

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**James E. Collins,
Plaintiff Below, Petitioner**

vs) No. 11-0086 and 11-0901 (Preston County 09-C-159)

**Messenger Limited Partnership, Inc.
and Wood Products, Inc.,
Defendants Below, Respondents**

FILED

**March 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner James E. Collins, by counsel, Lawrence E. Fraley, III, appeals from the Preston County Circuit Court's award of summary judgment in favor of respondents, Messenger Limited Partnership, Inc. and Wood Products, Inc. (hereinafter collectively referred to as "respondent"), as reflected in orders entered on December 13, 2010, January 13, 2011, and May 24, 2011, in this action seeking, *inter alia*, to quiet title to certain real estate. Respondent, by counsel, Amy M. Smith and John R. Callcott, has filed a brief in response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner owns a parcel of land adjacent to the 108-acre tract of land that is in dispute. The boundaries of the two tracts apparently overlap by several acres, which was the subject of the original conflict between the parties. In the course of investigating the nature and cause of the overlap, petitioner states that he discovered that respondent did not appear to have title to the disputed property. Petitioner alleged that there were discrepancies dating back to a judicial sale of real estate by a special commissioner in 1933, which sale arose out of litigation instituted in 1931 ("the 1931 litigation").

Petitioner instituted the case at bar seeking to quiet title to the 108-acre tract with related claims for timber trespass, a way of necessity, and the defacement and removal of survey monuments. Petitioner asserted that the disputed property was not a part of the judgment debtor's property conveyed by the special commissioner to C. Hartmeyer in 1933. Petitioner further asserted

that he had acquired title to the disputed property through quitclaim deeds from the heirs of the judgment debtor in the 1931 litigation. Respondent argued that the disputed property was, in fact, a part of the judgment debtor's property conveyed by the special commissioner to C. Hartmeyer in 1933; therefore, petitioner could not have acquired title to the same through the quitclaim deeds.

The parties filed competing summary judgment motions below. A hearing on the motions was held on November 9, 2010, resulting in the circuit court granting summary judgment in favor of respondent on petitioner's claim that the disputed property was within petitioner's chain of title. The circuit court found that petitioner does not have title to the disputed property for the reasons set forth in its "Order Regarding the Motions for Summary Judgment" entered on December 13, 2010, and in its "Amended and Revised Order Regarding the Motions for Summary Judgment" entered on January 13, 2011.

A second hearing was held on December 22, 2010, to address petitioner's remaining claims regarding the overlap between his property and the disputed tract, timber trespass, way of necessity, and the defacement and removal of survey monuments. In the "Order Regarding the December 22, 2010, Hearing Regarding Defendants' Motion for Summary Judgment" entered on May 24, 2011, the circuit court found that it was appropriate to dismiss with prejudice petitioner's timber trespass and way of necessity claims, which were tied to the disputed property, given its earlier ruling that petitioner does not have title to that property. The circuit court denied respondent's motion for summary judgment on petitioner's claim for defacement and removal of survey monuments because that claim relates to the overlap issue that remained in dispute.¹

This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Upon a careful review of the record and the parties' respective briefs, this Court finds no error. The circuit court appropriately gave effect to the Notice of Sale from the 1931 litigation and reconciled all parts of that Notice with other portions of the court file for the 1931 litigation, including the Bill of Complaint, Amended Bill of Complaint, and the Decree of Sale, as well as the special commissioner's deed to C. Hartmeyer, in reaching its conclusion that the disputed property "was identified and otherwise encompassed by the language in the Notice of Sale" from the 1931 litigation and was, thereafter, conveyed by the special commissioner to C. Hartmeyer in 1933. Inasmuch as petitioner does not have title to the disputed property, the circuit court correctly dismissed with prejudice petitioner's claims for timber trespass and way of necessity as they were directly tied to the disputed property.

¹ In each of the summary judgment orders, the circuit court stated that the order was a final judgment pursuant to Rule 54 of the West Virginia Rules of Civil Procedure. Accordingly, petitioner appealed each order although there were remaining issues to be decided by the circuit court. The Court does not express an opinion concerning any claims that remain pending below.

