No. 20-0863

IN THE
SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA

LAURA GODDARD,

PLAINTIFF BELOW, PETITIONER,

v.

TYLER HOCKMAN and
EMILY A. HOCKMAN,

DEFENDANTS BELOW, RESPONDENTS.

On Appeal from the Jefferson County Circuit Court of West Virginia
The Honorable David M. Hammer (Civil Action No.: CC-19-2018-C-14)

REPLY BRIEF FOR THE PETITIONER

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ASSIGNMENTS OF ERROR

I. **The trial court erred by applying *Carden v. Bush*, 109 W.Va. 655, 155 S.E. 914 (1930) and *Walker v. Summers*, 9 W.Va. 533 (1876) – cases with substantially dissimilar facts to the facts in the case at bar and disregarding the longstanding rule of law as outlined in *Hite v. Donnally*, 85 W.Va. 640, 102 S.E. 478 (1920) – a properly conducted foreclosure of a deed of trust extinguishes inferior encumbrances.**

II. **The trial court erred by applying several equitable rules of law, including the "bona fide purchaser doctrine," the "common scheme doctrine," and the "unity rule," as the cases cited by the trial court in support of its finding fail to share similar facts to the present matter warranting application.**

   A. **The trial court erred by applying the "bona fide purchaser doctrine" to the instant suit, as this rule does not apply to the facts at the case at bar.**

   B. **It was error on the part of the trial court to apply the "common scheme doctrine" to the case at bar, as equitable restrictions do not apply to the facts in the instant case.**

   C. **The cases cited by the trial court in support of the "unity rule" involve parties that derived title from a common developer, not a foreclosing trustee – a party with superior rights to that of the lot owners of the Falcon Ridge Subdivision.**

III. **The trial court erred by relying on the Community Impact Statement in making its finding, as easements, covenants, and restrictions are not enforced by Jefferson County and were therefore irrelevant to the trial court's determination.**

STATEMENT OF THE CASE

Petitioner relies on the Summary of the Case set forth in her previously submitted Petitioner's Brief.

SUMMARY OF THE ARGUMENT

Petitioner relies on the Summary of the Argument set forth in her previously submitted Petitioner's Brief.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner, Laura Goddard, does request oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, as the case at bar involves an issue of first impression.

REPLY ARGUMENT

This is case is not a bona fide purchaser or equitable servitude case, but instead involves a party – the Stephens (Petitioner's predecessor in interest) – with superior rights to the lot owners of the Falcon Ridge Subdivision. Further, although the Petitioner asserts under our law, that inferior appurtenant easements would have been extinguished by a validly conducted foreclosure sale, [1] it was an uncontested fact below [2] that all of the lot owners who purchased lots within the Falcon Ridge Subdivision pre-foreclosure sale waived and released their interest (if any) in the Subject Property. Further, had they chosen to avail themselves of the equitable remedy to enjoin

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[1] The Petitioner discussed *Carden v. Bush,* 109 W.Va. 655, 155 S.E. 914 (1930) at length in Petitioner's Brief. Therefore, the Petitioner will not waste the Court's time discussing *Carden*, as the Respondents rely on statements which were admittedly dicta. *See Id.* at 657.

[2] The Respondents, for the first time, argue that the circuit court did not establish as a fact below the ownership of the remaining lots in the subdivision. (Resp. Br. at 4-5). However, this is a false assertion, as the Respondents never contested whether the remaining lot owners within the Falcon Ridge Subdivision waived and released their interests in the Subject Property. In fact, to the contrary, the Respondents relied on the deed and release executed by the Falcon Ridge Subdivision lot owners in making several arguments to the circuit court.

Moreover, the deed and release executed by the remaining lot owners was attached as Exhibit "A" to the Petitioner's initial complaint, which said complaint specifically stated that the Respondents were the only parties to the suit "as the remaining lot owners within the Falcon Rudge Subdivision have waived and discharged the Grantee and the 21.52082-acre tract of real property – the subject matter of this suit from the terms, conditions and other matters set forth in the Falcon Ridge Subdivision Declaration of Covenants, Conditions, and Restrictions." A copy of the Petitioner's initial complaint, including the deed and release referenced therein, was included as part of the appendix record. A.R. 5-24.

It must also be noted that recordation of the deed and release is unnecessary for it to take effect upon delivery, as acknowledgement is only necessary for recording purposes. *See Jones v. Wolfe*, 203 W.Va. 613, 615, 509 S.E.2d 894, 896 (1998).

the sale as outlined in *Walker v. Summers*, 9 W.Va. 533 (1920) – this case may have had a different outcome. However, these facts are simply not before this Court.

