STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Gary Evans and Inis Evans,
Plaintiffs Below, Petitioners

vs) No. 11-1107 (Upshur County 09-C-49)

Dominick LaRosa,
Defendant Below, Respondent

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Gary Evans and Inis Evans, by counsel, Erika Klie Kolenich, appeals the Upshur County Circuit Court order dated June 28, 2011, granting the motion for judgment as a matter of law made by respondent Dominick LaRosa at the close of evidence at trial. Respondent, by counsel, Macel E. Rhodes, has filed his response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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.

This case concerns a piece of property consisting of 638.57 acres in Upshur County which petitioners attempted to purchase. The property in question adjoined 110 acres previously purchased by petitioners. The 638.57 acre tract was transferred to Mary Roda, James D. LaRosa, and Virgil B. LaRosa upon the death of their father. In 1983, the property was deeded to respondent. This deed was never recorded, although it was apparently presented to the County Clerk for recordation along with several other property deeds by the same law firm which were recorded. The County Clerk prepared a transfer list, which included the subject property, and a copy of this list was given to the County Assessor to be used to tax the property properly. The property was listed in the land books in the County Clerk's office as one-half fee simple to the respondent and one-half fee simple to Braxton Oil & Gas.

In petitioners' deed, an easement was granted by respondent to petitioners for travel across his land in 1990. Petitioners became interested in the 638.57 acres adjoining their property and attempted to determine ownership of this property. Petitioners began to question others regarding ownership of the property and eventually hired an attorney to do a title search. The attorney contracted the search to an independent abstractor, who found that respondent was assessed with a "one-half interest fee simple" in the preceding ten years and she found his tax assessment for the property. The abstractor found that Mary Roda appeared to have an interest in the property, but found no tax assessment for Ms. Roda, although petitioners and their attorney possessed the 2006 tax ticket

showing that respondent was taxed on the property. Petitioners sought out the heirs of Mary Roda and negotiated a purchase price for their interest in the land via a quitclaim deed in 2007. The quitclaim deed indicated that the 2006 land books showed that respondent and Braxton Oil & Gas each owned a one-half interest in the 638.57 acres in fee simple. Respondent recorded his deed in 2009. Thereafter, petitioners filed a petition to quiet title in the Upshur County Circuit Court. Both sides filed motions for summary judgment, which were denied.[1] The action then proceeded to trial.

At trial, several county employees testified, including the County Assessor, who stated that she was never asked by petitioners who owned the land and, if she were, she would have told them that respondent owned it, along with the oil and gas company. The County Clerk testified that if a person has a name and goes to the land books the clerk could have determined who the proper owner was at present.

At the close of evidence, respondent moved for judgment as a matter of law and the motion was granted. The circuit court found that a party is not protected as a bona fide purchaser without notice unless he looks to every part of the title he is purchasing. The circuit court also found that petitioners had sufficient notice that respondent owned the land from the tax tickets, land books, recitals of ownership of respondent in the agreements conveying the right-of-way and in petitioners' deed to their own 110 acres, and in the "wealth of public records available in the County Clerk's Office, the Assessor's Office and the Sheriff's Office showing [respondent's] ownership of the property." The circuit court also found that it was petitioners' duty to inquire fully, regardless of whether they hired a lawyer and regardless of whether that lawyer was found to be negligent in a separate pending action. The circuit court stated that "the [petitioners] put their heads in the sands and refused to look at available information regarding ownership of the property" and that the petitioners had reason to believe that respondent owned the property. The circuit court then found that respondent is the "absolute and unqualified owner of the undivided one-half interest in the 638.57 acres" and voided petitioners' quitclaim deed.

Petitioners appeal from the circuit court's order granting respondent's motion for judgment as a matter of law, also known as a motion for a directed verdict, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. This Court has stated as follows:

> "The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syl. Pt. 3, *Brannon v. Riffle,* 197 W.Va. 97, 475 S.E.2d 97 (1996).

Syl. Pt. 1, *Johnson v. Hills Dept. Stores, Inc.*, 200 W.Va. 196, 488 S.E.2d 471 (1997).

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[1]Petitioners have also filed a legal malpractice action against the attorney hired to execute the title search, which is stayed pending the result of this appeal.

