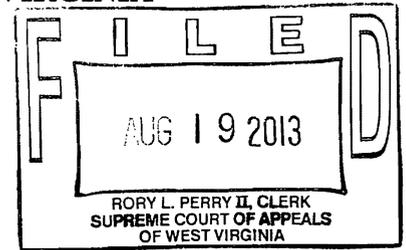


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston



DEAN LOWE AND MARTHA LOWE,
individually and as Trustees of the Demar
Revocable Trust, Counter-Plaintiffs and
Third-Party Plaintiffs Below,

Petitioners

v.

Docket No. 13-0234

JOSEPH C. RICHARDS and JOYCE A.
RICHARDS, Third-Party Defendants Below;
and, HUGH E. HEGYI, Trustee of the Herman
Hegy Trust, Plaintiff and Counter-Defendant Below,

Respondents.

PETITIONERS' CLOSING MEMORANDUM

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III. SUMMARY OF CLOSING ARGUMENT

By Order of the Circuit Court Granting Respondent Richards' Motion to Dismiss Counterclaim and Third Party Complaint entered on February 15, 2013 (APP 105-115), Petitioner Lowes' claims for ejectment, adverse possession and boundary line determination were all dismissed. That Order also dismissed Third Party Defendants, Respondents herein, Joseph C. Richards and Joyce A. Richards, entirely as parties to the civil action below.

As to the remaining allegations of the Respondents and Third Party Defendants Richards below, Petitioners have repeatedly pointed out, and continue to assert, that there was no allegation in the Counterclaim and Third Party Complaint that there is or was a controversy between the State of West Virginia and the Commonwealth of Virginia as to the location of the state line boundary between Virginia and West Virginia as it relates to Berkeley County, West Virginia and Frederick County, Virginia, and thus Respondents' argument below that there is no subject matter jurisdiction in the Circuit Court of Berkeley County, West Virginia, and that there are missing indispensable parties of the State of West Virginia and the Commonwealth of Virginia to the action below, are wholly without merit. Furthermore, subject matter jurisdiction of this action is not in the United States Supreme Court pursuant to the decision of *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L.Ed. 2d 186 (1963). Jurisdiction of a boundary line dispute between private parties as to real estate in Berkeley County, West Virginia lies in the Circuit Court of Berkeley County, West Virginia.

IV. ARGUMENT

A. The Circuit Court's Order Granting [Respondents Richards'] Motion to Dismiss Counterclaim and Third Party Complaint entered on February 15, 2013, is a final appealable order notwithstanding the lack of WVRCP Rule 54(b) "no just reason for delay" express determination language.

In the case of *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003), in the opinion at 213 W.Va. at 550, 584 S.E.2d at 184, this Honorable High Court stated in determining whether or not the finality as to the claim that is subject of Rule 54(b), “[a] judgment properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim”, citing with approval *Province v. Province*, 196 W.Va. 473, 479 n. 12, 473 S.E.2d 894, 900 n. 12 (1996).

In *Province v. Province*, 196 W.Va. 473, 479 473 S.E.2d 894, 900, n. 12, this Honorable Court stated:

A judgment properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim. A partial interlocutory adjudication of a claim cannot be certified because it is labeled a “partial final judgment”, “partial summary judgment” or labeled a 12(b)(6) dismissal, even if the requisite express determination has been made.

This Honorable Court continued in *Province*, 196 W.Va. at 481, 473 S.E.2d at 902, as follows:

Although we have chosen not to detour around this Serbonian bog, our decision to exercise appellate jurisdiction is buttressed by the familiar tenet that when an appeal presents a jurisdictional quandary, yet the merits of the underlying issue, if reached, will in any event do no harm to the party challenging jurisdiction, then the court may forsake the jurisdictional riddle and simply dispose of the case on the merits. See *Norton v. Mathews*, 427 U.S. 524, 530-31, 96 S.Ct. 2771, 2774-75, 49 L.Ed.2d 672 (1976); *Secretary of Navy v. Avrech*, 418 U.S. 676, 677-78, 94 S.Ct. 3039, 3039-40, 41 L.Ed.2d 1033 (1974). Neither party challenges jurisdiction in this case. Our decision to remand the case for further factual development does not ultimately harm either side. Thus, to a large extent we leave for another day just what limits we place on Rule 54(b) where there is no express determination by the circuit court and the continuing vitality of our trilogy of cases. (*McGraw, Sisson, and Durm*).