Petitioner also asserts that the circuit court erred by essentially conducting an unnoticed bench trial at the November 10, 2010, hearing on the parties' respective motions for summary judgment. Petitioner contends that there were issues of fact raised during this hearing concerning how the disputed property was treated in later years, which could not be resolved by summary judgment. However, the circuit court's Amended Order arising out of the November 10 hearing reflects, as does the transcript from that hearing, that the circuit court's ruling was based upon how the 1931 litigation affected the ownership of the disputed property, which the parties agreed was an issue of law to be decided by the circuit court. Accordingly, we find no error in this regard.

The Court adopts, incorporates, and attaches hereto the circuit court's well-reasoned summary judgment orders referenced herein. For the reasons stated in those Orders and for all of the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 30, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA**JAMES E. COLLINS,****Plaintiff,****v.****Civil Action No. 09-C-159****MESSENGER LIMITED PARTNERSHIP,
INC. , WOOD PRODUCTS, INC.; and any
unknown HEIRS OF WILLIAM T. BOWERS
(deceased),****Defendants.****ORDER REGARDING THE DECEMBER 22, 2010,
HEARING REGARDING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

On November 9, 2010, the plaintiff James E. Collins (the "Plaintiff"), by Lawrence Fraley III, his counsel, and the defendants Messenger Limited Partnership and Wood Products, Inc. (the "Defendants"), by John Callcott, their counsel, brought on for hearing before the Court their respective motions for summary judgment. After reviewing the record as well as considering the arguments of counsel, the Court GRANTED-IN-PART and DENIED-IN-PART the Defendants' motion for summary judgment, as set forth in the Court's "Amended and Revised Order Regarding the Motions for Summary Judgment," entered on January 13, 2011. In addition, the Court DENIED the Plaintiff's motion for summary judgment.

Thereafter, the Court held a second hearing to resolve additional issues related to the Defendants' Motion for Summary Judgment on December 22, 2010. The same counsel appeared for the parties. After considering the additional arguments of counsel, the record before the Court and its ruling regarding the hearing on November 9, 2010, the Court makes the following findings of fact and conclusions of law:

1. The Court notes that Plaintiff is making two claims in Count I regarding the 108 acre Bowers Tract No. 5 in dispute between the parties. First, Plaintiff was claiming title to the entire 108 acre tract, arguing that the tract was within his chain of title. On November 9, 2010, the Court granted summary judgment to Defendants as to this claim, for the reasons stated in the Amended Order entered January 13, 2011, and found that this claim should be dismissed.¹

The Court found that the Plaintiffs do not have deed title to the 108 acre Bowers Tract No. 5 for the reasons set forth in the Court's Amended Order from the November 9, 2010, hearing entered January 13, 2011, which is hereby incorporated by reference. This determination granting Defendants summary judgment as to this part of the Plaintiff's Complaint completely disposes of the Plaintiff's claim that the 108 acre tract, Bowers Tract No. 5, as referred to in Count No. 1 of Plaintiff's Complaint is in his chain of title.

2. The Court also notes, however, that Plaintiff is making a second claim related to a portion of the 108 acre tract, asserting that he owns 8.64 acres of it by virtue of an overlap. The Court does not resolve this claim regarding overlap and the 8.64 acres, and hereby denies Defendants' motion to the extent it seeks the dismissal of the overlap claim because there are factual issues regarding the overlap claim.

3. Defendants argue that the Court's finding regarding Plaintiff's "chain of title" claim to the entire 108 acre Bowers Tract No. 5, negates Plaintiff's claim for timber trespass (Count II of the Complaint), defacement and removal of survey monuments (Count III of the Complaint) and way of necessity (Count IV of the Complaint). Defendants argue that it is undisputed that the timber at issue in the timber trespass claim did not come from

¹ The Plaintiff and Defendants agreed this issue was a question of law for the Court.

the overlap area and only from that portion of the property that could pass to Plaintiff via his claim to the entire 108 acre tract. Defendants further argue that because the claimed overlap area was contiguous to Plaintiff's property, the Court's finding regarding the "chain of title" claim to the entire 108 acre tract necessarily negates the way of necessity claim.

