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)

BRIEF FOR THE PETITIONER

Katherine N. Ridgeway, WVSBN 12500
Crawford Law Group PLLC
214 Lutz. Ave.
Martinsburg, WV 25404
304-262-2237
304-262-2239(Fax)
kridgeway@clgpllc.com

Attorney for the Plaintiff Below, Petitioner
LAURA GODDARD

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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

This is an appeal from a summary judgment order of the Jefferson County Circuit Court pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, finding the Petitioner's 21.52-acre tract ("Subject Property") located in Falcon Ridge Farms Subdivision ("Falcon Ridge Subdivision"), Jefferson County, West Virginia, constitutes the "Common Area" to be used in common with the other lot owners of Falcon Ridge Subdivision.

On February 3, 2005, Wolverine Investments LLC, ("Wolverine") as the grantor of a deed of trust, granted and conveyed a 104-acre tract of land, less and excepting 22.3265 acres, to K. Stephen Morris, as trustee, for the benefit of Jefferson Security Bank ("JSB") to secure JSB for

the repayment of two promissory notes aggregating the total sum of $1,387,500.00 dollars. A.R. 34-43.

Thereafter, Wolverine, subdivided the aforesaid real estate into eight separate parcels of real estate - Lots 1-7, Lot 8 (labeled "Residue"), and the Subject Property (labeled "Common Area") – each identified on the final subdivision plat of Falcon Ridge Farms. A.R. 139-141. Prior to the subsequent foreclosure sale, Wolverine conveyed its interest in Lots 1, 4, 5, 6, and 8. A.R 216-237. Further, lots 1, 4, 5, 6 were conveyed by Wolverine to parties *prior* to recordation of any restrictive covenants restricting the aforesaid real estate. (emphasis added). *Id.*

On March 21, 2009, Wolverine, as the declarant, without the written consent of JSB as required by the aforesaid deed of trust [1], recorded the "Amended and Restated Declaration of Covenants, Conditions & Restrictions for Falcon Ridge Subdivision". A.R. 50-84. Subsequently, due to default on the part of Wolverine, the remaining parcels of Falcon Ridge were foreclosed on by Richard A. Pill, as the substitute trustee ("Substitute Trustee"). A.R. 142-158. By deed dated December 27, 2012, and recorded January 29, 2013, Brian Stephens and Sylvia J. Stephens (the "Stephens") purchased the Subject Property for the sum of $1,000.00. A.R. 45-48. The trustee's deed ("Stephens 'Deed") conveying the Subject Property to the Stephens did not reference any covenants or restrictions nor did it reserve any easements or other encumbrances. *Id.* JSB did not execute the Stephens 'Deed. *Id.* Furthermore, the legal description contained therein did not reference the subdivision plat but, instead, conveyed the Subject Property by its original description metes and bounds description describing the entire 104-acre parent tract and excepting therefrom those lots that had been previously conveyed and released as collateral by JSB, as well as a number of other out-conveyances. *Id.*

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[1] *See* A.R. 42 at ¶ 6.

By deed dated December 27, 2012, and recorded January 29, 2013, JSB purchased Lots 1, 3, and 7 of Falcon Ridge via a separate deed of conveyance ("JSB Deed") from the aforesaid Stephens 'Deed. A.R 109-110. The JSB Deed did not reference any covenants or restrictions nor did it reserve any easements or other encumbrances. *Id.* JSB did not execute the JSB Deed. *Id.* Further, neither the substitute trustee nor JSB reaffirmed any of the covenants and restrictions prior to conveying any of the aforesaid real estate.

None of the parties to the instant suit alleged that the foreclosure sale was conducted improperly. Moreover, none of the Falcon Ridge lot owners filed suit to enjoin the foreclosure sale in order to prevent extinguishment of any of their pre-foreclosure rights in the Subject Property. All the lot owners who purchased lots within Falcon Ridge (Lots 1,4,5,6 and the Lot 8 Residue) prior to the aforesaid foreclosure had knowledge of the foreclosure sale and thereafter waived and released their interest in the Subject Property via a deed and release executed by each of the aforesaid lot owners. A.R. 16-24.

