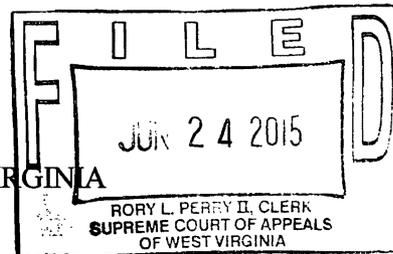


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1106

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

v.

DARRIS HUFFMAN and
NUETULIA HUFFMAN,
Defendants Below, Respondents.

PETITIONER'S
REPLY BRIEF

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

JEFFRY A. PRITT (WVSB #5573)
PRITT LAW FIRM, PLLC
P.O. Box 708
Union, West Virginia 24983
(304) 772-4700
jeffpritt@prittlawfirm.com

Counsel for Petitioner

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ARGUMENT

A. INTRODUCTION

The Petitioner hereby submits the following Reply in response to the arguments advanced in Respondents' Brief with respect to Petitioner's three Assignments of Error asserted herein.

B. ASSIGNMENTS OF ERROR

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

Petitioner's first Assignment of Error centered on the Circuit Court's reliance upon lack of privity as justification for not enforcing the boundary line settlement agreement against the Respondents (as the new owners of the adjoining tract of land). Allegheny Country Farms, Inc. (hereinafter referred to as "ACFarms") briefed in detail the incorrect factual findings made by the Circuit Court below with respect to the circumstances surrounding Respondents' substitution as parties to the boundary line settlement agreement in the place and stead of the former owner, Ethel Huffman Carper. See *Petitioner's Brief*, pp. 9-10, 20-23. For these reasons, Petitioner maintains that the Circuit Court's use of lack of privity to deny specific performance of the settlement agreement was erroneous, as this contract was mutually enforceable by either side. *Id.*, pp. 23-24.

However, Respondents' briefing on this point was completely

unresponsive to the core issue of privity. Respondents admit that they did sign an "acknowledgment" form when they closed on their property. *Respondents' Brief*, p. 5. Yet they never discuss their own separate promise, as expressly set out therein, by which they agreed to "execute the BOUNDARY LINE AGREEMENT pursuant to the terms of the aforesaid SETTLEMENT AGREEMENT" in exchange for the "acquiescence" of ACFarms in permitting their real estate closing to move forward (before the formal boundary line survey was complete). See *Acknowledgement [sic] of Boundary Line Agreement*, Dec. 12, 2006 [219].¹ Instead, Respondents' entire line of argument in response to this Assignment of Error focuses almost exclusively on the viability of the alleged "preemptive right of first refusal" which they contend prevented any adjustment of the boundary line between ACFarms and Ethel Huffman Carper in the first place, and whether Petitioner had notice of the same. *Id.* at pp. 5-10.

Accordingly, this Court should take Respondents' failure to properly address the lack of privity issue as an admission that Petitioner's Assignment of Error in this regard is well-founded. The bottom line is that Respondents were and are in privity with ACFarms. They are the assignees of Ethel Huffman Carper by virtue of her deed to them, and by their own voluntary assent to the terms and conditions of the Settlement Agreement modifying the boundary

¹References to pages within the Appendix Record previously filed herein are identified as "[__]".

line between their land and the adjoining tract owned by ACFarms. Consequently, lack of privity was not a valid ground for the Circuit Court to deny ACFarms the the specific performance it requested, and most certainly did not validate the granting of summary judgment to the Respondents.

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

Just as they did with regard to the first Assignment of Error, the Respondents likewise elected to almost wholly ignore the arguments advanced by Petitioner in support of its second Assignment of Error. The Circuit Court's ruling against ACFarms below invoked the clean hands doctrine both because of the alleged lack of privity, and also due to the "preemptive option" (which that Court mistakenly believed was contained in the partition deed to Respondents' predecessor in title, Ethel Huffman Carper). *Amended Order Granting Defendant's Motion for Summary Judgment*, pp. 6-7, Dec. 17, 2014 [232-33].

