IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Jody L. Oelschlager, D.V.M. and
Charles K. Wilson,
Plaintiffs Below, Petitioners

vs.

Docket No. 21-0784

Garen E. Francis, Diana L. Francis,
and Daniel E. Francis,
Defendants Below, Respondents

PETITIONERS' BRIEF

D. Kevin Coleman (W.Va. State Bar # 6018)
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ASSIGNMENTS OF ERROR

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STATEMENT OF THE CASE

Proceedings Below

This dispute involves the ownership of a 2445 square foot parcel encompassing a two-car garage to the rear of a residence located at 2205 First Street in Moundsville, West Virginia. *See* Plat, pp. 56-58. Petitioners are spouses and reside in Belmont County, Ohio. Respondents Garen and Diana Francis are husband and wife. Respondent Daniel Francis is their son and an adult. Each Respondent resides in Moundsville. Complaint, Appx. p. 9.

On May 14, 2020, Petitioners filed their Complaint for Declaratory and Other Relief. Complaint, Appx. pp. 8-15. For their complaint, Petitioners contend that due to a mutual mistake, a 2009 deed transferring Petitioners' entire parcel at 2205 First Street to Respondents' predecessor-in-title, Thomas G. Hunt, was in error; that Petitioners and Hunt each agreed that Hunt was to only purchase the half of the property fronting First Street and that Petitioners would continue to own the rear half of the property enclosing a two-car garage; that neither Petitioners nor Hunt were aware of the mistaken deed description at the time of its execution or at any time during Hunt's ownership of the 2205 First Street residence. Following his death, Hunt's property at 2205 First Street was foreclosed and sold at auction to the Respondents on September 16, 2019. Respondents claim that their purchase includes both the residence and the garage. However, the parties' joint stipulation and testimony reveal that prior to their purchase of the property, Respondents were informed by Petitioners' realtors that Petitioners were attempting to sell the 2205 First Street garage tract along with Petitioner Oelschlager's veterinary practice located next door at 2203 First Street. Petitioners contend that Respondents' foreknowledge of Petitioners' ownership claim in the garage prevented Respondents from claiming the status of *bona fide* purchasers under the long-standing precedence of this Court.

Respondents filed a joint Answer on June 24, 2020. Answer, Appx. pp. 18-24. Both parties requested a bench trial. The material facts being largely undisputed, no discovery was undertaken by the parties in the case. On April 28, 2021, the parties filed a Joint Stipulation of the relevant facts with the court. Joint Stipulation, Appx. pp. 25-32. On May 7, 2021, the parties filed cross motions for summary judgment. Appx. pp. 33-120. The parties served responses on May 28, 2021. Appx. pp. 121-132. Petitioners served their reply on June 4, 2021. Appx. pp. 135-139.

Following the filing of the parties' cross motions for summary judgment, the court conducted a hearing on August 10, 2021 to hear evidence on the issue of Respondents' status as *bona fide* purchasers. Transcript, Appx. p. 148. Each of the Respondents testified at the hearing on their own behalf. Petitioners presented the testimony of two real estate agents, Erin Fonner and Denise Pavlik, to testify concerning Respondents' knowledge of Petitioners' claim of ownership to the property prior to Respondents' purchase of the property in foreclosure.

On September 1, 2021, the circuit court entered its Final Order. Appx. p. 1. In its order, the circuit court did not make an explicit finding as to whether Petitioner had proven that a mutual mistake had occurred in the drafting and execution of the 2009 deed to Hunt. The court entered judgment in the Respondents' favor on the question of Respondents' *bona fide* purchaser status, holding that

> 23. Although the evidence shows the defendants did know that the plaintiffs were attempting to sell the garage with the veterinary property, the question is whether this knowledge, in the face of the mountain of public recordings to the contrary, was sufficient to assign them having acted in bad faith, or mala fides in continuing with their purchase. Were they suspicious enough to think the plaintiffs really owned the garage somehow despite public records, or did they just think the plaintiffs were wrong, and nothing needed to be remedied? The burden of proving mala fides is on the plaintiffs.
>
> 24. The testimony of the defendants was clearly to the effect that they thought that the plaintiffs were just wrong about owning the garage, rather than having some suspicion that there was perhaps some ancient mistake that needed

remedied. Such a belief would be reasonable based on the facts. Such reasonable belief makes them *bona fide* purchasers.

