

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Homecomings Financial Company, LLC  
and Residential Funding Company, LLC,  
Defendants and Cross-Claim Plaintiffs  
Below, Petitioners**

**FILED**

June 24, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs) **No. 101616** (Ohio County 07-C-187)

**David A. Millhouse and Lisa M. Millhouse,  
Plaintiffs Below; and Lucille A. Forsch  
d/b/a L.A. Forsch & Co., Cross-Claim  
Defendant Below, Respondents**

**MEMORANDUM DECISION**

Petitioners Homecomings Financial Company, LLC and Residential Funding Company, LLC (generally hereinafter referred to as “petitioners”) appeal the circuit court’s orders awarding attorney’s fees to respondents David and Lisa Millhouse (hereinafter referred to as “the Millhouses”) and dismissing petitioners’ cross-claims against respondent Lucille A. Forsch. The Millhouses and respondent Forsch have filed responses.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration, *in part*, under the Revised Rules.<sup>1</sup> The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error.<sup>2</sup> For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

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<sup>1</sup> As set forth in this memorandum decision, the Court concludes that in this case the requirements of Rule 3 of the prior Rules of Appellate Procedure control the time for filing this appeal.

<sup>2</sup> As set forth herein, the Court does not consider the merits of petitioners’ arguments regarding the award of attorney’s fees as such issues were not preserved.

## **Award of Attorney's Fees**

The underlying suit was based upon allegations by the Millhouses, plaintiffs below, of predatory lending by petitioners and an inflated appraisal of the Millhouse home by respondent Forsch. Prior to trial, the Millhouses entered into settlements with petitioners and with respondent Forsch. Pursuant to the settlement between the Millhouses and petitioners, petitioners agreed to pay reasonable attorney's fees and costs to counsel for the Millhouses, as determined by the circuit court. The circuit court conducted an evidentiary hearing and entered an order on February 3, 2010, awarding attorney's fees and costs to the Millhouses' counsel, Bordas & Bordas and Mountain State Justice. Petitioners filed a motion for relief from the circuit court's order awarding such attorney's fees, which the circuit court denied by order of March 29, 2010. At that point, due to the settlements, the only remaining litigation concerned petitioners' cross-claims against respondent Forsch who moved to dismiss those cross-claims.

The circuit court granted respondent Forsch's motion to dismiss the cross-claims on May 21, 2010. In its May 21, 2010, Order, the circuit court noted that the litigation was concluded with the dismissal of the cross-claims, stating: "no non-settling Defendants remain in the litigation because everyone has settled with the plaintiffs." On June 4, 2010, petitioners filed a motion to alter or amend judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure addressing only the dismissal of their cross-claims against respondent Forsch, which the circuit court denied on July 16, 2010.

Petitioners filed their petition for appeal in the Ohio County Circuit Court on November 12, 2010. Petitioners indicated on the requisite Supreme Court of Appeals docketing statement that they were appealing the circuit court's May 19, 2010 order.<sup>3</sup> The petition for appeal raises assignments of error as to the circuit court's award of attorney's fees, as well as to the circuit court's dismissal of the cross-claims against respondent Forsch. The Millhouses argue that petitioners' assignments of error regarding the award of attorney's fees are untimely filed because petitioners did not file their petition for appeal within four months of entry of the circuit court's order of May 21, 2010, which resolved the last remaining claims in the case-at-bar and that the period for appeal was not extended by petitioners' Rule 59(e) motion, which only addressed the cross-claims issue. Petitioners contend that their appeal as to the award of attorney's fees is not untimely as "there is no final order in this case resolving all of the claims as to all of the parties....[p]etitioners appeal from two interlocutory orders governed by Rule 54(b). . . ." However, petitioners conversely note that "[t]he case would have been final on May 19, 2010 but for Petitioners' motion to amend under Rule 59(e) that tolls the finality of the case. . . . therefore, the four month period

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<sup>3</sup> May 19, 2010, is the date on which the circuit judge signed the order, which was then entered by the circuit clerk on May 21, 2010. Any reference by petitioners to the May 19, 2010, order is actually a reference to the May 21, 2010, order.

for filing the petition for appeal did not begin to run until July 13, 2010, the date the Circuit Court denied [petitioners'] Rule 59(e) motion.”

The time for filing this appeal is governed by the previous Rules of Appellate Procedure because the entry dates of the challenged orders were prior to December 1, 2010, the effective date of the revised appellate rules. Rule 3 of the West Virginia Rules of Appellate Procedure (2010) provides: “No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order.”

