BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

BARBARA RENNER and JOHN L, RENNER,

Plaintiffs Below, Appellees

vs. **NO.: 35528**
Tyler County Circuit Court No.07-C-15K

EDGAR L. BONNER and HAZEL BONNER, MELISSA COX FELSKE, ROSEMARY LANG, BRIAN TRUNK, MICHAEL TRUNK, RYAN J. RENNER and DAVID RENNER,

Defendants Below.

MELISSA COX FELSKE, ROSEMARY LANG, BRIAN TRUNK, MICHAEL TRUNK, RYAN J. RENNER and DAVID RENNER, Appellees

EDGAR L. BONNER and HAZEL E. BONNER, Appellants

BRIEF ON BEHALF OF MELISSA COX FELSKE, BRIAN TRUNK and MICHAEL TRUNK, APPELLEES

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STATEMENT OF FACTS

The Plaintiff/Appellees brought a Partition Action in the Circuit Court of Tyler County, West Virginia, pursuant to W. *Va. Code §37-4-3* and have joined all of parties owning an interest in the subject property. The Defendant/Appellees making this brief are three (3) of the Defendants in the underlying action that arises from an Order of the Circuit Court of Tyler County, West Virginia. These three (3) Defendants are children of the Plaintiff/Appellant Barbara Renner. They were included in the litigation by virtue of having purchased interests in the subject real estate. Upon information and belief, these Defendants bought these interests incident to the efforts of the Plaintiff/Appellee in raising capital to finance other litigation, contrary to the assertions of the Defendant/Appellant Bonners.

In any event, the Plaintiff/Appellees filed the aforesaid suit and did therein recite their allegations in regard to the ownership of the property, and in regard to the particular facts as to the manner in which the property lies and that the same cannot be partitioned in kind. One of these Defendant/Appellees does also reside on the property in a mobile home, but does not have a deed to any particular parcel of land. The Plaintiff/Appellees have made a number of improvements to the property over the time that it has been owned by said parties. These Defendant/Appellees did not disagree with any allegations made in the Plaintiff/Appellees' Complaint for Partition.

These Defendant/Appellees concur with the assessment of Plaintiff/Appellees that the Defendants/Appellants have attempted to make this case not about partition of the real estate, but about a right of way. It is absolutely true that when the Bonners learned the Renners were purchasing outstanding interests in Robert E. Amos property, they meddled into the matter by

purchasing the undivided 1/9 interest of Billie G. Worden. This was in spite of an agreement that Plaintiff/Appellee Barbara Renner had reached with said Billie G. Worden to purchase her interest, and which she later reneged upon to sell it to the Bonners. This was an apparent effort to obtain a right-of-way across this property. The separate civil action to address that issue against Billy Worden, Edgar Bonner and Hazel Bonner was part of the aforesaid need to raise capital, and the Memorandum Order which was attached as Exhibit "A" to the Appellants Brief stems from that action. This was a separate proceeding before the Circuit Court of Tyler County, West Virginia, and these Appellees do not believe that any such Order was made part of the proceedings in this case in the trial court. The propriety of its admission to the record at this point is questionable, because, as the Plaintiff/Appellees correctly point out, the Bonners have never filed any action to establish a right of way, nor was any objection ever made in any other of the several cases involving these parties. However, the Bonners objected to the appointment of commissioners for determining if the property could be partitioned in kind on the ground that unless the sale was subject to the right of way, then their adjacent property would be landlocked. See Page 5 of the Appellants' Brief. This argument is rather circular, however, as it presupposes a right that has never been established as a basis to defeat a right that is being established; partition of the property.

Upon the appointment of commissioners, the commissioners made inspection of the property, and present that time were the Defendant/Appellants and their counsel, and also the Plaintiff/Appellees and their counsel. Each party was given opportunity at that time to make arguments to the commissioners either for or against partition. The Commissioners noted in their report that the biggest concern of both parties was the right-of-way road located on the subject

property that goes from a public road to gas wells on the adjacent Bonner property, and the use of that road.

