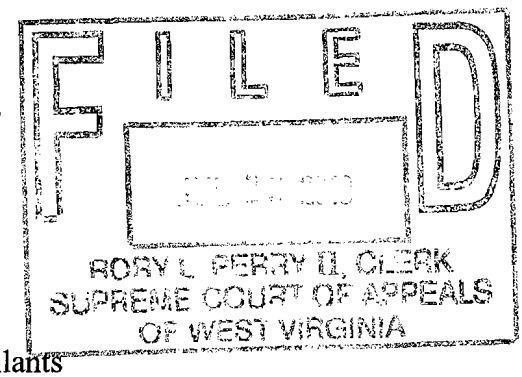
**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

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 BARBARA RENNER AND JOHN L. RENNER, APPELLEES

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## I. STATEMENT OF FACTS

The Plaintiffs/Appellees have 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 the co-tenants owning an interest in the subject property. The subject property is described as containing approximately 120.65 acres which is contained in three (3) separate assessments in Meade District, Tyler County, West Virginia.

Besides alleging all the ownership of the co-tenants and describing the real estate involved and the deeds by which everyone got their interest in the property, the Complaint of the Plaintiffs alleged in Paragraph 18 that the Plaintiffs moved into the old farm house located on the property and increased its value by drilling a new water well on the property, constructing a water line to service the farm house, constructing a new gas line to service the farm house, constructing a cabin on the 8 acre 104 pole parcel, placing a mobile home to be used as a rental on the 110-124/160 acres parcel, building a septic system to accommodate and service the mobile home, installing gas, electric and water service to the mobile home, clearing and mowing fields, planting thousands of pine trees on the property, cultivating the garden, and doing sundries and other things, which have improved and enhanced said property, thereby increasing its value. The Defendants, in their Answer, answered that allegation by simply stating that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in that Paragraph and therefore denied the same.

Further, in Paragraph 19 of the Complaint filed herein the Plaintiffs, Barbara Renner and John L. Renner, her husband, allege that they verily believe that said real estate is not susceptible of partition among the owners thereof because of the nature and

character of said property, it being a contiguous tract containing, in three (3) separate assessments, approximately 120.65 acres upon which is situate a two-story residence which was constructed *circa* 1850, a cabin which was constructed by the Plaintiffs, and containing fields which are cultivated and some of which are not cultivated, a large portion of a wooded area, steep hillsides, and wet bottom lands; and further alleged that if the Court found that said property is not susceptible to partition, then the Plaintiffs desire that the same be allotted to them or sold and the proceeds of sale be divided among the parties hereto according to their respective interests; and that should the Court find that said property is not divisible in kind or subject to partition, the Plaintiffs verily believe that the interests of those entitled to said real estate, or the proceeds thereof, will be promoted by an allotment or sale of the whole said real estate. The Defendants, Edgar L. Bonner and Hazel E. Bonner denied the allegations contained in Paragraph 19.

By that all inclusive denial they were denying not only that it was not susceptible to partition but that it contained 120.65 acres, that there was situate upon the property a two-story residence that was constructed *circa* 1850, a cabin which was constructed by the Plaintiffs, and that the property contained fields some of which were cultivated and some that were not cultivated, that the property contained a large portion of a wooded area, and that the property contained steep hillsides and wet bottom lands.

To the Defendants/Appellants this is not a partition suit. This suit is about a right-of-way. When Edgar and Hazel Bonner found out that the Renners were purchasing the outstanding undivided interests of the Heirs of the Robert E. Amos Farm, they interceded into the mix by buying the undivided 1/9 interest of Billy G. Worden for the intended purpose of getting a right-of-way across this property. The deed from Billy

Worden was dated January 30, 2001. That move by the Bonners initiated a Civil Action by Barbara Trunk Renner against Billy Worden, Edgar Bonner and Hazel Bonner. The Memorandum Order which was attached as Exhibit "A" to the Appellants Brief was a culmination of that suit.

The Appellants claim that they have a prescriptive easement across the Robert E. Amos Farm which is the property in question. See Page 7 of the Appellants' Brief. The Appellants also state in their brief that unless the sale was subject to the right-of-way their adjoining real estate would be landlocked. See Page 5 of the Appellants' Brief. Appellants have never filed suit to establish their prescriptive right-of-way.

The Appellants raised their objections to the appointment of the commissioners for determining whether said property was subject to said partition on the grounds that the Appellees had committed sham transactions in order to defeat partition. In the hearing on the Motion for Appointment of Commissioners held on June 7, 2007, Judge Karl at Page 6, line 12 ruled that he did not know of any prohibition to prevent Mrs. Renner from signing off on parcels as she needed to, to family members or whomever. Obviously, Judge Karl did not feel that her conduct was inequitable, or that she had 'unclean hands'. He went on to appoint the three (3) Commissioners on that day.

