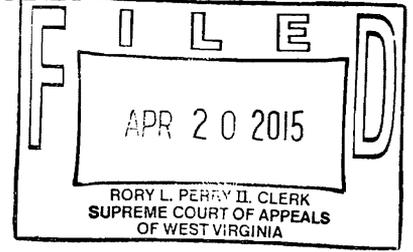


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-1106



ALLEGHENY COUNTRY FARMS, INC.,
Plaintiff Below, Petitioner,

v.

DARRIS HUFFMAN and
NUETULIA HUFFMAN,
Defendants Below, Respondents.

PETITIONER'S BRIEF

(Appeal from Circuit Court of Monroe County Civil Action No. 08-C-65)

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ASSIGNMENTS OF ERROR

- I. The Circuit Court Erred in Denying Petitioner Specific Performance Due to an Alleged Lack of Privity with the Respondents
- II. The Circuit Court Erred in Denying Petitioner Specific Performance as Based Upon the Clean Hands Doctrine
- III. The Ruling of the Circuit Court Violates The Policy Favoring the Resolution of Controversies by Compromise or Settlement

STATEMENT OF THE CASE

The Petitioner, Allegheny Country Farms, Inc. (hereinafter "ACFarms") owns a tract of land in Wolf Creek District, Monroe County, which borders real estate now owned by the Respondents, Darris and Nuetulia Huffman. Respondents' tract was previously owned by their relative, Ethel Huffman Carper, and prior to that was part of a larger parent tract owned by various other Huffman family members. ACFarms has been involved in a long-running dispute with the Huffmans - including two other civil actions in addition to this one - which have involved access to a public road and the boundary line between the neighboring properties.

The land that the Respondents now own has been in their family for a long period of time as Alfred Huffman first acquired the parent tract from which it came in 1939.¹ *Complaint*, ¶ 7, Civil Action No. 06-C-44 [154].² Alfred Huffman passed away in March, 1991, and his four children - one of which was Ethel Huffman Carper - succeeded to his ownership of the parent tract. *Fiduciary Record*, Estate of Alfred D. Huffman [207]. As part of the settlement of Mr. Huffman's estate, each of his four children signed an identical agreement which stated, among other things:

I am in agreement with my brothers and sister that the

¹Petitioner is informed and believes that Alfred Huffman was the grandfather of Respondent Darris Huffman.

²References to the Appendix Prepared by Petitioner are set forth herein as "[__]".

land and property remain as it is on this date and that if I ever wish to sell my share of the land it be offered first to a member of the family before being sold to the public.

Agreement signed by Alfred Huffman heirs [176-79]. This agreement was placed in the Estate file of record in the Office of the Clerk of the County Commission of Monroe County, West Virginia.

ACFarms acquired its tract of land in 1994. *Complaint*, ¶ 6, Civil Action No. 06-C-44 [154]. Almost immediately after purchasing the neighboring land it was haled into court by Ethel Huffman Carper and her siblings for a preliminary injunction hearing regarding the right of ACFarms to use a public road known as Huffman Road, W.Va. Route 7/7, for ingress and egress to its land. See generally *Order*, June 13, 1997, Civil Action No. 94-C-91 [149-151]. ACFarms has always contended that its property borders Huffman Road, but the Huffman family contests that claim. However, ACFarms was not successful in establishing that it had legal access to the public road in the 1994 case due to questions regarding the precise location of the boundary line between the adjoining properties, and the width and character of the public road. *Id.* at p. 2 [150].

The 1994 case was merely an injunction proceeding concerning whether or not ACFarms could prove its right to utilize Huffman Road for ingress and egress to its property, and the ruling therein did not address the actual boundary line between the adjoining properties. Thus ACFarms filed a boundary line action in 2006

against Ethel Huffman Carper and the other owners (her siblings) of the parent tract. See generally, *Complaint*, Civil Action 06-C-44 [153-157]. When the Huffmans asserted res judicata as a bar to the 2006 case, the Circuit Court confirmed that the ruling from the 1994 case was limited only to a preliminary injunction proceeding, and did not block the newer action because there had been no definitive declaration as to the location of the actual boundary line between the parties' adjoining properties. See generally, *Order*, May 15, 2007, Civil Action No. 06-C-44 [115-17].

At some point after ACFarms filed the 2006 boundary line case, the Huffman siblings unilaterally decided to partition off part of the parent tract to Ethel Huffman Carper. Thereafter, her siblings conveyed a 33.163 acre parcel of land as her portion of the parent tract, which conveyance was made by deed without specific reservation or restriction of any kind. *Deed*, Oct. 4, 2006 [168-71]. Ms. Carper thereafter desired to sell her tract of land, but the ongoing boundary line litigation affected her plans since ACFarms had filed a Notice of Lis Pendens to protect its interests. *Notice of Lis Pendens*, Nov. 14, 2006 [173-75]. Consequently, she entered into a Settlement Agreement with ACFarms resolving the boundary line issue between them once and for all, and providing for the Notice of Lis Pendens to be released. *Settlement Agreement*, Nov. 16, 2006 [208-11].