25. The defendants will not be charged with the obligation to discover the whole mess created ten years earlier, rather that [sic] requiring the plaintiffs to be diligent and discover it themselves.

Final Order, Appx. p.5.

Petitioners now appeal the circuit court's Final Order entering judgment for Respondents.

Statement of Facts

For a complete understanding of events leading to the present dispute, it is necessary to understand the Petitioners' complete history of ownership of not only the property at 2205 First Street, but the adjoining property at 2203 First Street, as well. In 1997, Petitioners purchased the property at 2203 First Street, next door to the disputed parcel. J.S. ¶1, Appx. p. 25. Petitioner Oelschlager, a licensed veterinarian, maintained a veterinary practice called The Family Pet Practice at 2203 First Street from 1997 until 2016. J.S. ¶3, Appx. p. 25.

On June 24, 2002, Petitioners purchased the property at 2205 First Street - next door to The Family Pet Practice property. J.S. ¶4, Appx. p. 25. The 2205 First Street property included a residence fronting on First Street and detached two-car garage to the rear which faced an alleyway which ran along the side of the Family Pet Practice property. *See* Plat, Appx. pp. 56-58. The Petitioners' purpose in purchasing 2205 First Street was to use the detached garage as additional off-street parking for The Family Pet Practice and to provide some additional space to walk dogs and collect samples. J.S. ¶6, Appx. p. 26.

On December 5, 2007, Petitioners petitioned the Moundsville Planning Commission to subdivide the 2205 First Street property into two tracts, thus severing the rear garage and a small portion of the yard from the house and remaining yard. J.S. ¶7, Appx. p. 26. Petitioners advised

the City that "the proposed subdivision will be continued residential use with regard to Tract 1, while allowing Tract 2 to serve as additional off-street parking for our adjoining parcel to the west which currently serves as The Family Pet Practice." *Id.* Petitioners further explained that the purpose of the proposed subdivision was to allow "a more reasonable back yard for the business to allow a few parking spaces and/or room for clients to walk dogs while waiting to get samples when needed." J.S. ¶8, Appx. p. 26. On January 31, 2008, the Moundsville Planning Commission approved Petitioners' plat and proposed subdivision of the 2205 First Street property. J.S. ¶9, Appx. pp. 26-27. The subdivision plat was recorded with the Clerk of Marshall County on April 1, 2008 but was never indexed in the name of the Petitioners. *Id*; *see also*, Plat, Appx. pp. 56-58.

In March 2009, Petitioners had the electrical service to the garage disconnected from the residence and ran a new electrical service connecting the garage to The Family Pet Practice property. J.S. ¶12, Appx. p. 27. The Family Pet Practice property insurance policy was amended to include the garage tract. J.S. ¶20, Appx. p. 28.

In August 2009, Petitioners listed the residence at 2205 First Street for sale with realtor Paull Associates. Pavlik Affidavit, Appx. p. 69. The sales listing for the property provided that the "Garage on rear of property DOES NOT convey; owner will work with any potential buyer for access to one side of the garage." Affidavit ¶4, Appx. p. 69.

On September 4, 2009, Petitioners entered into a Real Estate Purchase Agreement to sell the 2205 First Street residence to Thomas G. Hunt for $62,500. An Addendum to the Purchase Agreement, executed the same day, states that – "Buyer is aware that the garage DOES NOT convey with this property as stated on MLS sheet 11171. Seller will obtain a survey with new boundaries lines." J.S. ¶13, Appx. p. 27; Affidavit ¶5, Appx. 70. An appraisal of the property commissioned by Hunt's lender, USDA Rural Development, appraised the value of the property

without the two-car garage to have been $68,000. J.S. ¶14, Appx. p. 27; Affidavit ¶6, Appx. p. 70. The appraisal report noted that the two-car garage in the rear had been severed from the property by the sellers was not to be included in the sale. J.S. ¶14, Appx. p. 27; Affidavit ¶6, Appx. p. 70. Hunt resided at 2205 First Street until his death in 2016. J.S. ¶21, Appx. p. 29. Throughout that time, Petitioners continued to use the two-car garage and a portion of the yard for The Family Pet Practice and its clients. J.S. ¶18, Ex. Appx. p. 28.