The Appellants have assumed that the Commissioners could not partition the real estate because the Plaintiffs conveyed what the Appellants called ridiculously small interests in a parcel of real estate.

As stated in the Commissioners' Report, the Commissioners went out and viewed the property in dispute. At that time both parties and their attorneys were present on the property and the Commissioners were given reasons by both parties as to why or why not

the property could be partitioned. 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. The Commissioners did not attempt a partitioning even though it was suggested to them by the Appellants that they should get the area contained on the plat with the road. It is the Appellees belief that the Commissioners failed to 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. In other words, in order to give Appellants the parcel containing the road right-of-way which accesses the gas well located on the Appellants property, the Commissioners would have necessarily deprived the Appellees, who would have the remaining property, of access to water by the Appellees' livestock.

The Appellants filed their objections to the Commissioners' Report arguing that the Commissioners should have allotted a smaller parcel to the Appellants, Edgar L. Boner and Hazel E. Bonner and allotted the larger parcel to the Plaintiffs. They further objected to their report on the basis that the Commissioners failed to state facts and reasons supporting their conclusions why the real estate cannot be partitioned in kind.

Most importantly to the Appellants, they objected 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 the real estate of Edgar L. Bonner. Appellants allege that unless the sale would be subject to said right-of-way their real estate adjoining the subject property would be land locked. That is just another false

statement. The Bonners have a right-of-way across their brother's property to a road on the opposite side.

The Order of the Court 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. 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). Said sale is subject to confirmation by the Court, and of course subject to this appeal.

## II. TABLE OF AUTHORITIES

**WEST VIRGINIA CODE**

Chapter 37, Article 4, Section 3 ..... 9

**WEST VIRGINIA CASES**

*Consolidated Gas Supply Corp. v Riley* 161 W.Va. 782, 247 S.E.2d 712 (1978) ..... 9

*Wilkins v Wilkins* 338 S.E.2d 388 (W.Va. 1985) ..... 11

*Ark Land Company v Harper* 250 W.Va. 331, 599 S.E.2d 754 (2004) ..... 12

*Fanti v Welsh* 161 S.E.2d 501 (W.Va. 1968) ..... 13

*Croston v Male* 49 S.E. 136 (W.Va. 1904) ..... 13

## III. DISCUSSION OF LAW AND ARGUMENT

The Defendants/Appellants Edgar L. Bonner and Hazel E. Bonner have submitted three (3) assignments of error.

First Error: 1. 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.

This Court has recognized that by virtue of *W.Va. Code §37-4-1 et. seq.* "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). In that same case at Syllabus Point 3 this Court set 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 Defendants/Appellants correctly state that on July 31, 2009, the Court held a hearing upon the objections of the parties to the Commissioners' Report. Although, both parties had a number of witnesses present, including the Commissioners appointed herein, the Court, without taking evidence, determined that the real estate should be sold as one parcel and appointed Frederick E. Gardner and Keith White as Special

Commissioners to sell said real estate. Both parties were prepared on July 31, 2009 to offer evidence in support of or against the sale of the subject property. We were not, however, allowed to produce the same.

The Commissioners' Report which is in the record, does not specifically contain numbered findings of fact. However, a reading of the same shows that the Commissioners went out and viewed the property in dispute. That the Commissioners were given by both parties reasons why or why not the property could be partitioned. That the biggest concern of the parties was a right-of-way 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. They also found that if that was done, then the two (2) parcels were sold, as they were not susceptible to partition, that both owners of the two (2) parcels would have a joint use of that road. They recommended the sale of both parcels on the Courthouse steps and felt that the sale of the property, as divided, would give both parties a fair share of both parcels. The Commissioners found that a sale of those two (2) parcels would give the parties involved the opportunity to bid on one or both parcels as mentioned above. The Commissioners did not recommend allotment as was argued by the Defendants/Appellants. 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.

The letter of the Commissioners is tantamount to a Finding of Fact that it was the roadway which was being the major issue that caused them to be unable to partition the property in a manner which would be equitable to all parties involved. It was the

argument of the Defendants/Appellants that actually kept the Commissioners from being able to partition the property and not any other reason. It was the reason the Commissioners only addressed the roadway and the use of the same in their findings addressed to the Court. It was the insistence of the Defendants/Appellants that they be given the parcel with the roadway on it that kept the Commissioners from being able to partition the property in kind.