Among other things, the Settlement Agreement specifically

provided that the new boundary line between the parties' adjoining properties "shall be designated along the center of W.V. Rt. 7/7-Huffman Road for the entire length of the boundary line between the subject tracts or parcels of real estate." Id., ¶ 1, p. 2 [209]. This agreement finally permitted ACFarms to resolve the long-standing dispute regarding access to its property via Huffman Road. As part of the Agreement, ACFarms agreed to pay for the costs of a formal survey, and to release the Notice of Lis Pendens thereby permitting Ms. Carper to move forward with her planned sale. Id., ¶¶ 3, 6 [209-10]. The parties also agreed to execute a formal boundary line agreement when the survey was completed, and ACFarms promised to pay Ms. Carper \$1,000.00 upon the signing of that document. Id., ¶¶ 2, 5 [209-10]. Since Ms. Carper had decided to have her property auctioned, she agreed to have her auctioneer "publicly announce the location of the subject boundary line prior to the commencement of the auction of her tract or parcel of real estate" which such auction was scheduled to be held two days later on November 18, 2006. Id., ¶ 4 [209-10].

There is no dispute that ACFarms honored its portion of the Agreement in reliance upon Ms. Carper's promises by tendering a Release of the Notice of Lis Pendens, *Release of Lis Pendens*, Nov. 16, 2006 [212-23]; and, that it was at all times prepared to pay \$1,000.00 upon the execution of a formal boundary line agreement. *Affidavit of Gregory H. Wittkamper*, ¶¶ 3-4, Dec. 3, 2008 [39-40].

Accordingly, Ms. Carper went forward with the public auction of her tract of land. The Respondents, Darris and Nuetulia Huffman, then entered the picture as they became the purchasers of the Carper parcel at the auction. However, there is likewise no dispute that the Respondents were advised prior to the auction of the new boundary line agreement that had been reached between ACFarms and Ethel Huffman Carper.

As she promised in the Settlement Agreement, Ms. Carper requested that her auctioneer announce the terms of the Agreement prior to the auction, and the auctioneer, Randy Burdette, not only did so, but also made note of it in the written auction materials. Darris Huffman signed a Bidder's Registration form on behalf of himself and Nuetulia Huffman which clearly stated in bold type:

Do not bid until you have read and agreed to be bound by the referred Contract and its addendums and the Terms for Bidding (located in the Property Information Package).

Bidder's Registration, Nov. 18, 2006 [214]. Since the Huffmans were the high bidders, they signed a Contract for Sale of Real Property once the auction was closed. That Contract made clear that their purchase was subject to the Agreement that Ms. Carper had reached with ACFarms:

Seller warrants that it presently has title to said property, and at the time sale is consummated, it agrees to convey good and marketable title to said Property to Purchaser by Special Warranty Deed subject only to: (1) Zoning ordinances affecting said property, (2) General utility Easements serving the property, (3) Leases, other easements, restrictions, and encumbrances specified in this contract or of public record, **(4) Right of ways that**

may be created, any minor out sales or conveyances to or agreements with Allegheny County [sic] Farms, Inc. et.al.

Contract for Sale of Real Property, Nov. 18, 2006 (emphasis supplied) [215-17].³ Moreover, the fact that the sale was subject to any agreements with ACFarms was also emphasized on the cover sheet for the auctioneer's Property Information Package:

The property will be offered by the existing boundary **(minus any out sales or agreements with Allegheny Country Farms, Inc., et. al)**

Property Information Package Cover Sheet (emphasis supplied) [218].

That cover sheet also specified the following:

By prior written agreement the family will be provided special opportunity to purchase the property.

Id. (emphasis in original)[218].

The Respondents also confirmed during discovery that they were advised of the boundary line agreement between Ms. Carper and ACFarms prior to the sale; knew they were bound by it; and, yet still chose to go forward and voluntarily bid on the property. In their Responses to Requests for Admissions, they acknowledged:

1. Please admit that prior to bidding on Ethel Carper's property at public auction you were advised that she had entered into a settlement agreement with [ACFarms] regarding the boundary line between their respective adjoining tracts of land.

³The Contract was signed only by Darris Huffman and he was the only named purchaser thereon, but the property was ultimately deeded to both him and Nuetulia Huffman. Also, the phrase "or agreements with", which appears near the end of the bolded language above, was handwritten onto the Contract, and apparently initialed by both Darris Huffman and Ethel Huffman Carper.

Response: **Admit**

2. Please admit that prior to bidding on Ethel Carper's property at public auction you were advised that you would be legally bound by the settlement agreement she had entered into with [ACFarms] regarding the boundary line between their respective adjoining tracts of land.

Response: **Admit**

Note: Two of the following admissions are mis-numbered on [ACFarm's] request.

Responses are numbered as they are in the request.

2. Please admit that you voluntarily elected to bid on Ethel Carper's property at public auction after being advised of the settlement agreement she had entered into with [ACFarms] regarding the boundary line between their respective adjoining tracts of land.

Response: **Admit**

Defendant's [sic] Response to First Set of Requests for Admissions to the Defendants, ¶¶ 1, 2 and 2 (emphasis supplied) [110-11].