As briefed by Petitioner in considerable detail, the alleged pre-emptive rights agreement, by which the subject land was supposedly restricted, arose from an agreement entered into by and between Ethel Huffman Carper and her siblings years before her tract was partitioned from the parent tract; but, this particular agreement was most likely totally void, or at best, only enforceable between those siblings, due to the rule against

perpetuities. *Petitioner's Brief*, pp. 24-30.² Respondents note in passing in their Brief that ACFarms raised the argument regarding the rule against perpetuities, *Respondents' Brief*, p. 11, but never address that issue or otherwise offer counter authority establishing the basic viability of the Huffman siblings' preemptive rights agreement.

Rather than address the legal argument advanced by Petitioner in its second Assignment of Error, Respondents alternately elected to argue that ACFarms had "notice" of the informal agreement and chose to ignore it. *Id.*, p. 12. However, alleging that ACFarms had notice of an agreement which is either void, or at best only

²ACFarms contends that per the ruling in Smith v. VanVoorhis, 170 W.Va. 729, 296 S.E.2d 851 (1982), the informal agreement among the Huffman siblings at issue in this case is either void, or at best only extends to afford a right of first refusal to the siblings themselves and not to other members of the Huffman family such as the Respondents herein. However, Petitioner neglected to note in its Brief that West Virginia adopted the Uniform Statutory Rule Against Perpetuities sometime shortly after the Huffman siblings signed their agreement in 1992 (and also after the VanVoorhis decision). See W.Va. Code § 36-1A-1, et seq. Nevertheless, although the uniform version of the rule did somewhat change the calculation to be used in determining whether a nonvested property interest is valid or not, the subsequent statutory change has no impact upon the validity of the agreement between the Huffman siblings beyond the analysis set out in VanVoorhis. The fundamental flaw with the Huffman agreement is that there is no presently closed class to use as the measuring point for assessing validity under the rule unless the four siblings who signed the agreement themselves are used for such a purpose (similarly to the ultimate decision in VanVoorhis, 296 S.E.2d at 854). However, if the four siblings are utilized as the closed class then that completely rules out more distant possible heirs, such as the Respondents, from being within the class of persons entitled to either the benefits of the agreement, or to seek its enforcement.

enforceable by the signatories thereto, does nothing to help Respondents' position. Either way, the Respondents have no right to enforce the agreement themselves.

Moreover, options such as these are typically considered to be only personal rights as opposed to creating actual interests in land. Sun Lumber Co. v. Thompson Land & Coal Co., 138 W.Va. 68, 76 S.E.2d 105, Syll. Pt. 3 (1953) ("An option is a mere personal right, not an interest, and, as such, it differs materially and essentially from a condition subsequent capable of working a forfeiture.") See also, Woodall et al v. Bruen et al., 76 W.Va. 193, 85 S.E. 170, Syll. Pt. 3 (1915) ("An option of purchase is a mere personal right, not an interest in the optioned land.") *Contra*, West Va.-Pittsburgh Coal Co. v. Strong, 129 W.Va. 832, 841-42, 42 S.E.2d 46, ___ (1947). Therefore, even if one dubiously assumes that the agreement at issue in this case is not void due to violating the rule against perpetuities, it still constituted no flaw in the chain of title which precluded ACFarms from entering into a boundary line agreement with Ethel Huffman Carper.

Moreover, the Respondents fail to explain how the Huffman siblings executed a fee simple partition deed to their sister, Ethel Huffman Carper, without reservation or reference of any kind whatsoever to the pre-emptive rights agreement, and without thereby

rendering the prior agreement invalid.³ Our state code makes clear that if "no words of limitation are used in the conveyance", then it is presumed that a fee simple estate passes to the grantee.⁴ W.Va. Code § 36-1-11. See also Cottrill v. Ranson, 200 W.Va. 691, 490 S.E.2d 778, Syll. Pt. 4 (1997) ("In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language.") (citing Hall v. Hartley, 146 W.Va. 328, 119 S.E.2d 759, Syll. Pt. 2 (1961)). And if one receives a fee simple estate in and to property, then their ownership of the same is not subject to any conditions. Yeager v. Fairmont, 43 W. Va. 259, 27 S. E. 234 (1897) ("'Fee simple' is a freehold estate of inheritance, free from

³The granting clause in the partition deed to Ethel Huffman Carper from herself and her siblings states that they "do hereby GRANT and CONVEY **all their right title and interest** unto the party of the second part, with covenants of GENERAL WARRANTY of title, all that certain lot, tract or parcel of land together with the buildings and improvements thereon, easements, rights of way, and the appurtenances thereunto belonging" Deed, Oct. 4, 2006, p. 1 (emphasis supplied) [168].

