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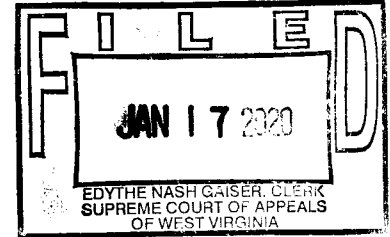
## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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LANNA KLEIN,  
Plaintiff Below, Petitioner,

v.

DARLENE McCULLOUGH,  
Defendant Below, Respondent.



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On Appeal from the Circuit Court of Tyler County, West Virginia  
Civil Action No. 18-C-38-H

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### BRIEF OF PETITIONER

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## I. ASSIGNMENT OF ERROR

The Circuit Court erred in applying the “Stranger to a Deed Rule” to the Right of First Refusal in this Action.

## II. STATEMENT OF THE CASE

This case involves a dispute as to ownership of oil and gas underlying approximately 35 acres in Meade District, Tyler County, West Virginia, presently assessed as Map 15, Parcel 14 (hereinafter the “Subject Lands”). By Deed, dated June 24, 1995, Julia McCullough, the mother in law of the Defendant below and Respondent herein, Darlene McCullough, conveyed the Subject Lands to Benjamin McCullough, Darlene McCullough’s husband. (Deed Book 320, Page 424.) That Deed, contained a provision reading as follows:

This conveyance is made subject to the provision that upon the subsequent conveyance, sale or devise of the said property, the said Benjamin F. McCullough, his heirs or assigns, shall offer a first right of refusal on the subject property to the following individuals in order of listing: First, to Lanna L. Klein [and then to Benjamin McCullough’s three other siblings].

Plaintiff contends that this language created a right of first refusal in her favor. (Pl.’s Compl. <sup>1</sup> at ¶ 11, 00002JA.)

Benjamin McCullough passed away on April 13, 2010 and his Will left the entirety of his estate to the defendant, Darlene McCullough. (Pl.’s Compl. at ¶ 13, 00002JA.) On July 24, 2012, Darlene McCullough conveyed the oil and gas underlying the Subject Lands to Eric and Brian Cochran (Deed Book 400, Page 112). (Pl.’s Compl. at ¶ 14, 00002JA.) Plaintiff contends that Darlene McCullough did not first offer the property to her for purchase and therefore violated the terms of the right of first refusal. (Pl.’s Compl. at ¶¶ 15, 29., 00002JA, 00004JA.) Brian and

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<sup>1</sup> Plaintiff moved to amend her Complaint. The Circuit Court granted that motion and deemed it filed at the same hearing wherein the Court Granted the Motion presently under consideration. The differences are not significant to this Appeal.

Eric Cochran subsequently leased their interests in the oil and gas and sold the mineral fee. (Pl.'s Compl. at ¶¶ 18-20, 00003JA.) Plaintiff below sought specific performance of the alleged right of first refusal. (Pl.'s Am. Compl. at Counts II and III, 00014JA-00015JA) Plaintiff also sought contract damages and a declaration as to the rights of the parties. (Pl.'s Am. Compl. at Counts I and IV, 00014JA-00016JA.)

The Defendant Below and Respondent herein, Darlene McCullough, moved to dismiss the Plaintiff's claims against her on the basis of the "Stranger to a Deed Rule" as set forth in *Erwin v. Bethlehem Steel Corp.*, 134 W. Va. 900, 62 S.E.2d 337 (1950) and elsewhere in the common law of West Virginia. (Def.'s Memo in Supp. Of Mot. to Dismiss, 00020JA.) Respondent argued that because Plaintiff below was a "stranger" to the deed, no right of first refusal could be created in her favor and thus Plaintiff/Petitioner's claims failed as a matter of law. (Memo in Supp. Of Mot. to Dismiss, 00025JA.) At a hearing held on September 12, 2019, the Circuit Court granted the Respondent's motion and dismissed the claim on the basis of the Rule. (Order, 00071JA.)

### **III. STANDARD OF REVIEW**

This is an appeal from the grant of a motion to dismiss pursuant to Rule 12(b)(6). The standard of review is *de novo*. *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 672 S.E.2d 255 (2008) ("In general, this Court will apply a *de novo* standard of review to a circuit court's order granting a motion to dismiss.").

### **IV. SUMMARY OF ARGUMENT**

The Court erred in concluding that the stranger to a deed rule precluded the creation of a right of first refusal in favor of the Petitioner. While the rule remains valid law in West Virginia, it precludes only the creation of present possessory interests in third-parties. It does not apply where, as here, the right created is a contractual expectancy, and not a present possessory

interest in the real estate. Hence, the Circuit Court erred and its decision should be reversed and the case reopened for further proceedings consistent with this Court's Order.

**V. STATEMENT REGARDING ORAL ARGUMENT**

Petitioner requests oral argument. Petitioner believes that the case may be appropriate for Rule 20 oral argument because this case presents an issue of first impression. Petitioner does not believe that this case is appropriate for memorandum opinion.

**VI. ARGUMENT**

The "Stranger to a Deed Rule" essentially provides that a deed cannot create or grant an interest in land to a non-party to that deed. *See Erwin v. Bethlehem Steel Corp.*, 134 W. Va. 900, 900, 62 S.E.2d 337, 338 (1950) ("A reservation or an exception in favor of a stranger to a conveyance does not serve to recognize or confirm a right which does not exist in his favor when the conveyance which contains such reservation or exception is made.") The rule remains the law of the land in West Virginia but does not preclude the creation of a right of first refusal in favor of a third-party. In fact, this Court and our State's broader jurisprudence evidence a clear policy in favor of upholding contractual agreements and giving effect to the intentions of the parties to written instruments. Hence, this Court should reverse the decision of the Circuit Court.

This Court's previous decisions applying the stranger to a deed rule do not involve rights of first refusal. Rather, those cases deal with the creation or grant of present possessory interests in real estate. The seminal *Erwin v. Bethlehem Steel Corp.* case supra. dealt with a coal severance. The issue was whether language in a surface deed, between two strangers to the coal title, that excepted and reserved "so much of the coal underlying said land as was conveyed by James Fleming and wife to A. B. Fleming and J. O. Watson, and which has since been conveyed to and now belongs to The Gaston Gas Coal Company" could enlarge the rights of the coal companies rights created in the original deeds that severed the coal. *Erwin*, 134 W. Va. at 908, 62

S.E.2d. at 342. Unsurprisingly, this Court held that this language had no effect on the coal operator's rights based on the stranger to a deed rule.

This Court has never addressed the issue of whether the stranger to a deed rule applies to preclude operation of a right of first refusal in favor of a non-party. In fact, very few Courts have expressly addressed this issue. The New York Supreme Court, Appellate Division did, however, recently address this issue and that Court's logic is sound and in line with this Court's prior precedent. In *Peters v. Smolian* 154 A.D.3d 980 (2017), Richard Smolian conveyed two parcels to Alexander Peters and Sasfox Associates, LLC, *Id.* at 981. In each conveyance, he reserved a right of first refusal in favor of himself, his then wife, and his two adult children. *Id.* Approximately twenty years later, Peters and Sasfox, the original purchasers, contracted to sell the properties and sought waivers of the rights of first refusal from Richard Smolian, his then ex-wife, and his two children, in order to facilitate the same. *Id.* Richard Smolian, the original seller, agreed to waive his right, but his children and his ex-wife, who had never owned an interest in the property, did not. *Id.* Peters and Sasfox filed a declaratory judgment action seeking to declare the rights of first refusal in favor of the two children and ex-wife of Richard Smolian invalid "under the 'stranger to the deed' rule." *Id.*

The Appellate Division first acknowledged that "the long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third-party, a so-called 'stranger to the deed,' does not create a valid interest in favor of that third-party." *Peters*, 154 A.D.3d at 982. (citations omitted). The court distinguished the right in issue here from those rights precluded under the stranger to a deed rule. According to the New York Court "a right of first refusal does not constitute a 'reservation' falling within the ambit of the rule." *Id.* A "'reservation' [precluded by the rule] refers to an interest that touches the land, such as a right to use, occupy, profit from, or enjoy the land being conveyed." *Id.* "A right of first refusal, on the

other hand, is a preemptive or contractual right to ‘receive an offer.’” *Id.* at 982-983. Hence, the right of first refusal was enforceable by the “stranger to the deed.”

The New York court’s decision is in line with the implicit logic of other courts. *Quality Prop. Asset Mgmt. Co. v. Trump Va. Acquisitions, LLC*, 2012 WL 3542527 (W. D. Va. 2012), is one such case. In it, the United States District Court in Virginia recognized the prior existence of a right of first refusal on a mansion in favor of “the then current owner” of a large parcel adjacent to the mansion. *Id.* at \*3. The phrase “then current owner” of course expressly anticipates a stranger to the original deed. While the Court recognized the right, it declined to enforce it in favor of the alleged “then current owner”, Donald Trump, because the larger parcel had been subdivided and thus the future president was not “the then current owner” of the parcel described. *Id.* at \* 10. Thus, the Virginia Court would have enforced the right of first refusal in favor of a non-party, had that non-party actually held the right.

In *Kennedy v. Dawson*, 989 P.2d 390 (Mont. 1999), the Montana Supreme Court affirmed enforcement of a right of first refusal by an *assignee* to the original right and thus a stranger to the original. *See Kennedy v. Dawson*, 989 P.2d 390 (Mont. 1999). Perhaps most closely analogous to the instant case, a Kentucky court enforced the following provision of a will, “I give and devise unto my son, Wade Fields, my house and lot, which is described in a Deed to me by Hiram Fields .... Should Wade Fields at any time decide to sell this property, he shall give the right of first refusal to each of his brothers and sisters.” *Cable v. Steely*, 2009 WL 3400508, at \*1 (Ky. Ct. App. 2009).

Enforcing the terms of the right of first refusal as written in this case is also consistent with the public policy of this state in favor of freedom of contract. *See Syl. Pt. 3 Wellington Power Corp. v. CNA Surety Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005) (“[West Virginia’s] public policy favors freedom of contract which is the precept that a contract shall be

enforced except when it violates a principle of even greater importance to the general public.”) This Court’s enforcement of the same would moreover be consistent with this State’s tendency to give effect to the intent of the parties over technical, but potentially antiquated rules of construction. *See e.g.* W. Va. Code § 35-2-2 (applying *cy pres* doctrine to devises, bequests and trusts); W. Va. Code § 36-1A-1 *et seq.* (modifying common law Rule Against Perpetuities).

This Court should adopt the reasoning of the New York, Montana, Virginia and Kentucky Courts and allow enforcement of the right of first refusal according to its terms. Unlike the previous decisions on this Court applying the Stranger to a Deed Rule, the right created here is not a present possessory interest. It is, on the contrary, a contractual expectancy which by its very terms would require another document (*e.g.* a deed) to carry out. This is very different from a situation where a stranger claims a right in property. Here, the “stranger” (children/siblings of the party to the deed) merely claim the right to receive an offer. This Court should give effect to the parties’ intent and ensure that future parties rest soundly in the comfort that their contracts will be enforced according to the rule of law.

## VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Trial Court’s grant of Darlene McCullough’s Motion to Dismiss should be reversed and the case remanded for further proceedings consistent with this Court’s Opinion and the law.

Dated this 16th day of January, 2020.



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Plaintiff Below, Petitioner,

v.

NO. 19-0888

DARLENE MCCULLOUGH,

Defendant Below, Respondent.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> of January, 2020, I served the foregoing "Brief of Petitioner" and "Joint Appendix" upon counsel of record by email and by depositing a true and exact copy thereof via U.S. mail, postage prepaid, in envelopes addressed as follows:

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