The deed transferring the property to Hunt was prepared by Attorney J. Thomas Madden at the request of Realtor Pavlik. J.S. ¶17, Appx. p. 28, Affidavit, ¶8, Appx. p. 70. Realtor Pavlik failed to inform Attorney Madden that the garage tract was excluded from the sale and was not to be included in the description. *Id.* Attorney Madden used the same description from the Petitioners' 2002 deed as the description of the property being conveyed in the deed to Hunt. As a result, the deed to Hunt did not exclude the garage. *Compare* 2002 Deed, Appx. pp. 67-69 *with* Hunt Deed, Appx. pp. 103-104. Petitioners were unaware of the mistake in the deed to Hunt until sometime after the Respondents purchase of the 2205 First Street parcel on September 16, 2019. J.S. ¶30, Appx. p. 64. In 2010, Petitioners submitted an insurance claim under their business property insurance policy for hail damage to the roofs of both the garage and The Family Pet Practice. Both roofs were repaired and paid for under The Family Pet Practice policy. J.S. ¶20, Appx. p. 28.

Petitioner Oelschlager closed The Family Pet Practice in 2016 and listed the property for sale with realtor Paull Associates sometime in 2017. J.S. ¶23, Appx. p. 29; Affidavit ¶9, Appx. p. 71. The sales listing for Petitioners' sale of the vet practice property provided that the "garage is part of the property." A copy of the sales listing was placed in the window of the vet practice building for public viewing. Affidavit ¶10, Appx. p. 71.

Five days prior to Respondents' purchase of the Hunt property at 2205 First Street, Respondent Diana Francis called Paull Associates' Glen Dale, WV office concerning the listing of The Family Pet Practice property at 2203 First Street. J.S. ¶25, Appx. p. 29. Mrs. Francis specifically inquired as to whether the two-car garage behind 2205 First Street was included in the sale of The Family Pet Practice property. J.S. ¶26, Appx. p. 29. She was advised that the garage was included in the sale. *Id.* Despite the parties' stipulation to the above facts, Mrs. Francis denied that any such contact occurred between her and the realtors prior to the Respondents' purchase of 2205 First Street property on September 16, 2016. Transcript, Appx. pp. 31-32. Mrs. Francis testified to having a single phone conversation with realtor Pavlik in October, 2019 and could not recall any discussions with realtor Fonner. Transcript, Appx. pp. 32-33.

Petitioners called realtors Denise Pavlik and Erin Fonner to testify at the hearing and obtained the admission into evidence of handwritten notes maintained by Paull Associates realtors to maintain a record of calls received. Plaintiffs' Hearing Exhibit 1, Appx. pp. 140-145. Ms. Fonner testified to two phone call with Mrs. Francis on September 11, 2019 with questions concerning the realtor's listing of the Family Pet Practice property located at 2203 First Street. Transcript, Appx. pp. 185-186. During the second of these calls. Mrs. Francis specifically inquired whether the garage was being sold with the vet practice and she was advised that it was included with the sale. *Id.* Mrs. Francis call to the realtor on September 11, 2019 was noted by Fonner in the realtor's call logs. Appx. p. 141.

Mrs. Francis was the only Respondent to contact Paull Associates concerning the sale of the garage with the vet practice. Denise Pavlik testified that Respondent Garen Francis called her on September 16, 2019 to also inquire whether the garage was being sold by Petitioners with the sale of the Family Pet Practice property. Ms. Pavlik confirmed to Mr. Francis that the garage was

being sold with the property. Transcript, Appx. pp. 195-196. The call from Respondent Garen Francis was noted by Pavlik in the Paull Associates call notes. Plaintiffs' Exhibit 1, Appx. p. 142. Furthermore, Respondents have stipulated to this phone conversation between Garen Francis and Ms. Pavlik. J.S. ¶ 28, Appx. p. 28. Garen Francis' call to Pavlik occurred an the same day as Respondents' purchase of the 2205 First Street property.

