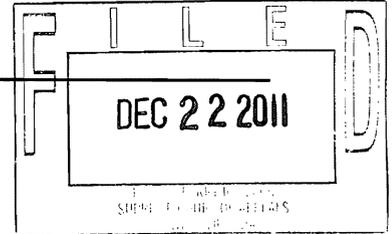


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1132

GLENN SPITZNOGLE, JR., and
MARLENE SPITZNOGLE,
Petitioners,



Appeal from a final order
of the Circuit Court of Marshall County
(Civil Action No. 09-C-209H)

vs.

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

RESPONDENTS' BRIEF

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STATUTES

W.Va.Code, §36-1-11. 5

I. ASSIGNMENTS OF ERROR¹

- A.** The petitioners have claimed the lower court erred by granting summary judgment to the respondents, and appear to claim error alleging that the lower court found the respondents to be the owners of oil and gas mineral interests in the subject real estate, not previously reserved or conveyed away.
- B.** The petitioners have claimed the lower court erred by finding that the land contract merged with the deed that reserved oil and gas interests.
- C.** The petitioners have claimed the lower court should have granted summary judgment to the petitioners rather than to the respondents, asserting no genuine issues of fact and entitlement as a matter of law.

II. STATEMENT OF THE CASE

A. Procedural Posture

Petitioners, Glenn Spitznogle, Jr. and Marlene Spitznogle (hereafter “Spitznogles”), commenced a civil action in the Circuit Court of Marshall County by filing a complaint against the respondents, Kevin R. Durbin and Krista A. Durbin, complaining that the respondents had refused to convey oil and gas interests to them upon completion of a land contract between the parties.

¹ These Assignments of Error are the undersigned’s attempt to fairly paraphrase those claimed by the petitioners, and to avoid any misapprehension, the Court is referred to the petitioners’ brief for the source material.

Limited discovery was conducted. Pursuant to an established schedule the Spitznogles filed their motion for summary judgment and memorandum supporting the same and Durbins filed their response and memorandum in opposition, requesting summary judgment on their behalves. Oral argument was held, and on May 20, 2011, the Circuit Court entered an Order denying summary judgment to the Spitznogles and granting summary judgment in favor of the Durbins. A.R. 97-100.

B. Facts

Spitznogles and 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, with monthly payments to be made for 120 months. The contract was not drafted by an attorney. The contract was silent as to the sale of any oil and gas rights to the Spitznogles. (Copy at A.R. 31-32; 80-81). 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. Spitznogles accepted the deed and caused it to be recorded.

Durbins became the owners of the subject property by deed dated June 1, 1993 from Roger Guy Holmes and Janice Lou Holmes (Copy at A.R. 29-30). The Holmes became the owners by deed dated May 1, 1969 from Johnson Scherich and Lorena Scherich (Copy at A.R. 11-13; 33-35). In the latter deed, the Scherichs reserved the oil and gas interests to themselves for their joint lifetimes.

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. It is undisputed that Johnson Scherich died on April 26, 2000 and Lorena Scherich died on November 19, 2001.

Kevin Durbin executed and filed an Affidavit contemporaneously with the Durbins' request for summary judgment, that he is familiar with the oil and gas industry having been employed in the field, that he owns and operates an oil and gas well, would never consider \$60,000 adequate consideration for selling the oil and gas rights to the petitioners, and that he is in the habit of reserving oil and gas when he conveys land to others. A.R. 96. No disputing evidence was offered by the Spitznogles.

III. SUMMARY OF ARGUMENT

- A. The petitioners' first assignment of error is not well understood. It seems to claim the court erroneously found that the respondents, Durbins, owned oil and gas interest in the land. Respondents do not understand this claim (perhaps due to typographical errors in petitioners' brief) and there seems to be no argument in the petitioners' brief addressing the same, except for perhaps issues surrounding the oil and gas life estates discussed below. The tenor of the petitioners' argument seems to indicate no dispute that the Durbins indeed owned the oil and gas.
- B. Next, the petitioners, Spitznogles, assert that the absence of a reservation of oil and gas in the land contract should be treated as the rule in deeds, wherein fee title passes unless otherwise provided. The respondents, Durbins, assert that this rule

would not apply where the Spitznogles accepted and recorded a deed that did reserve the oil and gas to the Durbins, pursuant to the doctrine of merger.