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 Plaintiffs/Appellees would liken the roadway in this case to the ravine in *Wilkins v Wilkins* 338 S.E.2d 388 (W.Va. 1985) which caused the Commissioners appointed in that case to make a finding that the location of the ravine and the slope of the property did not permit an equitable partition. In that case the circuit court did not make findings of fact with respect to the promotion of the appellee's interests or the lack of prejudice to appellant's interest. This Court stated at page 391 that "Although such failure constitutes a violation of Rule 52(a) W.Va. R. C. P., it is not necessary in this case to remand for compliance with the rule.... when there is sufficient information in the record with regard to the facts which control the proper disposition of the case."

Second Error: 2. 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.

The statement that Edgar L. Bonner's real estate would be landlocked is a pure fabrication. Mr. Bonner was willed his property by his father who left his farm of over Three Hundred (300) acres to his four (4) children in different parcels. Mr. Bonner, as well as his sister, own property at the back end of his father's farm. There is a roadway which traverses the property which his father devised to his brothers so that he can have access, as well as his sister, to a public road by going over his brothers' properties. Mr. Bonner has simply decided that it is more convenient to go across the Amos Heirs Farm which is the subject of this suit. In *Ark Land Company v Harper*, 250 W.Va. 331, 599 S.E.2d. 754 (2004) this Court held its Syllabus Point 3 in part that "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".

The question in this case is 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. The Defendants/Appellants are actively urging that because Mr. Bonner owns adjacent property and wants a right-of-way across this property that this Court should consider that if this property is sold that the sale would be prejudicial to him for that reason. The Plaintiffs/Appellees do not feel that this Court should extend one's attachment to adjoining property to put a stay on the sale of this property.

The Defendants/Appellants have stated that they have a prescriptive easement across the subject property. A bonafide purchaser for value could extinguish a prescriptive easement that is not visible and of which they have no actual or constructive notice. (See *Fanti v Welsh*, 161 S.E.2d 501 (W.Va. 1968). A visual examination of the subject premises would reveal the roadway to the Bonner gas well in which the Defendants/ Appellants claim a prescriptive right-of-way. This would give a bonafide purchaser for value notice of a prescriptive right-of-way.

If they do have a prescriptive easement across the subject property that easement is not extinguished and would not be extinguished by a sale in partition. The purchaser at the sale and partition would stand in the same position that the parties all stand now. If this property is a subservient property to the Bonner property that will not change by a sale in partition. It would still be subservient to the Bonner property as far as the right-of-way is concerned, if indeed the Bonners have a prescriptive easement.

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.

It is important to note that the Commissioners did not mention the conveyances of the Plaintiffs/Appellees in their report to the Court.

The Circuit Court, as stated above, did not find that the conduct of Barbara Trunk Renner was unconscionable or inequitable as to bar this action in partition even though the same was argued before the Court.

For that matter, this Court stated in *Croston v Male*, 49 S.E. 136 (W.Va. 1904) in Syllabus Point 4, in part, that " meagerness of area in some or all of the shares due to the

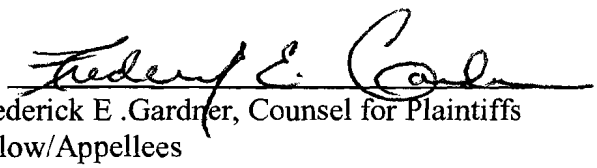
necessity of dividing a small tract of land among a number of people, and the existence of dower and curtsey estates in land, do not per se make partition inconvenient, within the meaning of the statute." Thus it is apparent that the Commissioners were not to consider the smallness of the interest which have been conveyed by the Plaintiffs/Appellees to relatives in exchange for consideration. It should be noted that the Commissioners did not mention the same as an obstacle to partition in this matter.

## IV. SUMMARY

Your Appellees pray that this Appeal be dismissed and that the Order of the Circuit Court of Tyler County be affirmed.

Dated July 21, 2010

Respectfully submitted, Barbara Renner and John L. Renner, Plaintiffs Below, Appellees

By 

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EDGAR L. BONNER and HAZEL E. BONNER, Appellants

**CERTIFICATE OF SERVICE**

That I, Frederick E. Gardner, Counsel for Plaintiffs Below/Appellees, Barbara Renner and John L. Renner, hereby certify that on the 21st day of July, 2010, a true and correct copy of the foregoing BRIEF ON BEHALF OF BARBARA RENNER AND JOHN L. RENNER, APPELLEES, was served upon the following, by mailing postage pre-paid, through United States Postal Service to:

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