IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0784

JODY L. OELSCHLAGER, D.V.M., and CHARLES K. WILSON,
Plaintiffs Below, Petitioners,

v.

Appeal from a final order of the Circuit Court of Marshall County (Civil Action No. 20-C-64)

GAREN E. FRANCIS, DIANA L. FRANCIS, and DANIEL E. FRANCIS,
Defendants Below, Respondents.

RESPONDENTS' BRIEF

Thomas E. White
White Law Office
604 Sixth Street
Moundsville, WV 26041
(304) 845-7008
(304) 845-7016 (fax)
WV Bar #4022
twhite@white-law.com

Counsel for Respondents,
Garen E. Francis, Diana L. Francis,
and Daniel E. Francis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR[1]

A. The petitioners have claimed that the lower court was clearly erroneous in determining that the Respondents were *bona fide* purchasers of the garage.

B. The petitioners have claimed the lower court erroneously found that the petitioners were required to prove bad faith (*mala fides*) on the part of the respondents.

II. STATEMENT OF THE CASE

A. Procedural History

This is a dispute over ownership of a parcel of land with a garage on it.

On May 14, 2020, the petitioners filed their complaint for declaratory and other relief alleging the respondents were not *bona fide* purchasers of a garage once owned by the petitioners. Complaint, Appendix Record (hereafter A.R.) p. 9. The complaint sought reformation of a deed executed by the petitioners some ten years earlier that conveyed a house and garage, now alleging they did not mean to convey the garage, and that the respondents who subsequently purchased the house and garage should have discovered the petitioners' mistake.

---

[1] These Assignments of Error are the undersigned's attempt to fairly paraphrase those claimed by the petitioners, and consequently to avoid any misapprehension, the Court is referred to the Petitioner's brief for the source material.

The respondents timely filed their Answer on June 24, 2020. A.R. 18-24. On April 28, 2021, the parties filed a Joint Stipulation of facts. A.R. 25-32. On May 7, 2021, the parties filed cross motions for summary judgment and memoranda in support thereof A.R. 33-120. Responses were filed on May 28, 2021. A.R. 121-132. The petitioners filed a reply on June 4, 2021. A.R. 135-139. Thereafter, the Court *sua sponte* scheduled a hearing on August 10, 2021, to hear evidence on the issue of the respondents' status as *bona fide* purchasers. Transcript, A.R 148-214.

On September 1, 2021 the Honorable Jeffrey D. Cramer, Judge of the Circuit Court of Marshall County, entered the court's Final Order, finding that the respondents were *bona fide* purchasers, and denying the petitioners' request to reform the deed they had signed conveying the garage away. A.R. 1-7.

B. Facts

The facts in this matter are largely undisputed. Their legal significance is.

The petitioners once owned adjoining real estate parcels located at 2203 First Street, Moundsville (where a veterinary practice was located) and next door at 2205 First Street (where a residential house and garage are located). Joint Stipulation (hereafter J.S.) ¶ 1,4; A.R. 25. The petitioners thereafter got approval from the Moundsville Planning Commission to subdivide the residential parcel at 2205 First Street into two parcels, one where the house was located and the other where the garage was located. J.S. ¶¶ 9,10;

A.R. 26-27. The subdivision was recorded at the Office of the Clerk of the Marshall County Commission on April 1, 2008 but was not indexed under the name of either petitioner. J.S. ¶ 11; A.R. 27. The respondents never had any knowledge of this happening. J.S. ¶ 31, A.R. 30.

Subsequently, the petitioners contracted to sell the house only, to a Mr. Thomas Hunt. J.S. ¶ 13, A.R. 27. The petitioners' realtor, Denise Pavlik, of Paull Associates, requested attorney, J. Thomas Madden, to prepare the deed. It is agreed that she did not inform Mr. Madden of the subdivision or that he should only convey the house and not the garage to Mr. Hunt. J.S. ¶ 17, A.R. 28. The respondents never had any knowledge of this happening. J.S. ¶ 31, A.R. 30. The petitioners' deed to Mr. Hunt conveyed to him the entire property, including the garage, on November 10, 2009. J.S. ¶ 15, A.R. 28. Both petitioners executed the deed without raising any issue about its contents or description. It was subsequently recorded at the County Clerk's office. J.S. ¶ 15, A.R. 28.

The petitioners assert that they used the garage and exercised various indicia of control over it during Mr. Hunt's ownership, with his permission. J.S. ¶¶ 18-22, 24; A.R. 28-29. The respondents had no knowledge of any of these things happening. J.S. ¶ 31, A.R. 30. Respondents never had any conversations with Mr. Hunt about the property at 2205 First Street during his lifetime or ownership of the property. J.S. ¶ 34, A.R. 31.

Mr. Hunt borrowed purchase monies, and a deed of trust was placed upon the entire property as described in the deed. J.S. ¶ 32, A.R. 31. Mr. Hunt died on June 14,

2016, apparently still owing sums to the lending institution. J.S. ¶ 33, A.R. 31. The property was advertised on September 6, 2019 for foreclosure sale at the front steps of the courthouse, to occur on September 16, 2019. J.S. ¶ 35, A.R. 31.

At this time, the petitioners had already listed the adjoining property at 2203 First Street (the veterinarian property) for sale with Paull Associates, indicating it included a garage. J.S. ¶ 23, A.R. 29; 71. One of the respondents, Diana Francis, called petitioners' realtor on September 11, 2019, to inquire about the sale of the vet practice property, asking various questions about it, including if the sale included the garage next door and was told it did. J.S. ¶ 26, A.R. 29. At the evidentiary hearing, she testified the phone call was later in time, after the sale. Transcript, A.R. 31-33.

