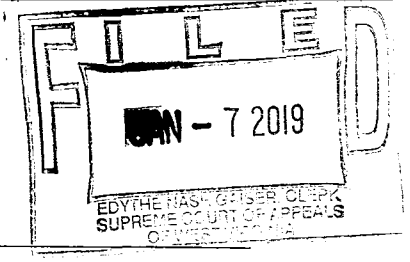
NO. 18-0847



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

U.S. EXPLORATION, LLC, and HARRY SLACK, individually,

Defendants Below, Petitioners,

v.

GRIFFIN PRODUCING COMPANY,

Plaintiff Below, Respondent.

On Appeal from the Circuit Court of Ritchie County, West Virginia
Civil Action Nos. 14-C-38 and 39

BRIEF OF PETITIONERS

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GRIFFIN PRODUCING COMPANY,

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BRIEF OF PETITIONER

I. ASSIGNMENTS OF ERROR

A. The Trial Court Erred in Granting Partial Summary Judgment on the Basis that W. Va. Code § 40-1-9 (the "Recording Act") Did Not Apply to the Modification and Surrender of Oil and Gas Leases in Issue.

B. The Trial Court Erred in Granting Partial Summary Judgment on the Basis that West Virginia is a Pure "Race" State with Respect to Modification and Surrenders of Oil and Gas Leases.

II. STATEMENT OF THE CASE

This civil action presents, essentially, a dispute over the rights of the parties to oil and gas leases in Grant District, Ritchie County, West Virginia. (Plaintiff's Complaint, JA025-028). The Plaintiff below and Respondent herein, Griffin Producing Company (hereinafter "Griffin") owns the oil and gas fee underlying approximately 40 tracts or lots known as the "Kennedy Tracts." (*Id.* at ¶ 1, JA025). Defendant below Magnum Oil Corporation (hereinafter "Magnum") at one point held various leasehold ownership of oil and gas. (*Id.* at ¶ 3, JA026). For purposes of clarity, these will be referred to as the "Kennedy Leases." These facts are not disputed.

On December 28, 2012, Magnum, acting through its officer, Petitioner Harry V. Slack, assigned all of Magnum's interests in the Kennedy Leases to the Defendant below and

Petitioner herein, U.S. Exploration, LLC (hereinafter "U.S. Exploration"). (Assignment, JA032.) That assignment was not recorded until July 15, 2014. (*Id.*) In the interim, the other owner and officer of Magnum, Kathleen Fitzpatrick, executed two alternative documents, both dated July 12, 2013, purporting to modify, assign and surrender the Kennedy Leases to Griffin. (JA02-031.) These instruments were recorded on August 20, 2013. According to Griffin's President, Douglas Boyd, Ms. Fitzpatrick was paid $5,000.00 in exchange for her execution of these two documents. (Dep. of D. Boyd, JA036-037.) Thus, U.S. Exploration lays claim to the Kennedy Leases by virtue of its December 2012 assignment and Griffin lays claim to the same by virtue of the "surrenders" of July 2013.

Significantly, at the time the competing assignments/surrenders were made, the two principals in Magnum and U.S. Exploration, Mr. Slack and Ms. Fitzpatrick, were embroiled in a bitterly contested divorce. (Aff. H. Slack, JA038-039.) That divorce proceeding was initiated in Vermont, the parties then residence, and concluded in North Carolina. During their separation, Ms. Fitzpatrick befriended Jim Eliopulos, who was working as a realtor and agent for Griffin. In fact, Mr. Eliopulos served as Griffin's corporate representative at the parties' unsuccessful mediation of the case below. (Dep. D. Boyd at 31-32, JA037.) Mr. Eliopulos had previously attended a number of hearings in the divorce court in Vermont and was intimately aware of the contested nature of the divorce. (Aff. H. Slack at ¶¶ 7-11, JA039.) Further, Mr. Slack specifically told Mr. Eliopulos that he, and by extension Magnum, would never agree to sell the Kennedy Lease to him or to Griffin. (*Id.* at ¶ 10, JA039).

