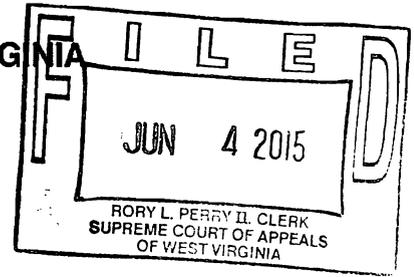


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1106



**ALLEGHENY COUNTRY FARMS, INC.,
PETITIONER,**

**vs. Appeal from a Final Order of the Circuit
Court of Monroe County (08-C-65)**

**DARRIS HUFFMAN and
NUETULIA HUFFMAN,
RESPONDENTS.**

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

The Petitioner has long been attempting to gain additional access to his property through the Huffman family property.¹ In 1992, the Estate of Alfred D. Huffman was settled, leaving approximately 58 acres to children, Ethel Huffman Carper, Clifford Ray Huffman, Kyle J. Huffman, and Ralph D. Huffman. Two years later, beginning in 1994, there was litigation over the issue of whether the subject road is a public road. The Petitioner was a party to that action. The June 13, 1997 Order issued from the Monroe County Circuit Court ruled in favor of the Huffman family and against the Petitioner, holding that sufficient proof had not been provided showing that the road was indeed public. Furthermore, the Court, following a bench trial, determined that regardless of the public vs. private issue, the Petitioner's property did not adjoin the road:

The Plaintiff [Huffmans] has offered testimony to the effect the Defendant's [Allegheny Country Farms, Inc.] property line does not front on the right of way, and that Defendant's predecessor's in title have until recent years, maintained their own road way on their side of the fence. The fence has been regarded as the boundary for many years by both landowners. Earl Smith, Defendant's immediate predecessor in title, used the roadway since 1991, with Plaintiff's permission. Defendant has offered no evidence to counter this testimony.

Plaintiff [Huffmans] has also offered the expert testimony of James Wentz, a licensed Land Surveyor. Mr. Wentz conducted a field survey, and opined that the boundary line did not adjoin the edge of the existing roadway. His testimony was that the boundary was south of the road at all points, and that there is a gap between the existing fence and roadway of 3 to 15 feet.

See June 13, 1997 Order Appendix page 219.

In 2006, the Petitioner filed suit against the Huffman children, seeking to re-litigate the issues from 1997. The action was titled "Complaint to Establish Boundary

¹ The Petitioner already has access to his property from a public road. He is seeking a secondary means of access to his property.

Line and for Declaratory Judgment.” The Petitioner alleged a general boundary dispute, without specifics, and sought a declaration from the Court that the Petitioner has the right to use the roadway through the Huffman properties. See “Complaint to Establish Boundary Line and For Declaratory Judgment”, Appendix at 157. The named Respondents were Ethel Huffman Carper, Clifford Ray Huffman, Kyle J. Huffman, and Ralph D. Huffman.

Similar to the 1990’s litigation, the Petitioner again failed to ever prove his allegations. Instead he took advantage of Ethel [Huffman] Carper, who wanted/needed to sell her property. By filing a *lis pendens*, he prevented her from selling the property. Then he offered, via Settlement Agreement, to release the *lis pendens*, and to give her the paltry sum of \$1,000.00, in exchange for her agreeing to give him any of her property south of the subject roadway. See Settlement Agreement, Appendix at 31. Since Ethel’s property was the furthest West of all the Huffman parcels, this would give the Petitioner a right to travel across the properties of the other Huffman children without ever resolving the litigation against them. Indeed, there never was a trial or final order resolving the 2006 action prior to a final order being entered herein. The Petitioner has never proven that he has any right to use the Huffman road, whether public or private. The Petitioner yet again filed another lawsuit in the case *sub judice* seeking to compel the Respondents to sign the boundary line agreement contemplated, but never executed, between the Petitioner and Ethel Carper.

When the Estate of Alfred D. Huffman was settled, all of the Huffman children/siblings, including Ethel [Huffman] Carper, signed a notarized document stating the following:

I, Ethel H. Carper, daughter of Alfred D. Huffman, deceased, having received a account of the income, expense, property and bank accounts, accept this account as presented.

