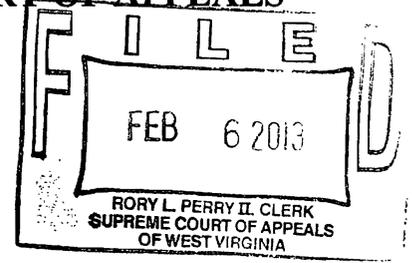


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

DOCKET NO. 12-0991



**ROBERT BURNWORTH,**

Petitioner/Appellant,

vs.

**KENT GEORGE, ROBINSON &  
MCELWEE, PLLC, and JOHN T.  
POFFENBARGER,**

Respondents/Appellees.

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**RESPONSE BRIEF ON BEHALF  
OF THE RESPONDENT/APPELLEE  
JOHN T. POFFENBARGER**

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## I. STATEMENT OF THE CASE

On October 14, 2011, Petitioner/Appellant, Robert Burnworth (hereinafter “Burnworth”) in this appeal filed a legal malpractice action in the Circuit Court of Kanawha County against Respondents/Appellees Kent George (hereinafter “George”), Robinson & McElwee, PLLC (hereinafter “RAM”) and John T. Poffenbarger (hereinafter “Poffenbarger”). That action had its genesis in a commercial transaction dating back to 2000. In that transaction, which closed in August 2001, today’s Petitioner/Appellant Burnworth, as sole shareholder and President of a business known as Access Document Systems Incorporated (hereinafter “ADS”), entered into an agreement to transfer or sell two-thirds of his interest in ADS to a Robert Jones (hereinafter “Jones”), who was both Burnworth’s friend and stockbroker. (JA 117).

In that transaction, RAM represented Burnworth and ADS and Poffenbarger represented Jones. RAM was responsible for preparing documents concerning the shareholder agreement and the ADS redemption of Burnworth stock, as well as a strategy to effectuate control to Jones. (JA 259). Ultimately, the deal was configured for Burnworth to transfer his interest in ADS to a newly created entity, ADSC Holding Company, with Jane Jones the wife of Robert Jones becoming the primary shareholder. (JA 125, 218).

Importantly, the deal provided Burnworth payment of a certain sum by the Joneses at closing, provided him an employment contract, provided him shares in ADSC Holding Company and finally provided him a Promissory Note for ADSC Holding Company for the balance owed. (JA 205).

More important, the agreement provided this Promissory Note was to be secured by two (2) second priority liens on real property owned by the Joneses, as well as secured by their personal guarantee. Poffenbarger prepared the two second priority Deeds of Trust. At the closing, however, Jones pledged only realty secured by one of the Deeds of Trust and substituted for the second

security interest, a different realty interest which was pledged by Colby Corporation, a company wholly owned by Jane Jones, and not a party to the deal. Both of these second priority Deeds of Trust were recorded on August 2, 2001, the day following the closing of this deal. (JA 226, 243).

Later, on July 2, 2002, Burnworth executed a Release of Deed of Trust (second priority), thereby releasing the Joneses' part of the security for the Promissory Note. The Colby Corporation property remained as security.

Then on August 22, 2006, Burnworth informed George that ADSC Holding Company and Jones defaulted under the Promissory Note and instructed him to notify both of the defaultees. Later, in 2009, there was another default. So Burnworth's counsel in this appeal, William Pepper, commenced collection efforts under the Promissory Note and the second priority security instrument. In the course thereof, Burnworth employed a separate lawyer, Glenn Turley, to conduct a title search concerning the Deed(s) of Trust and report defects. (JA 34).

In the Circuit Court Complaint, Burnworth alleges he was damaged because of the failed collateral, the second priority Deed of Trust substituted by Colby Corporation. The Complaint alleges expected theories of professional negligence, breach of contract, and even an alleged fraud against Poffenbarger. (JA 101). The fraud claims were not pleaded with the required specificity, as was expected when none existed. A Motion to Dismiss the Complaint was filed and summary judgment granted before an Answer was necessary.<sup>1</sup> (JA)12). Quite specifically, in Paragraph 33 of his Complaint, Burnworth alleges:

“As a direct and proximate result of aforesaid breach of contract, Plaintiff has lost the ability to seek foreclosure on the valuable subject property to enforce payment of the note, which sale would have

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<sup>1</sup>There is no discovery and allegations are simply taken as true for purposes of this Response.

realized \$640,000 or more paid over to Plaintiff.”