- C. Finally, the petitioners have claimed the lower court should have granted summary judgment to the petitioners rather than to the respondents, asserting no genuine issues of fact and entitlement as a matter of law. Respondents herein agree there are no material factual disputes, but assert they are entitled to summary judgment as a matter of law. In the alternative, if parol evidence should have been considered by the lower court, then summary judgment should be denied to both parties and the matter remanded for evidence.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument may be deemed unnecessary pursuant to the criteria in Rule 18(a), as the dispositive issue or issues have been authoritatively decided; and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. Lack of Mineral Reservation in Land Contract

Petitioners cite the case *Freudengerger Oil Co. V. Simmons*, 79 W.Va. 46, 90 S.E. 815 (1916), and others for the proposition that, “A deed conveying lands, unless an exception is made therein, conveys all the estate, right, title and interest whatever, both at law and in equity, of the

grantor in and to such lands.” Respondents agree. This law applies to deeds, and the cases cited by the petitioners construe a statute, *W. Va. Code* §36-1-11, which provides:

When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will.

The cited cases and statute they construe deal specifically with conveyances and devises. It simply does not apply to a land contract as it is not a deed, conveyance, or devise, but only an agreement to convey in the future. Petitioners are unable to cite a case or statute that requires reservations be set forth in land contracts because there apparently is no such case or statute.

B. Deed Provisions Constitute Merger of Land Contract Provisions

The doctrine of merger provides that the deed supersedes the land contract and any provisions at variance are ignored because the deed constitutes the final word as a merger of the contract and the deed. Under the doctrine of merger, when a deed is delivered and accepted, the general rule is that the contract is merged in the deed; and no cause of action upon the prior agreement then exists. 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. 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). Other jurisdictions have agreed. *Fuller v. Drenberg*, 3 Ohio St.2d 109, 111, (1965); *McSweyn v. Musselshell County*, 632 P.2d 1095, 193 Mont. 525 (1981); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). Nor can parol evidence generally be introduced to dispute the provisions of a deed.

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

When the Spitznogles accepted delivery of the deed from the Durbins that conveyed the surface and reserved the minerals, and had it recorded, this act constituted acceptance of the deed as written as the doctrine of merger would apply. The Durbins effectively reserved the oil and gas to themselves in said deed and the same was not conveyed to the Spitznogles. Consequently, the Spitznogles' claim for the oil and gas interests was properly denied by the circuit court.

C. Former Owners' Life Estates in Mineral Interests

Although probably understood to be a red herring unnecessary to the decision of this matter, out of an abundance of precaution, the respondents herein respond to some assertions in petitioners' brief regarding the former owners' life estates in mineral interests, and perhaps to the petitioners' first assignment of error.

The petitioners' brief recites that "Mr. Durbin had advised the Plaintiffs/Appellants that he was not going to convey the oil and gas as he mistakenly believed that he and his wife did not receive the oil and gas until after the contract had been entered into ... " There was no evidentiary hearing in this matter, nor any affidavit filed by the Spitznogles to establish what may be recognized as hearsay. Moreover, the lower court declined to consider parol evidence. More importantly, it is not completely clear what point the petitioners are asserting by indicating this. Nevertheless, the respondents provide the following:

When the Durbins received conveyance of the land, they received the fee simple interest subject to the reservation of oil and gas life estates in former owners. The life tenants were still alive when the land contract with the Spitznogles was executed. It is well settled that under such

a circumstance the Durbins received a then presently vested remainder interest in the oil and gas. Remainders are future interests that are immediately vested in a known remainderman. The Durbins did not suddenly get an oil and gas interest in the property when the life tenants died as the petitioners may be intimating. That the Spitznogles were in possession of the land via the land contract at the time the life tenancies expired is an unimportant event or status. The expiration of the life estates was not an event that could confer any interest in land to the Spitznogles. Moreover, although the Spitznogles would have an equity interest in whatever the land contract conferred, they do not get title to the land until the contract is completed. Being in possession of the land when the life estates expired means nothing.