...

I am in agreement with my brothers that the 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.

See Right of First Refusal, Appendix at 162. This document was recorded in 1992 in the Fiduciary Records and Settlement Records at Book 20 page 698 in the Office of the Clerk of the County Commission of Monroe County. This had the effect of creating a preemptive right - a right of first refusal for Huffman family members, effective against each of the Huffman children, including Ethel Carper. This preemptive right applied to the original Alfred Huffman Estate property, of which the Ethel Carper property was derived from. This document was at all relevant times hereto discoverable for anyone researching the title of the Ethel Carper/Huffman property.

The Respondents were not a party to the settlement agreement between Ethel Carper and the Petitioner. Nor were they a party to the case which was supposedly settled, Monroe County Civil Action No. 06-C-44. The case was never dismissed prior to a final order being entered in this case. There was never a trial. No final order had been entered prior to a final order being entered in this case.

II. SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment against the Petitioner following his attempt at forcibly taking use of a roadway from the Huffman family farm in order to use it to create a secondary entrance to his property. The Petitioner was unable to gain use of the roadway on the merits of the underlying claim, which was the

argument that the Petitioner's property adjoined the road, and therefore was accessed by it. They were unable to come to any other resolution with the Huffman family property owners who own and use the roadway. Instead, they singled out Ethel Huffman Carper, who needed to sell her property, placed a *lis pendens* to prevent the sale, and then offered to give her \$1,000.00, and release the *lis pendens* to allow a sale, in exchange for a boundary line agreement bringing Petitioner's boundary line to the roadway. See Settlement Agreement, App. at 31.

Ethel Carper presumably didn't care whether the Petitioner gained use of the roadway since she no longer was going to have any interest in the property. The remaining property owners, and Huffman family members, could do nothing but purchase Ethel Carper's property at the auction sale. However, the agreement between Ethel Carper and the Petitioner was never performed. A boundary line agreement was not created at the time the Respondents became the new record owners of the property. Nor was any deed, or other conveyance, executed or recorded in the property's chain of title. The Respondents did not agree to a boundary line agreement. Nor does it benefit them in any way to agree to a boundary line agreement granting the Petitioner use of their roadway.

In any event, Ethel Carper could not have conveyed any interest in her real estate to the Petitioner without honoring the existing, of record, right of first refusal in favor of the Huffman family - a preemptive right which was known to the Petitioner - both constructively and actually. The Circuit Court properly refused to engage in extraordinary equitable relief where the Petitioner had created the very twisted legal situation for which he complained of, and which did not justify the requested relief. Nor

does public policy favor enforcing a settlement agreement made by a third party with no true “skin in the game” - especially where there was little, if any, consideration to justify the agreement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As this case involves assignments of error in the application of settled law, the availability of oral argument is governed by Rule 19 of the West Virginia Rules of Appellate Procedure. As the case law is settled on the errors raised by Petitioner, oral argument is not necessary and would not further aid the Court in its decision. However, if the Court determines that oral argument is appropriate and necessary, Respondents reserve the right to present oral argument.

IV. ARGUMENT

1. The Circuit Court properly denied Petitioner Specific Performance Due to Lack of Privity of Contract with the Respondent and Due to the Fact That Ethel Carper Did Not, and Could Not, Convey Any Portion of Her Real Estate to the Petitioner

The Respondents admittedly signed an “acknowledgment” form at the time of the real estate closing. However, the only effect the “acknowledgment” form can have is to place the Respondents on notice of the supposed settlement agreement between their predecessor, Ethel Carper, and the Petitioner. But, since an instrument was never actually executed by those parties, there is no need for a *bona fide* purchaser analysis. Therefore, whether or not the Respondents had notice of Ethel Carper’s supposed agreement is irrelevant. The Respondents own what they have been conveyed down

through their chain of title. A contractual agreement outside the Respondents' chain of title, to which the Respondents were not a party, cannot alter the Respondents' property boundaries.

This Court has previously determined following expert testimony by surveyors, in 1997, that the Petitioner's boundaries do not adjoin the Huffman road. Therefore, regardless of whether the road is public or private, he does not have the right to access his property via the road. For this reason he sought a conveyance from Ethel Carper, of all of her land south of the Huffman road. The result would be that the Petitioner could then use the road to access his property without ever proving his case in court.

