

11-1132

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

GLENN SPITZNOGLE, JR., and  
MARLENE SPITZNOGLE,  
Plaintiffs,

v.

CIVIL ACTION NO. 09-C-209H

KEVIN R. DURBIN, and  
KRISTA A. DURBIN,  
Defendants.

2011 MAY 20 PM 1:43  
DANIEL H. LALY

**ORDER GRANTING SUMMARY JUDGMENT**

On the 15<sup>th</sup> day of April, 2011, came the plaintiffs, Glenn Spitznogle, Jr. and Marlene Spitznogle, by counsel, Frederick E. Gardner, and also came the defendants, Kevin R. Durbin and Krista A. Durbin, by counsel, Thomas E. White, for oral argument on the plaintiffs' motion for summary judgment and the defendants' response thereto.

The plaintiffs timely filed their motion for summary judgment with MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT, and the defendants timely filed their DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

After mature consideration thereof, and after hearing oral argument, the Court is of the opinion to DENY the plaintiffs' motion for summary judgment and does hereby GRANT summary judgment in favor of the defendants. The Court's decision is based on the following findings and conclusions:

## FINDINGS OF FACT

1. Plaintiffs (Spitznogles) and defendants (Durbins) entered into a land contract on September 1, 1999, wherein Durbins agreed to sell a 138 acre tract, less a small exception, for the sum of \$60,000, payable at the rate of \$500 per month, for 120 months.
2. The contract was not drafted by an attorney.
3. The contract was silent as to the sale of any oil and gas rights to the Spitznogles.
4. After full payment, the Durbins executed and delivered a deed on December 30, 2009, conveying the property to Spitznogles and reserving to themselves, the oil and gas.
5. Spitznogles accepted the deed and caused it to be recorded (DB 694/611).
6. Durbins became the owners of the subject property by deed dated June 1, 1993 from Roger Guy Holmes and Janice Lou Holmes (DB 573/132).
7. The Holmes became the owners by deed dated May 1, 1969 from Johnson Scherich and Lorena Scherich (DB 406/194). In the latter deed, the Scherichs reserved the oil and gas interests to themselves for their joint lifetimes.
8. At the time the land contract was executed for the subject property, both Scherichs were still alive and therefore the life estates were in existence.
9. Johnson Scherich died on April 26, 2000 and Lorena Scherich died on November 19, 2001, at which time the remainder mineral rights vested in the Durbins.
10. Although there may have been verbal statements between the parties in dispute, the Court has not considered the same because of the parol evidence rule, and the same do not constitute material facts to the decision in this matter.

11. The Court finds that there are no material facts in genuine dispute, within the meaning of Rule 56 of the West Virginia Rules of Civil Procedure.

### CONCLUSIONS OF LAW

12. In order to grant summary judgment, the trial court must determine that “it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963); *Glen Falls Insurance Co. v. Smith*, \_\_\_\_ W.Va. \_\_\_\_, 617 S.E.2d 760 (7-1-2005).  
The Court so concludes in this matter.
13. Where there is no genuine issue of material fact, the Court may grant summary judgment to the nonmoving party if entitled thereto as a matter of law. *Cruce v. Randall*, 266 S.E.2d 486 (1980).
14. The plaintiffs’ central argument was to the effect that land contracts should be construed like deeds with respect to transferring fee simple interest unless stated otherwise.
15. The defendants’ central argument was to the effect that the terms of the land contract were superseded by the language of the deed which the defendants accepted and recorded containing the reservation of oil and gas, pursuant to the doctrine of merger.
16. It is the Court’s opinion that the deed accepted and recorded by the plaintiffs controls over the land contract. Where an executory land contract is followed by a conveyance thereof, the contract is merged into the deed and the deed will control. *Wolfe v. Landers*, 124 W.Va. 290, 20 S.E.2d 124 (1917). A contract of sale is merged in a conveyance

made in pursuance of it, and, if there is any conflict between the papers, the deed controls.

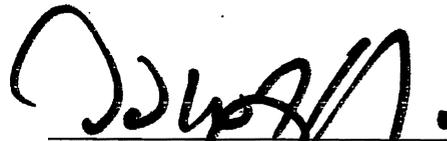
*Harman v. Dry Fork Colliery Co.*, 80 W.Va. 780, 90 S.E.2d 1047 (1916).

17. Since the deed contained provisions reserving the mineral rights to the defendants, the deed controls and the defendants are entitled to ownership of the mineral interests.

**RELIEF GRANTED / ORDERED**

18. Summary judgment is DENIED to the plaintiffs.
19. Summary judgment is GRANTED to the defendants.
20. The plaintiffs, Glenn and Marlene Spitznogle, own the surface of the subject land described in the Deed dated December 30, 2009, and recorded in Marshall County Deed Book 694, Page 611.
21. The defendants, Kevin and Krista Durbin, own any minerals and mineral rights (not previously reserved or conveyed away) under the land described in the Deed dated December 30, 2009, and recorded in Marshall County Deed Book 694, Page 611.
22. Objections and exceptions of the plaintiffs are noted and saved.
23. The Clerk shall provide copies of this Order to counsel of record.

Entered this 20 day of May, 2011.

  
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David W. Hummel, Jr.  
Circuit Court Judge

A Copy Teste:

David R. Ealy, Clerk

By Donna Cross Deputy

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