The plat of that road is shown on Exhibit "C" of the Appellants brief, immediately behind the Commissioners' report. It should be noted, however, that this plat is from other litigation involving Mrs. Renner, wherein she appealed a decision of the Circuit Court of Tyler County, West Virginia to this Court, reference No. 31242, involving Triad Energy, and this Court reversed the lower Court. This plat was not ever introduced in the proceedings of this case for any purpose, and, again, the propriety of its admission at this point in questionable. Particularly in light of the fact that the Commissioners did not attempt to partition the property after suggestion by Defendant/Appellant Bonners that Bonners get the area contained on the plat with the road. These Appellees believe, in concert with Plaintiff Renner's belief that the Commissioners did not so partition because to give the Appellants the area with the road right-of-way would also give the Appellants the only water source for livestock on the entire farm.

The Appellants filed their objections to the Commissioners' Report that: 1. the Commissioners should have allotted a smaller parcel to the Appellants and allotted the larger parcel to the Plaintiffs, 2. that the Commissioners failed to state facts and reasons supporting their conclusions why the real estate cannot be partitioned in kind, and 3, because the sale of the real estate as urged by the Commissioners would not promote the interests of the Appellants who use the right-of-way across the subject premises to reach other real estate of Edgar L. Bonner. The Bonners have falsely alleged that their real estate adjoining the subject property would be landlocked if either the sale is not subject to a right of way, or unless they receive that part of the

property by partition that contains the roadway. This is flatly false because the Bonners have a right-of-way across their brother's property to a road on the opposite side, and have testified in other proceedings that a right of way over the subject property is not necessary for them to access the Edgar Bonner property.

There was a hearing before the Circuit Court of Tyler County, West Virginia on July 31, 2009, and it was this hearing from which the Appellant's Petition for Appeal arises. The Court did on that date receive and approve the Commissioner's report, after ruling upon the parties' objections. No evidence was presented at this hearing by Appellants, and although it was stated to the Court that a vouch of the record was desired, no such presentation was made by them at that hearing or at any later time. The Order was entered on December 15, 2009. Said Order approving the Commissioners' Report appointed Appellants' Counsel, Keith White and Appellees' Counsel, Frederick Gardner, as Special Commissioners to conduct a sale of the subject property, but stayed the sale for a period of sixty (60) days in which time the Appellants were to proceed with a Petition for Appeal. No such Petition was forthcoming, and the Order was entered nearly six (6) months later. On January 15, 2009, a judicial sale was held at the front door of the Tyler County Courthouse at which the only bidders were John and Barbara Renner and Edgar and Hazel Bonner. Said sale was conducted as an auction and there were forty (40) separate bids. The highest bid was submitted by John and Barbara Renner in the amount of Two Hundred Thirty-five Thousand Dollars ($235,000.00). Thereafter, the Appellants filed this Petition for Appeal.

It should be noted that contrary to the allegation in Appellant's Petition for Appeal, Appellee Brian Trunk appeared for two (2) hearings in the course of this litigation, and

had filed an answer to the proceedings against him in this matter.

I. TABLE OF AUTHORITIES

WEST VIRGINIA CODE

WEST VIRGINIA CASES

II. DISCUSSION OF LAW AND ARGUMENT

The Defendants/Appellants Edgar L. Bonner and Hazel E. Bonner have submitted three (3) assignments of error, which Defendant/Appellees will address in sequence:

First Error: That the Circuit Court of Tyler County, West Virginia erred in ordering a sale of the subject premises when the Commissioners' Report did not contain facts to support a conclusion that the subject premises could not be partitioned in kind and where no evidence was presented to the Court showing that the real estate could not be partitioned in kind.