On February 8, 2017, the Stephens conveyed the Subject Property to the Petitioner, Laura Goddard for the sum of $18,000.00. A.R. 26-27, 178-183. [2] The deed where the Petitioner obtained her interest in the Subject Property did not subject the Subject Property to any encumbrances of any sort. *Id.* By deed dated June 27, 2013, and recorded on July 1, 2013, JSB conveyed Lot 7 to the Respondent, Tyler J. Hockman. A.R 110-111.

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[2] By a deed 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 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 ruling in the Respondents' favor below, the trial court misapplied established rules of law to an issue of first impression, [3] ultimately resulting in the taking of the Petitioner's private property for the Respondents' private use and benefit. Thereafter, on October 28, 2020, the Petitioner filed this notice of appeal to enforce her property rights in the Subject Property.

SUMMARY OF THE ARGUMENT

Carden and *Walker* are the only cases cited in the trial court's order that involve a trustee's foreclosure sale where the trustee took title via the deed of trust to real estate in its unencumbered state. However, there cases are distinguishable from the case at bar.

In *Walker,* a subdivision developer (grantor-developer) who conveyed real estate in trust in its unencumbered state to secure repayment of the purchase money filed suit to enjoin the sale of trust property *prior to* the foreclosure sale. On appeal, the grantor-developer requested the *Walker* Court to require the sale of the trust property according to grantor-developer's plat rather than in gross. Although the *Walker* Court ultimately found that grantor-developer failed to provide sufficient evidence that the defendant (beneficiary-lender) consented to a change in the trust property such that the streets and alleys of the subdivision should be exempted from the foreclosure sale and that the sale should be made by lots according to the plat rather than in gross, the facts in *Walker* are substantially different than the instant suit and therefore are irrelevant to this Courts ultimate determination.

In the instant suit, none of the lot owners who purchased lots within the Falcon Ridge Subdivision prior to the foreclosure sale claim any interest in the Subject Property. Further, each lot owner who purchased lots within the subdivision prior to the foreclosure sale waived and

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[3] The trial court acknowledges in its Rule 54(b) order that this is an issue of first impression, and for this reason, questions its ruling given there is no binding authority on the matter. A.R. 397-398.

released their interest (if any) in the Subject Property. For this reason, *Walker* does not apply to the instant suit.

Carden does not apply to instant suit because the "bona fide purchaser doctrine" was not applied in *Carden*, as there was no evidence that the defendant in *Carden* had notice (actual or constructive) of the prior agreement between the deed of trust grantor and neighboring lot owner. For this reason, the *Carden* Court held that it would not consider what effect, if any, actual notice would have had on the outcome the case.

Upon reviewing the cases cited by the trial court in support of the bona fide purchaser doctrine,[4] this Court only applied the doctrine where: (1) a party's "prior rights and equities" pre-existed the purchase in question and (2) where the purchaser in question had actual or constrictive notice of the "prior rights and equities."

In the case at bar, the Stephens took title to the Subject Property in its unencumbered state prior to the purchase of lot 7 by the Respondents. Therefore, because the Respondents never took any interest in the Subject Property, there were no "prior rights or equities" of the Respondents that would be enforceable under our law. Further, all the lot owners who purchased lots within the Falcon Ridge Subdivision prior to the foreclosure sale waived and released their interest in the Subject Property. Because none of the lot owners filed suit to require the sale of the Subject Property to be subject to their pre-foreclosure interests, the foreclosure sale resulted in the extinguishment of inferior encumbrances, including any appurtenant easements and restrictive covenants burdening the Subject Property.

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[4] *See Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908); *Eagle Gas Co. v. Doran & Associates, Inc.*, 182 W.Va. 194, 387 S.E.2d 99 (1989); *Wolf v. Alpizar*, 219 W.Va. 525, 637 S.E.2d 623 (2006).

In reviewing the cases cited by the trial court in support of the "bona fide purchaser doctrine," [5] the "common scheme doctrine,"[6] and the "unity rule,"[7] it is clear these equitable doctrines fail to share similar facts to the facts in the case at bar warranting application. Each case cited by the trial court in support of the aforesaid equitable doctrines involve either parties claiming prior rights and equities, which pre-dated the purchase in question or parties who derived title from a common developer. None of the foregoing cases involve the facts before this Court – a party with superior interest to that of the lot owners of Falcon Ridge Subdivision.

