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

GLENN SPITZNOGLE, JR. and MARLENE SPITZNOGLE, Plaintiffs  
Below, Petitioners

vs.

NO. 11-1132 (Civil Action Number 09-C-209H)  
Marshall County Circuit Court

KEVIN R. DURBIN and KRISTA A. DURBIN  
Defendants, Below, Respondents

GLENN SPITZNOGLE, JR. and MARLENE SPITZNOGLE, Appellants

KEVIN R. DURBIN and KRISTA A. DURBIN, Appellees

**BRIEF ON BEHALF OF GLENN SPITZNOGLE, JR. AND MARLENE  
SPITZNOGLE, APPELLANTS**

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WEST VIRGINIA**

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA**

Your Appellants, Glen Spitznogle, Jr. and Marlene Spitznogle, respectfully represent unto this Honorable Court that they are aggrieved by the decision and order entered on the 20<sup>th</sup> day of May, 2011, by the Circuit Court of Marshall County, West Virginia. The said order granted summary judgement to the Appellees, Kevin R. Durbin and Krista A. Durbin.

Your Appellants assert that said Circuit Court Order is not supported by the evidence and is directly contrary to the laws of the State of West Virginia. Therefore, Appellants pray for a reversal of the order entered on May 20<sup>th</sup>, 2011.

**I. SUMMARY OF PROCEEDING AND RULING OF THE LOWER  
TRIBUNAL**

Glen Spitznogle, Jr., and Marlene Spitznogle, the Plaintiffs/Appellants herein, initiated this civil action against Kevin R. Durbin and Krista A. Durbin, the Defendants/Appellees herein in the Circuit Court of Marshall County, West Virginia, alleging that the land consisting of 138 Acres located on Dry Ridge, in Webster District, Marshall County, West Virginia, which they purchased from the Defendant/ Appellee by land contract dated the 1<sup>st</sup> day of September, 1999, and upon which they had paid in full the agreed purchase price of \$60,000.00 prior to the filing of said suit, included the oil and gas underlying said property, as the land contract contained no language reserving oil and gas rights unto the Defendants.

The Plaintiffs/Appellants filed suit on October 7, 2009, in the Circuit Court of Marshall County, West Virginia, for the determination of the question as to whether or not the oil and gas were included in the contract for the sale of the property and to have specific performance of the conveyance of the oil and gas. At that time the Defendants/Appellees herein, were still the legal owners of the real estate as they had not given the Plaintiffs/Appellants, a deed for the property. Mr. Durbin had advised the

Plaintiffs/Appellants that he was not going to convey the oil and gas as he mistakenly believed that he and his wife did not receive the oil and gas until after the contract had been entered into with the Plaintiffs/Appellants herein. The Defendants/Appellees later admitted that they were conveyed the oil and gas at the same time as they were conveyed the surface, however, the oil and gas were subject to the life estates of prior owners.

After discovery was completed, the Plaintiffs/Appellants filed their motion for summary judgement pursuant to Rule 56 of the Rules of Civil Procedure based upon the pleadings and the evidence as revealed in discovery. The Defendants/Appellees filed a memorandum of law in opposition to the Plaintiffs motion for summary judgement.

On April 15, 2011, the Court held a hearing on the Plaintiffs/Appellants motion for summary judgement and the Defendants/Appellees response to said motion. After consideration the Court did deny the Plaintiffs motion for summary judgement and granted summary judgement in favor of the Defendants. Said order was dated May 20<sup>th</sup>, 2011.

## **II. STATEMENT OF FACTS**

The subject real estate is situate on Dry Ridge, in Webster District, Marshall County, West Virginia, and consists of 138 acres. The Defendants/Appellees were conveyed this property by Roger Guy Holmes and Janice Lou Holmes, his wife, by deed dated June 1<sup>st</sup>, 1993 and of record in the Marshall County Clerk's Office in Deed Book 573, at page 132. ( See Appendix Page 29)