However, Ethel Carper was not at liberty to convey property to the Petitioner, whether via settlement agreement, or whether by deed. The other Huffman family members had the preemptive right of first refusal to the entirety of her property, and were also entitled to have the property remain "as it is [was]" on March 6, 1992. The 1997 Order clearly found that there were long-standing fenced lines of possession between the Petitioner's property and the Huffman property. See Order, Appendix at 219.

Ethel Carper was not at liberty to convey any portion of her property to the Petitioner via settlement agreement, or otherwise, due to the 1992 right of first refusal - a preemptive right:

The owner of a property burdened by a preemptive right, also known as a right of first refusal, must, before selling such property to a third party, give written notice to the rightholder of the third party's offer and of the owner's intention to accept such offer. The rightholder is then required to advise the owner that he is willing to purchase the property on the same terms.

Syllabus Point 3, John D. Stump & Associates, Inc. v. Cunningham Memorial Park, Inc., 419 S.E.2d 699, 187 W. Va. 438 (W. Va. 1992). The Huffman family members also had

the preemptive right to foreclose Ethel Carper from altering her parcel in any way. In the right of first refusal document, all the siblings agreed that the "land and property [will] remain as it is on this date" This recorded document was obviously intended to prevent any one sibling from doing just what Ethel Carper did - selling any portion of the original family farm to a third party, or otherwise unilaterally affecting the property rights of the other siblings.

According to the testimony of the Huffman family members, they were never provided with notice of Ethel Carper's intention to convey/alter her property. Nor were they given an opportunity to purchase the property she sought to convey to the Petitioner. See attached Second Affidavit of Darris Huffman, Appendix at 191. The Petitioner either knew, or should have known, that Ethel Carper was not entitled to agree to a settlement agreement wherein any portion of her property is conveyed to a non-family member. Furthermore, it matters not whether Ethel Carper disclosed the existence of the preemptive rights to the Petitioner.

The law has long been settled in West Virginia that the Petitioner is charged with the responsibility of making his own investigation into the marketability of title:

Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.

Syllabus Point 2, Staker v. Reese, 82 W. Va. 764, 97 S.E.641 (1918). The Petitioner had already been litigating boundary and right of way issues against the Ethel Carper property for twelve years by the time he entered into the settlement agreement with Ethel Carper. He therefore would, or should, have knowledge that all the Huffman

children signed the right of first refusal agreements in 1992 - whether or not Ethel Carper disclosed the same. Moreover, Ethel Carper's deed referenced the estate of Alfred D. Huffman, and also made reference to "all prior instruments in the chain of title for all reservations, restrictions, and limitations pertaining to the real estate hereby conveyed" The right of first refusal document was a restriction and limitation pertaining to the real estate, which was recorded within the chain of title, since it was recorded in the fiduciary records along with the Will. See Ethel Carper Deed, Appendix at 165.

Even if the Petitioner, did not undertake his own investigation, and even if he did not have actual notice, the law provides that the Petitioner will be charged with constructive notice of all relevant documents which have been recorded in the appropriate registry of deeds and probate:

Constructive notice is [s]uch notice as is implied or imputed by law, usually on the basis that the information is a part of a public record or file, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.

John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W.Va. L.Rev. 449, 500 (1996) (quoted by In re Williams, 584 S.E.2d 922, 926, 213 W. Va. 780 (W. Va. 2003). Indeed, even the Petitioner's counsel was aware of the existence of the right of first refusal documents in 2006. Prior to representing the Petitioner, Petitioner's counsel performed a title search for the auction of the Ethel Carper property. In his November 17, 2006 letter to the auctioneer, Randy Burdette, Petitioner's counsel noted on the first page of his letter:

- C. Each of the children executed a basic first right of refusal for this property. I have attached this item as Attachment 4.

See Mr. Pritt's November 17, 2006 title search opinion letter, Appendix at 170.

