

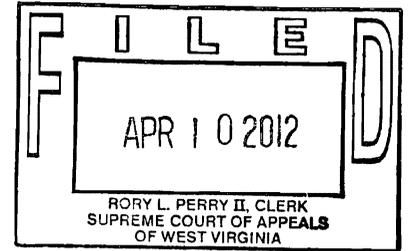
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Douglas W. Wilson, II and Joellen Wilson,
Petitioners Below, Petitioners

vs.) No. 12-0042

Johnny L. Staats and Lori A. Staats,
Respondents Below,
Respondents.

(Jackson County Circuit Court Case No. 09-C-5)



PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The court erred in not finding that the petitioners had a leasehold easement of necessity as a result of the subject parcels being derived from the same parent tract of real estate and being a part of a unitized drilling unit pursuant to the subsisting oil and gas leases.

2. The court erred in not finding that the petitioners had an implied leasehold easement as a result of the subject parcels being derived from the same parent tract of real estate and being a part of a unitized drilling unit pursuant to the subsisting oil and gas leases.

STATEMENT OF THE CASE

The action below was filed as a petition for temporary and permanent injunctive relief prohibiting the respondents from removing or interfering with petitioners' gas line across respondents' real estate. The petitioners and respondents own adjoining parcels of real estate both of which parcels were derived from the same parent tract of twenty acres and both of which are subject to subsisting oil and gas leases, which leases were unitized to form a drilling unit. A producing gas well was drilled on an adjoining thirty-nine acre tract included in the drilling unit and owned by a nonparty neighbor. In the summer of 2000 the petitioners learned that both they and the respondents were entitled to one free gas hookup for use at the parties' respective residences. The most direct route from the well to the petitioners' residence would require the petitioners' gas line to also cross the respondents' property. The respondents agreed to allow petitioners to lay their gas line across the respondents' property. Before letting the petitioner lay the gas line the respondents drafted a document titled "AGREEMENT BETWEEN JOHNNY L. & LORI A. STAATS AND DOUGLAS AND JOELLEN WILSON, II," which they required the petitioners to sign. The agreement stated that respondents "...give Douglas and Joellen Wilson II permission to install a pipeline... with understanding that... there will be no

binding Right of Way thru Johnny and Lori Staats' property, that the line be installed 10ft from the existing line, and that the line will be moved in the event of any building purposes in the future." Thereafter, in the summer of 2000, the petitioners installed a gas line across the respondents' property and converted their home from electric to gas. By letter dated December 12, 2008, the respondents demanded in writing that the petitioners remove the gas line from respondents' property no later than January 30, 2009. The petitioners did not remove the gas line, but instead filed the civil action below seeking temporary and permanent injunction permitting petitioners to maintain such gas line until such time as the well on the unit in question is plugged and abandoned. The court below granted a temporary injunction and the case proceeded to bench trial on May 19, 2011. Thereafter, on September 6, 2011, the court below entered a final judgment order in favor of the respondents ordering the petitioners to remove the gas line from the respondents' property. The petitioners filed a timely motion, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, for new trial and to amend judgment. Petitioners' Rule 59 motion was denied by order entered on December 9, 2011. It is from these adverse rulings that petitioners take this appeal.

SUMMARY OF ARGUMENT

Although this is a case of first impression in West Virginia, petitioners submit that a leasehold easement to maintain a gas line across respondents' real estate is supported by the following legal theories: easement of necessity and implied easement.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner submits that the facts and legal arguments are adequately presented in the brief and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

The parties below stipulated to the following facts [Appendix Vol I p. 21]:

1. Joint Exhibits A, B, C, D and E are the oil and gas leases that are included in the Declaration of Unit, being Joint Exhibit F. [Appendix Vol I pp. 24-44]
2. The petitioners and respondents own those certain parcels of real estate described in Joint Exhibits G and H all of which parcels derived from the same 20 acre parent tract. [Appendix Vol I pp. 45-51]
3. The aforesaid real estate of the petitioners and respondents is subject to subsisting oil and gas leases upon their real estate, included in the above Joint Exhibits, and are unitized by the above Joint Exhibit F Declaration of Unit. [Appendix Vol I p. 40]
A producing gas well was drilled upon a 39 acre tract included in the unit and adjoining respondents' real estate, which well continues to produce natural gas in commercial quantities. All of the oil and gas leases included in the unitized parcels afford the lessors a right to free gas. Peake Energy confirmed that the petitioner and respondent had the right to hook onto the aforesaid well and receive free gas therefrom as long as said well continued to produce sufficient gas or until it was plugged. On or about the year 2001 petitioners laid a gas line from said well to their home on their real estate, a portion of which gas line crosses the aforesaid real estate owned by the respondents. The

respondents gave permission for the petitioners to install the gas line across the respondents' real estate, but required the petitioners to sign Joint Exhibit I before the line could be installed. [Appendix Vol I p. 52] By letter, being Joint Exhibit J, respondents notified petitioners to remove the said gas line from respondents' real estate. [Appendix Vol I p. 53]

EASEMENT OF NECESSITY

Courts have found implied easements created by necessity. This was recognized by our Court in the case of *Miller v. Skaggs*, 79 W.Va. 233, 71 S.E. 536 (W.Va. 1917)

The *Miller* case involved a sewer line. The *Miller* Court reasoned as follows:

In accordance with the weight of modern English and American decisions we have decided that an implied reservation or grant of an easement can only arise where at the time of the deed or grant the existing servitude is apparent, continuous, and strictly necessary to the enjoyment of the dominant estate. Hoffman v. Shoemaker, 69 W. Va. 233, 71 S. E. 198, 34 L. R. A. (N. S.) 632, and authorities cited.

And there seems to be no material distinction in the application of this principle between an implied reservation and implied grant of such an easement, except that in a grant the terms of the grant according to the general rule is to be construed most strongly against the grantor in favor of the grantee. 9 R. C. L. 765, and cases cited.

And there is a well recognized rule of the common law, applicable to cases of implied reservations or grants of such easements, namely, that where the owner of two tenements sells one of them, or the owner of one entire estate sells a portion thereof, the purchaser takes the tenement or portion sold with all the benefits and burdens which" appear at the time of the sale to belong to it, as between it and the property which the vendor retains. Lampman v. Milks, 21 N. Y. 505; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Washburn on Easements and Servitude (4th Ed.) 95; Harwood v. Benton, 32 Vt. 733; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 672.

The *Miller* Court also is instructive on the degree of necessity required to imply such an easement stating:

But was the easement claimed one of strict necessity within the meaning of the authorities referred to? The rule of strict necessity has not been uniformly defined by the courts. But the greater number in weight and reason hold this rule not to be limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience. 9 R. C. L. 765, § 28; *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978; *Dillman v. Hoffman*, 38 Wis. 559; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; *Miller v. Hoeschler*, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327, note III b, 328. In *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550, It was decided that if the service imposed on one during unity of possession of two parcels was of a character looking to permanency, and discontinuance of such service would absolutely involve an actual and substantial re-arrangement of these parts of the estate in whose favor the service was imposed, to the end that it might be as comfortably enjoyed as before, then such necessity would seem to exist. Our case of *Bennett v. Booth*, 70 W. Va. 264, 73 S. E. 909, 39 L. R. A. (N. S.) 618, seems to be in accord with this principle of implied reservation.

...

"The term 'necessary' is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without this easement."

And in section 157, the same authority says:

"The degree of necessity that must exist to give rise to an easement by implied grant, or to an easement by implied reservation, where such an easement is recognized, and no marked distinction is made between a grant and a reservation, is such merely as renders the easement necessary for the convenient and reasonable enjoyment of the property as it existed when the severance was made. 'The degree of necessity is to be determined rather by the permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other.' The use of the right need not be absolutely necessary to the enjoyment of the thing granted. It is only requisite that the right shall materially affect the value of the thing granted."

In the case at bar the facts sufficient to support a finding of an implied easement by necessity are uncontroverted, most of which have been stipulated by the parties. The petitioners' and respondents' subject parcels of real estate derived from the same 20 acre

parent tract. Both the petitioners and the respondents took title to said parcels knowing that these parcels were subject to subsisting oil and gas leases which had been combined into a drilling unit for purposes of production of natural gas. A producing gas well was drilled upon a 39 acre tract included in the unit and adjoining respondents' real estate, which well continues to produce natural gas in commercial quantities. All of the oil and gas leases included in the unitized parcels afford the lessors a right to free gas, including the petitioners and the respondents. In order to take advantage of their right to free gas both the petitioners and the respondents had to install gas line from the well across a neighbor's adjoining real estate; and, the petitioners also had to run their gas line across the respondents' real estate. The only property contained in the drilling unit that allows petitioners to access their free gas is to lay their gas line across the respondents' property. Based on these facts and the circumstances surrounding this case your petitioners contend that they have a leasehold easement across the respondents' real estate to keep and maintain a gas line for so long as there is a producing gas well located within the parcels that make up the drilling unit. Clearly this need rises to the level of reasonable necessity as contemplated by the *Miller* decision.

IMPLIED EASEMENT

The existence of an implied easement must be determined from the factual circumstances unique to each case. In the case of *Knotts v. Snyder Enters, Inc.*, 296 S.E.2d 849 (W. Va. 1982) our Court recognized an implied easement to the use of streets in a subdivision even though there was not an expressly granted easement. Syllabus point 1 of the *Knotts* Court states:

"When lands are laid off into lots, streets, and alleys, and a map plat thereof is made, all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots." Syllabus Point 2, Cook v. Totten, 49 W.Va. 177, 38 S.E. 491 (1901).

It may not seem apparent that the case at bar should be compared to a subdivision with lots, streets, and alleys with a map plat being referenced. Yet, when the petitioners and the respondents took title to their respective parcels of real estate they did so subject to the subsisting oil and gas leases and the declaration of unit agreement all of which were of record, in the same manner as a map plat was of record for reference purposes in the *Knotts* case. In the case at bar it is reasonable to imply a leasehold easement in favor of members of the drilling unit across other members of the drilling unit for the limited purpose of accessing their respective rights to free gas. Such an implied easement is not a permanent easement but exists only so long as there is a producing gas well located within the unitized pool of properties to which the unit members are entitled to free gas. Such a limited implied easement is consistent with the agreement entered into between the petitioners and respondents. [Appendix Vol I p. 52] The agreement in pertinent part states: "...there will be no binding Right of Way..." The implied leasehold easement sought by your petitioners is not a "binding Right of Way" that runs with the land to heirs and successors in interest. To the contrary, it exists, if at all, only so long as free gas is available within the drilling unit and is extinguished upon a cessation of production of natural gas thereon. The parties' agreement also states "...that the line will be moved in the event of any building purposes in the future." Petitioners realize that they may have to modify their gas line in the future in the event that it interferes with the respondents' building purposes on their parcel and are prepared and willing to do so if necessary.

However, moving or modifying their gas line for building purposes does not mean removing the line completely and losing their right to free gas.

CONCLUSION

For the reasons and authority set forth above your petitioners request that the circuit court's orders denying injunctive relief be reversed and that they be granted an easement of necessity or implied easement allowing them to keep and maintain a gas line across respondents' real estate.

Petitioner,
By Counsel:



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CERTIFICATE OF SERVICE

I, Lee F. Benford II, counsel for the petitioner, do hereby certify that I have served the foregoing Petitioners' Brief by hand delivering a true copy thereof to the following counsel of record this the 10th day of April, 2012:

Leah R. Chappell, Esq.
Adams, Fisher & Chappell
Counsel for Respondents



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