Moreover, although the trial court considered the Community Impact Statement ("CIS") and the Falcon Ridge Subdivision plat to support its finding that the Subject Property is encumbered by an easement and restrictive covenants benefitting the Respondents, as discussed below, covenants and restrictions are private agreements and therefore are not enforced by Jefferson County. Therefore, the CIS and Falcon Ridge Subdivision plat are irrelevant to this Court's determination.

Finally, in the instant case, the trial court and Respondents fail to provide any established rule of law that supports a finding that the Respondents' acceptance of a deed of conveyance of a separate lot in a subdivision (lot 7 in the instant suit) results in an easement appurtenant in a separate tract (Subject Property), which was conveyed via a separate deed of conveyance (a separate contract), via a metes and bounds description, without reference to the subdivision plat,

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5 *Id.*

6 *See Jubb v. Letterle*, 185 W.Va. 239, 406 S.E.2d 465 (1991).

7 *See Cook v. Totten, 49. W.Va. 177, 38 S.E. 491* (1901); *Bauer Enterprises, Inc. v. City of Elkins*, 173 W.Va. 438, 317 S.E.2d 798 (1984); *Chapman v. Catron*, 220 W.Va. 393, 647 S.E.2d 829 (2007); *Randolph v. Glendale Improvement Co.*, 103 W.Va. 81, 137 S.E. 349 (1927).

and from a grantor (Substitute Trustee) who is separate from the grantor (JSB) the easement is claimed to be derived through.

As discussed below, the only manner in which the Respondents could have acquired an easement in the Subject Property post-foreclosure would have been by actions on the part of JSB to encumber the real estate post-foreclosure. However, the Plaintiff and Defendants took title via separate deeds and were therefore strangers to each other's deeds. Furthermore, the transfer to the Plaintiff was by a metes and bounds description excepting therefrom those lots and parcels conveyed out of the original 104-acre parent tract. For this reason, the Subject Property was sold in gross without objection, resulting in the extinguishment of any easement in the subject property in favor of the lot owners within the Falcon Ridge Subdivision.

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.

ARGUMENT

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.

It is a longstanding rule of law in this state that a properly conducted foreclosure of a deed of trust extinguishes inferior encumbrances. *See Hite v. Donnally*, 85 W.Va. 640, 643-44, 102 S.E. 478, 480 (1920). In *Hite*, our West Virginia Supreme Court found that "[s]o far as the subsequent liens are concerned they in no wise affect the interest conveyed to the trustee." *Id.* Our Court furthered that "[a] purchaser under the deed of trust would take the property entirely free of any subsequent *encumbrances* thereon[.]" *Id.* (emphasis added).

In considering the foregoing, the Defendants do not provide any valid West Virginia law that a would tend to support a finding that a regularly conducted foreclosure sale would work to cut off subsequent encumbrances, such as judgments, liens and deeds of trust, but would fail to have the same effect on appurtenant easements and restrictive covenants. Although *Carden* and *Walker* are the only cases cited in the trial court's order that involve a trustee's foreclosure sale where the trustee took title via a deed of trust to real estate in its unencumbered state, each case is distinguishable from the case at bar.

a. *Carden*

In *Carden*, after transferring the lot to the trustee as collateral for a $4,925.00 loan to secure the purchaser price, the deed of trust grantors entered into a contract with an adjoining lot owner where the deed of trust grantors agreed not to erect a structure over fourteen feet in height. *Carden v. Bush*, 109 W.Va. 655, 655-56, 155 S.E. 914, 916 (1930). The contract was thereafter recorded. *Id.* After purchasing the lot in question from the trustee at the foreclosure sale, the defendant began construction of a structure that would violate the agreement. *Id.*

Thereafter, the plaintiffs filed a claim in the circuit court and sought to have the trustee's deed to the defendant "set aside" and "the lot re-sold, first being offered subject to their rights, etc." *Id.* at 656, 658. In making its determination, the Court found that such an equitable remedy could not be applied to a regularly conducted foreclosure sale against an innocent purchaser without notice. *Id.* at 657-58.

Although the trial court characterizes the defendant's status in *Carden* as an innocent purchaser without notice as "[c]entral to the Court's decision" [8], the Petitioner asserts that the trial court misconstrued the finding in *Carden*, as the statement cited in *Carden* was admittedly dicta.

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[8] A.R. 325-326 at ¶ 4.