Without doubt, the contemplated boundary line agreement between Ethel Carper and the Petitioner would have violated the preemptive right - it would have been a conveyance of land, and it would have caused the property to not "remain as it is" as required in the right of first refusal. West Virginia law has long held that a land conveyance can be found by deed of conveyance, or by contract, where the document contains an identity of the land being conveyed by means of a description:

It has been consistently held in this State that extrinsic evidence may be admitted to make certain the descriptive matter in a deed of conveyance or a contract for the sale of land, if such writing pointed to facts and circumstances which, if established, would render the description certain. The identity of the land does not depend solely on the descriptive words used in the deed of conveyance, if the description furnishes means of identifying the land intended to be conveyed.

Meadow River Lumber Co. v. Smith, 126 W. Va. 847, 854, (1944). Furthermore:

The main object of a description of land sold or conveyed, in a deed of conveyance or in a contract of sale, is not in and of itself to identify the land sold but to furnish the means of identification, and when this is done it is sufficient.

Consolidation Coal Co. v. Mineral Coal Co., 126 S.E.2d 194, 202, 147 W. Va. 130 (W. Va. 1962). Thus, land is conveyed, by deed of conveyance, or by contract, where there is a description of some portion of land being conveyed to another party. The keystone of a land conveyance is the description, or the means of discerning the description. In the case *sub judice*, it was anticipated that there was going to be a formal description created by survey, and contained in the deed of conveyance (boundary line agreement)

which was supposed to be signed by Ethel Carper. However, the new survey description was never completed prior to the Respondents becoming the record owners of the property. This was not just a clarification of existing boundary lines, it was a new survey of a new boundary line, and was not based on any earlier metes and bounds description from either party's chain of title. Therefore, the settlement agreement and anticipated boundary line agreement was to be a conveyance of a portion of the Carper real property. It was going to have a definite description of property being conveyed from one party to another - no different than any other conveyance of land by deed.

Currently, there has been no conveyance of Huffman land to the Petitioner. There exists only an unenforceable agreement from 2006 which was never consummated, and which is not now enforceable against the Respondents. In any event, there could not have been, nor can there now be, a conveyance of any portion of the Respondents property to the Petitioner, without first honoring the rights of the remaining Huffman family members pursuant to their 1992 preemptive right agreements. The conveyance to the Respondents - Huffman family members - did not violate the right of first refusal agreement. See Second Darris Huffman Affidavit, Appendix at 191.

2. The Circuit Court Properly Denied Petitioner Equitable Relief Under The Clean Hands Doctrine

Petitioner argues that the preemptive rights which existed in favor of the Huffman family was not legally enforceable, and as such that the Circuit Court erred in choosing to deny equitable relief to the Petitioner, whom the Court found had “unclean” hands.

As the Circuit Court noted in the Amended Order Granting Summary Judgment:

Specific performance is a form of equitable relief. Equitable has been defined as just or consistent with the principles of justice. *See* Equity 27A Am. Jur. 2d Equity § 1, (“Equity regards as done that which ought to be done.”). The longstanding use of equity in courts has developed a robust set of maxims designed to guide the courts in deciding whether to apply or grant equitable relief. *See* Principles and Maxims of Equity, Maxims Applicable to Litigants, 27A Am. Jur. 2d Equity § 92.

Among this extensive list of maxims, a few stand out as well known: who seeks equity must do equity; who comes into equity must come with clean hands; and equity aids the vigilant, not one who sleeps on rights. *Id.* Where a litigant fails to meet a standard of equity, all relief should be denied. *Id.*

See December 17, 2014 Amended Order Granting Summary Judgment, Appendix at 231.

The Circuit Court found that the deed by which Ethel Carper obtained the subject real estate contains a preemptive option in favor of the Huffman family, which provided that before Ethel Carper could sell her land to the general public, it must be first offered to one of the family members. The Court further found that “there is no evidence that this procedure was followed during the negotiations leading to the execution of the 2006 Settlement Agreement.” *Id.*, App. at 236-237. Although Petitioner argues that the preemptive right at issue may violate the rule against perpetuities if applied to certain extended members of the Huffman family, the undisputed facts are that the preemptive option procedure was not followed for any Huffman family member. Moreover, the

enforceability of the preemptive option was never contested by the Petitioner. It was merely ignored.