⁴The deed did contain a standard reference "to all prior instruments in the chain of title for all reservations, restrictions, and limitations pertaining to the real estate hereby conveyed and for a more particular description of the property." However, there was absolutely no mention made of the pre-emptive rights agreement signed by the Huffman siblings when they settled their father's Estate. Obviously, if they intended for said agreement to still have any vitality in the future, then it had to be specifically excepted from the operation of this conveyance since each of the parties hereto quite clearly conveyed a fee simple interest, including all of their right, title and interest, to Ethel Huffman Carper without reservation.

conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands." (citation omitted).⁵

Finally, Respondents failed to address the basic intent of the pre-emptive rights agreement, as reflected by its own terms, which shows that the parties thereto could not have intended for it to be of any further force and effect after the partition deed to Ethel Huffman Carper. When the Huffman siblings each signed their separate one-page agreements back in the early 1990's at the time of their father's passing, the third paragraph of each agreement opened as follows: "I am in agreement with my brothers and sister that the land and property remain as it is on this date" *Agreement signed by Alfred Huffman heirs* [176-79]. Quite clearly, the situation changed, as once the partition deed was executed the land was not at all the same as it had been some fourteen years earlier since Ms. Carper's parcel had been cut off and separated from the parent tract. Once Ms. Carper had her own separate land

⁵And if the pre-emptive rights agreement at issue herein in any way constituted an actual interest in the property, then it would be subject to the doctrine of merger, which means that the same was extinguished when all of the siblings conveyed a fee simple title in the partitioned tract to Ethel Huffman Carper. See Turk v. Skiles, 45 W.Va. 82, 30 S.E. 234, Syll. Pt. 4 (1898) ("Where a greater and less estate unite in the same person, without intermediate estate, the less at once merges into the greater.") (cited with approval in EB Dorev Holdings, Inc. v. W. Va. Dep't of Admin., ___ W.Va. ___, 760 S.E.2d 875, Syll. Pt. 3 (2014)).

holding, she could no longer sell her "share of the land" as envisioned by the original agreement, but only her own separately owned parcel. Id.

However, rather than addressing any of these serious legal failings with the pre-emptive rights agreement (upon which Respondents almost exclusively rely in challenging the merits of this appeal), they instead resort to arguing facts which are not of record in this proceeding as somehow justifying the denial of equitable relief. Respondents assert that ACFarms brought this result upon itself by pressuring "an elderly lady, who was required to sell her property, to sign an agreement behind the backs of her other family members, including those members who share the roadway to access their farms." *Respondents' Brief*, p. 12. There is no citation to any document in the record supporting these alleged facts, and indeed there cannot be as no such evidence was presented to the Circuit Court below.

In sum, the Circuit Court's decision to invoke the clean hands doctrine was misguided at best. The pre-emptive rights agreement at issue here serves as no basis for application of that principle. And, there was no other evidence admitted below otherwise justifying such a ruling. This doctrine certainly did not mandate that Respondents be granted summary judgment, and should not have prevented ACFarms from being awarded specific performance.

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

Respondents admit that our State's public policy favoring the voluntary compromise of disputed civil actions is relevant to this proceeding, but only if there was an enforceable contract between ACFarms and themselves. *Respondents' Brief*, pp. 13-14, 15-19.⁶ However, despite citing to several basic contract cases, Respondents fail to delineate exactly why the settlement agreement entered into by Ethel Huffman Carper was unenforceable, and why they, as her assigns, are not bound by the obligations therein that they voluntarily assumed.