Roger Guy Holmes and Janice Lou Holmes, his wife, received title to said property by a deed from Johnson Scherich and Lorena Scherich , his wife, dated May 1<sup>st</sup>, 1969 and record in said Clerk's Office in Deed Book 406, at page 194. ( See Appendix Page 33) In the deed from Johnson Scherich and Lorena Scherich, his wife to Roger Guy Holmes and Janice Lou Holmes, his wife, the Scherich's had the following language of reservation included in the deed:...."The said parties of the first part hereby reserve unto themselves for and during the lifetime of said parties and the lifetime of the survivor of them, all the oil and gas, together with any and all delay rentals, storage payments, rentals, royalties and other benefits arising by any virtue of any existing oil gas lease upon the property hereby conveyed together with the right re-lease the parcel hereby conveyed for oil and gas or gas storage in the event the present lease if any presently exists, is

surrounded during the lifetime of either of the first parties”.

When Roger Guy Holmes and Janice Lou Holmes, his wife, conveyed the property to Kevin L. Durbin and Krista A. Durbin in their deed date June 1, 1993, the same language of reservation was set forth in that deed. (See Appendix page 29)

In a land contract agreement dated September 1<sup>st</sup>, 1999, Kevin Durbin and Krista Durbin agreed to sell to Marlene Anderson, now known as Marlene Spitznogle and Glen Spitznogle, Jr., the 138-acre plot of land located on Dry Ridge, in Webster District, Marshall County, West Virginia for the agreed upon price of \$60,000.00 to be paid in installments of \$500.00 per month on the principal and \$375.00 per month for the leasing of said property making a total payment of \$875.00 per month beginning with the first payment on September 1, and continuing there after for 120 months (10 years) until the purchase price was paid in full. Said land contract agreement did not contain any reservations of oil and gas (See Appendix Page 80 and 81).

Thereafter the Plaintiffs/Appellants made the payments as required under said land contract and paid said contract in full with their monthly payment of August, 2009. (See Appendix Paragraph V on Page 3 and Paragraph V on Page 15).

The Defendant/ Appellee, Kevin Durbin first advised the Plaintiffs/Appellants that he did not intend to convey the oil and gas rights to the Plaintiffs in the summer of 2009, just before the land contract was to be paid in full by the Plaintiff/Appellants. ( See Paragraph XIV Page 5 and Paragraph XIV Page 16 of the Appendix)

After the contract was paid in full by the Plaintiffs/Appellants they filed suit in the Circuit Court of Marshall County in this civil action on October 7, 2009, to force the specific performance of the conveyance of the oil and gas interests underlying the subject property. ( See Appendix Page 1) The Defendants/Appellees filed their answer on October 26, 2009 and the issues were joined. (See Appendix Page 15)

The Defendants/Appellees tendered a deed for the surface dated December 30, 2009, while the suit for the suit for specific performance of the conveyance of the oil and gas underlying said property was pending. Said deed was recorded on February 17, 2010, in the Office of the Clerk of the County Commission of Marshall County, West Virginia in Deed Book 694, at page 611. (See Appendix Page 84)

It is the recording of this deed that the Court used to rule that the Defendant/ Appellees were the owners of the oil and gas underlying the subject property.

### III. ASSIGNMENTS OF ERROR

Plaintiffs/Appellants, Glen Spitznogle, Jr. and Marlene Spitznogle respectfully submit the following assignments of error:

1. The Circuit of Marshall County, West Virginia, error in granting summary judgement to the Defendants/Appellees in finding that the Defendants/Appellees in finding that the Defendants/Appellees were the owners of any minerals and mineral rights including oil and gas which had no previously been reserved or conveyed away on the subject property.

2. The Circuit Court of Tyler County error in finding that the land contract merged into the deed and deed controlled and once the Plaintiffs/Appellants recorded the deed that they excepted the deed including the reservation of the oil and gas pursuant to the doctrine of merger not with standing the fact that the Plaintiffs/Appellants had all ready filed suit to have that issue determined by the Circuit Court and thus it was apparent that the Plaintiffs/Appellants had not accept the deed without calefaction and that issue was pending before the Court.

3. The Circuit Court error in denying summary judgement to the Plaintiffs/Appellants as it was clear that there was no genuine issue of fact to by tried and inquiring concerning the facts was not desirable to clarify the application of law.