Furthermore, the Respondents had no misunderstanding as to where the new boundary line was located as confirmed by their Affidavits filed below:

When I agreed to purchase the subject property at auction, it was my understanding that the settlement agreement entered into by Ethel Carper was solely that the boundary line between the properties would be to the center of the road.

Affidavit of Darris Huffman, ¶ 1, Aug. 13, 2009 [89] ; Affidavit of Nuetulia Huffman, ¶ 1, Aug. 14, 2009 [91].

Everything possible was done to make sure that the potential winning bidder at the sale of Ms. Carper's tract was fully advised

of the agreement for a new boundary line between her land and the parcel owned by ACFarms; and, the Respondents, as the winning bidders, clearly had actual knowledge of the agreement prior to bidding. However, the formal survey needed for preparation of the boundary line agreement could not be completed before Ms. Carper and the Huffmans wanted to close. Therefore, in exchange for ACFarms permitting the closing to go forward without a new formal boundary line agreement being recorded, the Respondents instead executed an acknowledgment form at their bank prior to closing. *Affidavit of Darris Huffman*, ¶ 2, Aug. 13, 2009 [183]; *Affidavit of Nuetulia Huffman*, ¶ 2, Aug. 14, 2009 [185].

By that acknowledgment the Respondents not only confirmed once again that their purchase of the 33.163 acre tract from Ethel Huffman Carper was subject to the written Settlement Agreement between her and ACFarms, but also that they themselves would execute the formal Boundary Line Agreement once the metes and bounds description was available:

We, the undersigned, DARRIS HUFFMAN and NUETULIA HUFFMAN, husband and wife, do hereby acknowledge that the tract of real estate that we have agreed to purchase from Ethel Huffman Carper, consisting of 33.163 acres, more or less, **is subject to that certain SETTLEMENT AGREEMENT entered into by and between Allegheny Country Farms, Inc, a West Virginia Corporation and Ethel Huffman Carper, dated November 16, 2006**, wherein the parties thereto agreed to enter and execute a BOUNDARY LINE AGREEMENT in order to establish a boundary line between the tracts of real estate owned by Allegheny Country Farms, Inc. and Ethel Huffman Carper, as described therein.

By our execution hereto, and **in consideration of the acquiescence of Allegheny Country Farms, Inc. with respect to the closing of the aforesaid transaction between ourselves and Ethel Huffman Carper, we acknowledge that we will execute the BOUNDARY LINE AGREEMENT** pursuant to the terms of the aforesaid SETTLEMENT AGREEMENT, at such time as the same is presented to us for execution by Allegheny Country Farms, Inc., after the metes and bounds for the same have been prepared.

Acknowledgement [sic] of Boundary Line Agreement, Dec. 12, 2006 (emphasis supplied) [219-20]. Upon the execution of this document the closing was permitted to go forward, and the Respondents became the new owners of the parcel of land adjoining ACFarms.

The boundary line survey was not completed until some six months later. See *Plat of A Partial Survey*, May 2007 [221]. Upon completion of the survey ACFarms prepared a formal Boundary Line Agreement incorporating the new metes and bounds description, and submitted it for execution to the Respondents. *Boundary Line Agreement*, May 27, 2008 [15-20]. However, the Respondents thereafter refused to sign the Agreement, and this litigation ensued. *Complaint*, ¶ 13 [5].⁴

⁴The Respondents admitted in their Answer filed below that they had signed the Acknowledgement [sic] of Boundary Line Agreement, and had agreed to execute a formal Boundary Line Agreement per the terms of the Settlement Agreement between ACFarms and Ethel Huffman Carper. *Answer*, ¶ 12 [21]. However, they disputed that they had been presented with an "appropriate" Boundary Line Agreement, and contended that the one tendered to them "exceeds the scope of the Settlement Agreement between Plaintiff and Ethel Carper with which the Defendants agreed to be bound." *Id.* at ¶ 13 [21].

Soon after filing its Complaint, ACFarms moved for summary judgment as based upon the written agreements it had with both Ethel Huffman Carper, and Darris and Nuetulia Huffman. See generally, *Plaintiff's Motion for Summary Judgment*, Dec. 4, 2008 [23-40]. The Circuit Court initially granted summary judgment to ACFarms. *Order Granting Plaintiff's Motion for Summary Judgment*, February 5, 2009 [45-51]; as subsequently amended, *Amended Order Granting Plaintiff's Motion for Summary Judgment*, February 5, 2009 [61-67]. However, it then permitted the Respondents to file an untimely Motion for Reconsideration six months later which alleged that the ruling in favor of ACFarms should be overturned upon the grounds that there was no consideration for the original Settlement Agreement with Ethel Huffman Carper; that the Respondents had not been represented by counsel when they signed the acknowledgment form; and, that no discovery had been undertaken in the case. See generally, *Motion for Reconsideration and Memorandum in Support of Defendants' Motion for Reconsideration*, August 13, 2009 [73-92]. The Circuit Court thereafter vacated its order, *Order - Vacating Amended Order Granting Plaintiff's Motion for Summary Judgment*, April 7, 2011 [98]; and, the case then languished on the docket for a period of time with little activity until both parties filed cross-motions requesting summary judgment in 2013.

