that the jury in the trial below was never given the opportunity to hear this evidence as the trial court below incorrectly denied them access to said documents, neither as evidence of the fraud nor as impeachment of the Dan Ryan representatives testifying at trial.

Subsequent to the counterclaim being filed by the Petition, the Respondents claim that they forwarded Requests for Admission to Petitioner's counsel. Upon not receiving responses to these Requests allegedly sent to Petitioner's counsel, the Respondents filed for and were granted summary judgment. Petitioner's counsel has repeatedly expressed that he did not receive said Requests nor the subsequent motions and orders as a result of his moving his office in the course of this time period. As a result, the Petitioner filed a Motion to Set Aside the Order Granting Summary Judgment. The Respondents incorrectly state that the Petitioner never moved the Court to excuse his failure to respond. However, as stated above, the Petitioner filed his Motion to Set Aside asking the Court to do exactly that. (See Exhibit "B" of Petitioner's Appendix). Therefore, it was inappropriate for the Respondents to represent to this Court that the Petitioner did not move to excuse the failure to respond to the Admissions. Summary Judgment was based solely on the Requests for Admissions being deemed admitted, not on actual evidence. (See Exhibit "C" of

Petitioner's Exhibit). As a result of this failure to set aside the summary judgment, this matter proceeded to trial on the issues of damages alone. Therefore, the Petitioner was prohibited from presenting any evidence in his defense at the trial of this matter. As a result of this extreme prohibition, the jury returned a verdict for significant damages more fully outlined in the Respondents' Response to Petition. It is important to note that punitive damages were awarded to both Respondents based upon the deemed admission that the Petitioner acted wantonly and willfully, not upon any evidence of said willful and wanton conduct. In fact, as set forth below and in the Petitioner's Brief previously filed, said evidence does not support said verdict. Therefore, the verdict below was not supported by evidence, but only as a result of the Order Granting Summary Judgment.

RESPONSE TO SUMMARY OF ARGUMENT

In their Summary of Argument, the Respondents again misstate that the Petitioner failed to respond to the Admissions or move to set aside said admissions. This is completely false. As set forth above, below and in the original Appellant's Brief, the Petitioner clearly moved to set aside the summary judgment based upon said admissions. (See Exhibit "B" of Petitioner's Appendix). In that Motion to Set Aside, the Petitioner makes it clear that the matters were improperly deemed admitted and should be set aside. (See Exhibit "B" of Petitioner's Appendix). The trial court below refused to set aside said summary judgment. As a result, the issue of responding to the Admissions was moot. Therefore, the Respondents wholly misrepresented to this Court that the Petitioner never moved to set aside the admissions.

Next, the Respondents misstated that the fraudulent documents were being presented at trial to attempt to circumvent a prior ruling by the trial court below. First, it is the Petitioner's position

that the summary judgment should clearly have been set aside. However, even assuming that this summary judgment was properly granted, the purpose of presenting this evidence was to impeach the character and testimony of the Dan Ryan representative testifying at trial. The Respondents relied on the representative to testify as to the alleged damages sustained by them. However, when attempting to impugn his testimony by showing that Dan Ryan had presented inaccurate and falsified documents, the trial court denied that opportunity. Therefore, the jury was denied the opportunity to hear both sides of the story.

Next, the Respondents counsel attempts to claim that her firm never had an attorney-client relationship with the Petitioner. However, it is clear that a Deed of Easement and Exchange was prepared for Mr. Mills to establish the exact easement at issue in this matter by the same firm that represents Respondent in this matter. As a result, this is clearly a misstatement of fact.

Finally, the Respondents state that it was proper for them to state that Mr. Mills personally intimidated buyers of the Dan Ryan property. However, it is beyond controversy that the witness proffered by the Respondents at trial to show said intimidation admitted under oath that she had never laid eyes on the Petitioner prior to trial. Therefore, as a function of the improperly entered summary judgment, the Respondents were given license to lie to the jury with no supporting evidence of any kind.

RESPONSE TO ARGUMENT

1. **The Petitioner showed no bad faith with respect to the Requests for Admissions**

The Respondents claim that the trial court below acted properly in refusing to set aside the summary judgment because the Petitioner allegedly failed to Respond to the Requests for

Admissions even after receiving them. However, this is a disingenuous argument. The Petitioner has repeatedly submitted the position that he did not receive the Requests for Admissions until after the summary judgment had already been entered. (See Exhibit "B" of Petitioner's Appendix). Therefore, the proper step at that point was to move to set aside the summary judgment. As the Respondents have stated in their Response, the trial court below had stated in its order that the matters were deemed admitted and therefore, there was no need to respond to the Admissions. (See Response to Petition for Appeal, p. 2). Therefore, prior to moving to set aside the summary judgment based solely on the admissions, the Petitioner had no recourse. Furthermore, the trial court below refused to set aside the summary judgment. As a result, the Petitioner was not given the opportunity to respond to the admissions. As a result, there was no bad faith on the part of the Petitioner.