In their brief on appeal, the Respondents present a number of hypothetical arguments to support a finding in their favor. In doing so, the Respondents apply cases that share dissimilar facts to the case at bar [3] and rely on the rights of third parties (the Falcon Ridge lot owners who purchased lots within the Falcon Ridge Subdivision pre-foreclosure sale) who chose to waive their rights (if any) in the Subject Property.

In making their argument on appeal, the Respondents raise issues that are not ultimately before this Court in an attempt to build a straw argument based on the following premise: this Court must rule in their favor in order to ensure a fair outcome to those parties' who purchased lots within subdivisions prior to the 2008 mortgage crisis [4] and to prevent landlocked parcels that would be incapable of being sold.[5] In making these fallacious arguments, the Respondents profess to this Court that they must rule in their favor to ensure an equitable outcome, when in fact, the

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[3] The Respondents, throughout their brief on appeal, wrongly focus on the bona fide purchaser doctrine along with a number of other equitable servitude doctrines intended to prevent fraud to a purchaser by enforcing the originally agreed upon, bargained-for contract between a purchaser and developer. *See Cook v. Tottem,* 49 W.Va. 177, 38 S.E. 491 (1901)(held that it can be presumed that the purchasers paid for the added value for public ways dedicated by the original land owner and therefore he cannot withhold such use from lot purchasers); *Jubb v. Letterle*, 185 W.Va. 239, 406 S.E.2d 465 (1991)(lot owners purchasing property within the area originally designated as the subdivision acquired a right to enforce the restrictive covenants); *Wallace v. St. Clair*, 147 W. Va. 377, 127 S.E.2d 742 (1962)(plaintiffs, purchasers who relied on covenants and restrictions to restrict the lots within a subdivision to residential use, were entitled to enforce the restrictions against a lot owner who sought to use a portion of the dwelling as a rooming house in violation of the covenants and restrictions intended purpose).

[4] None of this evidence was presented below nor is it supported by any authority, and therefore, fails to meet the requirements outlined in Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure.

[5] An easement in favor of the Falcon Ridge lot owners in Falcon Ridge Drive is not the issue before this Court. In fact, the Petitioner conveyed a right-of-way easement over Falcon Ridge Drive to the Falcon Ridge Subdivision lot owners via a deed and release execute by all lot owners (except the Respondents). A.R. 16-24. Furthermore, an implied right of way of necessity exists in those instances where a grantor inadvertently landlocks a grantee. *See* Restatement (Third) of Property § 2.15.

seminal case cited by the Respondents in support of their argument – *Walker v. Summers*, 9 W.Va. 533 (1876) – provides lot owners the equitable remedy to enjoin a sale under a specific set of factual circumstances. [6]

The Respondents first build their strawman by focusing on the bona fide purchaser doctrine as outlined in their brief [7] and applying it to the case at bar. The Respondents correctly cite the bona fide purchaser rule, as outlined in *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*,63 W.Va. 685, 60 S.E. 890 (1908), as follows: [w]hatever is sufficient to direct the attention of a purchaser to *prior rights and equities* of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice." Resp. Br. at 8-9 (emphasis added). However, it is clear that this doctrine applies only to parties who have prior rights and equities in existence *prior to* the purchase in question. *See Id* (emphasis added).

The Respondents wrongfully ignore and never address the fact that the Respondents had no prior rights and equities in the Subject Property; and for this reason, create an irrelevant argument without a proper foundation (i.e., straw). Further, the Respondents fail to point to any rights and equities in existence in favor of the Respondents *prior to* the Stephens purchase of the Subject Property. (emphasis added). The Stephens (the Petitioner's predecessor in title) took title to the Subject Property in its unencumbered state *prior to* the purchase of lot 7 by the Respondents. Whether or not the Petitioner's deed included a scrivener's error [8] is irrelevant in determining what

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[6] The particular facts, as outlined in *Walker*, are irrelevant to the case at bar, as the lot owners who purchased lots within the Falcon Ridge Subdivision pre-foreclosure sale waived their rights (if any) in the Subject Property.

[7] *See* Resp. Br. 8-10.

[8] By a deed of conveyance dated February 8, 2017, the Stephens conveyed their interest in the Subject Property to the Petitioner. Due to an error on the part of the attorney who drafted the original deed of conveyance from the Stephens to the Petitioner, the Petitioner was originally conveyed only a portion of

prior rights and equities existed in the Respondents post-foreclosure sale. [9] Further, none of the cases cited by the Respondents, involve parties who acquired their interest *after* the foreclosure sale and *after* the purchase in question. (emphasis added).