Neither does it matter that the Durbins may have erroneously thought and stated that they got the oil and gas interest from the Scherichs (life tenants) under the will of Johnson Scherich. To a layman, it may be reasonable to assume it happens that way when a life tenant dies. Arguably, it makes it even more reasonable that Durbins had no intention of including oil and gas interests in the land contract if they did not think they got them until the Scherichs' deaths. To have a valid contract with respect to selling the oil and gas rights to the petitioners, there had to be a meeting of the minds with respect to that issue among the parties. The absence of a mutual understanding on the issue at the time the contract was made is undeniably apparent. Having no mutual meeting of the minds on that issue at the time of the contract renders that part of the deal of no effect.

D. Granting Summary Judgment to Nonmoving Party

Obviously, the respondents believe that summary judgment was proper in that there was

no genuine issue of material fact and the trial court granted such judgment in their favor. The lower court was free to rule in favor of whichever party should win based on those facts as a matter of law and granted summary judgment to the nonmoving party. *Cruce v. Randall*, 266 S.E.2d 486, (1980).

Nevertheless, out of an abundance of precaution, and as an alternative argument, the respondents herein argue that there may be factual issues in dispute which may require denial of summary judgment to both parties, if parol evidence should be considered.

E. Application of Parol Evidence Rule

The Court may deem it necessary to consider extraneous evidence pursuant to the parol evidence rule. If so, such evidence would exemplify factual disputes regarding who said what to whom about the oil and gas interests underlying the subject property, perhaps establishing the intent of the parties with respect to the mineral rights. The parol evidence rule is a doctrine that prohibits the introduction of oral testimony or other evidence extrinsic to the contract to explain its meaning or intent, unless there was ambiguity or other lack of clarity. West Virginia law regarding application of the parol evidence rule is well-settled. “[W]here the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it made contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement.” *Haymaker v. General Tire Inc.*, 187 W.Va. 532, 420 S.E.2d 292 (1992); *Yoho v. Borg-Warner Chemicals*, 185 W.Va. 265, 266, 406 S.E.2d 696, 697 (1991); *Kanawha Banking & Trust Co. v. Gilbert*, 131 W.Va. 88, 101, 46 S.E.2d 225, 232-33 (1947).

Conversely, the law does provide that parol evidence may be used to explain uncertain, incomplete, or ambiguous contract terms. See *Glenmark Associates, Inc. v. Americare*, 179 W.Va. 632, 371 S.E.2d 353 (1988); *Holiday Plaza, Inc. v. First Fed. Sav. & Loan Ass'n*, 168 W.Va. 356, 285 S.E.2d 131 (1981); *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

Here, there may be an uncertain, incomplete, and ambiguous issue with respect to whether the parties contemplated the issue of whom was to end up with the oil and gas. If the Court determines that the contract is uncertain, incomplete, or ambiguous, then the parties would be permitted to testify as to their respective intents and testimony about what was said between the parties orally would be admissible. If that is the case, then summary judgment is clearly inapplicable, and the matter should be remanded for the taking of evidence.

Of particular import in this regard, would be a “value” argument that would be asserted on the Durbins’ part. The land contract sale price was \$60,000 for slightly less than 138 acres. This constitutes a sale for approximately \$435 per acre. This fact alone should show that there was no intent to sell or convey the valuable oil and gas interest to the petitioners. This price is indicative of a conveyance of the surface only. Mr. Durbin’s Affidavit (A.R. 96) indicates that he knew and considered the value of oil and gas, was well versed in the area, had worked in the oil and gas arena, actually operates his own oil and gas well, and had reserved oil and gas in prior conveyances to others. The doctrine of unjust enrichment should interpose to prohibit the petitioners from usurping the oil and gas interest at this late juncture for a song.

IV. CONCLUSION

The ruling of the circuit court was correct and should be affirmed. In the alternative, the matter should be remanded to hear parole evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas E. White", is written over a horizontal line.

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CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENTS' BRIEF** was had upon the petitioners by mailing a copy thereof to the following, by first class U.S. Mail, this 19th day of December, 2011:

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