

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FAITH UNITED METHODIST CHURCH AND CEMETERY
OF TERRA ALTA, WEST VIRGINIA AND TRINITY
METHODIST CHURCH OF TERRA ALTA, WEST VIRGINIA,**

PETITIONER,

VS.

**DOCKET NO.: 12-0080
(CIVIL ACTION NO.: 11-C-27)**

MARVIN D. MORGAN,

RESPONDENT.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT

A handwritten signature in black ink, appearing to read "Steven L. Shaffer".

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RESPONSIVE ARGUMENT

Now comes the petitioners, Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, by counsel, and herein submits this responsive argument in rebuttal to the brief of respondent heretofore filed.

The respondent has stated in his reply brief that the 1907 Forman deed was ambiguous and was reasonably susceptible to more than one meaning. In his brief, respondent stated that

The term ‘ambiguity’ is defined as language ‘reasonably susceptible of two different meanings’ or language ‘of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.’

Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995), quoting Syl. Pt. 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985).

The real issue in this matter is, what did the word “surface” mean in 1907 at the time when the Forman deed was prepared?

The respondent answered this question when he stated, on page 18 of his brief, that in *Williams*, the Court adopted a hard and fast definition for the term “surface,” declaring that surface meant the upper or superficial part of the land. By granting only the surface, therefore, the Court held that the original owner retained all other interests in the land, including the oil and gas. *Williams v. South Penn Oil Co. et al.*, 43 S.E. 214, 217, 52 W.Va. 181 (1903). See *Respondent’s Brief, Page 18*. The respondent went on to state, on page 18 of his brief, that the *Ramage* court overruled this portion of *Williams*, concluding that the term “surface,” when used as the subject of a conveyance, will not always have the same meaning, but, rather, must be interpreted within the context in which it is used. *Ramage v. South Penn Oil Co.*, 118 S.E. 162, 94 W.Va. 81 (1923) See

Respondent's Brief, Page 18. The *Ramage* case was not decided until 1923, some sixteen (16) years after the Forman deed was prepared.

That is the exact scenario as in the present case. Florence Forman conveyed the “surface only” in the real estate which meant that all she conveyed was the surface and that she retained all other interests in the land, including the oil and gas. The prevailing law in 1907 was the law from the *Williams* case which clearly held that when the word “surface” was used in a deed of conveyance, that the only thing conveyed was the surface and that the grantor retained all other interests in the land, including the oil and gas. The deed was clear and unambiguous in 1907, when it was prepared, and remained that way until sixteen years later when the Court overruled *Williams* with the *Ramage* case in 1923. If the Forman deed was prepared after 1923 and after the Court had ruled on *Ramage*, then the deed could possibly have been declared ambiguous because of the new law *Ramage* set forth in overruling that part of *Williams*, which was law in 1907.

The Respondent goes on to state, on page 25 of his brief, that the *Ramage* court stated that “the express mention of one thing implies the exclusion of another.” *Ramage*, 94 W.Va. 81, 118 S.E. 162, 169. *See Respondent's Brief, Page 18.*

In the 1907 deed, Florence Forman not only used the word “surface” to denote what she was conveying, she went one step further and used the words “surface only” to expressly, clearly and unambiguously state that she was only conveying the surface of the real state. As the Respondent stated in his brief, the express mention of one thing implies the exclusion of the other. The use of the word “only” behind the word “surface” clearly shows that Florence Forman did not intend to convey the mineral and gas which was underneath the surface.

The West Virginia Supreme Court stated that where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily will not resort to parol or extrinsic evidence. *Pocahontas Land Corp. v. Evans*, 332 S.E.2d 604, at 609 (W.Va. 1985)

That Court further stated that “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl pt. 4, *Zimmerer v. Romano*, 223 W.Va. 769, 679 S. E.2d 601, (2009).

The Court also stated “It has long been held that where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give to every word its usual meaning.” *W. Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, at 825, 226 S.E.2d 717, at 719 (1976).

As the Court has stated in these cases, if the grantor’s intent is clearly expressed in definite and unambiguous language, the lower court is to give effect to such language and it is not subject to judicial interpretation. The Court also stated that the lower court had the duty to give every word its usual meaning.

The West Virginia Supreme Court also stated in 1902 that “in the construction of deeds, as well as wills, the rule **nowadays** is that the intention of the grantor controls, and technical words of legal import must yield to plain intent, and the whole instrument, not merely and separately disjointed parts, is to be considered.” *UHL v. Ohio River R. Co.*, 41 S. E. 340, 51 W.Va. 106 (1902)

The *UHL* and the *Williams* cases were the governing law regarding the word “surface” when used as a conveyance of real estate and how a court was to interpret a deed in 1903, and even up

through 1907, when the Forman Deed was prepared and recorded. Another key word in the *UHL* case is “**nowadays.**” That word is important because that was the law which was used in 1907, when the Forman Deed was prepared, not the law set forth in *Dolan* in 1911, nor the law set forth in *Ramage* in 1923. To hold the 1907 preparer of the Forman Deed to the standard of that person trying to know what the law was in 1911, 1923, 2011, or 2012 is preposterous, ridiculous and impossible.