4. The Court then questioned counsel for Plaintiff regarding Plaintiff's position regarding the timber trespass claim and the way of necessity claim. Plaintiff acknowledged that it is undisputed that no timber was cut from the overlap area still in dispute. As a result, Plaintiff acknowledged that the Court's ruling related to the November 9, 2010, hearing negated Plaintiff's timber trespass claim. Further, Plaintiff also acknowledged that the way of necessity claim would be negated by the Court's ruling related to the November 9, 2010, hearing.

5. Based upon the record and the comments of counsel, the Court finds that it is undisputed that no timber in dispute was cut from the overlap area still in controversy as between the parties. As such, and because the timber in controversy was only located on that portion of the property that the Court has found not to be in Plaintiff's chain of title, the Court hereby finds it appropriate to dismiss with prejudice Plaintiff's timber trespass claim, Count II of the Complaint.

6. Based upon the record and the comments of counsel, the Court further finds that it is undisputed that no claim for a way or necessity or implied easement can lie, given the dismissal of Plaintiff's claim as it relates to the entirety of the 108 acres. As such, the Court hereby dismisses with prejudice Plaintiff's way of necessity claim, Count IV of the Complaint.

7. The Court DENIES Defendants' motion for summary judgment as it relates to claims for defacement and removal of survey monuments, Count III of the Complaint, as

the Court finds fact issues in dispute because the survey monuments also allegedly relate to the overlap issue in dispute.

8. The Court also notes that Defendants have raised issues in relation to the timber trespass claim based upon a statute of limitations defense. Having already ruled upon that claim based upon the dismissal of Plaintiff's chain of title claim regarding the entire 108 acres, the Court does not rule upon or address Defendants' statute of limitations argument because it is moot.

9. The Court DENIES Defendants' motion to be excused from mediation and ORDERS that mediation occur before the pretrial conference.

10. The Court ordered that Plaintiff be allowed to amend his complaint to request a jury trial.

11. The Court saves all parties their exceptions to the ruling of the Court.

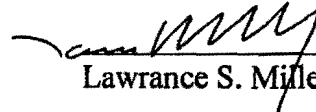
12. This is a final judgment per Rule 54(b) as to Count II and IV of Plaintiff's Complaint. The Court further notes that its Amended and Revised Ruling regarding the November 9, 2010 hearing is also a final judgment pursuant to Rule 54(b) as to Plaintiff's claim under Count I of the Complaint to decide ownership of the entire 108 acre Bowers Tract No. 5 in dispute between the parties. The Clerk is directed to enter final judgment as to these claims as there is no just reason for delay.

The Clerk is directed to forward a certified copy of this Order to all counsel of record.

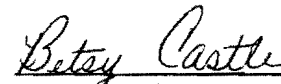
2 copies
s/d 5/24/11
J.R.C.
L.E.F.

IT IS SO ORDERED.

Entered this the 24 day of May, 2011.

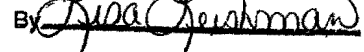

Lawrance S. Miller, Jr., Judge

Entered this the 24 day of May, 2011.


Betsy Castle, Circuit Clerk
by:  Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

By  Deputy

11-0086
11-0901

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

JAMES E. COLLINS,

Plaintiff,

v.

Civil Action No. 09-C-159

MESSENGER LIMITED PARTNERSHIP,
INC. , WOOD PRODUCTS, INC.; and any
unknown HEIRS OF WILLIAM T. BOWERS
(deceased),

Defendants.

AMENDED AND REVISED ORDER REGARDING THE MOTIONS
FOR SUMMARY JUDGMENT

On November 9, 2010, the plaintiff James E. Collins (the "Plaintiff"), by Lawrence Fraley III, his counsel, and the defendants Messenger Limited Partnership and Wood Products, Inc. (the "Defendants"), by John Callcott, their counsel, brought on for hearing before the Court their respective motions for summary judgment.