To the contrary, in line with established principles of appellate review, the *Carden* Court found that because actual notice was not an issue before the Court, it was unnecessary to consider its effect on the outcome of the case. [9]

Moreover, in considering constructive notice, in citing West Virginia Code, Chapter 74, section 10 [10], our Court found that the Defendant "shall not . . . be affected by the record of a deed or contract made by a person under whom his title is not derived", finding the Defendant's property could not be affected by an agreement made by parties whose rights were inferior to those of the trust, as the Defendant was not a subsequent purchaser from the parties to the agreement but a purchaser from a trustee with a "superior right to those making the agreement." *Id.*

Like the defendant in *Carden*, the Petitioner's predecessor in title derived title from the foreclosing trustee, Richard A Pill – a party with superior rights to that of the lot owners of Falcon Ridge Subdivision. The trustees deed from Richard A. Pill to the Stephens did not subject the property to any appurtenant easements and no appurtenant easements appear in the Petitioner's chain of title. Further, no action was taken on part of Wolverine or the lots owners of Falcon Ridge Subdivision to ensure the Subject Property was sold subject to their appurtenant easements. Rather, all the lot owners who purchased lots within Falcon Ridge Subdivision prior to the foreclosure sale released and waived their interest in the Subject Property. In considering the foregoing facts, it is clear a regularly conducted foreclosure sale of the Subject Property resulted in extinguishment of

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[9] More specifically, the *Carden* Court commented that "[i]t is not necessary to consider what effect, if any, notice of the plaintiff's claims would have on the standing of Bush", as "[h]e denies (without controversion) actual notice thereof and under our recording acts is not affected by constructive notice." *Id* at 657.

[10] W.Va. Code § 40-1-15 is the current version of this statute.

inferior encumbrances, including any appurtenant easements that could be claimed by the lot owners of Falcon Ridge Subdivision

a. *Walker*

Walker does not apply to the case at bar because the facts are materially different than the matter before the Court. The trial court erroneously relied on *Walker* to support its finding that JSB, by releasing lots sold by reference to the subdivision plat, consented to the dedication of the "common space" depicted on the subdivision plat such that each lot owner who purchased lots prior to the foreclosure sale also acquired an easement in the subject property.

In *Walker*, the deed of trust grantor who was also the developer, who subdivided the real estate in question (grantor-developer), filed a suit with the circuit court to enjoin the sale of the trust property and to require the sale of the trust property via the subdivision plat rather than in gross. *Walker v. Summers*, 9 W.Va. 533 (1876). After the circuit court dissolved the injunction restraining the sale of the trust property, the grantor-developer appealed the circuit court's order, requesting the *Walker* Court to overturn the circuit court's findings below and to order the sale of the trust property according to grantor-developer's plat rather than in gross. *Id.*

In considering the evidence presented below, the Court found that although the grantor-developer alleged that he sold nineteen lots of the trust property, he failed to allege to whom the sales were made and failed to include the lot owners as parties to the suit. Id. at 546-47. Moreover, the Court furthered that the grantor-developer failed to provide sufficient evidence that the defendant (beneficiary-lender) consented to a change in the trust property such that the streets and alleys of the subdivision should be exempted from the foreclosure sale and that the sale should be made by lots according to the plat rather than in gross. *Id.* at 644-45.

In comparing the facts in *Walker* to the present matter, the present facts are materially different than the facts in *Walker*. First, neither the lot owners who purchased pre-foreclosure sale

nor Wolverine filed a suit to enjoin the sale of the Subject Property. Second, the lot owners in *Walker* purchased lots from the grantor-developer *prior* to the foreclosure sale whereas the Respondents purchased their lot from JSB – a trust-beneficiary – *after* the property had been foreclosed on by the substitute trustee. Here, the Respondents do not stand in the same position as the plaintiff in *Walker* nor, in the instant case, do they stand in the same position as Wolverine (the grantor-developer) or the lot owners who purchased lots within the Falcon Ridge Subdivision prior to the foreclosure sale.

In the case at bar, none of the parties who arguably had any pre-foreclosure interest in the Subject Property filed a suit to enjoin the sale. Further, none of these parties bid on the Subject Property at the foreclosure sale to protect their interests from extinguishment. Instead, each lot owner who purchased a lot within the Falcon Ridge Subdivision prior to the foreclosure sale chose to waive and release their interest in the Subject Property. A.R 16-24. For this reason, the Subject Property was sold in gross without objection, resulting in the extinguishment of any encumbrance, including appurtenant easements, which existed prior to the foreclosure sale. *See Hite*, 85 W.Va. at 640.