The Respondents continue their strawman argument by making a number of bald generalizations relating to foreclosure sales and the 2008 mortgage crisis:

> [I]t is common knowledge that lenders were left numerous unfinished subdivisions as collateral. Prior to the default by their developer borrowers, lenders regularly released lots platted after the deed of trust was placed of record. This is precisely what occurred here. Upon default by the borrower and foreclosure, the recorded plat provided the lender the ability to sell individual lots rather than the balance of the subdivision as a whole. Again, this is what JSB did here.

Resp. Br. at 11.

Not only is this generalization not based on any fact, in making their arguments, the Respondents fail to cite any evidence in support of their bald assertions and fail to cite any precedential cases dealing with the circumstances before this Court. This suggests, contrary to the Respondents assertions, that the factual circumstances before this Court are not as common as the Respondents allege.

The Respondents next argue that JSB cannot be allowed to "cherry-pick" what it will recognize on the final plat. The Respondents state the following in support of their argument:

> [T] lender cannot ignore the common scheme of development as shown on the final plat given (1) the fact that it has released other lots in the subdivision from its lien when those were sold by its borrower to third parties who would have relied upon that common scheme; and (2) the lender's need for that common scheme to continue

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the Stephens' interest. Thereafter, a deed of correction, dated July 24, 2017, conveying the Stephens' entire interest obtained from the Stephens' Deed was prepared and recorded. As part of this conveyance, the Petitioner took title to the access easement known as Falcon Ridge Drive.

> in order to maintain the enhanced value of the lots which, as here, the lender must credit bid in order to protect its investment. [10]

Not only are these fallacious arguments, but the Respondents also ultimately ignore the relevant fact – the only lots released as collateral from the deed of trust are those parties that waived their interest (if any) in the Subject Property. Therefore, this argument cannot be properly made by the Respondents and therefore is a red herring brought to the Court's attention in an effort to avoid the real issue – the Respondents do not stand in the same position as the lot owners who purchased lots within the subdivision pre-foreclosure sale and therefore cannot avail themselves of the same equitable legal remedies. As a purchaser who derived their title directly through the trust-beneficiary, JSB, the Respondents do not have the standing to make a legal argument based on encumbrances which the Respondents argue existed prior to the foreclosure sale – at a time when they had no interest in any lot within the Falcon Ridge Subdivision.

Further, as pointed out by the Respondents, the lower sales price is a clear indicator of what was bargained for, which is typical when dealing with distressed properties. In reviewing the sales prices pre and post foreclosure, it is clear that the Respondents also purchased the property for far less after the foreclosure sale than they would have pre-foreclosure,[11] which suggests they did not

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[10] Contrary to the Respondents' assertions, the deed of trust executed by Wolverine stated the following:

> Sale of the Property. To the extent permitted by applicable law, Grantor hereby waives any and all rights to have the Property marshaled. In exercising its rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property[.]

A.R. 41 at ¶ 5.

[11] For example, lots similar in size to the Respondents' lot 7 sold for $175,000.00 pre-foreclosure sale, whereas the Respondents purchased lot 7 for the "mere" price of $75,000.00. See A.R.110-111, 219-237.

bargain for anything beyond what they received – a parcel of real estate without any appurtenant easement in the Subject Property.

Finally, the Petitioner in its brief discussed the relevant facts and discussed each assignment of error in turn. Therefore, the Petitioner makes no additional argument other than to say: The Respondents Brief ultimately failed to respond to the following uncontested facts – none of the lot owners who purchased lots within the Falcon Ridge Subdivision pre-foreclosure sale filed suit to enjoin the sale. Further, none of the lot owners who purchased lots within the subdivision pre-foreclosure join in this suit to set aside the foreclosure sale. For this reason, the Subject Property was sold in gross (via a metes and bounds description without reference to the Falcon Ridge Subdivision plat) without objection, resulting in the extinguishment of any encumbrance, including appurtenant easements, which existed prior to the foreclosure sale. *See Hite v. Donnally*, 85 W.Va. 640, 102 S.E. 478 (1920). Thereafter, the Stephens took title to the Subject Property in its unencumbered state via the trustee's deed [12] *prior to* JSB transferring the remaining lots to the Petitioner [13] and Respondents. [14] As to all other points outlined in Respondents' Brief, as they are irrelevant to the matter before this Court and do not warrant further discussion, Petitioner refers to Petitioner's Brief previously filed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Jefferson County Circuit Court and to order summary judgment in favor of the Petitioner, which is in line with West Virginia precedent.

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12 A.R. 45-48.
13 A.R. 255-256.
14 A.R. 110-111.

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CERTIFICATE OF SERVICE

STATE OF WEST VIRGINIA

COUNTY OF BERKELEY, TO WIT:

I, Katherine N. Ridgeway, having been first duly sworn, state that I served a copy of the Reply Brief for the Petitioner on the following counsel for the Respondents by overnight courier service this 31st day of March, 2021:

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