IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2019 Term

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No. 18-0550

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FILED
November 8, 2019
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BANBURY HOLDINGS, LLC,
Plaintiff Below, Petitioner

v.

ROBERT W. MAY,
Defendant Below, Respondent

Appeal from the Circuit Court of Berkeley County
The Honorable Christopher C. Wilkes, Judge
Civil Action No. 17-C-5

AFFIRMED

Submitted: October 15, 2019
Filed: November 8, 2019

Charles F. Printz, Jr., Esq.
J. Tyler Mayhew, Esq.
Bowles Rice LLP
Martinsburg, West Virginia
Counsel for the Petitioner

Wm. Richard McCune, Jr., Esq.
Wm. Richard McCune, PLLC
Alex A. Tsiatsos, Esq.
Tsiatsos Law Firm, PLLC
Martinsburg, West Virginia
Counsel for the Respondent

JUSTICE ARMSTEAD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." Syllabus Point 2, *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005).

Armstead, Justice:

This matter[1] is an appeal from an order from the Circuit Court of Berkeley County denying Petitioner Banbury Holdings, LLC's renewed motion for summary judgment and granting declaratory relief. In its order, the circuit court found that a judgment order entered in prior litigation[2] in which Banbury Holdings, LLC was a party, and recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, ran with the land[3] and was binding upon Banbury Holdings, LLC and all its successors in title.

In its appeal, Banbury Holdings, LLC asserts the judgment order issued in the Injunction Proceeding was void *ab initio,* and could not be enforced against it[4].

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[1] As more fully discussed below, we will refer to this matter as the "Collateral Proceeding."

[2] Berkeley County Civil Action Number 10-C-1004. We will refer to that matter as the "Injunction Proceeding."

[3] The property at issue is referred to throughout the record as a subdivision called "The Lakes."

[4] Banbury Holdings, LLC asserts four assignments of error – 1) the judgment order in the Injunction Proceeding was void *ab initio* because all interested parties were not joined in that matter; 2) the void judgment order could not give notice to subsequent purchasers; 3) Banbury Holdings, LLC was not in privity of title with a prior owner of The Lakes; 4) Banbury Holdings, LLC did not have constructive notice of the judgment order in the Injunction Proceeding.

As we discuss below, we hold that Banbury Holdings, LLC is judicially estopped from asserting these claims, and as such, we will not address the merits of these

However, Banbury Holdings, LLC intervened in the Injunction Proceeding in the place of the party that it now claims was not joined, and obtained a favorable ruling.

We have reviewed the briefs, the record, and the pertinent legal authorities, and affirm the judgment of the circuit court.

I. FACTUAL AND PROCEDURAL BACKGROUND

By deed dated March 4, 2005, Mark-Banbury, LLC acquired property in Berkeley County, West Virginia, containing 230.58568 acres, which it thereafter began developing as The Lakes. On the same date, Mark-Banbury, LLC granted a credit line

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specific assignments of error. "[W]here inconsistent conduct is taken that 'is barred by ... judicial estoppel, there are no triable issues of fact as a matter of law.' *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 39, 591 S.E.2d 870, 895 (2004)." *Larry V. Faircloth Realty, Inc. v. Pub. Serv. Comm'n of W. Va.*, 230 W. Va. 482, 487, 740 S.E.2d 77, 82 (2013).

We have long held that this Court may affirm a circuit court for any reason disclosed by the record. "An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support." *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-169 (1996); ("We agree with the Circuit Court, and affirm its decision, although for different reasons than those expressed by the lower court.") *Longwell v. Hodge*, 171 W.Va. 45, 47, 297 S.E.2d 820, 822 (1982); ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.") Syllabus Point 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

deed of trust on The Lakes to Mercantile Mortgage Corporation[5]. Robert W. May[6] owns a piece of property across the road from The Lakes, containing 38.41 acres. As a condition of construction of The Lakes, Mark-Banbury, LLC was required by the Berkeley County Planning Commission to construct certain storm-water management facilities. Without permission, Mark-Banbury, LLC, entered on to May's land, constructed a storm-water management facility, and began draining water across May's land.

On December 8, 2010, May brought the Injunction Proceeding against Mark-Banbury, LLC and later amended his petition to include Lawrence I. Rosenberg, managing member of Mark-Banbury, LLC, as a defendant. By judgment order entered August 5, 2013, the circuit court awarded judgment in the Injunction Proceeding in favor of May and against both Mark-Banbury, LLC and Rosenberg.

In that order, the circuit court awarded damages and an injunction prohibiting Mark-Banbury, LLC and Rosenberg from future development of The Lakes until the encroachment on May's property was removed, flooding and damages were stopped, and further storm-water management was undertaken. That judgment order was subsequently

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[5] The parties represent that PNC Bank became successor to Mercantile Mortgage Corporation.

[6] Prior to oral argument, May's counsel filed a suggestion of May's death in this Court. By the obituary notice attached to that suggestion, May passed away on October 12, 2019. At the time this opinion was issued, no party has filed a motion in this Court to substitute parties.

recorded in the appropriate records in the Office of the County Commission of Berkeley County.

At no point during the pendency of the Injunction Proceeding were Mercantile Mortgage Corporation or PNC Bank named as defendants. Nonetheless, after entry of the judgment order in the Injunction Proceeding, PNC Bank assigned the credit line deed of trust to Banbury Holdings, LLC on April 30, 2014.

Once it had been assigned PNC Bank's interest in the credit line deed of trust, Banbury Holdings, LLC declared a default and proceeded to a trustee's sale of The Lakes, which took place on September 12, 2014. Banbury Holdings, LLC sent notice of the sale to both May and May's counsel. Upon receiving this notice, May filed an emergency motion in the Injunction Proceeding to preserve the injunction. After May filed his motion, Banbury Holdings, LLC entered an appearance in the Injunction Proceeding on September 9, 2014. A hearing on May's emergency motion was held in the circuit court on September 11, 2014 – one day prior to the trustee's sale. Banbury Holdings, LLC appeared at that hearing and argued its position that the injunction should be dissolved[7]. Following that

[7] By allowing Banbury Holdings, LLC the opportunity to be heard at this hearing, the circuit court implicitly recognized that Banbury Holdings, LLC had standing to assert its position. We have previously stated that "[g]enerally, standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821

hearing, the circuit court found May's motion to be premature, denying it without prejudice. Thereafter, the trustee's sale took place as scheduled on September 12, 2014, and Banbury Holdings, LLC purchased The Lakes.

On January 3, 2017, Banbury Holdings, LLC filed this Collateral Proceeding for declaratory judgment[8], requesting that the circuit court "declare that the Judgment Order [in the Injunction Proceeding] is void, invalid and of no effect as to . . . Banbury Holdings, LLC and its successors in title; [and] declare that the Judgment Order does not bind or otherwise run with the land that is the subject of this civil action." Banbury Holdings, LLC filed a motion for summary judgment, which was denied, and the circuit court allowed discovery to proceed.

(2002) (internal footnotes omitted). We articulated the elements for establishing standing in Syllabus point 5 of *Findley* as follows:

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

By its order of July 11, 2017, the circuit court formally acknowledged the presence of Banbury Holdings, LLC as an intervening party in the Injunction Proceeding by its previous appearance protecting its interests.

[8] Banbury Holdings, LLC initially filed an action substantially similar to this Collateral Proceeding in federal court on February 16, 2016. The federal court, on abstention grounds, dismissed that matter on December 5, 2016.

On June 5, 2017, six months after filing this Collateral Proceeding, Banbury Holdings, LLC filed its petition in the Injunction Proceeding seeking dissolution or modification of the judgment order to allow development of portions of The Lakes that did not drain water on to May's property.