On appeal, petitioners first argue that the circuit court erred in finding that tax assessments and sales listing forms provide notice of ownership and in holding that petitioners were not bona fide purchasers without notice. Petitioners argue that they purchased the land in good faith and for fair market value, making them bona fide purchasers. Petitioners also argue that they used an attorney to perform a title search, and that respondent waited in excess of twenty-six years to record his deed. Petitioners state that in order to have found the tax records or sales listing forms with the respondent's information, they would have had to have his name. Petitioners state that they were justified in relying on the record titles in the County Clerk's Office indicating that Mary Roda owned a 1/6 interest. Petitioners claim they had no knowledge of the 1983 deed to respondent, which was not recorded. Petitioners argue that they were, therefore, bona fide purchasers and proved this at trial by showing that they used reasonable diligence in finding the owner of the property. Petitioners argue against respondent's claim that property assessments are indicative of ownership, noting that there is no caselaw stating as much.

In response, respondent argues that the circuit court properly found that since petitioners were in possession of the tax assessment listing respondent as the owner, this was sufficient notice to them that they had a duty to inquire further. Moreover, respondent argues that the circuit court was correct to find that the tax ticket, the land books, the instrument conveying an easement across respondent's property in favor of petitioners, petitioners' own deed referencing the easement signed by respondent, and the numerous public records showing respondent as the owner of the land were all legally sufficient notice to petitioners of the proper owner of the land. Thus, petitioners were not bona fide purchasers. Respondent also notes that petitioners could have asked the Assessor's Office who owned the property, and failed to do so.

This Court has written extensively on what makes a party a bona fide purchaser as follows:

> As we have previously explained, "[w]hen a prospective buyer of an interest in real estate has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists." Syl. pt. 1, *Eagle Gas Co. v. Doran & Assocs., Inc.*, 182 W.Va. 194, 387 S.E.2d 99 (1989). As further reiterated, "[i]n general a party without *actual* notice may rely upon record titles in the office of the clerk of the county commission of the county in which the land is located." *Id.*, 182 W.Va. at 197, 387 S.E.2d at 102. We also have held that
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> > [a] grantee in a conveyance of land, to be protected against a prior unrecorded deed for the same property, and to a different person, must be a complete purchaser, without notice of the prior deed, and have paid in full the purchase price for the land purchased by him; but he will be protected to the extent of any purchase money paid therefor before such prior deed is recorded.
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> Syl., *Alexander v. Andrews,* 135 W.Va. 403, 64 S.E.2d 487 (1951); *See also* Syl., in part, *United Fuel Gas Co. v. Morley Oil & Gas Co.,* 101 W.Va. 83, 131 S.E. 716

(1926) ("To be protected . . . against a prior unrecorded deed, one must be a complete purchaser, must have had no notice of the prior contract or deed, and have paid all the purchase money for the land purchased by him.").

A bona fide purchaser of land is " 'one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.' " *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921) (internal citations omitted). *See also* Syl. pt.2, in part, *Hupp v. Parkersburg Mill Co.*, 83 W.Va. 490, 98 S.E. 518 (1919) ("[T]he possession under the unrecorded deed is apparently consistent with that of the grantor having record title to all of the land on which there is such concurrent possession at different places, wherefore a purchaser from him is under no duty to prosecute his inquiry as to the title beyond the record and the possession by the holder of the recorded title."); *Simpson v. Edmiston*, 23 W.Va. 675, 680 (1884) ("[A] bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it[.]"); Black's Law Dictionary 1271 (8th ed.1999) (defining a "bona fide purchaser" as "[o]ne who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."). As previously held by this Court, and more recently reiterated, " '[a] *bona fide* purchaser is one who actually purchases in good faith.' Syl. pt. 1, *Kyger v. Depue*, 6 W.Va. 288 (1873)." *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005).

Wolfe v. Alpizar, 219 W.Va. 525, 529-30, 637 S.E.2d 623, 627 - 28 (2006). In the present case, this Court finds no error in the circuit court's finding that petitioners had adequate notice of respondent's interest in the land, and in the finding that petitioners were not bona fide purchasers. As the circuit court found, the tax ticket, the land books, the instrument conveying an easement across respondent's property in favor of petitioners, petitioners' own deed referencing the easement signed by respondent, and the numerous public records showing respondent as the owner of the land were all legally sufficient notice to petitioners of the proper owner of the land. We therefore affirm the circuit court's finding that petitioners were not bona fide purchasers.