Of course, Burnworth never exercised any of his collection remedies against Jones until after commencing the action herein, and even then only to the extent of the failed Circuit Court action. Then about a month later, November 14, 2011, his counsel, Mr. Pepper, filed a separate action in the Circuit Court of Kanawha County, against the Joneses and ADSC Holding Company under the Promissory Note. (JA 108). That separate action was assigned to Judge Webster.<sup>2</sup> (JA 166).

While some procedural wrangling followed, Burnworth’s separate action was only discovered by counsel in this action in the course of the hearing on May 23, 2012. The actions were never consolidated because of Burnworth’s objection. (JA 93, 138, 180). Neither Respondents/Appellees, nor their counsel, was provided notice of this separate action. Nonetheless, once discovered even if almost by accident, the second action proved pivotal to the Circuit Court’s disposition of the within action. As it developed, Mr. Pepper, representing Burnworth, appeared for a hearing before Judge Webster on April 19, 2012, and together with counsel for the Joneses, and without any notice to your Respondents/Appellees. At that hearing they entered into the “Stipulation of Settlement and Order of Dismissal” (hereinafter “Stipulation”). The Stipulation expressly provided not only for a judgment against ADSC Holding Company, as well as the Joneses in the amount of \$725,715.28. (JA 302). It also provided that “. . . [t]he entry of judgment in favor of the plaintiff (Burnworth) . . . shall operate to extinguish all obligations of all the defendants under the [Promissory] Note, and any security instrument given to secure the same, and the subject Note, is cancelled and merged into

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<sup>2</sup> Senior Status Judge Robert G. Chafin was appointed as a Special Judge in this action because, understandably, all the Kanawha County Circuit Judges recused themselves. (JA 24).

the judgment.”<sup>3</sup> (Emphasis added).

At the hearing of May 23, 2012, Judge Chafin quickly grasped the implications and consequences of this Stipulation. First, he inquired of Burnworth’s counsel in this action, Kathy Brown, co-counsel with Jim Lees, and asked:

“Can you explain to me the uniqueness of this judgment order(s)?”

(JA 320).

Then Judge Chafin inquired:

“Would you agree that the action which you relied on in this matter was based upon the Note which no longer is of any consequence?”

(JA 322-May 23, 2012, Transcript of Hearing, page 3).

Finally, he explained his analysis and ruling:

“Well, as I say, when I first looked at the judgment order, before anything was filed by counsel, my immediate first impression was this Plaintiff has basically dismissed his own lawsuit by the wording of that Order and the more I look at it, the more I’m convinced that that’s what he’s done. The basis of the lawsuit is the Note. That’s what the damages are predicated upon. By his action in extinguishing the Note, I see no further basis for his claim in this action.”

(JA 324).

Notwithstanding the clear direction of Judge Chafin’s ruling, later embodied in his Order of July 23, 2012, granting summary judgment in favor of Respondents/Appellees and dismissing the action with prejudice, Burnworth advanced a number of explanations to avoid its consequences, largely through the vehicle of an Affidavit in which he explained his counsel, Mr. Pepper, had

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<sup>3</sup> “The Circuit Court confirmed with Attorney Kathy Brown that Burnworth had been represented by counsel in the collection action and that Burnworth approved the Stipulation of Settlement and Order of Dismissal upon the advice of counsel (May 23, 2012, Transcript of Hearing, page 20). (JA 191).

advised his claim was not collectible against the Joneses and ADSC Holding Company. A Corrected Stipulation of Settlement and Order of Dismissal was entered, however, without changing the consequences. (JA 273). Burnworth argued Respondents/Appellees should be liable anyway for the second defective priority Deed of Trust from Colby Corporation which he rationalized was there to protect him in the event ADSC Holding Company and/or the Joneses were judgment proof. The Affidavit and the record in an action decided on the pleadings are silent concerning Burnworth's collection efforts. In any event, Judge Chafin in his Judgment Order of July 23, 2012, gave no credit to the Burnworth Affidavit and denied a motion for further relief by Order dated August 15, 2012. (JA 377).