## IV. TABLE OF AUTHORITIES

### WEST VIRGINIA CODE

Chapter 36, Article 1, Section 11 8

### WEST VIRGINIA CASES

*Aetna Casualty and Surety Co. v. Federal Ins. Co. Of New York*  
148 W. Va. 160, 133 S. E. 2d (1963) 8

*Glen Falls Insurance Co. v. Smith*  
617 S. E. 2d 760 (WV 2005) 8

*Freudeberger Oil Co. v. Simmons*  
79 W. Va. 46, 90 S. E. 815 (1916) 8

*Hall v. Hartley*, 146 W. Va 328, 119  
S. E. 2d 759 (1961) 9

*G. W. Auto Center Inc. v. Yoursco*  
280 S. E. 2d 327 (WV 1981) 9

*Swope v. Pageton Pocahontas Coal Co.*  
129 W. Va. 813, 41 S.E.2d 691 (1947) 9

*Wolf v. Landers* 124 W.Va. 290,  
20 W. E. 2d 124 (1917) 9

*Harman v Dry Fork Colliery Co.*  
80 W. Va. 780, 90 S.E. 2d 1047 (1916) 9

*Collins v. Stalnaker*, 131 W. Va. 543,  
48 S. E. 2d 430 (1948) 9

*Myers v. Carnahan* 61 W. Va 414,  
57 S. E. 134 (1907) 10

### TREATISE

12b M. J. *Merger* § 2,  
pages 642 & 643 10

## V. DISCUSSION OF LAW

The West Virginia Supreme Court of Appeals has determined the test that Circuit Courts should employ in considering motions for summary judgment made pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. In order to grant summary judgment, the trial court must determine that it is clear that there are no genuine issues of fact to be tried and that inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, *Aetna Casualty and Surety Co. v. Federal Ins. Co. of New York* 148 W.Va. 160, 133 S. E. 2d 770 (1963); *Glen Falls Insurance Co. v. Smith* 617 S. E. 2d 760 (WV 2005)

In *Freudenberger Oil Co. v. Simmons*, 79 W. Va 46, 90 S.E. 815 (1916) the West Virginia Supreme Court in Syllabus point 1 set the following rule: “A deed conveying lands, unless an exception is made therein, conveys all the estate, right, title and interest whatever, both at law and in equity, of the grantor in and to such lands.”

This rule was stated to interpret West Virginia Code, Chapter 36, Article 1, Section 11, (1931), which provides: “When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will”.

“In *Freudenberger*, the interest conveyed consisted of the surface and a partial interest in minerals which was obtained at a later date than the surface. The grantor in the deed claimed the mineral interest did not pass. There was no exception of the minerals in the deed and the Supreme Court set the rule in its Syllabus point 1 to settle the matter.

In this case we must look to the Land contract Agreement dated September 1, 1999, for the purchase and sale of the subject property. Even though the Defendant/Appellee now admit that they were conveyed the oil and gas with the subject property contemporaneously with the surface when they purchased the property from Roger Guy Holmes and Janice Holmes, his wife, in 1993, subject to the life estates of Johnson Scherich and Lorena Scherich, they did not expressly except those oil and gas rights in the contract dated September 1, 1999. It was not until the summer of 2009, shortly just before the Defendants/Appellees were to give the Plaintiffs/Appellants a deed for the property that Mr. Durbin advised the Plaintiffs/Appellants that they were excepting the oil and gas from the conveyance. With

respect to deeds our Supreme Court has held that in order to create an exception or reservation, such exception or reservation must be expressed in certain and definite language. *Hall v. Hartley*, 146 W. Va 328, 119 S. E. 2d 759 (1961). Further, the general rule of construction is that when it appears from the language of the deed that there is doubt as to whether the grantor intended to except or reserve to himself an interest in the land conveyed, the question of interpretation will be solved in favor of the grantee. *G. W. Auto Center, Inc., v. Yoursco* 280 S. E. 2d 327 (1981); *Collins v. Stalnaker*, 131 W. Va. 543, 48 S. E. 2d 430 (1948); *Swope vs. Pageton Pocahontas Coal Co.*, 129 W. Va. 813 41 S. E. 2d 691 (1947).