Respondent Daniel Francis testified that, prior to joining with his parents in purchasing the property at 2005 First Street, his father, Respondent Garen Francis, had advised him that the Petitioners were attempting to sell the garage along with the vet practice property next door at 2203 First Street. Transcript, Appx. pp. 151-152. Despite their awareness of Petitioners' claim to ownership in the garage, Respondents made no inquiry with either the realtors or with the Petitioners themselves as to how it was that Petitioners could believe that they had the right to sell the garage notwithstanding the prior deed to Hunt. Transcript, Appx. pp. 171, 203.

Eight days after their purchase of the property, Respondent Daniel Francis contacted Denise Pavlik to advise her that Respondents had purchased the property at 2205 First Street and that she inform Petitioners that they now claimed ownership of the garage. J.S. ¶29, Appx. 30.

SUMMARY OF ARGUMENT

The circuit court's finding that Respondents were *bona fide* purchasers of the garage tract at 2205 First Street, notwithstanding Respondents' actual knowledge that Petitioners were seeking to sell the garage tract along with Petitioners' adjacent property, was clearly erroneous under *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.,* et al., 63 W.Va. 685, 60 S.E. 890 (1908) and its progeny.

> Whatever 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.
>
> A party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests.
>
> That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser.
>
> If one has knowledge or information of facts sufficient to put a reasonable man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same; and, if he wholly neglects to make inquiry, the law will charge him with knowledge of all facts that such inquiry would have afforded.

Syl. pts. 1-4, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.,* et al., 63 W.Va. 685, 60 S.E. 890 (1908). The circuit court's holding that Respondents reliance solely upon the deed to Hunt executed 10 years earlier by Petitioners despite Petitioners' ownership claim which was in direct contravention to that deed, entitled Respondents to bona fide purchaser status was clearly erroneous. *Myers v. Stickley*, 180 W.Va. 124, 126, 375 S.E.2d 595, 597 (1988).

The circuit court's judgment for Respondents, predicated on Petitioners' failure to prove actual bad faith ("mala vides"), resulted from the imposition of an erroneous burden of proof on Petitioners.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to W.Va. R. App. P. 18(a)(4), Petitioners believe the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

1. Standard of Review

The Supreme Court of Appeals employs a two-pronged deferential standard of review to the findings and conclusions of the trial court following a bench trial. Syl. Pt. 1, *Heitz v. Clovis*, 213 W.Va. 197, 578 S.E.2d 391 (2003). "The final order and ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." *Id.*

2. Respondents have proven by clear and convincing evidence that a mutual mistake was made in the 2009 deed to Respondents' predecessor-in-title.

The circuit court's order does not directly address Petitioners' first burden – proof of a mutual mistake in the Petitioners' 2009 deed to Respondents' predecessor-in-title. Following the parties' filing of cross motions for summary judgment, the Court held a trial limited to whether Respondents were *bona fide* purchasers.

> THE COURT: This matter comes on today, I believe, for lack of a better term, testimony with regard to the allegations in the cross motions for summary judgment. Would you agree, counsel?
> ...
> MR. COLEMAN: Yes, Your Honor. My understanding is that the Court wished to hear testimony on the issue of whether the Defendants were *bona fide* purchasers.
>
> THE COURT: Exactly. I think that goes to the crux of the argument.

Transcript, Appx. p.148:10-19.

Although the circuit court did not affirmatively rule whether Petitioners had proven mutual mistake, the court did make the following factual finding –

> "4. The attorney who prepared the [Hunt] deed made the mistake because he was not told by the plaintiffs' realtor to except the garage from the deed, by using a new subdivision description."

Final Order, Appx. p.3.

The circuit court's cursory consideration of the issue of mutual mistake likely arose from the fact that Respondents did not contest that a mutual mistake had occurred in the Hunt deed in either their own motion for summary judgment or in their opposition to Petitioners' motion for summary judgment. *See* Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Appx. pp.109-120, and Defendants' Response to Plaintiffs' Motion and Memorandum for Summary Judgment, Appx. pp. 121-124. From an abundance of caution, Petitioners will address the facts and law which support the existence of a mutual mistake in the 2009 deed from Petitioners to Mr. Hunt.