Plaintiff brought on for hearing his motion for summary judgment regarding the ownership of a parcel of property at issue in this litigation. Defendants brought on for hearing their motion for summary judgment, also regarding the question of the ownership of the parcel, along with other issues pending in the case.

Before going forward with the hearing, the Court confirmed that the parties had completed discovery and that there were no requests for additional time to conduct discovery. Finding none, the Court proceeded.

After reviewing the record as well as considering the arguments of counsel, the Court hereby GRANTS-IN-PART the Defendants' motion for summary judgment, as set forth below, and stays consideration of the remaining parts of the Defendants' motion

pending a subsequent hearing before the Court. In addition, the Court DENIES the Plaintiff's motion for summary judgment.

In so doing, the Court makes the following findings of fact and conclusions of law:

1. Between 1876 and 1890, William Bowers ("Bowers") acquired five tracts of land, each located in Grant District, Preston County, West Virginia, by the following instruments, recorded in the office of the Clerk of the County Commission of Preston County, West Virginia (the "Preston County Clerk"), as follows:
 - a. by deed dated February 4, 1876, and recorded in Deed Book 42, Page 252, Archibald Arnold conveyed a tract of land containing 108.5 acres to Bowers ("Bowers Tract No. 1")
 - b. by deed dated March 9, 1878, and recorded in Deed Book 44, Page 320, Archibald Arnold conveyed a tract of land containing 108.5 acres to Bowers ("Bowers Tract No. 2")
 - c. by deed dated April 13, 1881, and recorded in Deed Book 49, Page 317, Archibald Arnold conveyed a tract of land containing approximately 56 $\frac{3}{4}$ acres to Bowers ("Bowers Tract No. 3")
 - d. by deed dated March 28, 1890, and recorded in Deed Book 114, Page 542, Robert J. Arnold conveyed a tract of land containing 81.5 acres to Bowers ("Bowers Tract No. 4")
 - e. by deed dated April 1, 1890, and recorded in Deed Book 69, Page 174, Archibald Arnold conveyed a tract of land containing 108 acres to Bowers ("Bowers Tract No. 5")
2. As a result of acquiring Bowers Tract Nos. 1, 2, 3, 4 and 5, Bowers owned, in aggregate, 463 and a fraction acres of land in Grant District, Preston County, West

Virginia (collectively, "the Bowers Tracts"). The tracts of land which made up this acreage were contiguous.

3. The parties to this civil action do not dispute the deed book references for the Bowers Tracts and agree that the tract whose ownership is disputed in the present civil action derives from Bowers Tract No. 5.

4. In 1931, C. Hartmeyer ("Hartmeyer") filed suit against Bowers in the Circuit Court of Preston County, West Virginia, in a case styled *C. Hartmeyer v. William T. Bowers, et. al.*, Case No. 4296 (the "1931 Litigation"), seeking a lien in his favor for the repayment of five promissory notes, together with interest, against the Bowers Tracts and a decree to sell the Bowers Tracts to satisfy the lien. In the course of the 1931 Litigation, the Court entered judgment in favor of Hartmeyer and ordered that the Bowers Tracts be sold.

5. By a decree dated July 11, 1932, the Court held that Hartmeyer had established his claim to the Bowers Tracts and further appointed P. J. Crogan ("Crogan") to act as special commissioner for the purposes of selling the Bowers Tracts (the "Decree of Sale").

6. Following entry of the Decree of Sale, Crogan published a notice of sale, stating that the Bowers Tracts would be sold at public auction pursuant to the Decree of Sale (the "Notice of Sale").

7. The Notice of Sale specifically references "108 acres." Based upon this reference, and the other determinations made herein, the Court finds that this language is a reference to Bowers Tract No. 5, the disputed parcel in the present civil action, and that this parcel is a different parcel from the tract of land designated by a later reference in the Notice of Sale to "217 acres."