ACFarms renewed its summary judgment motion once again as based upon the original contractual grounds, and also filed a

supplemental memorandum addressing the arguments which Respondents made when they requested reconsideration. See generally, *Plaintiff's Renewed Motion for Summary Judgment*, June 24, 2013 [99-100]; and *Plaintiff's Supplemental Memorandum in Support of Renewed Motion for Summary Judgment*, July 12, 2013 [101-29]. The Respondents filed their own summary judgment request which raised new issues concerning whether the Settlement Agreement reached between Ethel Huffman Carper and her siblings at the time of settlement of their father's estate somehow precluded her from entering into a boundary line agreement with ACFarms. They also argued that any such Agreement was unenforceable against them because they had no privity of contract with ACFarms. See generally, *Defendants' Response to Plaintiff's Renewed Motion for Summary Judgment And Defendants' Cross Motion for Summary Judgment*, July 30, 2013 [130-89]. ACFarms refuted these new arguments prior to the hearing on the motions. See generally, *Plaintiff's Response to Defendants' Cross-Motion for Summary Judgment*, Aug. 5, 2013 [190-221].

A little over a year after the hearing was held an order was entered by the Circuit Court granting summary judgment to the Respondents based primarily on the lack of privity argument, and that the Settlement Agreement was executory in nature and therefore unenforceable against the Respondents. See generally, *Order Entering Summary Judgment*, Sept. 19, 2014 [222-25]. However, the

Court failed to even address the acknowledgment form which the Respondents had signed, and the specific promises made by them therein in exchange for ACFarms permitting their closing to go forward without the new boundary line agreement having been reduced to writing, signed and recorded. Counsel for ACFarms also objected to the inclusion of one particular citation in the Order since it had never been mentioned in the pleadings or during the hearing. Letter to Judge R. Irons, Sept. 24, 2014 [226].

Thereafter, the Circuit Court entered a revised order, sua sponte, setting forth more detailed grounds for its ruling. See generally, *Amended Order Granting Defendant's Motion for Summary Judgement*, Dec. 17, 2014 [227-234]. This time the Court again ruled that the Settlement Agreement ACFarms had with Ethel Huffman Carper was an executory contract, and therefore since it was not an actual deed itself, the Agreement could not be enforced against the Respondents. *Id.* at pp. 4-5 [230-31]. The Court then went on to hold that since there was no privity of contract between ACFarms and the Respondents, it was therefore likewise not enforceable against them (despite the clear wording of the acknowledgment form wherein Respondents agreed to execute the boundary line agreement once the legal description was prepared). *Id.* at pp. 5-6 [231-32]. The Court also determined that ACFarms was not entitled to equitable relief because it had an equitable remedy at law (suggesting that it pursue a boundary line action even though the

Settlement Agreement reached with Ethel Huffman Carper was done solely for the purpose of resolving the outstanding boundary line issues). Id. at p. 6 [232].

Finally, the Circuit Court also indicated that application of the "maxim of clean hands" was appropriate because "[t]he deed by which Ethel Carper obtained the subject real estate contains a preemptive option, in favor of the Huffman family [and t]here was no evidence that this procedure was followed during the negotiations leading to the execution of the 2006 Settlement Agreement." Id. at pp. 6-7 [232-33]. However, the Circuit Court was incorrect in holding that the deed to Ethel Huffman Carper contained any such option, as it clearly did not. The only possible "preemptive option" was the informal agreement that the heirs of Alfred Huffman signed, and the Court never addressed the validity of that agreement; its continued viability after the partition deed to Ms. Carper; and, whether the Respondents were even within the class of persons covered by it.

Finally, the Circuit Court accused ACFarms of sleeping on its rights by noting that it could have drafted the Settlement Agreement in the form of a deed; or, had the survey and formal boundary line agreement completed before the sale; or, even bought the property itself at auction. Id. at p. 7 [233]. However, all of these assertions ignore the reality that ACFarms chose not to pursue those very rights as based specifically on the promises of

Ethel Huffman Carper and, subsequently, Darris and Nuetulia Huffman. Nevertheless, the Circuit Court granted summary judgment to the Respondents, and denied specific performance of the Settlement Agreement, together with the right to an executed boundary line agreement, to ACFarms. It is from this ruling that the Petitioner now appeals.⁵

⁵The Circuit Court's ruling also permitted the companion boundary line case in Civil Action No. 06-C-44 to remain pending. However, that case was only filed against Ethel Huffman Carper and her siblings. Petitioner subsequently dismissed the siblings from the case as it sought to enforce the Settlement Agreement directly against Ethel Huffman Carper herself (since the Respondent's deed was made specifically subject to the boundary line agreement). However, the Circuit Court denied enforcement of the Settlement Agreement against Ethel Huffman Carper as well, and that ruling has likewise been appealed. It is now pending before this Court as Appeal No. 15-0189, and has been consolidated with this case for purposes of argument, but not for briefing.