West Virginia courts have the equitable power to reform a deed which has been executed through a mutual mistake of the parties and contrary to the parties' intent – provided the rights of an innocent purchaser for value are not prejudiced. *Myers v. Stickley*, 180 W.Va. 124, 126, 375 S.E.2d 595, 597 (1988); Syl. pt. 1, *Johnston v. Terry*, 128 W.Va. 94, 36 S.E.2d 489 (1945). A court's power to reform a deed extends to cases in which the mistake arises from an error in the description of the property being conveyed.

> A court of equity has power and jurisdiction to decree the reformation of a deed executed through a mutual mistake of the parties as to what is intended therein, or through a mistake of the scrivener in failing to make the agreement express the mutual intention of the parties, where such reformation is sought as between the parties, or the successor of either, who, at the date he acquired an interest in the property affected by such deed, had notice of the grounds on which reformation is sought.

Syl. pt. 1, *Johnston.*

The party seeking the reformation must prove that a mutual mistake occurred in the deed by clear and convincing evidence. *Johnston*, 128 W.Va. at 101, 36 S.E.2d at 493. Parol evidence may be used to show a mutual mistake of the parties to the deed or a mistake by the drafter of the

deed in failing to make the deed conform to the parties' intention. Syl. pt. 3, *Johnston, supra.* The mistake must be a mutual one by the parties to the deed. The requirement of mutuality means that the mistake must have been participated in by both parties. *Myers, infra.* A mistake by the scrivener or drafter of a deed is regarded as a mutual mistake of the parties. *Reed v. Toothman*, 176 W.Va. 241, 242, 342 S.E.2d 207, 209 (1986); *Davis v. Lilly*, 96 W.Va. 144, 122 S.E. 444, 448 (1924).

Petitioners have proven by clear and convincing evidence that a mutual mistake occurred in the description to the 2009 deed between Petitioners and Respondents' predecessor-in-title. The parties to the 2009 deed did not intend for Hunt to get the garage. Due to a mistake in the deed's description not intended or noticed by the parties to the deed, the garage was included in the transfer.

In 2002 Petitioners purchased the property at 2205 First Street to use the two-car garage and surrounding yard to support Respondent Oelschlager's veterinary practice next door at 2203 First Street. In 2007, Respondents subdivided the property into two tracts. The first tract contained the residence and measured 2885 square feet. The second tract included the garage along with some tard directly behind the vet practice and measured 2445 square feet. Respondents disconnected the garage's electrical service from 2205 First Street and reconnected it to the vet practice building next door. Petitioners added the garage to the veterinary practice's business property insurance policy.

Before selling the 2205 First Street residence to Hunt, Petitioners expressly excluded the garage from the sales listing. In an addendum to the purchase agreement, Hunt acknowledged in writing that his purchase of 2205 First Street did not include the garage. The written appraisal by Hunt's lender stated that the garage was not included in the purchase.

Denise Pavlik acknowledged by affidavit and in testimony at trial that she had retained Attorney J. Thomas Madden to prepare the deed for the parties but had neglected to advise Madden that the garage tract was to be excluded from the deed. Neither Pavlik nor the Petitioners realized the error in the deed until after Respondents purchased the property at a foreclosure auction in 2019.

The actions of Hunt and the Petitioners following Hunt's purchase of 2205 First Street further demonstrates that neither party believed that Hunt ever owned the garage. Following Hunt's purchase, Petitioner Oelschlager's staff and clients continued to use the garage for parking. Petitioners had the garage roof repaired in 2010 following hail damage. The repair of the garage roof was paid for by the veterinary practice's property insurer. After Petitioner Oelschlager closed her practice in 2016, Petitioners listed both the veterinary practice property and the garage for sale.

The evidence of the mutual mistake in the 2009 deed is both wholly uncontroverted by Respondents and clear and convincing. The only reasonable conclusion is that Petitioners never intended to sell and Hunt never intended to purchase the garage and that a mutual mistake occurred in the drafting of the 2009 deed, which Petitioners were unaware of until after the Respondents' 2019 purchase.

3. The Circuit Court's determination that Respondents were *bona fide* purchasers of the garage tract was clearly erroneous.