This case involves a simple assignment. Ms. Carper and the Respondents wanted to close their deal before the new boundary line survey was completed, and ACFarms did not object as long as the Respondents assented to the terms of the settlement agreement. This they did by executing the acknowledgment form. See *Acknowledgement*

⁶Respondents also cite a misplaced privity of estate argument in their Brief, relying upon Johnson v. Junior Pocahontas Coal, Inc., 160 W.Va. 261, 234 S.E.2d 309 (1977). *Respondent's Brief*, p. 15. Privity of estate has absolutely nothing to do with the issues in this proceeding. ACFarms is not attempting to impose any "burden" on "Respondents' property rights". *Id.* And the Junior Pocahontas Coal, Inc., decision relates to the liability of an independent contractor for injuries to third-parties while mining coal for a lessee on property which apparently included exculpatory clauses in the deed. That case has nothing to do with pre-emptive rights, the rule against perpetuities, boundary line agreements, assignees or novation, nor any other issue relating to the instant situation.

[sic] of Boundary Line Agreement, Dec. 12, 2006 [219]. That acknowledgment did not alter the terms of the original settlement agreement in any way (a copy of which was attached thereto). It simply substituted in the new owners of the property as the obligees to the new boundary line agreement, as an accommodation to them and their seller, Ms. Carper.

Respondents sole defense with respect to enforceability of the settlement agreement boils down to their contention that because Ethel Huffman Carper never executed a formal boundary line agreement, nor was paid the requisite \$1,000.00,⁷ before they received their deed, then nothing is enforceable against them. *Respondents' Brief*, p. 18. That might be a great defense if they had never executed the acknowledgment form, and had no knowledge of the settlement agreement. But they did, and as a result they should now be estopped from avoiding the obligations to which they so readily agreed, and upon which ACFarms justifiably relied in permitting their closing to go forward without completion of the new boundary line survey.

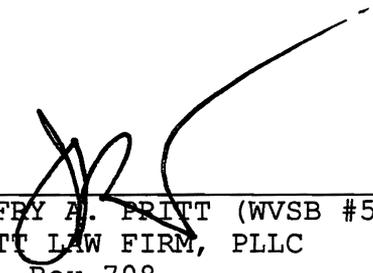
⁷Respondents suggest that because the \$1,000.00 payment recited in the Settlement Agreement has not yet been paid that this constitutes a lack of consideration for the contract. However, the Settlement Agreement explicitly states that the aforesaid payment is to be made upon execution of the formal "BOUNDARY LINE AGREEMENT", not before. *Settlement Agreement*, Nov. 16, 2006, ¶ 5 [210]. And ACFarms has at all times been prepared to pay this amount to the appropriate party when and if the formal agreement is ever executed. *Affidavit of Gregory H. Wittkamper*, ¶¶ 3-4, Dec. 3, 2008 [39].

This case should be the poster child evidencing why settlements are favored under the law of our jurisdiction. No party hereto has been served by this continuing fight over a disputed boundary line which should have been resolved once and for all back in 2006. None of Respondents' arguments justifies a deviation from our strong public policy favoring settlements. In fact, this particular case serves to emphasize the important need for just such a policy.

CONCLUSION

For the foregoing reasons the Petitioner, Allegheny Country Farms, Inc., respectfully requests that this Court enter an Order reversing the ruling below, and that this matter either be remanded for further proceedings, or that judgment as a matter of law be entered in its favor together with a decree for the specific performance of the Settlement Agreement as previously requested herein.

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



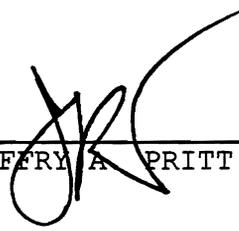
JEFFREY A. PRITT (WVSB #5573)
PRITT LAW FIRM, PLLC
P.O. Box 708
Union, West Virginia 24983
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Jeffrey A. Pritt, counsel for the Petitioner, do hereby certify that service of the attached PETITIONER'S REPLY 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 23rd day of June, 2015.



JEFFERY A. PRITT