SUMMARY OF ARGUMENT

Petitioner seeks specific enforcement of a written Settlement Agreement calling for the execution of a new boundary line agreement establishing the boundary between its property and the adjoining tract of land owned by the Respondents. However, the Circuit Court denied Petitioner's requested relief (and granted summary judgment to the Respondents) based on a finding that the parties were not in privity of contract since the Settlement Agreement was reached with Respondents' predecessor in title. Nevertheless, this holding was clearly erroneous as the Respondents signed multiple documents acknowledging their understanding and awareness of the Settlement Agreement, which such documents even contained Respondents' own separate promise to execute a new boundary line agreement in exchange for their closing being permitted to proceed.

The Circuit Court also denied Petitioner's requested relief because of an alleged preemptive option which it contended justified application of the clean hands doctrine to preclude any award of equitable relief. However, the Court failed to consider that the supposed agreement affording the pre-emptive rights was most likely invalid due to violating the rule against perpetuities, or at best did not include the Respondents within the class of persons entitled to enforce it. Thus the clean hands doctrine had no applicability to the facts of this case.

The Petitioner entered into a written Settlement Agreement resolving a long-running boundary line dispute which has tied up the court system with three different civil actions spanning more than twenty years now. The public policy of our state favors resolutions by compromise and settlement, and this case certainly merits enforcement of that policy. The Settlement Agreement which the Respondents fully acknowledged prior to purchasing their land should be enforced for the benefit of all parties hereto so that they can each be relieved of the burden of further litigation, and may begin putting their respective properties to the best and highest use.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that although the facts and legal arguments are (or will be) adequately presented in the briefs and record on appeal, this case is appropriate for a Rule 19 argument, if so determined by the Court, because it involves: (1) Assignments of error in the application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; and/or (3) insufficient evidence or a result against the weight of the evidence. The Petitioner does not believe that a memorandum decision would be appropriate in this instance, as Petitioner is seeking reversal of a Circuit Court ruling.

ARGUMENT

A. INTRODUCTION

On December 17, 2014, the Circuit Court of Monroe County entered an Order granting the Respondents' Motion for Summary Judgment, and denying the Petitioner's Motion for Summary Judgment. The Petitioner was seeking specific enforcement of a written Settlement Agreement requiring execution of a new boundary line agreement establishing the boundary line between the parties' respective properties. The Circuit Court held that the Petitioner was not entitled to this equitable relief, and permitted the Respondents to escape enforcement of their contractual and moral obligations. The Petitioner submits that this ruling was incorrect for several reasons, and that it remains entitled to a summary judgment ruling in its favor.

B. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, Syll. Pt. 1 (1994). This Court therefore reviews:

anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling. See West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997) ("De novo refers to a plenary form of review that affords no deference to the previous decisionmaker." (quoting Fall River County v. South Dakota Dep't of Revenue, 1996 SD 106, ¶ 14, 552 N.W.2d 620, 624 (1996) (citations omitted))). See also West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co., 200 W.Va. at 745, 490

S.E.2d at 834 ("The term 'de novo' means '[a]new; afresh; a second time.' " (quoting Frymier-Halloran v. Paige, 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting *Black's Law Dictionary* 435 (6th ed. 1990)))).

Blake v. Charleston Area Medical Center, 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997).

C. ASSIGNMENTS OF ERROR

I. The Circuit Court Erred in Denying Petitioner Specific Performance Due to an Alleged Lack of Privity with the Respondents

One of the primary reasons the Circuit Court denied ACFarms request for specific performance against the Respondents is because it found that there was no privity between them. As noted in its ruling:

The [Respondents] were never a party to the contract. They never assented to the terms of the contract, nor were they a part of the bargaining process. The acknowledgment they signed at the auction was required as part of the auction, and was not an agreement but rather an acknowledgment of the contract entered into by Ms. Carper and Allegheny Farms.

Order, Dec. 17, 2014, p. 5 [231]. It is true that the Respondents did not participate in the negotiation of the written Settlement Agreement between ACFarms and Ethel Huffman Carper. However, the other conclusions reached by the court are incorrect.

Respondents signed the acknowledgment form at their bank rather than at the auction (which had taken place a month

earlier).⁶ And by signing that form they did indeed become parties to the Settlement Agreement, and assented to its terms. A copy of the written Settlement Agreement was attached to the acknowledgment, and by signing off on it one can presume their consent to its terms and conditions: "A court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted." New v. Gamestop, Inc., 232, W.Va. 564, 753 S.E.2d 62, 76 (2013) (citing Adkins v. Labor Ready, Inc., 185 F.Supp.2d 628, 638 (S.D.W.Va. 2001)).

This is most certainly not the situation as contemplated in Casto v. Dupuy, 204 W.Va. 619, 515 S.E.2d 364 (1999), which is the only citation provided by the Circuit Court justifying its decision on the basis of a lack of privity. In Casto, there was a factual dispute over an alleged verbal contract for a home inspection which had been ordered by a mortgage company. The question was whether or not the homeowners were third-party beneficiaries to the verbal contract as if so, they would then have a right to sue for breach of it. 515 S.E.2d at 367. Unlike the facts in Casto, the agreements at issue in this case were reduced to writing and executed by all

⁶The Respondents did, of course, sign other documents at the time of the auction by which they acknowledged the existence of the Settlement Agreement between ACFarms and Ethel Huffman Carper.

of the parties hereto. The written documents present in this case also very clearly defined the mutual rights and obligations of the parties.