The Supreme Court, in between the time they ruled on *Williams* in 1903 and the time they ruled on *Ramage* in 1923, had the opportunity to revisit the word “surface” in 1911 in the *Dolan* case. In that case the Court had a Will interpretation before it and was quick to note that the *Williams* case was properly decided in that *Williams* was interpreting a deed. *Dolan et al., v. Dolan et al.*, 73 S.E. 90, at 92, 70 W.Va. 76 (1911).

So we see, if the 1911 West Virginia Supreme Court would have had the present case before it, it would have clearly ruled that the words “surface” and especially the words “surface only” when used in a Deed, clearly means that only the surface was conveyed and not the minerals. And this was four years after the Forman deed was prepared.

The 1923 Court, in overruling *Williams* stated that “it is but fair to say that if the *Williams* Case was correctly decided, as Judge Brannon says in the *Dolan* Case, then it is a precedent for the decision in this case, binding upon us, unless we overrule it.” *Ramage v. South Penn Oil Co.*, 118 S. E. 162, at 169, 94 W.Va. 81 (1923). That goes to prove that the word “surface” as set forth in the *Williams* Case was the law in 1907, and that Florence Forman only conveyed the surface to her brother in the 1907 deed. The 1923 West Virginia Supreme Court, in *Ramage*, overruled Syllabus Point 1 of *Williams*. However, that Court did not state that the rule was retroactive and that-

therefore-all deeds prepared prior to 1923, and that all title examinations prepared prior to 1923, were null and void because of the new law created in 1923, in *Ramage*.

At the time, in 1907, when the Forman Deed was prepared, the governing law in the State of West Virginia was that the word “surface” had a definite and certain meaning and that was the portion of the land which is or may be used for agricultural purposes. Plain and simple, that was the law when it came to a conveyance of real estate. In 1911, the Court looked at the word “surface” in regards to a Will interpretation and the Court said that the word surface had a different meaning when used in a Will than it did in a deed. Then in 1923, the Court said that it was overruling the *Williams* case in regards to the word “surface.” This was some 21 years after *Williams* was decided and attorneys in the State of West Virginia prepared many deeds using the word “surface” and used it with the definition which the West Virginia Supreme Court used. The attorneys who were preparing deeds during this time period could not know that the same court, years later would change the meaning of a word. Those deeds were prepared using the law in effect at that time and those deeds exhibited the intent of the grantors who wanted to convey the surface of their property and not the surface and all mineral underneath.

Florence Forman was one of these grantors and the deed she had prepared was clear and unambiguous in 1907 and that 1907 deed is clear and unambiguous today, using the law which was law at that time.

The Preston County Circuit Court should have ruled that the 1907 Forman Deed was unambiguous and that Florence Forman only conveyed the surface only of the 225 acre tract and that she was the owner of the oil and gas under the subject tract.

The 1907 deed between Florence Forman, the grantor, and Walter Forman, the grantee, was clear and unambiguous and clearly only conveyed the surface in the 225 acre tract. The importance of the present case cannot be overstated. If the law in *Ramage* is applied retroactive and is applied to all conveyances wherein the grantor used the word “surface” or “surface only” intending that only the surface be conveyed, it could change the entire real estate law as we know it and could affect every individual and business in the State of West Virginia. Every title examination which had been prepared on deeds of conveyance prior to 1923 could be affected.

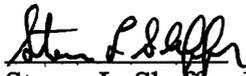
CONCLUSION

In 1907, when Florence Forman had the deed prepared, the law in West Virginia regarding what was conveyed when a deed stated that the surface was conveyed was that just the surface (the upper or superficial part of the land) was conveyed and that the grantor retained all other interest in the land, including the mineral rights. This law was set forth in 1903 in the *Williams* case. That law was clear that by granting only the surface, the original owner retained all other interests in the land, including the oil and gas. That was the law until 1923. That was the law when the Forman deed was prepared and that was the law for sixteen years after the Forman deed was prepared.

The *Ramage* case, which was not ruled on until 1923, changed the law regarding what the word “surface” meant in regards to a deed. The law which came out of *Ramage* was that the term “surface,” when used as the subject of a conveyance, will not always have the same meaning, but, rather, must be interpreted within the context in which it is used.

Florence Forman and the preparer of her deed in 1907 complied with all of the laws at that time regarding deed preparation and clearly set forth in her deed that she was conveying the “surface only” and the deed was unambiguous and clear on its face.

The petitioner prays that this Court does the right thing and sets the Circuit Court’s judgment aside and Order that the 1907 Forman Deed is unambiguous and that the heirs and assigns of Florence Forman are the owners of the 1/7 interest in and to the oil and gas underlying the 225 acre tract.



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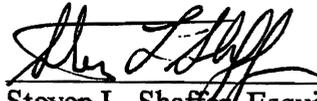
MARVIN D. MORGAN,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2012, I served a true and actual copy of the hereto annexed "*Petitioners' Reply to Brief of Respondent*" upon the respondent by mailing the same to counsel of record, by first class mail, postage prepaid, to the following address:

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