The Defendants cannot claim an interest through these parties, as purchasers who derived their title directly through the trust-beneficiary, JSB, they 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. Because it was uncontested that none of the lot owners who purchased prior to the foreclosure sale claim any interest in the subject property, it was an error of law on the part of the trial court to consider *Walker* in making its ruling.

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.

Each of the cases cited by the trial court in support of its finding involve parties: (1) who derived title from a deed of trust grantor-developer – not a foreclosing trustee and (2) whose interest in the real estate in question pre-dated the purchase of said real estate in question – not parties who acquired their interest after the purchase of the real estate in question. Therefore, these cases are inapplicable to the case at bar.

Further, although the Petitioner argues had the Respondents purchased directly from the deed of trust grantor-developer (Wolverine) this Court's precedent as outlined in *Hite v. Donnally*, *supra*, and West Virginia Code §40-1-15 support a finding by this Court that inferior appurtenant easements would have been extinguished by the foreclosure sale, these facts are not before this Court. Neither Wolverine nor any of the lot owners who purchased lots within the subdivision prior to the foreclosure sale sought to enjoin the sale. Furthermore, all the lot owners who purchased lots within the subdivision prior to the foreclosure sale, waived and released their interest in the Subject Property. A.R. 16-24. The only parties claiming an interest in the Subject Property are the Respondents. For this reason, consideration of the interests of those parties who purchased lots within Falcon Ridge Subdivision prior to the foreclosure sale is not an issue before this Court. Therefore, this Court should not consider the interests of those parties who purchased lots with Falcon Ridge prior to the foreclosure sale in making its determination.

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 of the case at bar.

In making its findings in support of its summary judgment order, the trial court cited several cases [11] in support of its conclusion of law that the Petitioner was not a bona fide purchaser without notice of the Respondent's interest in the Subject Property and therefore purchased the Subject Property subject to the Respondents 'appurtenant easement in the Subject Property. However, upon reviewing the facts of the cases cited by the trial court in support of its finding, it is axiomatic that for a party to avail themselves of this rule, the party claiming an interest must have "prior rights and equities" that were in existence prior to (that pre-dated) the purchase in question. Because the Defendants never took any interest in the Subject Property, as the Subject Property was conveyed to the Stephens (Petitioner's predecessor in title) [12] and ultimately to the Petitioner, in December of 2012 [13] prior to the Respondents taking title to Lot 7 of Falcon Ridge Subdivision in June of 2013,[14] the Respondents never possessed any "prior rights and equities" in the Subject Property that would be enforceable under our law. After considering the facts in the aforementioned cases, it becomes clear the bonda fide purchaser doctrine would not apply to the case at bar.

Therefore, it was error on the part of the Court to apply this rule of law. In fact, the same argument is better suited to the Defendants and the other lot owners who purchased lots within the Falcon Ridge Subdivision pre and post-foreclosure. In the instant suit, JSB's recorded deed of trust constituted notice to all parties that JSB had a lien on the subject property and that its lien was

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11 *See Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908); *Eagle Gas Co. v. Doran & Associates, Inc.*, 182 W.Va. 194, 387 S.E.2d 99 (1989); *Wolf v. Alpizar*, 219 W.Va. 525, 637 S.E.2d 623 (2006); A.R. 328-330.

12 The Stephen's deed conveyed the subject property via the original metes and bounds description of the 104-acre parent tract, excepting therefrom those parcels that had been previously conveyed, including parcels that were not part of the Falcon Ridge Subdivision; A.R. 45-48.

13 A.R. 26-27, 178-183

14 A.R 110-111.

superior in priority to the lot owners of the Falcon Ridge Subdivision. The foreclosure sale of the Subject Property resulted in property sold free of encumbrances, including appurtenant easements. *See Hite*, supra, 85 W.Va. at 640.

B. It was an 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.

The trial court cited *Jubb v. Letterle*, 185 W. Va. 239, 242, 406 S.E.2d 465, 468 (1991) in support of its holding that the common scheme doctrine applied to the case at bar. In *Jubb*, the common scheme doctrine was summarized as follows:

> "Where the owner of land divides it into lots in pursuance of a general plan for the development of an exclusively residential area and conveys the several lots to different grantees by deeds containing identical or substantially similar covenants restricting the use of the lots to residential purposes, an action in the nature of a suit in equity may be maintained by an owner of one of such lots against the owner or owners of any other lot to compel compliance with the restriction."