On September 7, 2017, the circuit court held a hearing on Banbury Holdings, LLC's petition to dissolve or modify, during which Banbury Holdings, LLC offered its expert engineer's opinions on water drainage issues. Upon hearing this testimony, the circuit court appointed its own expert and ordered him to conduct an investigation and file a written report on these drainage issues. That report was received by the circuit court on November, 2, 2017, and the court agreed with Banbury Holdings, LLC's expert that only certain portions of The Lakes drained onto May's property. On November 21, 2017, the circuit court entered an order in the Injunction Proceeding granting, in part, Banbury Holdings, LLC's petition to modify the injunction, allowing the development of the portion of The Lakes that does not drain onto May's property. This order was entered "*nunc pro tunc* in all respects" to August 5, 2013, the date that the original judgment order was entered in the Injunction Proceeding.

On February 1, 2018, Banbury Holdings, LLC renewed its motion for summary judgment in this Collateral Proceeding, and the parties agreed there was "no

triable question of fact" and requested that the circuit court "decide this matter based upon the record before it as developed through the parties' briefing."

In its Order Denying Plaintiff's Renewed Motion for Summary Judgment and Declaratory Order, the circuit court noted that when May filed his emergency motion in the Injunction Proceeding seeking to preserve the injunction and have it declared permanent, Banbury Holdings, LLC filed a notice of appearance and a responsive pleading, and thereafter appeared by counsel to participate in oral argument – one day prior to the trustee's sale. Banbury Holdings, LLC's counsel appeared at the hearing on that motion and was permitted to participate. After the circuit court decided to "neither extend nor dissolve the injunction," Banbury Holdings, LLC purchased The Lakes at the foreclosure sale. The circuit court also found that Banbury Holdings, LLC's notice of the recorded judgment order, "of which it voluntarily inserted itself in the litigation of, causes it to be subject to the injunctive relief found in said [j]udgment [o]rder . . . ." It is from entry of this order that Banbury Holdings, LLC seeks relief from this Court.

II. STANDARD OF REVIEW

"A circuit court's entry of a declaratory judgment is reviewed *de novo.*" Syllabus Point 3, *Cox v. Amick,* 195 W.Va. 608, 466 S.E.2d 459 (1995); *see also* Syllabus Point 2, *Blankenship v. City of Charleston,* 223 W. Va. 822, 823, 679 S.E.2d 654, 655 (2009). "As we explained in *Cox,* 'because the purpose of a declaratory judgment action

is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo.*' *Cox*, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995)." *Blankenship v. City of Charleston*, 223 W. Va. 822, 824-25, 679 S.E.2d 654, 656–57 (2009)(citation of *Cox* clarified).

III. ANALYSIS

At oral argument, May urged this Court to apply estoppel to Banbury Holdings, LLC's position on appeal and directed this Court to Syllabus Point 6 of *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271 (1896). *Bettman* applied estoppel *in pais* – equitable estoppel. *Id.* We disagree with May's contention that *Bettman* controls the estoppel doctrine applicable in this matter. However, equitable estoppel is just one estoppel doctrine. *See* Robin J. Davis & Louis J. Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure § 8(c) (Supp. 2018). Collateral estoppel, promissory estoppel, estoppel by record, estoppel by deed, and judicial estoppel are also recognized under West Virginia law. *See West Virginia Dept. of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 503, 618 S.E.2d 506, 512 (2005); s*ee also* Litigation Handbook on West Virginia Rules of Civil Procedure § 8(c) (Supp. 2018).

Though we disagree with May's assertion that equitable estoppel applies to this appeal, we nonetheless invoke judicial estoppel, *sua sponte*, as "judicial estoppel is an

equitable doctrine invoked by a court at its discretion." Robin J. Davis & Louis J. Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure § 8(c) (Supp.2018).