This Court concludes that petitioners’ assignments of error challenging the award of attorney’s fees to Respondents David and Lisa Millhouse were not preserved by the filing of a timely petition for appeal within four months of the final order of May 21, 2010 nor was the appeal period tolled by petitioners’ Rule 59(e) motion as to the dismissal of their cross-claims against respondent Forsch. “When a party to an action files a Rule 59(e) motion to alter or amend judgment, the only errors which benefit from the extended appeal period are those which are raised in the motion. The issues not assigned as grounds supporting an alteration or amendment of judgment retain the original filing period.” Syl. Pt. 3, *Thompson v. Branches-Domestic Violence Shelter of Huntington, W.Va., Inc.*, 207 W.Va. 479, 534 S.E. 2d 33 (2000). A review of petitioners’ Rule 59(e) motion reveals that the only issues raised in that motion concerned the dismissal of their cross-claims against respondent Forsch, and not with the attorney’s fees previously awarded to the Millhouses. This Court concludes that petitioners’ assignments of error relating to the award of attorney’s fees were not preserved and, thus, will not be further considered.

### **Cross-Claims against Forsch**

The remainder of petitioners’ appeal challenges the circuit court’s dismissal of their cross-claim and amended cross-claim against respondent Forsch, which alleged fraud, joint venture, breach of professional standards, professional negligence, implied indemnification, and a violation of West Virginia Code § 30-38-17.<sup>4</sup>

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<sup>4</sup> Petitioners’ original cross-claim also alleged the right to contribution. The circuit court ruled that the good faith settlement between the Millhouses and respondent Forsch extinguished petitioners’ claims for contribution against Forsch. That ruling is not challenged on appeal.

The circuit court dismissed the fraud, breach of professional standards and professional negligence claims because it found that they were time-barred by the controlling respective two-year statutes of limitation, which it concluded began to run in 2005, when the GMAC Comparative Market Analysis was conducted at the behest of petitioner Homecomings. The circuit court concluded that this analysis placed petitioners on notice of the substance of their potential claims against respondent Forsch. The circuit court further concluded that the joint venture claim lacked merit as it was not a stand-alone cause of action and that there was no private cause of action created by West Virginia Code § 30-38-17 or the associated rules promulgated by the West Virginia Real Estate Appraiser Licensing & Certification Board. Finally, the circuit court concluded that the implied indemnification claims were extinguished by the good faith settlements in the case. ““In non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault.” Syl. Pt. 7, *Hager v. Marshall*, 202 W.Va. 577, 505 S.E. 2d 640 (1998)” Syl. Pt. 8, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W.Va. 450, 693 S.E. 2d 815 (2010).

Petitioners contend that the circuit court erred in determining as a matter of law that petitioners were put on notice for the purpose of the applicable statutes of limitation that the original appraisal by respondent Forsch might have been fraudulent by the 2005 GMAC Comparative Market Analysis and 2006 eMortgage Logic analysis that were performed at their request and which were attached to respondent Forsch’s motion to dismiss. Petitioners argue that the circuit court erred in not converting the motion to dismiss into a motion for summary judgment and in not giving petitioners notice nor allowing an opportunity to be heard on these issues. Further, petitioners argue that the circuit court erred by failing to assume the truth of the allegations within their cross-claims complaint. Petitioners alleged that they first discovered respondent Forsch’s misconduct in regard to the appraisal in June 2008, when they received the appraisal report of Joshua R. Thornton who was retained to do a retro-appraisal of the property. They allege that there is a significant factual dispute regarding the point in time in which they knew or reasonably should have known that respondent Forsch’s original appraisal may have been fraudulent. Petitioners also contend that the circuit court erred in holding that their settlement with the Millhouses extinguished any implied indemnity claim.

The circuit court addressed these issues in its July 16, 2010, order denying petitioners’ Rule 59(e) motion. The circuit court rejected petitioners’ arguments that they did not receive an opportunity to contest or explain the 2005 GMAC Comparative Market Analysis and the 2006 eMortgage Logic analysis, finding that they had actual notice of these opinions as same were prepared at petitioners’ request and had been previously produced by them in discovery. Further, the circuit court found that petitioners “had at least two opportunities to contest or explain the rough appraisals, but failed to take the opportunity when given.”

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E. 2d 516 (1995). A review of the record demonstrates that unlike other cases in which error has been found for failure of opportunity to be heard in regard to a motion to dismiss, here, petitioners were aware of respondent Forsch’s statute of limitations arguments based upon the 2005 and 2006 appraisals well in advance of the circuit court’s consideration of same and had ample opportunity to respond. This Court, therefore, deems any error in the circuit court’s failure to convert the motion to dismiss into a summary judgment motion to be harmless error, particularly the consideration of the 2005 GMAC Comparative Market Analysis and 2006 eMortgage Logic. After careful consideration of the remaining arguments of the parties and the record, under the facts and circumstances of the present case, the Court does not find that the circuit court erred in its dismissal of the cross-claims against respondent Forsch.

For the foregoing reasons, we dismiss the assignments of error relating to the award of attorney’s fees to the Millhouses as untimely and affirm the circuit court’s orders concerning the issues raised in this appeal.

Affirmed.

**ISSUED:** June 24, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh