

No. 31770 – *West Virginia Department of Transportation, Division of Highways, a state agency, v. Joyce L. Robertson, et al.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Chief Justice, dissenting:

Only by invoking the doctrine of judicial estoppel could the majority circumscribe the critical findings upon which the circuit court relied in granting summary judgment to Ms. Robertson. After an exhaustive review of motions, memoranda, affidavits, depositions, exhibits, arguments of counsel, and pertinent legal authority, the trial court was firmly convinced that “[t]he metes and bounds description prepared by Erickson’s [grantor’s] attorney failed to adequately describe all the property Erickson owned in the Triadelphia District, excluding the 7-11 tract.” Based on the trial court’s additional finding that Ms. Robertson “clearly intended to purchase all Erickson’s property in the Triadelphia District, specifically excluding the 7-11 tract and specifically including all of Parcel A, Parcel B, and the Tract surrounding Parcel B” as further evidenced by her payment of taxes on the subject property,¹ the lower court had no difficulty applying long-standing precepts of property law that permit reformation of a deed where a mistake has been made.² Rather than allowing this

¹The circuit court’s order indicates that “Logan County tax records charge Robertson [buyer], not Erickson [seller], for taxes on the disputed mountainside property and credit Robertson with payment.”

²See Syl. Pt. 1, *Johnston v. Terry*, 128 W.Va. 94, 36 S.E.2d 489 (1945) (holding that “[a] court of equity has power and jurisdiction to decree the reformation of a
(continued...)

mistake in the property description set forth in the deed to be reformed, as the trial court wisely determined was the proper remedy, the majority decided to punish Ms. Robertson, the ultimate buyer of the property, for the inaccuracy of the deed. The law should not work an injustice as easily as the majority has deigned to do.

While I do not dispute that judicial estoppel has its place in the law, the exercise of that doctrine under the facts of this case is highly questionable and its use clearly works what can only be described as an injustice. Despite its recognition of the fact that judicial estoppel is an *extraordinary remedy* that demands judicious application, the majority quickly clears the hurdles set in place to discourage the improper use of this doctrine. The majority recognizes, but chooses not to adopt, certain well-designed parameters that other states have imposed regarding the use of this doctrine. Two such critical limitations that the majority cites are that “the estopped party had knowledge of the facts at the time he or she took the original position”³ and “the first position was not taken as a result of ignorance,

²(...continued)

deed executed through . . . a mistake of a scrivener in failing to make the agreement express the mutual intention of the parties, where such reformation is sought as between the parties, or the successor of either, who, at the date he acquired an interest in the property affected by such deed, had notice of the grounds on which reformation is sought”).

³*Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 92 P.3d 620, 627 (Mont. 2004).

fraud, or mistake.”⁴ Another important limitation on the doctrine’s use is that “the inconsistency must be part of an intentional effort to mislead the court.”⁵ *See Kitty-Anne Music Co. v. Swan*, 4 Cal. Rptr. 3d 796, 800 (Cal. App. 2003) (stating that to invoke judicial estoppel, “a party’s inconsistent position must arise from intentional wrongdoing or an attempt to obtain an unfair advantage”). In crafting its rule concerning the use of judicial estoppel, the majority unwisely discarded each of these necessary curtailments on the doctrine’s implementation.

By omitting these critical limitations on the use of judicial estoppel, the majority has failed to establish a standard designed to meet the objectives of the doctrine that it identifies: “[T]o maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies.”⁶ Ironically, in creating a standard that expressly fails to include any factors that pertain to the wrongful use of the court system for a parties’ advantage and that accounts for positions that are changed due to mistake, fraud, or ignorance, the majority has done a serious disservice to the judicial system, rather than upholding its integrity, as it claims. The record in this case is utterly devoid of any facts suggesting that Ms. Robertson intentionally misled the court or opposing parties as to the

⁴*Jackson v. County of Los Angeles*, 70 Cal. Rptr. 2d 96, 103 (Cal. App. 1997).

⁵*Cothran v. Brown*, 592 S.E.2d 629, 632 (S.C. 2004).

⁶*People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 125 Cal. Rptr. 2d 365, 370 (Cal. App. 2002).

total acreage of the property she purchased. And, while the majority suggests some degree of nefariousness in the late disclosure of the erroneous metes and bounds description on the deed, the record does not bear out this postulation. The trial court meticulously sets forth the chronology of events with regard to the discovery of the error in the deed. Nothing in that description even hints at wrongdoing on Ms. Robertson's part.⁷

Why the majority undertook to deny Ms. Robertson the protections that the law affords to others who find themselves, due to no fault of their own, in the midst of a legal matter that was brought about by a legal mistake is utterly mystifying. As the circuit court recognizes, the law of this state on the issue of deed construction requires that the intention of the parties should control where it can be determined. *See Realty Secs. & Discount Co. v. Nat'l Rubber & Leather Co.*, 122 W.Va. 21, 27, 7 S.E.2d 49, 51 (1940). According to the trial court's order, it is undisputed that Ms. Erickson intended to sell the subject property to Ms. Robertson. Moreover, as the trial court also observes, any ambiguity that arises in connection with the construction of a deed is construed against the grantor. *See Syl. Pt. 3, West Virginia Dep't of Hwys. v. Farmer*, 159 W.Va. 823, 226 S.E.2d 717 (1976) ("Where an ambiguity exists in a deed, the language of such deed will be construed most strongly against the grantor."). Yet, because the majority assumes that Ms. Robertson improperly

⁷As the circuit court makes clear, if there was any error it was on the part of the grantor's attorney in relying on a paper survey of the property that clearly indicated that it was unsupported by field work.

sought to gain an advantage by not previously raising the ownership issue of the disputed acreage – a factual issue of which she was initially unaware – she is denied the right to have her deed reformed.

On balance, this case simply does not fit the bill of one where the factual and procedural posturing of a party clearly warrant application of judicial estoppel. The case simply does not involve a litigant who was playing “fast and loose with the courts.” *See Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 181 (Cal. App. 1997) (stating that “[j]udicial estoppel is ‘intended to protect against a litigant playing “fast and loose with the courts”’” (citing *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990))). Rather than serving to uphold the integrity of the judicial system, application of judicial estoppel on the facts of this case merely serves to undercut the objectives of fairness and justice that are the foundation of our court system. Of additional concern to me as a jurist is the majority’s wholesale disregard of all of the factual and legal findings of the trial court. Such disregard for the trial court’s rulings does little to advance the overarching objective of upholding the integrity of the judicial system – the purported basis for the majority’s ruling in this case.

For the foregoing reasons, I respectfully dissent.