Id. at Syl. Pt. 1, citing Syl. Pt. 1, *Wallace v. St. Clair*, 147 W. Va. 377, 127 S.E.2d 742 (1962).

In determining whether to apply the common scheme doctrine, the Court has found that central to its finding is the original intention of the grantor of the real estate who divided the real estate pursuant to a general plan for development. *See Id.* at Syl. Pt. 3, citing *Wallace v. St. Clair*, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962)(citation omitted).

First, it must be noted that the Court has only applied the common scheme doctrine to enforce restrictive covenants for the benefit of lot owners within a subdivision (1) upon a purchaser of a lot within the same subdivision who would have been aware (through actual or constructive notice) of the restrictive covenants and (2) where it was found from the evidence presented that the original developer intended the restrictive covenants to apply to the subdivision in question. However, this doctrine has never been applied in favor of a lot owner who did not derive title from the original developer. In the instant case, the Stephens (Petitioner's predecessor in title) took title

to the Subject Property via the trustee's deed, via metes and bounds description, with no reference to any covenants or restrictions. JSB never took title to the Subject Property, as the Subject Property was conveyed directly to the Stephens from the foreclosing trustee. Further, the Respondents derived title via a deed of conveyance from JSB after the foreclosure sale had already taken place and after the Stephens had taken title to the Subject Property via the trustee's deed. The Respondents and the trial court failed to cite any evidence below that would tend to support a finding that JSB intended to subject the Subject Property to restrictive covenants. In fact, the deed of trust executed by Wolverine included the following provisions:

> 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,
>
> Amendments. This Deed of trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

A.R. 41 at ¶ 6 and A.R 42 at ¶ 6.

In reviewing *Jubb*, it becomes clear that such equitable relief was intended to treat parties who purchased lots within a subdivision from the same developer (parties sharing the same status) with notice of restrictive covenants equally. Notice (actual or constructive) is necessary because it would be inequitable to subject an individual's real estate to restrictive covenants that were not contemplated as part of the purchase.

For this reason, the Petitioner would like to reiterate that restrictive covenants implied to enforce equitable rights do not apply to a party with a "superior right" in real estate to those claiming the right. *See Carden*, supra, at 655. Notice is unnecessary to the Courts determination, as a party with a superior interest does not take title subject to the rights of inferior encumbrances.

The Stephens (the Petitioner's predecessor in interest) purchased the Subject Property in its original, unencumbered state from the foreclosing trustee – Richard A. Pill – a party with superior rights to Wolverine and the other lot owners of the Falcon Ridge Subdivision. The trustee's deed from Richard A. Pill to the Stephens did not subject the Subject Property to any restrictive covenants and no restrictive covenants appear in the Petitioner's chain of title.

Because a party with a superior right in real estate is not bound by subsequent agreements made by parties with subordinate interests, it was an error on the part of the trial court to apply this equitable doctrine to the case at bar.

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.

The "unity rule", has been outlined by our West Virginia Supreme Court of Appeals as follows:

> "When land are laid off into lots, streets, and alleys, and a map plat thereof is made, all lots sold and conveyed *by reference thereto*, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots."

Syl Pt. 2, *Cook v. Tottem*, 49 W.Va. 177, 38 S.E. 491 (1901); Syl. Pt., *Bauer Enterprises, Inc. v. City of Elkins*, 173 W.Va. 438, 317 S.E.2d 798 (1984); Syl. Pt. 3, *Chapman v. Catron*, 220 W.Va. 393, 647 S.E.2d 829 (2007). After reviewing the facts of the case cited by the Defendants, it becomes clear that the "unity rule" does not apply to the case at bar because the facts are dissimilar to the facts in present case. The cases cited by the trial court in support of the unity rule [15] involve parties that derived title from a common developer, not a foreclosing trustee – a party with superior

[15] *See Cook v. Totten*, 49. W.Va. 177, 38 S.E. 491 (1901); *Bauer Enterprises, Inc. v. City of Elkins*, 173 W.Va. 438, 317 S.E.2d 798 (1984); *Chapman v. Catron*, 220 W.Va. 393, 647 S.E.2d 829 (2007); *Randolph v. Glendale Improvement Co.*, 103 W.Va. 81, 137 S.E. 349 (1927).

rights to that of the lot owners of the Falcon Ridge Subdivision. The Defendants did not derive their title from a common developer, but instead derived their title from JSB after the substitute trustee foreclosed on the trust property.