The most significant distinction between the instant case and Casto is that this is not a third-party beneficiary scenario. ACFarms entered into a written agreement with Ethel Huffman Carper which established the boundary lines between their respective properties. The rights and obligations under that written agreement were transferred to the Respondents once they purchased Ms. Carper's tract of land. They were only permitted to proceed to a closing on the property with the express consent of ACFarms which was given in exchange for Respondents' promise to honor the written Settlement Agreement. Neither ACFarms nor the Respondents are third-party beneficiaries to the Settlement Agreement at issue herein. They constitute one original party (ACFarms) and the assign of the other original party (Carper to Respondents). This Agreement was mutually beneficial to all parties as it resolved a long-running boundary line dispute, and enhanced the value and marketability of the parties' respective properties.

By signing the acknowledgment and accepting a deed to the property from Ms. Carper, the Respondents merely stepped into her shoes. Thus, as opposed to the Circuit Court's misguided third-party beneficiary analysis, this situation presents a straightforward assignment whereby Ms. Carper, as the assignor,

simply handed off all of the Agreement's benefits and obligations to the Respondents, as her assignees and the new property owners.⁷ The acknowledgment merely served to formalize the process by which the Respondents agreed to become responsible for Ms. Carper's obligations under the Settlement Agreement, including the execution of a formal boundary line agreement once the survey was completed.

Our state has long recognized the right of mutual enforcement of contractual obligations when an assignee has replaced one of the original parties to a contract. For example, in Miller v. Jones et als., 68 W.Va. 526, 71 S.E. 248 (1911), when a seller under a land contract refused to accept payments from an assignee of the purchaser, this Court upheld the assignee's right to sue for specific enforcement, and noted that the right of enforcement was a two-way street:

It is one of the fundamental principles applicable to [suits for specific performance], that the rights of the parties must be mutual, that is, capable of enforcement by either party in case of a breach by the other, else equity will not give relief. Now, if [the Seller] had been willing to carry out the contract, and [Purchaser or] his assignee, had not, and Jones had sued for specific enforcement because of failure to pay the

⁷This could also possibly be viewed as a novation since the Respondents have pretty much been completely substituted in the place and stead of Ethel Huffman Carper with respect to the benefits and obligations under the Settlement Agreement as the new property owners and preferred signatories to a new boundary line agreement. "Novation is generally defined as a mutual agreement among all parties concerned for discharge of a valid existing obligation by the substitution of a new binding obligation on the part of the debtor or another." Ray v. Donohew, 177 W.Va. 441, 352 S.E.2d 729, Syll. Pt. 1, in part (1986).

purchase money, he would have been entitled to a decree compelling performance.

Miller, 68 W.Va. 529. Clearly, ACFarms has the same right of mutual enforcement against the Respondents in this case, as there would be no doubt that they could enforce the Settlement Agreement against ACFarms if it had been the party to renege on the Agreement.

Consequently, the Circuit Court was simply mistaken in holding that a lack of privity prevented specific enforcement of the Settlement Agreement against the Respondents. The Casto decision has no applicability to this situation. Resolving this matter requires only a resort to basic contract law recognizing the mutuality of the remedy of specific enforcement which is available to either an original party, or an assignee, for contractual obligations under West Virginia law.

II. The Circuit Court Erred in Denying Petitioner Specific Performance as Based Upon the Clean Hands Doctrine

The lower court indicated in its ruling that the clean hands doctrine applied to the facts of this case as a means of protecting the Respondents (as opposed to punishing ACFarms). *Order*, Dec. 17, 2014, p. 6 [232]. However, the court once again incorrectly recited the facts when it held that “[t]he deed by which Ethel Carper obtained the subject real estate contains a preemptive option, in favor of the Huffman family.” *Id.* In fact, her deed contains no specific restrictions or options, and her siblings conveyed the 33.163 acre parcel of land to her in fee simple. *Deed*, Oct. 4, 2006

[168-71].

What the Circuit Court should have referred to was the informal agreement signed by each child of Alfred Huffman which indicated that they wanted "the land and property [to] remain as it is" and that if any of them ever wanted to sell their "share" of the family land then it would "be offered first to a member of the family before being sold to the public." *Agreement signed by Alfred Huffman heirs* [176-79]. However, the court never addressed the existence, validity or enforceability of this writing; the scope of its very general language; or, the fact that the auction materials confirm that the family was indeed given the chance to buy the property per the agreement. *Property Information Package Cover Sheet* [218]. Instead, it simply assumed that the agreement was valid (apparently misconstruing that it was part of the deed); that it extended to persons such as the Respondents; and, that it alone was a sufficient reason to completely bar the relief sought herein by ACFarms.