The key element which Judge Chafin recognized was that a default judgment, a remedy readily available, would not require that the Promissory Note be "extinguished" and "cancelled." Of primary relevance is that the allegations against Poffenbarger devolve solely on the claimed loss of the security of the Promissory Note. Nothing more is at issue, as Judge Chafin recognized. Essentially, Burnworth doubled down on his bet to recover against the Joneses by knowingly agreeing to the judgment in place of the Promissory Note, the sole basis to connect Poffenbarger to any liability. Finally, in his Petition Burnworth declares as a justification for his appeal that there is an ambiguity in the Stipulation, to which he was a party and in this appeal tries to claim an ambiguity in his own Stipulation against non-parties to the Stipulation. By definition, a Stipulation is a mutually beneficial, voluntary agreement.

Burnworth and Jones established separate, unrelated binding and controlling enduring agreements, including the Promissory Note. Their security instrument was the Deed of Trust for the Promissory Note. Over the course of time, these parties--relying on the advice of competent counsel

in approximately May 2012--decided voluntarily and intentionally to enter into a different and mutually agreeable transaction. Simply stated, they agreed to void the Promissory Note, for which the Deed of Trust was security. By extinguishing the Promissory Note and substituting a judgment for the Note, the Deed of Trust was rendered a nullity. It no longer served any purpose. Judge Chafin readily grasped the implication of their agreement--the voluntary and intentional extinction of a Promissory Note--thereby voiding the companion security Deed of Trust instrument. Any defect in failing to properly secure this Promissory Note was nullified and a new debt and remedy established by the Agreement.

## **II. SUMMARY OF ARGUMENT**

The Circuit Court correctly decided that a consent judgment which was voluntarily and intentionally agreed upon by the Petitioner/Appellant and his debtor and which extinguished an underlying Promissory Note secured by a Deed of Trust prepared by Poffenbarger, also extinguished the basis of any alleged legal negligence claim. It is a fundamental and elementary principle that if a promissory note is extinguished, as it was here by a court order, the security for that note is extinguished. In this case where it is alleged Poffenbarger was negligent in failing to secure the correct Deed of Trust, the claim fails because the security interest is extinguished by extinguishment of the Promissory Note itself. So there is no basis for recovery against Poffenbarger on the Note and Burnworth is free to exercise whatever remedies that are available to him against Mr. and Mrs. Jones. Judge Chafin articulated the issue and reached the right result for the right reason in granting summary judgment. (JA 353). Accordingly, the grant of summary judgment must be upheld.

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

Respondent/Appellee Poffenbarger does not believe oral argument is necessary to decide this appeal.

### **IV. ARGUMENT**

- A. PETITIONER/APPELLANT BY INTENTIONALLY EXTINGUISHING THE PROMISSORY NOTE WHICH WAS SECURED BY A DEED OF TRUST PREPARED BY RESPONDENT/APPELLEE POFFENBARGER ALSO EXTINGUISHED HIS LIABILITY FOR LEGAL NEGLIGENCE BECAUSE THE PROMISSORY NOTE WAS NO LONGER IN EXISTENCE AND THERE IS NO BASIS FOR A RECOVERY ON THAT NOTE.**

Application of the well-known doctrine of accord and satisfaction results in the extinguishment of the Promissory Note and with it the extinguishment of any alleged liability against Poffenbarger. Our Court in Charleston Urban Renewal Authority v. Stanley, 346 S.E.2d 740 (W.Va. 1985) examined the contours of this well-established doctrine. Here it must be remembered Burnworth accepted a judgment order in return for, and in consideration of, an extinguishment of the Promissory Note and did so by the signature of his counsel, with his authority, agreeing to a court order effectuating the transaction. It is irrelevant that realizing at a later date, and after Judge Chafin recognized the mendacity and import of the cozy but consequential deal, that Burnworth did not like its consequences. As our Court said in Stanley in Syl. Pt. 1:

“To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all.”

Here there is no question Burnworth accepted the consent judgment in the place of the extinguished Promissory Note, so he received an accord and satisfaction of the subject debt. Whether that agreement was wise or beneficial is no longer relevant or even an issue. It is a fact that there was no longer any liability enabling him to collect on the Note.

As one court ruled, an accord and satisfaction is a new contract, a contract complete in itself. Or. Mut. Ins. Co. v. Barton, 109 Wn. App. 405 (Wash. Ct. App. 2001). So whether standing by itself or appended to the underlying transaction, the extinguishment of the Promissory Note ended the obligation at issue and with it the enforceability of any security agreement and any claim against Poffenbarger.