8. On February 23, 1933, Crogan conducted a public sale of the Bowers Tracts. Hartmeyer was the successful bidder.

9. By a decree dated May 4, 1933, the Court received Crogan's report of sale and confirmed the sale to Hartmeyer. Crogan was directed to execute and deliver a deed to Hartmeyer for the Bowers Tracts.

10. By deed dated June 19, 1933, and recorded in the Preston County Clerk's office in Deed Book 182, Page 69, Crogan conveyed the Bowers Tracts to Hartmeyer (the "Hartmeyer Deed").

11. The issue of law before the Court to be decided in the present civil action is how did the 1931 Litigation, specifically the Decree of Sale, the Notice of Sale and the Hartmeyer Deed, affect the ownership of Bowers Tract No. 5. ^①

12. The question for the Court's immediate consideration is whether Bowers Tract No. 5 was conveyed in the Hartmeyer Deed and whether it was properly included in the Decree of Sale and the Notice of Sale. The Plaintiff contends that Bowers Tract No. 5 was not properly included in the Decree of Sale and the Notice of Sale, that it was not conveyed in the Hartmeyer Deed, and that ownership of Bowers Tract No. 5 remained vested in the heirs of William Bowers. The Defendants' contention, among others, is that Bowers Tract No. 5 was included in the Decree of Sale and the Notice of Sale and that, as a result, Bowers Tract No. 5 was conveyed in the Hartmeyer Deed.

13. A key document for the Court to consider in resolving the issues presented is the Notice of Sale. Plaintiff contends that Bowers Tract No. 5 was not encompassed by the language of the Notice of Sale. Defendants argue otherwise. The Notice of Sale makes a specific reference to "108 acres." The Notice of Sale also states that, "These tracts adjoin each other and aggregate 463 acres and a fraction, more or less."

⁴
① The parties agreed that this issue was an issue of law

14. The Court finds that, under the rules of construction, it must give effect to the entire Notice of Sale.

15. The Court also finds that it is proper to consider the contents of the court file related to the 1931 Litigation and the manner in which Bowers Tract No. 5 was treated in its subsequent conveyance. The Bill of Complaint in the litigation file contains the language that the plaintiff, "sued out an attachment for the purpose of levying on certain real estate owned by the defendant William T. Bowers in Grant District, Preston County, West Virginia, consisting of about (sic) 463 1/4 acres, more or less, situate on the waters of Hazel Run and Big Sandy Creek, in said district."

16. The Amended Bill states in relevant part:

That at the commencement of this suit by amended bill as well as at the commence of the suit under the original bill an attachment issued for the purpose of levying on certain real estate formerly owned by the said William T. Bowers and now owned by the said defendants, his children heirs and situate in Grant District, Preston County West Virginia, consisted of about 463 1/4 acres, more or less, on and near the waters of Hazel Run and on and near the waters of Big Sandy Creek in said district.

17. The Decree of Sale states in pertinent part:

And it appearing from the pleadings and proofs in this cause that the plaintiff has established his claim, and that by the said order of attachment and the levy thereof on 463 1/2 acres of land in fee on and near the waters of Big Sandy Creek in Grant District, Preston County. . .

18. The Hartmeyer Deed states in pertinent part:

Now, therefore, in consideration thereof, the said P.J. Crogan, Special Commissioner as aforesaid, does hereby grant and convey unto the said C. Hartmeyer, Grantee, all of the real estate situate in Grant District, Preston County, West Virginia, on and near the waters of Sandy Creek and Hazel Run, which real estate is described in the bill and proceedings in said cause, including the attachment levied by the Sheriff of this county on said real estate, consisting of 463 1/2 acres,

more or less, and being the same real estate which was conveyed many years ago to the said William T. Bowers by Archibald T. Arnold, R.J. Arnold and others by various deeds of record in the office of the Clerk of the County Court of Preston County, West Virginia, conveying said land to the said William T. Bowers, being all of the same real estate assessed on the land books of said county in the name of said William T. Bowers. Reference to said records and said deeds are here made for a full and more particular description of said parcels of land aggregating 463 ½ acres, more or less.