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Syllabus Point 2, *Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005); *see also* Syllabus Point 3, *Riggs v. W. Va. Univ. Hosp., Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007); Syllabus, *Larry V. Faircloth Realty, Inc., v. Pub. Serv. Com'n of W. Va.*, 230 W. Va. 482, 740 S.E.2d 77 (2013). As we explained in *Robertson*, judicial estoppel exists to:

> [P]reclude[] a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation. *In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex.Ct.App.2004). Under the doctrine, a party is 'generally prevent[ed] ... from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 [120 S.Ct. 2143, 147 L.Ed.2d 164] (2000). This Court recognized long ago that '[t]here are limits beyond which a party may not shift his position in the course of litigation [.]' *Watkins v. Norfolk & Western Ry. Co.*, 125 W.Va. 159, 163, 23 S.E.2d 621, 623 (1942). Thus, '[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 552 n. 21, 584 S.E.2d 176, 186 n. 21 (2003).

Robertson, 217 W. Va. 497, 504, 618 S.E.2d 506, 513 (2005).

Applying the *Robertson* factors to this matter, we find that the first factor is satisfied since Banbury Holdings, LLC's contention that PNC Bank was not a party to the Injunction Proceeding is simply untrue. PNC Bank, as successor to Mercantile Mortgage Corporation, assigned its credit line deed of trust to Banbury Holdings, LLC on April 30, 2014. Once Banbury Holdings, LLC acquired the credit line of deed of trust from PNC Bank, it promptly declared a default and sold The Lakes at a trustee's sale. Critically, Banbury Holdings, LLC unilaterally and voluntarily intervened in the Injunction Proceeding and appeared at a hearing one day prior to the trustee's sale, arguing that the circuit court should dissolve the injunction. With that act, Banbury Holdings, LLC stepped into the shoes of PNC Bank and thus, for the purposes of the Injunction Proceeding, became the very party it now argues was not before the circuit court.

Significantly, during the pendency of this Collateral Proceeding, Banbury Holdings, LLC, filed a petition to dissolve or modify the judgment order in the Injunction Proceeding, participated in evidentiary hearings, and was granted relief when the circuit court modified its judgment order. Additionally, the order Banbury Holdings, LLC drafted modifying the judgment order and entered by the circuit court contained language making it effective *nunc pro tunc* to the original date the judgment was entered. This clearly placed Banbury Holdings, LLC into the shoes of PNC Bank and in the Injunction Proceeding on

August 5, 2013[9]. Banbury Holdings, LLC cannot participate in the Injunction Proceeding modifying the judgment order in the place and stead of the entity – PNC Bank – that they claim was not a party, and simultaneously argue in this Collateral Proceeding that the judgment order drafted by *its own counsel* in the Injunction Proceeding is void because PNC Bank was not a party.

Robertson's second and third factors are also satisfied. The second factor is satisfied because the same parties – Banbury Holdings, LLC and May – were present in both matters. The third factor is met because Banbury Holdings, LLC received a benefit by being able to effectively prevent full enforcement of the judgment order in the Injunction Proceeding until this Collateral Proceeding is resolved.

Finally, *Robertson*'s fourth factor is satisfied because if this Court were to sanction Banbury Holdings, LLC's above-noted assertions of inconsistent positions, such would greatly undermine the integrity of the judicial process. "'The integrity of the judicial

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[9] Though not necessary to resolve this matter, we note that the terms of the trustees sale when Banbury Holdings, LLC purchased The Lakes contained the following language:

> The sale shall be further subject to the following . . .
>
> 3. All covenants, conditions, restrictions, reservations, easements and rights-of-way of record in the chain of title to the property, or which may be visible from a physical inspection.

process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal.'" *Larry V. Faircloth Realty, Inc., v. Pub. Serv. Com'n of W. Va.*, 230 W. Va. 482, 488-489, 740 S.E.2d 77, 83-84 (2013) (quoting *Helfand v. Gerson,* 105 F.3d 530, 535 (9th Cir. 1997)).

As we find the four *Robertson* factors are satisfied, Banbury Holdings, LLC is judicially estopped from asserting conflicting positions in this Collateral Proceeding.

IV. CONCLUSION

Accordingly, we affirm the circuit court.

Affirmed.