A deed cannot be reformed on the grounds of a mutual mistake when to do so would prejudice the rights of a subsequent *bona fide* purchaser of the property. *Johnston, supra.* To qualify as a *bona fide* purchaser, a party must have purchased the property "without notice of any suspicious circumstances to put him on inquiry notice." *Subcarrier Communications, Inc. v. Nield,*

218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005) *quoting Stickley v. Thorn*, 87 W,Va. 673, 678, 106 S.E. 240, 242 (1921). The West Virginia Supreme Court of Appeals has further approved the following definition of a *bona fide* purchaser from Black's Law Dictionary – "one who buys something for value without notice of another's claim to the item or any defect in the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims." *Nield, supra.*

"Whatever 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." Syl. pt. 1, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.,* et al., 63 W.Va. 685, 60 S.E. 890 (1908). "A party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests." *Id.*, at syl. pt. 2. "That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser." *Id.*, at syl. pt. 3. "If one has knowledge or information of facts sufficient to put a reasonable man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same; and, if he wholly neglects to make inquiry, the law will charge him with knowledge of all facts that such inquiry would have afforded." *Id.*, at syl. pt. 4.

a. Prior to their purchase of the 2205 First Street property, Respondents had actual notice that Petitioners claimed ownership of the garage.

Before purchasing 2205 First Street in foreclosure, Respondents understood that Petitioners claimed ownership of the garage. Respondents Diana and Garen Francis were each advised by Petitioners' realtor that Petitioners were selling the garage along with vet practice property next door. The only action Respondents took subsequent to being advised of Petitioners listing of the garage was to conduct a search of the County Clerk's records which uncovered the 2009 deed from Petitioners to Hunt. The deed to Hunt was clearly contrary to Petitioners claim of ownership in the garage. Despite the clear conflict between the 2009 deed and Petitioners' listing of the garage for sale in 2017, Respondents took no further action to investigate. Despite being in contact with Petitioners' realtor, Respondents did not question the realtor as to the basis for Petitioners' belief that they still owned the garage. Likewise, Respondents did not reach out to Dr Oelschlager or her husband concerning their belief that they still owned the garage. A simple inquiry would have revealed to Respondents that Mr. Hunt never owned the garage and that the garage was included in his deed by mistake. By law, Respondents are charged with the knowledge of all facts which a reasonable inquiry would have revealed. Syl. pt. 4, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, et al., 63 W.Va. 685, 60 S.E. 890 (1908).

Respondents' search of county land records did not make them *bona fide* purchasers. Respondents' records search would have revealed one of two things - either Petitioners sold the garage to Hunt in 2009 and were now attempting to sell it again, or the 2009 deed to Hunt was in error. Respondents were free to take the chance that Hunt's deed was correct but that did not insulate them from the consequences of a mutual mistake in the 2009 deed. They were not innocent purchasers and cannot now be heard to complain when a reasonable investigation would have revealed the mistake in the deed.

In *Pocahontas Tanning, supra,* the Court set forth the duties on a purchaser of land who seeks to claim the status of a *bona fide* purchaser.

> That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser.

Syl. p3., *Pocahontas Tanning.*

> If one has knowledge or information of facts sufficient to put a reasonable man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same; and, if he wholly neglects to make inquiry, the law will charge him with knowledge of all facts that such inquiry would have afforded.

Syl. pt. 4, *Pocahontas Tanning.*

In *Harper v. Smith*, 232 W.Va. 655, 753 S.E.2d 612 (2012), the Court held that a title search was not sufficient to confer *bona fide* purchaser status on Smith because he was on notice of a potential defect in a tax deed prior to purchasing his interest. 232 W.Va. at 660, 753 S.E.2d at 617. "It is generally recognized that a person cannot be regarded a bona fide purchaser for a parcel of real estate *unless he received the conveyance and paid the price for the land before he received notice of any equities relating to the real estate.*" *Wells v. Tennant*, 180 W.Va. 166, 169, 375 S.E.2d 798, 801 (1988) (emphasis added).

b. Once Respondents became were aware of Petitioners' claim to ownership of the garage, Respondents could not be *bona fide* purchasers.

Petitioners' listing of the garage in the sale of the vet practice property certainly constituted a "suspicious circumstance" putting Respondents "upon inquiry." *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E.2d 240, 242 (1921). The fact Respondents contacted Petitioners' realtor for the

express purpose of confirming that Petitioners were selling the garage is proof that Respondents had both actual and inquiry notice of the Petitioners' ownership claim.