In this case we are not interpreting a deed, or language contained in a deed. We are interpreting a land contract agreement. The Plaintiffs/Appellants contend that we must give the same rules of construction and interpretation to land contract agreements so that there will be consistency in our real estate law. In this case the land contract agreement did not contain any language whatsoever which could be interpreted as indicating that the grantors intended to reserve the oil and gas underlying the subject property. It was almost ten years later, when the contract was almost paid off, that the Defendants/Appellees gave notice that they were not going to convey the oil and gas underlying the subject property. A contract for the sale of real estate over a period of time which is known as a land contract must be interpreted the same as a deed or it would to lend chaos to our real estate law.

In this case, the Circuit Court found that the deed accepted by the Plaintiffs/Appellants, and recorded by the Plaintiffs/Appellants, controlled over the land contract. The Circuit Court cited *Wolf v Landers* 124 W. Va. 290, 20 S. E. 2d 124 (1917) which held that where an executory land contract is followed by a conveyance thereof, the contract is merged into the deed and will control and if there is any conflict between the papers the deed controls. The Court further cited *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 90 S. E. 2d 1047 (1916).

However, the Circuit Court failed to distinguish the present case from the other cases based upon the fact the Plaintiffs/Appellants had already filed suit to force the specific performance of the conveyance of the oil and gas rights.

The Plaintiffs/Appellants merely accepted the deed for the surface as a partial performance of the contract by the Defendants/Appellees. They had already paid for the same and were entitled to a deed for the surface. It was never intended to be in complete satisfaction

of the contract or as a settlement of the pending suit. The Defendants/ Appellees have not claimed that the deed was given or accepted as settlement of the suit for specific performance of the oil and gas rights.

M.J., §2 *MERGER*, Page 642, states, “The doctrine of merger is a technical one founded upon the presumed intention of the parties”. Inasmuch as none of the parties intended to settle this suit for specific performance by tendering and recording the deed for the surface, it should not have been given that application by the Circuit Court. M. J. §2 *MERGER*, Page 643, states that...”If a vendee had rights under an original agreement for sale, the vendee could have refused a deed tendered not covering such rights and either recovered the purchase money or enforced his or her rights in a suit for specific performance.” In *Myers v. Carnahan* 61 W. Va. 414, 57 S. E. 134 (1907) the vendee did neither of the above but accepted the deed as a satisfactory performance of the contract of sale and made no claim for seventeen years thereafter, and the Court found that they waived every claim inconsistent with the deed provisions. In this case the vendee acted immediately by filing suit for specific performance of the conveyance of the oil and gas. This was prior to accepting and recording a deed for the surface.

**VI. PRAYER FOR RELIEF**

Wherefore, your Appellants herein pray that after hearing by this Honorable Court, the order of May 20, 2011, of the Circuit Court of Marshall County, West Virginia, be vacated, that the order be overturned, that the Appellants be given summary judgement, and that this matter be remanded to the Circuit Court of Marshall County, with directions and for such other relief as to this Court seems just.

Dated November 4, 2011

Respectfully submitted

Glenn Spitznogle, Jr.  
Marlene Spitznogle

By Counsel



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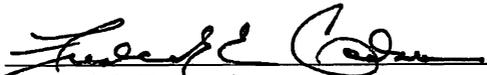
**GLENN SPITZNOGLE, JR., and MARLENE SPITZNOGLE, Appellants**

**KEVIN R. DURBIN and KRISTA A. DURBIN, Appellees**

**CERTIFICATE OF SERVICE**

I, Frederick E. Gardner, Counsel for the Plaintiffs/Appellants, Glenn Spitznogle, Jr., and Marlene Spitznogle, hereby certify that on the 4<sup>th</sup> day of November, 2011, a true and correct copy of the foregoing **BRIEF ON BEHALF OF GLENN SPITZNOGLE, JR., AND MARLENE SPITZNOGLE, APPELLANTS**, was served upon the following by mailing, postpaid, through the United States Postal Service to:

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