“To get equitable relief one must come into court with clean hands . . . and a suitor cannot expect the extraordinary power of the court exercised by way of injunction and committal to be directed in his favor, if he himself procures or prompts the acts complained of.” State ex rel. Taylor v. Devore, 134 W. Va. 151, 58 S.E.2d 641 (W. Va. 1950). The Petitioner had notice of the preemptive right in favor of the Huffman family, but chose to go around it - just as he chose to go around the other Huffman family members who own property accessed by the subject roadway - and pressure Ethel Carper to sign a Settlement Agreement. The Petitioner created the very situation for which he sought equitable relief: he pressured an elderly lady, who was required to sell her property, to sign an agreement behind the backs of her other family members, including those family members who share the roadway to access their farms. If Petitioner couldn't prove ownership rights to the roadway serving the Huffman family farms, he was going to get it by other means, all-the-while choosing to ignore the preemptive rights. Such actions amounted to coming into court with unclean hands - whether or not the preemptive rights ended up being enforceable. Moreover, as the Circuit Court noted:

In the case at hand, there were three instances where the Plaintiff's vigilance could have avoided the need to request specific performance in the first place. First, the Plaintiff could have drafted the 2006 Settlement Agreement to serve as a deed. Second, the Plaintiff could have ensured that a survey took place and the Boundary Line Agreement took effect before the sale. Third, the Plaintiff could have itself purchased the property at auction. When taken together, these three missed opportunities gives this Court reason to believe that the Plaintiff has slept on his rights, and is not entitled to equitable relief.

See December 17, 2014 Amended Order Granting Summary Judgment, App. at 237.

In any event, regardless of whether the Circuit Court was correct that the Petitioner had unclean hands, the Court also found that equitable remedies were unavailable because there was an adequate remedy at law available to the Petitioner:

A Court making judgments in equity must balance the interests and rights of the parties and render a decision consistent with the principles of justice. A remedy in equity is unavailable where there is an adequate remedy at law. In this case, Plaintiff is seeking a declaratory judgment to establish the boundary line of its border with the Huffman property. The plaintiff has an adequate remedy at law to settle a property dispute and does not need to invoke equity to receive an adequate remedy. Therefore it is appropriate to deny the Plaintiff's specific performance claim and allow Allegheny Farms to pursue the action in its companion case to determine the boundary line between the parties' properties.

See December 17, 2014 Amended Order Granting Summary Judgment at 235.

However, the Petitioner chose not to pursue his remedy at law.

3. The Ruling of the Circuit Court Does Not Violate the Policy of Favoring the Resolution of Controversies by Compromise or Settlement.

Petitioner argues that:

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.

See Petitioner's Brief at 31. In so arguing, the Petitioner emphasizes his longstanding harassment of the Huffman family in his attempts at turning their family farm's road into a subdivision entrance. However, this argument is only relevant if contract law supports

there being an enforceable contract between the Petitioner and the Respondents, which there is not.

The 2006 "settlement agreement" document between Ethel Carper and the Petitioner is not enforceable against the Respondents. The Respondents were never in privity of contract, or in privity of estate, with the Petitioner. And even if they were, the legal requirements for an enforceable contract are not present.

The facts are undisputed that the Respondents were not parties to the 2006 "Settlement Agreement." It is further undisputed that the 2006 agreement provides no benefit to the Respondents. The sole beneficiary of the agreement, should it be enforced, would be the Petitioner. The law provides that the 2006 agreement is unenforceable as against the Respondents because they were not in privity of contract with the Petitioner:

The rule in this state is that "in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit.

Casto v. Dupuy, 515 S.E.2d 364, 368 (W. Va. 1999) (quoting Robinson v. Cabell Huntington Hosp., Inc., 201 W. Va. 455, 456 (1997)). The 2006 agreement was not created for the sole benefit of the Respondents. Nor did it provide them with any benefit. Since the Respondents cannot enforce any aspect of the 2006 agreement against the Petitioner, neither can the Petitioner enforce the agreement against the Respondents. There is no privity of contract between the parties *sub judice*. Nor is there privity of estate. The Respondents contracted with Ethel Carper - not the Petitioner.