2. **The Petitioner does provide case law requiring a showing of prejudice contrary to the statement of Respondents.**

The Respondents improperly assert that no case law supports the requirement of a showing of prejudice to uphold the granting of summary judgment. However, this is again a clear misstatement. Once again, the Respondents wish to both rely on and ignore this Court's ruling in *Dingess-Rum Coal Co. v. Lewis*, 170 W.Va. 534, 295 S.E.2d 25 (1982). As previously stated, this Court held in *Dingess* 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. This is the same case relied upon by the Respondents. There clearly was no lack of good faith on the part of the Petitioner as he never was in receipt of the Discovery Requests. Therefore, contrary to the

Respondents' position, this Court clearly held in *Dingess* that it is necessary to show some sort of prejudice. The Respondents have relied on the *Dingess* case throughout this matter. It is the primary case relied upon to move for summary judgment in the first place. (See Exhibit "A" of Petitioner's Appendix). However, when it is pointed out that this Court in *Dingess* carved out an exception to their summary judgment, they expect the Court to take a blind eye to the *Dingess* case. The Respondents cannot have it both ways. It is incumbent upon this Court to recognize a clear exception to granting summary judgment based upon deemed admissions. Therefore, the Respondents were required by case law, namely *Dingess*, to provide a showing of prejudice. They failed to do so in the case below. Moreover, in their Response, the Respondents attempt to assert that they would have had no opportunity to prepare for trial if the Order of Summary Judgment were set aside and they would have been forced to go "blindly into trial." However, it is clear that the Motion to Set Aside Summary Judgment was filed in August 2010. (See Exhibit "B" of Petitioner's Appendix). The ultimate trial in this matter did not take place until mid-December, 2010. Therefore, there would have been ample time to conduct further discovery into the Petitioner's claims. Therefore, this allegation of prejudice is a clear misstatement of facts. Simply put, the court below 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. Clearly, this is in violation of the *Dingess* exception. 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.

Moreover, 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.

3. **The principles set forth in *Davis v. Sheppe* do apply to the case at bar.**

The Respondents have stated that the Petitioner's reliance on this Court's Opinion in *Davis v. Sheppe*, 187 W. Va. 194, 417 S.E.2d 113 (1992), is inappropriate. In so claiming, they state that since *Davis* did not deal with requests for admission, then this case is not applicable to the instant

matter. However, the Petitioner did not claim to put forth the *Davis* case as directly dealing with requests for admissions. Rather, it was presented to illustrate that this Court has recognized that there are circumstances where a perceived lack of diligence on the part of counsel shall not always be applied to his unknowing client. 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. As previously stated, the *Davis* 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 apprising 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.

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*. In short, the legal analysis dealing with the attribution of alleged intransigence on the part of the counsel shall not be automatic. 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.

4. Exclusion of the ability to cross-examine the representative of Dan Ryan Builders was improper.

The Respondents claim that the Court properly excluded evidence of fraudulent documents at the trial of this action. In support of their assertion, the Respondents cite Rule 608(a) of the West Virginia Rules of Evidence. The Respondents are correct in referring to Rule 608. However, their interpretation is again misguided. Rule 608 provides that instances of conduct of the witnesses may "be inquired into on cross-examination of the witness." This is exactly what the Petitioner was attempting to do. Petitioner's counsel attempted to inquire of the Dan Ryan Builders representative past instances of presenting falsified documents to the Planning Commission. However, the trial court below erroneously sustained the objection of the Respondents in prohibiting inquiry of the Dan Ryan representative. As a result, the Petitioner was prevented from properly attacking the credibility of the aforementioned witness. This is particularly important when you consider that the

only evidence with respect to some of the elements of damages, namely loss of profit, was the testimony of said representative. Therefore, by precluding the cross examination into the character of the witness, the trial court below essentially affirmed this testimony and gave the jury no chance to properly evaluate the credibility of the witness. Moreover, as stated more fully above, the Court should have set aside the Order of Summary Judgment and therefore, the trial should have been on all issues, both liability and damages.

Next, the Respondents claim that the evidence of fraudulent documents is irrelevant to the matter at hand. However, despite this assertion, this evidence is relevant as the inaccurate and false documents apply directly to the property at issue. This would show that the Respondents have been acting in an inappropriate manner with every aspect of the properties at issue. This would include the right of way, the valuation of the house, etc. Therefore, evidence of these falsified documents is clearly relevant to the issue at hand and fall within the province of the exception dealt with in *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.