The Respondent, Griffin, filed a Motion for Partial Summary Judgment on or about April 5, 2017. (Pl.'s Mot. for Partial Summ. J., JA001- JA013.) The basis of Griffin's Motion was the West Virginia Recording Act, W. Va. Code §§ 40-1-8 and 40-1-9. (*Id.*, JA004-005.) In its Motion, Griffin argued that the December 2012 assignment from Magnum to U.S. Exploration

was ineffective until it was recorded in July 2014. (*Id.*, JA005-006.) According to Griffin, "[t]herefore, the prior assignments and surrenders from Magnum Oil Corporation to Griffin Producing Company were valid documents that transferred title in the subject overriding royalty interests and surrendered the subject leasehold estates as of the time of their recording on August 20, 2013." (*Id.*)

The Petitioner, U.S. Exploration, responded to Griffin's Motion and agreed that "the key to the determination of this case lies in the West Virginia Recording Act, § 40-1-9 . . ." but argued that Griffin had notice of the competing claims to the Kennedy Leases and thus, was not a bona fide purchaser in good faith. (JA020.) Further, according to U.S. Exploration, Griffin had not proven its status as a bona fide purchaser, the inquiry presented a disputed issue of fact and discovery was nascent; hence, summary judgment was inappropriate. (*Id.*)

A hearing was held on Griffin's Motion on May 17, 2017. Attorney Scott Windom appeared on behalf of Griffin. Attorney Paul Marteney appeared, ostensibly on behalf of Magnum[1], and the undersigned appeared on behalf of Petitioner U.S. Exploration and Harry Slack. The entirety of the transcript of that hearing is included in JA043-063 and sets forth the basis of the Trial Court's decision and this appeal. Despite his Motion's focus on the operation of the Recording Act, Respondent's counsel paid scant attention to the same at the hearing. Rather, he first discussed an unrelated case in which some of the same parties were involved, though notably not the undersigned counsel. (Hearing Transcript 2-4, JA044-046.) Next, Respondent's counsel represented to the Court that Magnum (or presumably any predecessors as assignees) had not drilled any wells or produced them. (*Id.* at 5, JA047.) No evidence was introduced on this point at the hearing and no discovery had taken place on these issues prior to the hearing. Therefore,

[1] Mr. Marteney was allegedly retained by Magnum through Kathleen Fitzpatrick. Her ability to do so is a point of continuing contention in the North Carolina divorce court.

because according to Respondent's counsel there were no wells or production, these were merely surrenders and the bona fide purchaser status of Griffin was deemed irrelevant. (*Id.* at 7-8, JA049-050.) The Trial Court essentially agreed with Respondent's counsel, stating that his "thoughts hinge upon the fact [40-1-1] does not apply because it is not that type of transaction." (*Id.* at 19, JA061.)

The Court issued an Order, granting the partial summary judgment on September 22, 2017. (JA 064-070). The Court confirmed its logic articulated at the hearing that "[t]he modification and surrender of the subject oil and gas leases were not conveyances or 'sales of interests in real estate' and therefore are not subject to the requirements of the recording statutes, West Virginia Code § 40-1-8 and 40-1-9." *See Shearer v. United Carbon, Co.*, 143 W.Va. 482, 488, 103 S.E.2d 883, 887 (1958). (JA069.) Though the Court's Order granted only "partial" summary judgment, it effectively disposed of all substantive points of contention between the parties, *i.e.* who owned the Kennedy Leases. Hence, on September 7, 2018, the Court entered a Dismissal Order, disposing of the case in its entirety. (JA071-073.) Thus, while the latter order rendered the case ripe for appeal, it is the Court's decision on Griffin's Motion for Partial Summary Judgment, contained in the September 22, 2017 Order (JA064-070), that is subject to this Court's present review.

III. STANDARD OF REVIEW

This is an appeal from the grant of Partial Summary Judgment. The standard of review is *de novo*. Syl. *Thompson v. Hatfield*, 225 W. Va. 405, 693 S.E.2d 479 (2010).

IV. SUMMARY OF ARGUMENT

The Court erred in concluding, as a matter of law, that the "surrenders" and "modifications" in issue were not subject to the West Virginia Recording Acts, W. Va. Code §§ 40-1-8 and 40-1-9. First, the statutes do not, themselves, contain any sort of caveat or carve-out

for this sort of conveyance. Second, the Court's logic is based on a finding of fact with no evidentiary basis. In other words, the Court assumed that the underlying leaseholds were not valid due to a lack of production. As these facts were not before the Court and remain disputed today, summary judgment was inappropriate. Finally, the Court erred in concluding that, assuming this sort of conveyance was not subject to the Recording Act, that "first to record" would be given priority over "first in time." In other words, the Court determined that for documents not included in the Recording Act, the date of recordation and not the date of the document is the sole means of determining priority. This was again contrary to the law and in error.

V. STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument. Petitioner believes that the case may be appropriate for Rule 19 oral argument because this case presents an issue of first impression but involves a relatively narrow issue of law: application of the West Virginia Recording Act. Petitioner does not believe that this case is appropriate for memorandum opinion.

VI. ARGUMENT

A. The Court Erred in Concluding that the Recording Act Did Not Apply as a Matter of Law

W. Va. Code § 40-1-9 provides a mechanism for determining priority among competing documents purporting to convey "any such estate" in land, such as the competing assignments from Magnum to U.S. Exploration and from Magnum to Griffin. The statute does not contain any carve outs for "oil and gas leases" or "surrenders" thereof and thus applies to the competing documents in this case, provided that those documents do convey an interest or estate in land. W. Va. R. Civ. P. 56(c) provides that summary judgment, including partial summary judgment, is only appropriate where "there is no genuine issue of material fact." Here, the Court

below erred in granting partial summary judgment because issues of fact remained with respect to whether the surrenders and assignments "conveyed" such interests of estates.

W. Va. Code § 40-1-9 provides that:

> Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or memorandum of deed of trust pursuant to section two, article one, chapter thirty-eight of this code, or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for value without consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, deed of trust or memorandum of deed of trust or mortgage may be.

The statute thus applies to all instruments conveying "estates" or "terms" in land and protects only "subsequent purchasers for value without consideration." "'[A] bona fide purchaser is one who actually purchases in good faith." *Subcarrier Communications, Inc. v. Nield,* 218 W. Va. 292, 300, 624 S.E.2d 729, 737 (2005) (*quoting Kyger v.* Depue, 6 W. Va. 288 (1873) at Syl. Pt. 1.). The burden of proving that it was a bona fide purchaser rests on Griffin. *See Alexander v. Andrews*, 135 W. Va. 403, 409, 64 S.E.2d 487, 490 (1951). In the case below, the parties disputed whether Griffin was a bona fide purchaser in light of its knowledge, imputed through its actual agent, Eliopulos, of the contested divorce and steps undertaken to secure the asset. *See Whiteside v. Whiteside*, 222 W. Va. 177, 182, 663 S.E.2d 631 (2008)("one who purchases for a valuable consideration, paid or parted with, **without notice of any suspicious circumstances to put him upon inquiry."**)(emphasis added, internal citations omitted).

Though issues of fact with respect to Griffin's bona fide purchaser status remained, and were argued in the motions and response below, this was not the basis of the Trial Court's decision. Rather, the Trial Court summarily concluded that the July 2013 instruments executed by Ms. Fitzpatrick in favor of Griffin were not subject to the Recording Act and thus issues of notice and value were irrelevant. Implicit in the Court's decision is the assumption that these documents

did not convey an "estate" or "term" in land. The statute itself is silent as to what constitutes "an estate or term." The case law, however, makes clear that the statute does apply to oil and gas leases. *Eagle Gas Co. v. Doran & Associates, Inc.*, 182 W. Va. 194, 387 S.E.2d 99 (1989)(applying W. Va. Code § 40-1-9 to an oil and gas lease). It therefore logically follows that an assignment of a valid and existing oil and gas lease or the surrender of a valid oil and gas lease, either of which would have the effect of transferring to the transferee an estate in real estate – the right to develop oil and gas – would be subject to the Recording Act. The immediately preceding statement is based, as was the Trial Court's decision, on an assumption as to the validity of the oil and gas lease in question. If the lease is not valid – *i.e.* not held by production, the payment of rentals, etc. – than the document is simply a statement of fact and transfers nothing. If, on the other hand, the lease is valid and in effect, then the document clearly conveys an estate in land.