Even if there were privity of contract between the Petitioner and the Respondents, since there is no privity of estate, the Petitioner cannot impose a burden on the Respondents' property rights. Because no out-conveyance was made by Ethel Carper prior to the Respondents being deeded the property, the Petitioner cannot now force one to be made:

A distinction is made between privity of contract and privity of estate, and the rule is that privity of contract alone is insufficient to carry the benefit of a covenant to subsequent owners of the property. Similarly, a difference is indicated between the benefit and the burden with respect to the necessity for privity of estate. Thus, while the benefit, upon a transfer of land, will pass with the property to which it is incident, the burden or liability will be confined to the original covenantor, unless the relation of privity of estate exists or is created between the covenantor and the covenantee at the time when the covenant is made.

Johnson v. Junior Pocahontas Coal, Inc., 234 S.E.2d 309, 315, 160 W. Va. 261 (W. Va. 1977) (quoting 20 Am.Jur.2d, Covenants, Conditions, and Restrictions, § 34).

The agreement between Ethel Carper and the Petitioner was not made for the Respondents' benefit. The Respondents in fact received no benefit. The Respondents could not seek a benefit through legal action. Likewise, neither can the Petitioner seek to burden the Respondents through legal action. There exists no privity of contract, nor privity of estate, between the Petitioner and the Respondents. Therefore the Respondents own what they were conveyed by deed and chain of title - nothing more, nothing less.

Even if, alternatively, the settlement agreement could be enforced, the Respondents would have strong defenses to enforceability. The issue of whether settlement agreements are enforceable rests generally on contract law. *See generally* Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)

(the 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). Furthermore, “[w]here 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.” Syl. Pt. 1, Id. And as with all contracts “[a] meeting of the minds of the parties is a sine qua non of all contracts.” Syl. Pt. 1, Martin v. Ewing, 112 W. Va. 332, 164 S.E.2d 859 (1932).

In order for the Settlement Agreement to be binding on the Respondents, there must be an enforceable contract between the Petitioner and Respondents. In order for a contract to have existed between the Petitioner and the Respondents, the Petitioner must be able to demonstrate, by a preponderance of the evidence, that an offer to contract was made, that the offer did not lapse, that the offer was accepted, ***and that consideration was exchanged between the parties.*** Warden v. Bank of Mingo, 341 S.E.2d 679 (W. Va. 1985); McCormick v. Hamilton Business Systems, Inc., 332 S.E.2d 234 (W. Va. 1985); First National Bank of Gallipolis v. Marietta Manufacturing Company, 153 S.E.2d 172 (W. Va. 1967) (emphasis added).

Furthermore, there must be a meeting of the minds in order for a contract to be enforceable. Before a contract can exist, the parties must agree to the same thing at the same time, and the consent of all parties must be to precise terms. The minds of the parties must wholly meet - not partially meet. The agreement must be as a whole and not fractional, and the parties must agree by a meeting of the minds to every essential element of the contract. Meadows v. American Eagle Fire Ins. Co., 104 W. Va.

580, 140 S.E. 552 (1927). Competent parties able to mutually assent to the provisions of the contract are an essential part of a valid contract. The parties must have sufficient understanding to comprehend the nature of the agreement and its consequences and they must enter into the contract freely. Go-Mart, Inc., v. Olson, 198 W.Va. 559, 482 S.E.2d 176 (1996).

Consent to enter a contract must be freely given and communicated by words or conduct between the parties. Consent is not freely given if it is obtained by duress, fraud, undue influence or misrepresentation of material fact. Consent arises out of the intent of the parties as shown by the reasonable meaning of the words and conduct of the parties, and not from any unexpressed intention or understanding of either party. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). In order for a contract to be valid, there must exist mutuality of obligation. If, by a preponderance of the evidence it appears that one party to the contract is not bound to do the act which forms the consideration for the promise, there can be no enforceable contract. Eclipse v. South Penn. Oil. Co., 47 W. Va. 84, 34 S.E. 923 (1899).

Additionally, to be legally enforceable, a contract must be supported by consideration, which is defined as some right, interest, profit or benefit accruing to one party to a contract, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another. First National Bank of Gallipolis v. Marietta Manufacturing Company, 153 S.E.2d 172 (W. Va. 1967).