5. Carol Newsome was not proffered to provide expert testimony.

Despite the claim of Respondents that the Petitioner attempted to call Carol Newsome to as an expert. However, this is not true. The Respondents claim that it was inappropriate for her to testify as she had “no personal knowledge of the property.” This is simply not true. As proffered to the Court, she was simply going to report what she personally saw as the original value alleged by the Dan Ryan representative. To do this, Ms. Newsome simply looked at the listing history of the property at issue. There was no expertise involved in said testimony other than reading numbers off of an internet site. This is particularly important to the Petitioner’s case when considering the testimony intended to be offered was to directly dispute the claims of the Respondents of the lowering in value of the properties at issue. Therefore, she would simply testify as to factual listings which she had looked up from public record materials. The Respondents 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 Respondents 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.

It is important also to note that the Respondents have not even addressed the Petitioner’s assertion that even if there were certain opinions expressed in Ms. Newsome’s testimony, it would, at most, 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 opinion 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. The Respondents silence on the issue of permissible opinion testimony pursuant to Rule 701 illustrates that there is no argument to maintain the prohibition of such evidence was proper by the trial court below. Therefore, the trial court erred in refusing to permit the Petitioner from calling witnesses to testify as to valuation of the properties at issue.

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

The Respondents have claimed that there never was an attorney client relationship between the firm for Respondents counsel and the Petitioner. In support of this, they rely on a quote from Petitioner's counsel taken out of context at the hearing conducted January 11, 2011. Although counsel did make the statement that there was no "personal I guess attorney-client relationship where Mr. Mills had went out and hired him . . .", it is important to examine the entire context of the statement. Just prior to the statement quoted by the Respondents, Petitioner's counsel stated the following:

It was one of those where Mr. Mills had negotiated a deal with Harvey Trumbower. And as part of the deal, Mr Trumbower was to basically take care of the legal fees to draw up the document.

Upon examining the entire context of the statement, it becomes clear that Respondents' counsel performed legal work to create the right of way at issue herein. The fees were merely paid by Harvey Trumbower as a brokered deal. Although there is no specific case law in West Virginia dealing with Real Estate conflict of interest, a formal opinion has been promulgated by the Committee on Legal Ethics with respect to the topic. In that opinion, the committee held that "as

a general proposition, the client is the person or entity whose interests the attorney is hired to protect and advance.” Conflicts of Interest in Real Estate Practice, L.E.I. 89-01 (Attached hereto as Exhibit “A”). Moreover, it is the subjective “belief of the client, not the attorney, which is most often controlling in the establishment of the attorney client relationship . . . it is imperative that attorneys.. . obtain written informed consent from parties to real estate transactions.” *Id.*

In this matter, it is beyond dispute that the Respondents counsel prepared a deed establishing an easement on behalf of the Petitioner. Moreover, it is clearly the subjective belief of the Petitioner that an attorney client relationship existed. Also, there is no informed consent form with respect to this transaction in any way. Therefore, it is clear that despite the Respondents allegations, there most certainly was a conflict of interest in their representation. This Court has held that pursuant to Rule 1.9 of the Rules of Professional conduct, 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. 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.

7. There is no evidence that the Petitioner ever personally intimidated any potential buyers.

The Respondents have stated that there was no need to provide evidence of personal intimidation because this fact was deemed admitted by the Order of Summary Judgment. However, this goes right to the fallacy of the deemed admissions in the first place. The only witness of alleged

personal intimidation specifically denied ever laying eyes on the Petitioner. 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. The Respondents claim that they can simply rely on the deemed admissions. This essentially creates a license to tell untruths to the jury. As further evidence of the Respondents penchant for presenting lies to the jury, one of the Respondents, Raymond Enright, admitted under oath to testifying falsely at the trial of this matter. (See Transcript of Trial, Volume One, p. 253-254, Petitioner's Appendix, Exhibit "H"). 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. This provides further support and evidence of the prejudice against the Petitioner in the refusal to set aside the Summary Judgment. This failure resulted in complete fallacies to be expressed to the jury as truth. Clearly this is completely inappropriate. As a result, the trial court committed reversible error as these statements assuredly prejudiced the jury against the Petitioner resulting in an unfavorable verdict.

For all of the foregoing reasons and the assignments of error previously set forth in the Petitioner's Brief, the Petitioner respectfully requests 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, 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 and such other relief as this Honorable Court deems necessary, appropriate or proper.



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RODNEY MILLS
By counsel

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

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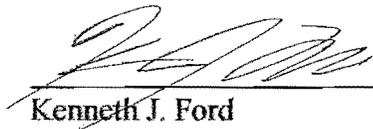
**DAN RYAN BUILDERS, RAYMOND ENRIGHT,
AND JACQUELYN ENRIGHT, Plaintiffs Below,**

Respondents.

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 REPLY BRIEF upon the following named counsel for Respondents by hand delivery the 9th day of September, 2011.

Tracey Rohrbaugh, Esq.
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Post Office Drawer 1419
Martinsburg, WV 25402



Kenneth J. Ford

Exhibits on File in Supreme Court Clerk's Office