Partition is a creature of statute created by the legislature of the State of West Virginia, and expanded upon by this Court. *Chapter 37, Article 4* of the West Virginia Code sets forth that body of law regarding the right of partition between co-tenants in real estate. "A common law right to compel partition has been expanded by [statute] to include partition by sale." Syllabus Point 2, in part *Consolidated Gas Supply Corp. v Riley,* 161 W.Va. 782, 247 S.E2d 712 (1978). Syllabus Point 3 of the *Riley* case lays out the following standard of proof that must be established to overcome the presumption of partition in kind:

By virtue of W.Va. Code §37-4-3, a party desiring to compel partition through sale is required to demonstrate (1) "that the property can not be conveniently partitioned in kind," (2) "that the interest of one or more of the parties will be promoted by the sale," and (3) that the interest of the others parties will not be prejudiced by the sale."

The Court appointed commissioners to ascertain whether the property could, in fact, be partitioned. The commissioners, as aforesaid, did inspect the property and did make their report the Court. The Court thereafter conducted a hearing upon any objections to the Commissioners' Report. The Court took the Commissioner's report and made its Order that the real estate should be sold as one parcel, and made the subsequent orders as to the Special Commissioners to sell said real estate.

The Commissioners went out and viewed the property in dispute, with the primary parties and counsel. As stated before, it appeared that the primary concern for the primary parties was a road that is located on said property and the use of said road. The Commissioners recommended that the property should be surveyed and split into two (2) separate parcels with the center of the right-of-way road as a division line, as they were not susceptible to partition, and that doing so would afford both owners of the two (2) parcels use of that road. The Commissioners did not recommend allotment as was argued by the Defendants/Appellants Renner. The Commissioners believed that if the Court was not in favor of a division of the property into those two (2) parcels for sale, then the property can not be partitioned equally and it must be sold.

Had the Defendant/Appellants not made the right of way road an issue for the Commissioners to have to factor into their view of the land and the decision as to recommend partition to the Court by sale or allotment, or in kind, then the Commissioners could have made a partition of the land. The issue of the claim of right of way was the primary cause for the recommendation that the land not be susceptible to partition in kind. It was the reason the Commissioners only addressed the roadway and the use of the same in their findings addressed to the Court. This particularly onerous due to the circular reasoning involving the claimed right of way where no such claim has been established before nor asserted until now. It is the position of the Plaintiffs/Appellees that the Commissioners made a sufficient finding of fact upon which the Circuit Court could rely in finding that the property was not susceptible of equitable partition. The Commissioners in this case arrived at nearly the only conclusion that could be arrived at once the proverbial "skunk" of the right of way road was injected into the mix. The

Plaintiff/Appellees have cited the case of *Wilkins v Wilkins* 338 S.E.2d 388 (W.Va. 1985), wherein a ravine and slope in that property caused those specific commissioners to make a finding that those unique features did not permit an equitable partition. That is precisely the circumstances that have occurred herein. This case is even more on point when consideration is given to the facts in the record that constitute sufficient information in the record to control the proper disposition of the case. *Wilkins v. Wilkins, supra* at 391. Therefore, the Circuit Court made no error in light of the evidence in the record in regard to the promotion of the appellee's interests or the lack of prejudice to appellant's interest.

Second Error: The Defendants/Appellants argued that the Circuit Court erred in ordering the sale of the subject real estate where there was no evidence presented to the Court or facts stated in the Commissioners' Report that said sale would not prejudice the interest of the Defendants/Appellants where Edgar L. Bonner's real estate which adjoined the subject real estate would be landlocked if the subject real property was sold.

There has been no showing or even a hint that the Defendant/Apellant Edgard L. Bonner will be prejudiced by said of the subject real estate. The only evidence that could be so construed is the false claim that he will be land-locked by such a sale. As has been part of the record and other briefs to this Court, Defendant/Appellant received his property by testamentary bequest from his father. Defendant/Appellant and other family members own tracts around the subject real estate and there is now, and always during the time of ownership by the Bonner family, a road over his brothers so that Defendant/Appellant is afforded access to a public road by going over his brothers' properties. To now assert otherwise is a falsehood. Plaintiff/Appellant asserts a defense to this argument is found in *Ark Land Company v Harper,* 250 W.Va. 331, 599 S.E.2d. 754 (2004). "Evidence of longstanding ownership coupled with sentimental or emotional interest in a property, may also be considered in deciding whether the

interest of the party opposing the sale will be prejudiced by the property sale". Plaintiff/Appellant raises the question as to whether the Court wants to extend that to the sentimental or emotional interest in adjoining property to be considered as prejudicing a party opposing the sale of this property.

