

FEB 2 | 2020

NO. 19-0888

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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 RESPONDENT**

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### **(3) ASSIGNMENTS OF ERROR**

Petitioner asserts as her single assignment of error that the Circuit Court erred in applying the “Stranger to a Deed Rule” to the facts of this case in granting a motion to dismiss in favor of Respondent Darlene McCullough.

### **(4) STATEMENT OF THE CASE**

By deed dated June 24, 1995 and recorded in Book 320 at Page 424, (the “Deed”) Julia McCullough conveyed property in Tyler County to Benjamin McCullough. (Joint Appendix at p. 2). The Deed contained a provision: “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 ....” (Joint Appendix at p. 2). Benjamin McCullough passed away on April 13, 2010. (Joint Appendix at p. 2). Benjamin McCullough’s will left the entirety of his estate, including the property conveyed in the Deed, to his wife, defendant Darlene McCullough. (Joint Appendix at p. 2).

Petitioner Lanna Klein is a stranger to the Deed and admitted as such in her response to the Respondent’s Motion to Dismiss. (Joint Appendix at p. 29). The Complaint does not allege that a right of first refusal in favor of Lanna Klein exists in another writing, instrument or contract either contemporaneous with or preexisting the deed. (Joint Appendix at pp. 1-8).

Respondent Darlene McCullough filed a motion to dismiss in the lower court. (Joint Appendix at pp. 20-27). The lower court entered an ORDER GRANTING MOTION TO DISMISS OF DEFENDANT DARLENE MCCULLOUGH on September 18, 2019. (Joint Appendix at pp. 71-73). This order held that Petitioner’s claims against the Respondent failed

because West Virginia law dictated that a reservation to a stranger to a deed was void for all purposes.

**(5) SUMMARY OF ARGUMENT**

The Circuit Court of Tyler County properly granted the Respondent's Motion to Dismiss in holding that West Virginia adheres to the stranger to the deed rule making the right of first refusal to Petitioner void and inoperative.

**(6) STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Counsel for the Respondent asserts that oral argument is not necessary pursuant to the criteria in Appellate Rule 18(a). The issues in this appeal have been authoritatively decided by this Court in the past, and the facts and legal arguments are adequately presented in the briefs and record on appeal such that the decisional process would not be significantly aided by oral argument.

**(7) ARGUMENT**

This is a simple case. The question for this Court to decide is whether former explicit pronouncements about the stranger to the deed rule by the West Virginia Supreme Court of Appeals continue to hold sway. There are no factual disputes in this appeal. The Deed reserved a right of first refusal to Petitioner Lana Klein, and Petitioner Lana Klein was a stranger to the deed, meaning that she was a third party to the deed neither the grantor nor the grantee. Petitioner even admits in her brief that the "Stranger to the Deed Rule" remains valid law in West Virginia. (Petitioner's Brief at pp. 2 & 3).

West Virginia law is explicit on the stranger to a deed. "A reservation to a stranger to the instrument is void for all purposes." *Erwin v. Bethlehem Steel Corp.*, 134 W.Va. 900, 909, 62 S.E.2d 337, 343 (1950) (quoting *Beckley National Exchange Bank v. Lilly*, 116 W.Va. 608, 182

S.E. 767 (1935). A deed can, however, recognize or confirm rights already existing in strangers. *Id.* (citing *Deaver v. Aaron*, 126 S.E. 382 (Ga. 1925)). However in this case there was no other writing or instrument evidencing the Petitioner's right of first refusal other than in the Deed.


This Court in its decision in *Meadows v. Belknap*, 199 W.Va. 243, 483 S.E.2d 826, n. 14 (1997) (quoting *Erwin*, *supra*), made the decisive statement that “[o]ur case law has been definitive in holding that “[a] reservation to a stranger to the instrument is void for all purposes.” This is the law of West Virginia, and it was correctly applied by the trial court in this case. A right of first refusal in the Deed was a reservation to a stranger and does not represent the exception that the Petitioner seeks to convince this Court that it does. West Virginia law is clear, and the trial court properly applied it.

It is a red herring to suggest that somehow the operation of the stranger to a deed rule is inconsistent with a public policy in favor of freedom of contract. Petitioner Lana Klein has not lost any contractual expectancy. She was not a party to the Deed and made no allegation in her Complaint that a separated contract existed evidencing a right of first refusal in her favor.

#### **(8) CONCLUSION**

For the reasons stated herein this Court should affirm the decision of the lower court granting the Respondent's Motion to Dismiss.

Dated this 19<sup>th</sup> day of February, 2020

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **BRIEF OF RESPONSENT** was served upon the following parties by U.S. Mail on this 19<sup>th</sup> day of February, 2020:

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