19. By giving effect to the entire Notice of Sale, the Court is able to reconcile all parts of the Notice of Sale as well as other portions of the court file for the 1931 Litigation, including the Bill of Complaint, Amended Bill of Complaint, and the Decree of Sale, as well as the Hartmeyer Deed. The language in the Hartmeyer Deed describes the land conveyed to C. Hartmeyer as:

* "all of the real estate situate in Grant District, Preston County, West Virginia..."; and

* "consisting of 463 ½ acres, more or less..."; and

* "being all of the same real estate assessed on the land books of said county in the name of said William T. Bowers"; and

* "said parcels of land aggregating 463 ½ acres, more or less."

20. It is undisputed that the land records of Preston County prior to the 1931 Litigation reflect that William T. Bowers was the owner of 463 and a fraction acres.

21. Based upon the forgoing, including the language of the relevant documents, the Court rules that Bowers Tract No. 5, the disputed parcel in the present civil action, was identified and otherwise encompassed by the language in the Notice of Sale. The Court also rules that Bowers Tract No. 5 was conveyed by the Hartmeyer Deed, to C. Hartmeyer.

22. The Court stays further consideration of the remaining portions of Defendants' motion for summary judgment until this hearing is reconvened on December 22, 2010 at 9:00 am.

23. The Court saves the Plaintiff an exception to the ruling of the Court.

24. This is a final judgment as to this issue per Rule 54(b).⁽²⁾ There is no just reason for delay and Defendants are entitled to judgment on this issue.

The Clerk is directed to forward a certified copy of this Order to all counsel of record.

IT IS SO ORDERED.

Entered this the 13 day of January, 2011.

Lawrence S. Miller, Jr.
Lawrence S. Miller, Jr., Judge

Entered this the 13th day of January, 2011.

Betsy Castle
Betsy Castle, Circuit Clerk

by: Shawntel Yambaka,
Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

Shawntel Yambaka, Deputy

257
② The court did not grant summary judgment as to the remaining issues in this case including the issue of property overlap.

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA**JAMES E. COLLINS,****Plaintiff,****v.****Civil Action No. 09-C-159****MESSENGER LIMITED PARTNERSHIP,
INC. , WOOD PRODUCTS, INC.; and any
unknown HEIRS OF WILLIAM TO. BOWERS
(deceased),****Defendants.****ORDER REGARDING THE MOTIONS
FOR SUMMARY JUDGMENT**

This matter came before the Court on November 9, 2010. Plaintiff was represented by Lawrence Fraley, III, and Messenger Limited Partnership and Wood Products, Inc. ("Defendants"), by John Callcott. Plaintiff brought on for hearing his motion for summary judgment regarding the ownership of a parcel of property at issue in this litigation. Defendants brought on for hearing their motion for summary judgment, also regarding the question of the ownership of the parcel, along with other issues pending in the case. Before going forward, the Court confirmed with the parties that discovery was complete and that there were no requests for additional time to conduct discovery. Finding none, the Court proceeded.

After reviewing the record as well as considering the arguments of counsel, the Court hereby GRANTS-IN-PART Defendants' motion for summary judgment as set forth below and stays consideration of the remaining portions of the motion pending a subsequent hearing before the Court. In addition, the Court DENIES Plaintiff's motion for summary judgment. In so doing, the Court makes the following findings of fact and conclusions of law:

1. There is a legal issue to be decided related to the affect of the 1930s litigation, *C. Hartmeyer v. William T. Bowers, et. al.*, Case No. 4296 (Circuit Court of Preston County, West Virginia), on the question of the ownership of a parcel of property, identified by deed located at Deed Book 69, Page 174, in the record books of Preston County, West Virginia, and otherwise referred to in this Order as the "disputed parcel."