The Stephens (the Plaintiff's predecessor in interest) took title directly from the trustee via a separate deed of conveyance, which did not reference the subdivision plat but, instead, conveyed the real estate by a metes and bounds description describing the entire 104-acre parent tract and excepting therefrom those lots that had been previously conveyed and released as collateral by JSB as well as number of other out-conveyances. A.R. 45-48. The Respondents acquired title from JSB who, in turn, acquired title from the foreclosing trustee. A.R 108-111.

The Court's conclusion of law that the Subject Property was sold subject to the "prior vested easements" is an inaccurate conclusion of law, as the Stephen's deed did not reference the subdivision plat, but merely excepted out-conveyances made by Wolverine and Wolverine's predecessor in title. A.R. 328. Furthermore, if JSB intended to dedicate the subject property to private use, it could have done so by conveying the Subject Property subject to the appurtenant easements of Falcon Ridge Subdivision lot owners. But instead, the foreclosing trustee foreclosed on the Subject Property and via the trustee's deed conveyed the Subject Property free and clear of subordinate encumbrances, including any appurtenant easement which existed in the Subject property prior to the foreclosure sale.

The only manner in which the Respondents would have taken title to their lot subject to an appurtenant easement in the Subject Property would have been by actions on the part of JSB to reaffirm the encumbrances post-foreclosure. However, no such action was taken on the part of JSB.

Therefore, in considering the longstanding rule of law in *Hite,* supra, and West Virginia Code § 40-1-15, in conjunction with the fact that all lot owners who purchased lots within the Falcon Ridge Subdivision pre-foreclosure (the only parties that could claim a pre-foreclosure interest in the Subject Property) waived and released all their interest in the Subject Property (if any existed post-foreclosure) – the trial court erred by applying the unity rule to a case at bar, as the present matter does not involve parties who derived title from a common developer but rather a foreclosing trustee.

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.

The trial court's order relied on the Community Impact Statement ("CIS") and the Falcon Ridge Subdivision plat to support its finding that the Subject Property is encumbered by an easement in favor of the Respondents. In making its finding, the trial court held that because JSB was only able to purchase lots 2, 3 and 7 due to the existence of the subdivision plat, which was a culmination of the subdivision process, the entire plat must apply, including all encumbrances shown thereon and described in the CIS. However, as acknowledged by the trial court in its March 1, 2019 hearing, easements, covenants and restrictions are private agreements are not enforced by the County. [16] Therefore, the CIS and Falcon Ridge Subdivision plat are irrelevant to this Court's determination.

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[16] Our zoning ordinance currently in effect reads as follows:

> Jefferson County shall not enforce or become involved in the enforcement of deed restrictions, covenants, easements, or any other private agreement, and, in the review of development proposals, the County will apply only its regulations to evaluate the proposal. All such restrictions shall be enforced by the parties to the restriction. It is the responsibility of an applicant for a proposed Cottage Industry or Home Occupation to research any private agreements relating to the subject property, contact the Homeowners' Association, or seek the advice of a surveyor, engineer or attorney.

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.

PETITIONER, LAURA GODDARD
By Counsel,

/s/ Katherine N. Ridgeway, Esq.
Katherine N. Ridgeway, Esq.
WV State Bar #12500
Crawford Law Group PLLC
214 Lutz Ave.
Martinsburg, WV 25404
Counsel for Plaintiffs Below, Petitioner

Jefferson County, West Virginia, Jefferson County Zoning and Land Development Ordinance § 4A.6.

As mentioned by the Respondents in a previous brief below, the ordinance is voluminous. A.R. 96. Therefore, if the Court should require a copy, the Petitioner will provide a copy upon request.

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 Brief for the Petitioner and Appendix on the following counsel for the Respondents by hand delivering a copy of the same, this 1st day of February 2021:

Kathy M. Santa Barbara
WVSB No. 5960
518 W. Stephen St.
Martinsburg, West Virginia 25401
Email: kathy@ksblawofc.com

/s/ Katherine N. Ridgeway
Katherine N. Ridgeway