In the case below, the Trial Court based its decision on a premature, fact-specific conclusion that the Recording Act did not apply to the surrender in issue. By the clear terms of the statute, this would be the case only if the surrender did not convey an estate in land. No actual evidence was introduced as to the present status of the oil and gas leases in question, aside from the self-serving statements of Respondent's attorney at the hearing on the motion for partial summary judgment. Moreover, these claims, that the leases in question were dead and valueless[2], were not briefed or even raised prior to the hearing, let alone supported by "depositions, answers to interrogatories, and admissions on file, together with the affidavits" as contemplated by Rule 56. In effect, the Petitioner was ambushed, by bald and unsubstantiated assertions and unarticulated theories, without an opportunity to respond, in contravention of any notion of due

[2] The facts that: (1) the Respondent herein did not allege lease cancellation in the action below; (2) that $5,000 was paid for the "surrender"; and (3) the fact that the parties have fought, strenuously, for a number of years over these rights betrays any notion that the estate conveyed by Kathleen Fitzpatrick was without value.

process as well as traditional notions of fair play contained in our Civil Rules and enunciated by this Court. *See McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995)("Trial by ambush is not contemplated by the Rules of Civil Procedure."). As substantial issues of fact remain undecided, unbriefed and unexplored in discovery, the Trial Court's grant of partial summary judgment was inappropriate and should be overturned.

B. The Court Erred in Creating a Race Statute for Surrenders or Assignments of Oil and Gas Leases

The Court further erred in concluding that when it comes to assignments and/or surrenders of oil and gas leases, West Virginia is a pure "race" state. In the instant case, there are two sets of competing documents. First, on December 28, 2012, Magnum, acting through its officer Harry V. Slack, assigned the Kennedy Leases to the Petitioner and recorded that assignment on July 15, 2014. (Assignment, JA010.) Second, the other owner and officer of Magnum, Kathleen Fitzpatrick, executed two competing instruments, both dated July 12, 2013 and recorded August 20, 2013. (JA02-031.) The Court concluded that notice was irrelevant since the modifications and surrenders were not conveyances subject to W. Va. Code §§ 40-1-8 and 40-1 9. (September 22, 2017 Order at ¶ 9, JA069.) Therefore, according to the Trial Court, "the prior assignments and surrenders from Magnum Oil Corporation to Griffin Producing Company were valid documents that transferred title in the subject overriding royalty interest and surrendered the subject leasehold estates as of the time of their recording on August 20, 2013." (*Id.* at ¶ 10, JA069.). In other words, the Court determined that for these documents, first to record ("as of the time of their recording . . . ."), as opposed to first in time, wins, regardless of whether the recorder was a bona fide purchaser or an out-and-out con artist.

In so ruling, the Trial Court created a "race" statute for assignments of interests of oil and gas leases. This was in error. As this Court can likely recall from law school, three basic

variations of recording statutes exist: race statutes, where the first to record wins, regardless of when the competing documents were executed; notice statutes where a subsequent bona fide purchaser wins, regardless of when their instrument is recorded; and race-notice statutes, where a subsequent bona fide purchaser wins but only if he or she records first. By the clear and uncontradicted language of W. Va. Code § 40-1-8 and 40-1-9, West Virginia is a "race-notice" state. Hence, "notice" matters.

The Trial Court's ruling that the conveyance in question was not subject to the Recording Act, addressed above, does not completely dispose of the question before the Trial Court. That is, even assuming *arguendo* that the Trial Court was correct in concluding that the Recording Act does not apply, the Trial Court would still have to determine who wins between first in time and first to record. The Trial Court, holding that the surrenders were valid "as of the time of their recording" determined that the first to record wins. There is no "race" statute on the books in West Virginia and no precedent for this in West Virginia law. The Recording Act that we do have, was intended to "protect a bona fide purchaser" and arguably, that is not the Respondent herein. Syl. Pt. 2, *City of Bluefield v. Taylor*, 179 W.Va. 6, 365 S.E.2d 51 (1987). Moreover, in the absence of an applicable statute, the common law rule of "first in time, first in right" would apply. *See e.g. ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742 (Colo. *En Banc* 2000)("Where no statute controls, the priority of rights in real property must be determined by reference to the common law.") Hence, priority, as between Griffin and U.S. Exploration, would be determined by first in time, that is the first to receive the conveyance, in this case U.S. Exploration[3]. Thus, even assuming that the Trial Court was correct in ignoring the Recording Act,

[3] It is acknowledged that the Respondent questions the authenticity of this instrument. This is but another issue of disputed fact precluding the proper exercise of summary judgment.

the Trial Court reached the wrong conclusion on the law and its grant of partial summary judgment was inappropriate.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Trial Court's grant of Partial Summary Judgment should be reversed and the case remanded for further proceedings consistent with this Court's Opinion and the law.

Dated this 7th day of January, 2019.

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