> That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand; and a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser.

Syl. pts. 4, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, et al., 63 W.Va. 685, 60 S.E. 890 (1908).

Once Respondents were aware of Petitioners' claim to the garage, they could not later be *bona fide* purchasers. One claiming *bona fide* purchaser status "must show that he acquired legal title before notice or knowledge of facts equivalent to notice." Syl. pt. 4, *Clark v. Lambert*, 55 W.Va. 512, 47 S.E. 312 (1904); *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005) (A *bona fide* purchaser must be "without notice of another's claim to the property"). One who has actual notice of an adverse party's claim may not rely upon the county clerk's land records to acquire good title. *Eagle Gas Co. v. Doran & Assocs.*, Inc. 182 W.Va. 194, 197, 387 S.E.2d 99, 102 (1989).

For all of the foregoing reasons, the Court should find that the circuit court's determination that Respondents were bona fide purchasers was clearly erroneous.

4. The Circuit Court finding that Petitioners' burden required proof of actual bad faith ("*mala fides*") by Respondents was erroneous.

The circuit court's clearly erroneous factual finding appears to have been predicated on an erroneous view of Petitioners' burden of proof.

> 23. Although the evidence shows the defendants did know that the plaintiffs were attempting to sell the garage with the veterinary property, the question is whether this knowledge, in the face of the mountain of public recordings to the contrary, was sufficient to assign them having acted in bad faith, or mala fides in continuing with their purchase. Were they suspicious enough to think the plaintiffs really owned the garage somehow despite public records, or did they just think the plaintiffs were wrong, and nothing needed to be remedied? The burden of proving mala fides is on the plaintiffs.

Final Order, Appx. p. 5 (emphasis added).

Under the court's view of Petitioners' burden, it was insufficient for Petitioners to prove the Respondents had actual notice of Petitioners' claim of ownership in the garage. The Court found that Petitioners had to prove both the Respondents' knowledge of their claim but further that Respondents had a subjective belief that Petitioners claim was legally correct – that they "really owned the garage somehow despite public records."

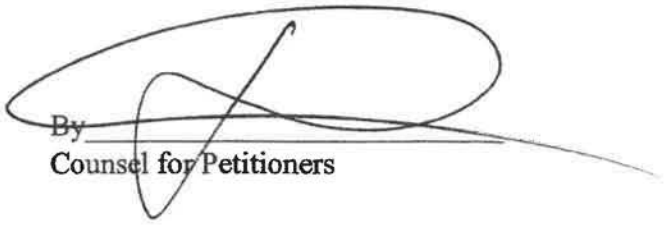
The circuit court created an impossible and improper burden on Petitioners in holding that the Petitioners failed to prove that Respondents held a subjective belief in the merits of Petitioners' claim prior to their purchase of the property. "When a claim to protection as a bona fide purchaser for value and without notice is involved, the burden is on the party denying the validity of the purchase, to prove notice of his equity, and, upon the other party to prove good faith and payment of an adequate consideration." *Johnston v. Terry*, 128 W.Va. 94, 108, 36 S.E.2d 489, 495 (1945).

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the Court to reverse the Final Order of the Circuit Court of Marshall County entered on September 1, 2021 finding the Respondents to have been bona fide purchasers of the disputed tract on the grounds that the court's determination was clearly erroneous. Petitioners further request the Court to reverse the circuit courts decision on the grounds the court's decision was based on an erroneous burden of proof placed on the Petitioners.

Petitioners request the Court to reverse and remand the matter to the circuit court for entry of judgment in their favor with direction to the circuit court to reform both the 2009 deed to Hunt and the 2019 deed to Respondents in order to exclude the garage tract from the transfers.

JODY L. OELSCHLAGER, DVM
and CHARLES K. WILSON,
Plaintiffs Below, Petitioners



By_____
Counsel for Petitioners

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CERTIFICATE OF SERVICE

Service of the foregoing PETITIONERS' BRIEF was made upon Respondents via hand-delivery on the 3rd day of January 2022 addressed as follows:

Thomas E. White, Esq.
604 6th Street
Moundsville, WV 26401
Counsel for Respondents

JODY L. OELSCHLAGER, DVM
and CHARLES K. WILSON,
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