However, the informal agreement reached among the four children of Alfred Huffman is absolutely no impediment to the boundary line agreement entered into between ACFarms and Ethel Huffman Carper, or its subsequent enforcement against the Respondents. As a threshold matter, the agreement itself is so vague and ambiguous that it is difficult to even determine if it is truly enforceable. Unlike a proper pre-emptive right, it contains

no terms requiring that the property be offered to a family member at the same price at which it is being offered to a third-party, nor does it even state how long a family member has to respond to a third-party offer.

Moreover, it not even clear that Darris Huffman and Nuetulia Huffman are within the class of persons to whom the pre-emptive right is granted. The agreement does not specify who constitutes "a member of the family" to which the property must be offered before offering it to the public. Darris Huffman apparently contends that as a grandson of Alfred Huffman he is a family member entitled to enforce this agreement, but he is not a signatory thereto and the agreement does not provide that it extends to the heirs of the signatories. (The agreement was apparently entered into by and between Darris Huffman's father and his father's siblings, including Ethel Huffman Carper.) However, assuming arguendo that the agreement is at least tentatively enforceable, there are far more serious legal flaws affecting its applicability as a vehicle to preclude the remedy of specific enforcement against the Respondents.

Unfortunately, under West Virginia law, this type of agreement, with such undefined and general language, cannot extend to heirs of signatories due to the rule against perpetuities. As explained in Smith v. VanVoorhis, 170 W.Va. 729, 296 S.E.2d 851 (1982), the rule against perpetuities applies to executory

limitations such as the pre-emptive rights set out in the informal Huffman agreement:

A pre-emptive right is a sufficient executory interest to make it subject to the rule against perpetuities.

The rule against perpetuities requires that every executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor.

Smith, Syll. Pts. 2 and 3 (citing Brookover v. Grimm, 118 W.Va. 227, 190 S.E. 697, Syll. Pt. 5, in part (1937)).

The pre-emptive language at issue in Smith was more detailed in its particular requirements than the verbiage used by the Huffman family members, but was also somewhat vague as to the scope of family members entitled to its enforcement. That case involved language in a deed which resulted from six members of the VanVoorhis family partitioning their land. Just as with the Huffman family, the grantors were all heirs of a certain deceased VanVoorhis family member. The partition deed in question preserved pre-emptive rights "for the other heirs of Morton VanVoorhis" if the tract of land partitioned off was ever offered to a third-party. 296 S.E.2d at 852. Of course, once that tract of land was in fact optioned to a third-party, then one of the original six grantors sought to enforce their pre-emptive rights, and there was apparently an argument made that the pre-emptive language in the deed was completely void because it violated the rule against

perpetuities.

This Court ultimately upheld the pre-emptive rights language used in the deed in the Smith case by finding that the limitation "for the other heirs of Morton VanVoorhis" represented a closed class (meaning only the six original grantors) which therefore did not violate the rule against perpetuities. 296 S.E.2d at 854. Since there were apparently six identical partition deeds which contained this specific language, this conclusion was logical under the particular facts of that case. Otherwise, if the class of persons entitled to enforce the pre-emptive right included heirs on further down the line, then the rule against perpetuities would have been violated, and the pre-emptive language deemed completely invalid.

The net effect of the Smith decision was to accord validity to the partition deed language by construing it to apply only to the persons who were actually parties to it. Had those pre-emptive rights been extended to heirs who were further removed, without any limitation to vesting within the time frame required by the rule against perpetuities, then it would have been invalid. Accordingly, Darris Huffman, as an heir to one of the signatories of the agreement reached between the children of Alfred Huffman, cannot claim the right to enforce the agreement as a beneficiary thereof. Nor can his wife, Nuetulia Huffman, as an extended Huffman family member. The agreement does not specifically name either of them as a specific beneficiary, nor were they signatories thereto. And,

to open up the class of possible beneficiaries of the agreement to include either of them will clearly violate the rule against perpetuities since there will be no limit on vesting.

It logically follows that if the informal agreement among the Huffman siblings is to be given any affect at all, then at most it can only apply to the four persons who executed it. However, none of those persons has contested the Settlement Agreement with Ethel Huffman Carper (and even if they did it appears highly likely that the agreement was invalid in any event due to the rule against perpetuities). Regardless, the Respondents certainly have no right to assert this informal agreement as a bar to specific enforcement of the Settlement Agreement against them. The pre-emptive language in the informal Huffman agreement must either be completely invalid (which is the most likely conclusion), or it does not include the Respondents as beneficiaries.

Either way it makes no difference to the outcome of this case. The Respondents cannot assert that informal agreement as a defense to this action, and the Circuit Court should have recognized this deficiency rather than simply accepting the validity of the agreement without question.⁸ Consequently, it was erroneous for

⁸Even if the informal Huffman agreement were valid when executed, and the Respondents were within its ambit, there would still be a question as to its continued viability. As noted earlier in passing, the partition deed to Ethel Huffman Carper contains no specific restrictions on her ownership. Her three siblings deeded their interests in that particular tract of land
(continued...)

that Court to hold that the clean hands doctrine applied to prevent specific enforcement of the Settlement Agreement against the Respondents as based on some alleged pre-emptive rights which were clearly either invalid, or inapplicable, as the case may be.