Here, the Circuit Court dismissed Petitioners' Counterclaim and Third Party Complaint on the grounds of lack of subject matter jurisdiction because, according to the Order entered by the Circuit Court, the court could not determine a boundary between private property owners within Berkeley County, West Virginia, that borders the West Virginia/Virginia line (see App. 107-110; and App. 112-114).

The Order of February 15, 2013 dismissing the Counterclaim and Third Party Complaint by the Circuit Court, dismissed all of Petitioners' claims for ejectment, adverse possession and boundary line determination between these private parties.

The Order also completely dismisses the Respondents Richards as parties to the civil action below and all of Petitioners' claims for relief. For that reason, and most particularly because the reasoning behind the dismissal was the Circuit Court's determination was that it lacked subject matter jurisdiction to determine this matter, the decision by this Honorable Court is an appealable final order of the Circuit Court.

B. Despite the argument advanced by Respondents' Richards that the issue of the location of the state line between West Virginia and Virginia as it relates to the boundary line between these private parties' real estate is a political issue; one in which the United States Supreme Court has original jurisdiction; requires both the States of West Virginia and Virginia to be made parties; and, that the Circuit Court lacks subject matter jurisdiction, the United States Supreme Court has already ruled that when there is a disagreement as to the private ownership of property, that is bisected by a state line, the state court has jurisdiction to determine who owns that property, and that there is no lack of jurisdiction in state court nor U.S. Supreme Court jurisdiction necessary to determine the rights between the private landowners.

In the case of *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), the Durfees brought an action in Nebraska state court in 1956 against Duke seeking to quiet title to certain bottom land situated on the Missouri River. The main channel of that river forms the

boundary line between the states of Nebraska and Missouri. The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska¹.

Dukes appeared in the Nebraska state court and through counsel fully litigated the issues, explicitly contesting the Nebraska court's subject matter jurisdiction over the subject matter of the controversy, asserting that the subject land was in Missouri. At the hearing, the Nebraska court found the issues in favor of the Durfees and ordered that title to the land be quieted in them. The Dukes' appealed to the Supreme Court of Nebraska who affirmed the judgment after a trial *de novo* on the record made in the lower court. The Supreme Court of Nebraska specifically found that the rule of avulsion was applicable, and that the land in question was in Nebraska, and that the Nebraska state court therefore had jurisdiction over the subject matter of the litigation, and that title to the land was in the Durfees. See *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959). Duke did not petition to the United States Supreme Court for a writ of *certiorari* to review that judgment of the Nebraska High Court. *Durfee v. Duke*, *supra*, 375 U.S. at 107-110, 84 S.Ct. at 243-45.

Two months later, Dukes filed a second suit against the Durfees in a Missouri court to quiet title to the same land. The Dukes' complaint alleged that the land was in Missouri. The suit was removed to federal district court by reason of diversity of citizenship. The federal district court, after hearing evidence, expressly found that the land was in Missouri, but held that all issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata* and binding upon the federal district court. The Eighth Circuit Court of Appeals reversed, holding that the district court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not

¹ Petitioners below in their Counterclaim and Third Party Complaint asserted that both the Respondent Hegyi Trust and Respondent Richards claimed to own a portion of land that Defendants Lowes own in Berkeley County, West Virginia (see App. 27, paragraph 6).

applicable because the controversy involved land in a court in Missouri, and the Missouri court was therefore free to re-try the question of the Nebraska court's jurisdiction of the subject matter. See *Duke v. Durfee*, 308 F.2d 209 (8th Cir. 1962).