However, the Defendant/Appellees take a different view of the position of Defendant/Appellant Bonners. Simply put, one must remain consistent in the factual positions in the course of litigation. One cannot take a factual position in a matter and then take the convenient opposite position in another matter. This is exactly what the Bonners attempt to do. In part of pleadings, they assert the claim to a right of way by prescription. In another part, they take the position that to sell the property is to extinguish their right of way. In yet proceeding, Mr. Bonner admits that he has access to his property through an adjacent property. Thus, while this issue sounds in the same vein as the *Ark Land Company* case, these Defendant/Appellees point to *Haba v. Big Arm Bar and Grill, Inc.*, 468 S.E.2d 915, 196 W.Va. 129 (W.Va., 1996) for this Court to put an end to the sham of whether there is access or not. In that case, the Plaintiffs were barred from taking an inconsistent factual position from one case to another over the issue of certain lighting in an area wherein a fatality occurred near the bar from a pedestrian being struck by a vehicle. In one case, the lighting was said to be adequate, and in another case was said by the same party to now be inadequate. The parallel is astounding. Edgar Bonner has first admitted that access is had through adjacent property, which access was made to avoid precisely the issue that he attempts to claim is his prejudice here, to avoid being landlocked. He now tells this Court that the sale landlocks him. Such ubsequent factual position is barred by *Haba*.

Third Error: 3. That the Circuit Court of Tyler County erred in ordering a sale of the subject property where Plaintiffs' conveyed small interests in said

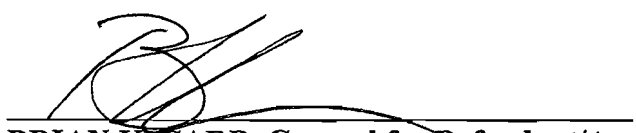
real estate for the purpose of defeating a partition in kind.

Plaintiff/Appellants hit the proverbial nail on the head by the citation of *Croston v Male,* 49 S.F. 136 (W.Va. 1904) in Syllabus Point 4, in part, that " meagerness of area in some or all of the shares due to the necessity of dividing a small tract of land among a number of people, and the existence of dower and curtsey estates in land, do not per se make partition inconvenient, within the meaning of the statute." Clearly, the conveyance of smaller shares of the subject property to the Defendant/Appellees is irrelevant and was not part of the Commissioners' consideration in making their recommendations to the Court. The Bonners now seek to shift blame for an unfavorable Commissioners' report from their own conduct in raising the frivolous right of way issue to blaming the Plaintiff/Appellees for the Commissioners' report. Property is freely alienable, subject to any restriction that may be in the chain of title, and, therefore, the conveyances to the Defendant/Appellees was completely proper. This was a ruling made by the Circuit Court of Tyler County, West Virginia at an earlier hearing as well, particularly since these conveyances were made with consideration and not as mere gifts.

IV. SUMMARY

The Defendant/Appellees pray that this Appeal be dismissed and that the Order of the Circuit Court of Tyler County be affirmed as written.

Respectfully submitted, Melissa Cox Felske, Brian Trunk, and Michael Trunk



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EDGAR L. BONNER and HAZEL E. BONNER, Appellants.

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner does hereby certify that on the 30th day of July, 2010, he served a true and exact copy of the foregoing and hereto annexed **BRIEF ON BEHALF OF MELISSA COX FELSKE, BRIAN TRUNK AND MICHAEL TRUNK** upon the following, by US Mail, first class, postage prepaid, all as follows:

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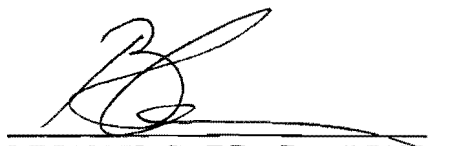

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