The entirety of the Burnworth claim is predicated on whether he can collect money owed under the ADSC Holding Company Promissory Note and its security. Thus Burnworth must prove that but for the defects in the security, he would be able to collect. That point Burnworth himself nullified, so the allegations of legal malpractice are rendered moot.

Our Court in Conservative Life Ins. Co. v. National Exchange Bank of Wheeling, 171 S.E. 530 (W.Va. 1933) explained that only complete ignorance would allow vacation of a released deed of trust. To the contrary, this was a very intentional and deliberate plan, not necessarily smart, but certainly not borne of ignorance. Whether wise is another issue, but the plan of choice was to collect the money owed from the responsible party. It is a complete fiction, at best, to revive a Note that was extinguished. Once rung, a bell cannot be unring.

Burnworth goes on at length to excuse and even reinvent his new deal and its implications. That is wasted paper and ink. It is as odious as it is unconscionable that there was a second, or amended, Consent Order which itself failed in any way to change the consequences of the

extinguished Promissory Note. Once extinguished, it cannot simply by connivance be reinstated. There is no consideration and no basis for such a connivance.

Furthermore, Burnworth's arguments concerning the merger of the language is an exercise in futility. J & G Construction Co. v. Freeport Coal Co., 129 S.E.2d 834 (W.Va. 1963). That connivance offers no relief here because the merger of the Promissory Note into the judgment applied to the same party, the debtor. That result has nothing to do with his third-party claims. In fact, the exact opposite is true because as it applies to Poffenbarger, at least, his alleged liability is dependent only because of a defect in the security agreement for the Promissory Note. That is what Burnworth intentionally relinquished, thus extinguishing any potential claim against Poffenbarger.

While the merits of a legal malpractice action were never addressed, nor implicated even at the edges, there are certain principles which have currency and must be recognized.<sup>4</sup> Specifically, our Court in Calvert v. Scharf, 619 S.E.2d 197 (W.Va. 2005), makes it plain in Syl. Pt. 3 that:

“In an attorney malpractice action, proof of the attorney's negligence alone is insufficient to warrant recovery; it must also appear that the client's damages are the direct and proximate result of such negligence.” Syl. Pt. 2, Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (W.Va. 1990).

Because this case turned on the narrow question of the nullification of a promissory note and consequently the security instrument, the principle in Calvert is an insurmountable road block to any claim of professional malpractice because the loss, if any, of the security was caused by Burnworth's own voluntary actions.

Lastly, we return to Burnworth's argument that his machinations with the Joneses should be

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<sup>4</sup>Again while not reached by the Court, the fact that Poffenbarger did not represent Burnworth is fatal to any allegation of legal malpractice because of the absence of privity. Calvert v. Scharf, 619 S.E.2d 197 (W.Va. 2005).

construed as ambiguous. As difficult a concept as that is to grasp in this case as somehow helpful, Burnworth is not free to construct his own ambiguity to avoid a profoundly unwise arrangement that may have even been harmful. Those parties created their reality and those parties must bear its consequences. As one court explained:

“Instruments are not rendered ‘ambiguous’ due to the fact that the parties do not now agree upon the proper construction to be given them.”

Cole v. Ross Coal Co., 150 F.Supp. 808 (U.S.D.C. S.D. W.Va. 1957).

Accordingly, this Court has no interest in the ambiguity or the difficulty those parties encountered with their agreement which nullified the Promissory Note, the security instrument and, consequently, the basis of any legal malpractice claim against Poffenbarger.

#### V. CONCLUSION

For the foregoing reasons and authorities, the judgment of the Circuit Court of Kanawha County should be affirmed.

Respectfully submitted,

JOHN T. POFFENBARGER  
By Counsel



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POFFENBARGER, Defendants Below,**

Respondents/Appellees.

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that the following original document, **RESPONSE BRIEF ON BEHALF OF THE RESPONDENT/APPELLEE JOHN T. POFFENBARGER**, has been served upon counsel of record by depositing a true and exact copy thereof, via regular U.S. Mail and properly addressed on this 4<sup>th</sup> day of **FEBRUARY, 2013**, as follows:

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