Petitioners next argue that the circuit court erred in finding that they are charged with having the same information as their counsel in determining whether they were bona fide purchasers without notice. The circuit court ruled that petitioners' counsel had documentation from the title abstractor that the tax assessment was in respondent's name and this should have merited additional investigation and constituted notice. Petitioners argue that there is no legal precedent that notice to the attorney is notice to the client. Petitioners further argue that it would be "dangerous precedent to hold that [petitioners] cannot rely on the representations of their attorney and/or that [petitioners] are charged with knowledge that their attorneys have or should have had despite evidence that said information was provided to the [petitioners]."

Respondent argues that there was no finding by the circuit court that charged them with the same information as their lawyer. Regardless of what the attorney knew, respondent argues that

petitioners had a duty to inquire, independent of their lawyer. The circuit court found that petitioners were in possession of respondent's tax receipt and their own deed stating that respondent conveyed the easement to them. Respondent argues that the circuit court was correct in finding that petitioners had sufficient notice regardless of whether they hired a lawyer. Petitioners claim that they only had the letter from their attorney stating that Mary Roda and Braxton Oil & Gas owned an interest in the property, but respondent argues that this is inaccurate, as petitioners had several items indicating the respondent's ownership of the property, including the tax ticket, the deed to petitioners' own 110 acres wherein respondent granted them an easement, and several public records indicating who owned the property.

As stated above, this Court finds no error in the circuit court's holding that petitioners were not bona fide purchasers. The circuit court did not err in finding that petitioners had notice that respondent had an interest in the land. Thus, this Court finds no error in the circuit court's grant of judgment as a matter of law on this issue.

Petitioners' third assignment of error is that the circuit court erred in directing a verdict in favor of respondent. The circuit court previously denied two motions for summary judgment filed by respondent, one only two weeks prior to trial. Thus, petitioners argue that there must have been a genuine issue of fact that needed to be heard by a jury. Petitioners argue that a reasonable jury could have found that they were bona fide purchasers and, therefore, the directed verdict was improper.

Respondent argues that prior to trial, the circuit court had not heard sworn testimony in making its decision regarding the summary judgment motions. Respondent states that at trial, the court heard testimony from witnesses who were never deposed, including testimony of the County Clerk, the County Assessor, and respondent's brother. Respondent argues that the evidence clearly showed that there was significant evidence that he owned the subject property and that the petitioners, who are both college graduates, had notice of the same.

Rule 50(a)(1) of the West Virginia Rules of Civil Procedure states as follows:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In the case at bar, respondent points out that the circuit court denied summary judgment prior to the trial, but had not heard some of the testimony elicited at trial. After hearing the testimony at trial, the circuit court found that the evidence showed that petitioners were not bona fide purchasers. This Court does not find error in the circuit court's decision, considering the evidence in the light most favorable to petitioners, and therefore this Court declines to reverse the circuit court's order.

Petitioners' final assignment of error is that the circuit court erred in prohibiting discovery and limiting evidence regarding respondent's prior convictions for tax evasion and subsequent asset seizures. Petitioners argue that the policy behind the "first to file" rule is that the party failing to file the deed is the party to suffer the loss, making respondent's reason for failing to record his deed for twenty years relevant.

In response, respondent argues that the circuit court did not prohibit the discovery deposition of respondent, but properly denied petitioners' motion to compel examination of respondent's prior convictions for tax evasion. Respondent argues that evidence of his crime is not admissible because he was pardoned in 1992, making such evidence inadmissible under Rule 609 of the West Virginia Rules of Evidence. Moreover, respondent argues that there is no evidence that he failed to record the deed since the sales listing form on file with the County Clerk shows the cost of the transfer stamps and recording fees. Thus, it appears that the failure to record the deed was not respondent's fault, and the transfer was recorded in the land books and tax records.

Rule 609(b) of the West Virginia Rules of Evidence states that evidence of a conviction more than ten years from the date of conviction or more than ten years since the party's release from incarceration is not admissible unless the probative value substantially outweighs its prejudicial effect. Further, Rule 609(c) states that evidence of a conviction is not admissible if the conviction has been the subject of a pardon. In the present case, respondent was pardoned; thus, this Court finds no error in the denial of petitioners' motion to compel examination of respondent's prior convictions.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 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