In the present case, it is undisputed that the Respondents did not contract with the Petitioner. Rather, they were put on notice of a contract (Settlement Agreement) between their predecessor in title and the Petitioner, and arguably thereby became

bound to it upon being conveyed the property. However, if the contract was never enforceable as to their predecessor in title, it cannot be enforceable as against them. And since Ethel Carper, the predecessor in title, never executed a boundary line agreement, before the Respondents can be bound to a boundary line agreement, it must first be determined whether they have ever agreed to be so bound

The original Settlement Agreement required the Petitioner to pay the sum of One Thousand Dollars and 00/100 (\$1,000.00) to Ethel Carper, the Respondents' predecessor in title, "upon the execution of the Boundary Line Agreement." See Settlement Agreement, App. at 31. However no boundary line agreement was executed as between Ethel Carper and the Petitioner. Nor did the Petitioner tender \$1,000.00 to Ethel Carper. Thus, there was an absolute lack of the requisite consideration to render the Settlement Agreement enforceable as against Ethel Carper.

And even if the Settlement Agreement were enforceable as against Ethel Carper, that does not automatically impose execution of the Boundary Line Agreement on the successors in title - the Respondents. Rather, since there was no record boundary line agreement at the time the property was conveyed, the Court should look at whether the Respondents ever contractually agreed to execute such a boundary line agreement, which would require consent, capacity to contract, and mutuality of obligation.

According to the Affidavits of Darris and Nuetulia Huffman, Appendix at 186, at the time they purchased the property, they were unrepresented by counsel. They only understood that there was a settlement agreement between Ethel Carper and the Petitioner, and that it solely placed the boundary line between the properties at the center of the road. The result of the proposed boundary agreement was a drastic

change in the property rights for the subject property: it could no longer hold cattle without substantial a substantial investment into fences and new ponds, and now would turn their property into an entrance for a trailer park. Id. Moreover, when the Respondents closed on their property, the bank shoved an Acknowledgment of Boundary Line Agreement in their faces and told them they had to sign it. They did so because they felt they had no choice. They were unrepresented by counsel and did not understand the legal significance of the document they were signing - nor did they understand the precise terms of the agreement (assuming of course that it does have any legal significance). Id.

Therefore, although policy favors the resolution of controversies by settlement and compromise, policy does not favor the enforcement of unenforceable contracts. Policy favors the resolution of boundary line and right-of-way issues on the merits of those cases, or through a meeting of the minds of the interested parties. Since the Petitioner was unable to resolve the underlying property issues in his favor, he looked for an easy target of compromise, which was Ethel Carper. The problem with that resolution is that Ethel Carper was simultaneously disposing of her interest. She may care less at that point whether the Petitioner gains use of the roadway to insert a trailer park. If such a resolution is favored, then only one real party in interest obtained any benefit. Only one party is agreeable and satisfied with the resolution. Such an outcome cannot be favored by public policy.

4. Standard of Review

A trial court's entry of summary judgment is reviewed *de novo*. Kelley v. City of Williamson, 221 W. Va. 506, 510, 655 S.E.2d 528, 532 (2007). The same standard used in the trial court to examine the motion for summary judgment is used during appellate review. Nicholas Loan & Mortg., Inc. v. W. Va. Coal Co-Op., Inc., 209 W. Va. 296, 299, 547 S.E.2d 234, 547 S.E.2d 234, 237 (2001). Thus, all facts and reasonable inferences are viewed in the light most favorable to the non-moving party. Powderridge Unit Owners Ass'n. v. Highland Properties, Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996). Accordingly, summary judgment must be granted or affirmed if the pleadings, depositions, answers to interrogatories and admissions, and any affidavits evidence that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

V. CONCLUSION

For the foregoing reasons, the Respondents request this Honorable Court affirm the Amended Order Granting Summary Judgment in favor of the Respondents, and for such other and further relief as this Court deems just and fit.

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CERTIFICATE OF SERVICE

I, John H. Bryan, hereby certify that a true and exact copy of the foregoing Respondents' Brief has been served upon the Petitioner by hand delivery, to:

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Dated this the 4th day of June, 2015.



JOHN H. BRYAN