2. The question for the Court's immediate consideration is whether this disputed parcel was conveyed as a result of this litigation and the related Decree for Sale, Notice of Sale, Special Commissioner's Deed and other documents associated with that proceeding. Plaintiff contends that the disputed parcel was not transferred, but rather that it remained in the possession of the heirs of William Bowers. Defendants' contention, among others, is that the tract was transferred as part of the 1930s litigation and the resulting deed to C. Hartmeyer.

3. The following facts are undisputed:

a. When William Bowers was sued in the matter of *C. Hartmeyer v. William T. Bowers*, Case No. 4296, his land holdings in Preston County, West Virginia, were identified as consisting of 463 and a fraction acres.

b. The tracts of land which made up this acreage were contiguous and the deed references are known and not in dispute among the parties.

c. It is undisputed that the parcel in dispute in this litigation is referenced by a deed located at Deed Book 69, Page 174, in the record books of Preston County, West Virginia.

4. The deed that both parties identify as referencing the disputed patcel reflects its acreage as consisting of 108 acres.

5. The Decree of Sale from the 1930s Hartmeyer litigation provides that Hartmeyer established his claim to 463 and a fraction acres of land.

6. A key document for the Court to consider in resolving the issues presented is the Notice of Sale. Plaintiff contends that the disputed parcel was not encompassed by the language of the Notice of Sale. Defendants argue otherwise. The Court finds that under the rules of construction, the Court should give effect to the entire Notice of Sale. The Court also finds that it is proper to consider the contents of the litigation file and the manner in which the parcel was treated in its subsequent conveyance.

7. The Notice of Sale makes specific reference to "108 acres." Based upon this reference, and the other determinations made herein, the Court finds that this language is a reference to the disputed parcel, and that this parcel is a different parcel from the tract of land designated by a later reference in the Notice of Sale to "217 acres."

8. The Notice of Sale makes specific reference to the fact that the tracts adjoin each other and aggregate 463 and a fraction acres.

9. By giving effect to the entire Notice of Sale, the Court is able to reconcile all parts of the Notice of Sale as well as other portions of the 1930s litigation file, including the Bill of Complaint, Amended Bill of Complaint, the Decree of Sale and the subsequent deed from P. J. Crogan Special Commissioner, to Hartmeyer at Deed Book 182, Page 69. The language in the deed describes the land conveyed to C. Hartmeyer as "being all" of the same real estate as assessed on the land books of the county in the name of William Bowers.

10. Based upon the forgoing, the Court rules that the disputed parcel, otherwise identified by reference to a deed located at Deed Book 69, Page 174, in the land records of Preston County, West Virginia, was identified and otherwise encompassed by the

language in the Notice of Sale. The Court also rules that this disputed parcel was conveyed by operation of the deed referenced at Deed Book 182, Page 69 in the land records of Preston County, West Virginia, to C. Hartmeyer.

This is a final judgment as to this issue per Rule 54(b) - There is no suit pending for delay and defendants are entitled to judgment on this issue.

11. The Court stays further consideration of the remaining portions of Defendants' motion for summary judgment until this hearing is reconvened on **December 22, 2010 at 9:00 am.**

12. The Court saves the Plaintiff an exception to the ruling of the Court.

The Clerk is directed to forward a certified copy of this Order to all counsel of record.

IT IS SO ORDERED.

*2 copies
S/D 12/13/10
LEF
JRC*

Enter ~~ed~~ this the 13 day of December, 2010.

Lawrence S. Miller, Jr.
Lawrence S. Miller, Jr., Judge

Entered this the 13th day of December, 2010.

Betsy Castle
Betsy Castle, Circuit Clerk
by: *Shauntel Yambka*
Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By *Shauntel Yambka* Deputy

Respectfully submitted by:



John R. Callcott (WV State Bar # 9206)

STEPTOE & JOHNSON PLLC

PO Box 1616

Morgantown, WV 26507-1616

(304) 598-8000

**Counsel for Defendants Messenger Limited
Partnership, Inc., and Wood Products, Inc.**