In *Durfee v. Duke*, *supra*, finding that the issue of subject matter jurisdiction was fully adjudicated in the Nebraska courts, the United States Supreme Court reversed the Eighth Circuit Court of Appeals, and entered the District Court's prior judgment and order. The United States Supreme Court found as follows, 305 U.S. at 115, 84 S.Ct. at 247:

It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question *as between the parties to the litigation there*. Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question. *Fowler v. Lindsey*, 3 Dall. 411, 1 L.Ed. 657; *New York v. Connecticut*, 4 Dall. 1, 1 L.Ed. 715; *Land v. Dollar*, 330 U.S. 731, 736-737, 67 S.Ct. 1009, 1011-1012, 91 L.Ed. 1209. Either state may at any time protect its interest by initiating independent judicial proceedings here. *Cf. Missouri v. Nebraska*, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372. [Emphasis added here].

Hence, as the Petitioners have been asserting all along, there is no need for the states of West Virginia and Virginia to be parties to this action as the only rights being adjudicated are those of the private parties herein, and their privies. There is no political question to be determined as only the private rights of these parties are being adjudicated.

Mr. Justice Black's concurring opinion in *Durfee*, 375 U.S. at 116-117, 84 S.Ct. 248, is even more pointed to the issues here, and addressed whether the instant civil action must be brought in the United States Supreme Court under its exclusive jurisdiction as alleged by Respondent Richards:

Petitioners and respondents dispute the ownership of a tract of land adjacent to the Missouri River, which is the boundary between Nebraska and Missouri. Resolution of this question turns on whether the land is in Nebraska or

Missouri. Neither State, of course, has the power to make a determination binding on the other as to which State the land is in. U.S.Const. Art. III § 2; 28 U.S.C. § 1251(a). However, in a private action brought by these Nebraska petitioners, the Nebraska Supreme Court has held that the disputed tract is in Nebraska. In the present suit, brought by this Missouri respondent in Missouri, the United States Court of Appeals has refused to be bound by the Nebraska court's judgment. I concur in today's reversal of the Court of Appeals' judgment, but with the understanding that we are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two States under Art. I § 10, that the disputed tract is in Missouri.

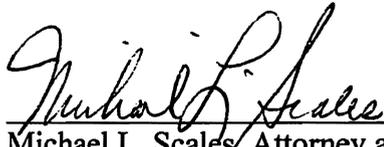
So, when and if a dispute arises between the states of West Virginia and Virginia as to the state line boundary, their independent resolution may, in the future, decide the boundary; but for the time being, the Circuit Court of Berkeley County has subject matter jurisdiction to determine the claims brought below between these private parties, and the resolution will be binding upon these parties and their privies.

V. CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Berkeley County, West Virginia dismissing Petitioners' Counterclaim and Third Party Complaint must be reversed and the case remanded to the Circuit Court with instructions that the Circuit Court has subject matter jurisdiction to determine the claims in this case.

Most respectfully submitted this 14th day of August, 2013.

Dean Lowe and Martha Lowe, individually
and as Trustees of the Demar Revocable
Trust, Counter-Plaintiffs and Third-Party
Plaintiffs Below, Petitioners
By Counsel



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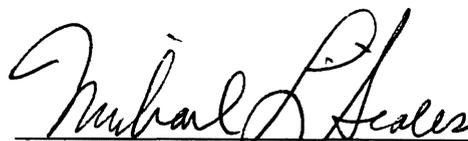
CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Petitioners, Dean Lowe and Martha Lowe, individually and as Trustees of the Demar Revocable Trust, do hereby certify that I have served a true copy of the foregoing PETITIONERS' CLOSING MEMORANDUM upon the following counsel:

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each by United States Postal Service Mails, postage prepaid and securely affixed, this 14th
day of August, 2013.



Michael L. Scales, Attorney at Law