III. The Ruling of the Circuit Court Violates The Policy Favoring the Resolution of Controversies by Compromise or Settlement

This Court has repeatedly recognized the strong public policy in favor of upholding settlements of disputed actions by compromise: "[T]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Sanders v. Roselawn Memorial Gardens, Inc., 152 W.Va. 91, 159 S.E.2d 784, Syll. Pt. 1 (1968); Moreland v. Suttmiller, 183 W.Va. 621, 397 S.E.2d 910, Syll. Pt. 1 (1990). "Where parties have made a settlement . . . such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same." Calwell v. Caperton's Adm'rs, 27 W.Va. 397, Syll. Pt. 1, in

⁸(...continued)

without specific reservation or exception of any kind whatsoever (other than general deed language noting restrictions, etc., in the chain of title). Therefore, to the extent there were any informal pre-emptive rights agreement between these siblings, they arguably waived and released the same by deeding land to their sister in fee simple without further reservation.

part (1886); DeVane v. Kennedy, 205 W.Va. 519, 519 S.E.2d 622, Syll. Pt. 7 (1999).

ACFarms has been fighting a long-running battle with various members of the Huffman family since first buying its tract of land in 1994. For over twenty years now it has been denied the ability to access its parcel via the adjoining public road, and this controversy has spawned three separate civil actions. Clearly, both the litigants and the Monroe County Circuit Court would be better served by having this matter finally concluded.

ACFarms thought that resolution had finally been achieved in 2006 when Ethel Huffman Carper agreed to resolve the disputed boundary line issue. The only thing which blocked a conclusion at that time was the Respondents' desire to move forward with the closing of their purchase, and the surveyor's inability to produce a new boundary line description more promptly. In fact, had ACFarms simply not cooperated with Ethel Huffman Carper and the Respondents - and instead chosen to have blocked their closing - then the current situation would not exist.

The Circuit Court declares in its Order that ACFarms slept on its rights, and used this as a reason to deny equitable relief. *Order*, Dec. 17, 2014, p. 7 [233]. However, the reality is that ACFarms justifiably relied upon the Settlement Agreement it had reached with Ethel Huffman Carper; the Respondents' assent to that Agreement and their promise to sign off on a subsequent formal

boundary line agreement; and, the public policy of this state to uphold settlements of disputed actions. For these reasons, the Respondents should now be estopped from denying the enforceability of the Settlement Agreement to which they specifically agreed.

The Respondents well knew of the boundary line dispute - and its agreed upon resolution - before they ever bid on Ms. Carper's tract. There is no reasonable excuse or justification for their refusal to abide by and honor the Agreement reached between ACFarms and Ethel Huffman Carper. They bought into a compromise, and instead converted it into further litigation. This is precisely the type of situation in which our public policy favoring settlements should be upheld. No party is benefitting from the continued litigation over access to a public road across a disputed boundary line, and all parties hereto will benefit from the cessation of court activities and the enhanced marketability of their respective properties with established and undisputed boundaries.

CONCLUSION

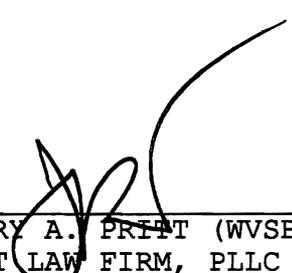
For the foregoing reasons the Petitioner, Allegheny Country Farms, Inc., respectfully requests that this Court enter an Order overturning the granting of summary judgment to the Respondents by the Circuit Court of Monroe County; and, that this matter be remanded back to that Court for further proceedings.

Alternatively, in the event that this Court reverses the granting of summary judgment to the Respondents, the Petitioner

further requests that summary judgment be rendered in its favor instead, for the reasons already stated of record below, as the pleadings, admissions, and affidavits already on record show that there is no genuine issue as to any material fact, and that the Petitioner is entitled to judgment as a matter of law.

The Petitioner does further request specific performance of the Settlement Agreement against the Respondents herein, and that they either be directed to execute a formal boundary line agreement incorporating the metes and bounds description as previously prepared; or, that the undersigned be appointed as Special Commissioner to execute said agreement on their behalf; or, that the Circuit Court of Monroe County be directed to prepare an appropriate Order for recording in the Office of the Clerk of the County Commission of Monroe declaring and adjudging the boundary line between the parties adjoining tracts of land to follow the metes and bounds description along the center of Huffman Road, W.Va Route 7/7; together with such other and further relief as to this Court seems just and equitable.

ALLEGHENY COUNTRY FARMS, INC.,
A West Virginia Corporation
By Counsel



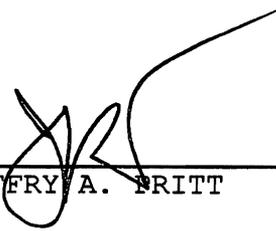
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CERTIFICATE OF SERVICE

I, Jeffrey A. Pritt, counsel for the Petitioner, do hereby certify that service of the attached PETITIONER'S BRIEF has been made upon the Respondents by hand delivering a true and accurate copy of the same to their counsel of record as follows:

John H. Bryan
Attorney At Law
P.O. Box 366
Union, West Virginia 24983

this 20th day of April, 2015.



JEFFREY A. PRITT