Subsequently, on September 13, 2019, two of the respondents conducted research at the courthouse and determined that by everything on record, Mr. Hunt owned the house and the garage, that the deed of trust was on both the house and garage, and that the entire property including the garage was what was being sold at foreclosure. J.S. ¶ 38, A.R. 32 There was no document of record indicating the petitioners still owned the garage. Obviously, they did not find even the subdivision because it was not indexed under the petitioners' names. J.S. ¶ 11; A.R. 27.

On September 16, 2019, the day of the foreclosure sale, one of the respondents, Garen Francis, called Paull Associates and spoke with realtor Denise Pavlik concerning the 2203 First Street listing. Said respondent inquired of the realtor as to whether the

listing included the two-car garage. She informed the respondent that the two-car garage was included in the sale of the 2203 First Street property. The said respondent who had conducted research at the courthouse, asserted to Pavlik that the petitioners did not own the garage and should discontinue their listing for its sale. J.S. ¶ 28; A.R. 30.

Later that day, the respondents purchased the property at the foreclosure sale. The trustee's deed to them again described the entire property. J.S. ¶¶ 39,40; A.R. 32. On September 24, 2019, one of the respondents, Daniel Francis, informed the realtor, Denise Pavlik, that they had purchased and now owned the adjacent property, including the garage. J.S. ¶¶ 29,30; A.R. 30. The realtor subsequently informed the petitioners who filed this civil action. J.S. ¶ 31; A.R. 30.

III. SUMMARY OF ARGUMENT

The lower court did not commit error with respect to any of those assigned by the petitioners, or otherwise. The respondents are innocent purchasers in good faith of the garage property at issue. The respondents' knowledge that the petitioners were attempting to sell the garage was not sufficient to put them on notice to discover a mutual mistake made by petitioners a number of years earlier in the face of all other discoverable recorded records to the contrary.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument may be deemed unnecessary pursuant to the criteria in Rule 18(a), as the dispositive issue or issues have been authoritatively decided; and 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.

V. ARGUMENT

In order to prevail upon their venture to reform the deed, petitioners have to prevail on two points: First, there has to be showing by clear and convincing proof of a mutual mistake of the parties in the deed that was contrary to their intent; and Second, that reformation of the deed would not injure an innocent purchaser for value. *Myers v Stickley*, 180 W.Va. 124, 375 S.E.2d 595 (1988); *Johnston v. Terry*, 128 W.Va. 94, 36 S.E.2d 489 (1945).

Mutual mistake:

Petitioners have conceded in their brief that any mutual mistake must be made by both parties to the deed and the burden of proof is on them by clear and convincing evidence to prove the same. *Johnston, supra*. Here, the petitioners must fail because there is no proof of whether the now deceased person participated in the so-called "mutual" mistake. It would be impossible to prove by clear and convincing evidence at this point due to having no input or evidence from the other party involved.

Respondents agree that deeds may be corrected and reformed where there is a mutual mistake in the description or the like. While this general principle can be applied where the facts warrant, the respondents assert that it would not apply to our set of facts. First, any mutual mistake made was not made between the litigants herein. A review of the cases where this doctrine is applied shows that for the most part, the mutual mistake is considered where both "mistakers" are litigating the matter, or where the defendant is not innocent of the mistake. Here, assuming *arguendo*, a mutual mistake between the petitioners and Mr. Hunt may have been made, that does not mean that it can affect innocent third parties who were not a party to the mistake.

The mistake alleged is certainly not mutual between the petitioners and respondents. The respondents played no part in any mistakes made by others. See *Myers v Stickley*, 180 W.Va. 124, 375 S.E.2d 595 (1988), where this Court indicated that a subsequent *bona fide* purchaser for value, who was not a party to the mistake, was not subject to having his deed reformed due to a remote mistake by others.

Bona fide purchasers:

In order to prevail the appellant petitioners had to prove in the lower court that the respondents were not *bona fide* purchasers. The lower court determined that the respondents were indeed *bona fide* purchasers. To prevail here, the petitioners must show that the lower court's determination in this regard was clearly erroneous.

This appellate Court has opined that: "To reform a deed on the ground of mistake, the mistake must be mutual (that is, participated in by both parties), and must be made out, by clear and convincing proof, beyond reasonable controversy; and in no case will it be made to the injury of a *bona fide* purchaser for value without notice." *Robinson v. Braiden*, 44 W.Va. 183, 28 S.E. 798 (W. Va. 1897). Here, it is far from clear and convincing and beyond reasonable controversy.

Thus, even where there is a mutual mistake in a deed, reformation thereof will be denied where it would injure a *bona fide* purchaser. The respondents are *bona fide* purchasers in that they could not possibly be on notice of whether any mistake was mutual between the petitioners and a deceased person they never met and had never gotten any information from regarding a mistake (or not) on his part. To require purchasers to search for a mutual mistake between remote conveyancers in order to be *bona fide* purchasers would be more than problematic requirement.

Petitioners rely heavily on the case of *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co., et al.*, 63 W.Va. 685, 60 S.E. 890 (1908), for the following syllabus point propositions:

> 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.

Respondents do not quarrel with the black letter law set forth, but point out that there are limitations on the extent of inquiry required from a given set of facts. Moreover there are limitations on what will be considered sufficient notice to even cause an inquiry. The notice must be sufficient to put a reasonable man on inquiry of the existence of a claim in conflict with that which he is about to purchase. *Pocahontas*, *supra*.

In the *Pocahontas* case, McCarty, Holt, and Matthews bought 2302 acres at judicial sale. Holt and Matthews conveyed their 2/3 interest to McGraw with the following declaration in the deed: "But the pine and hemlock timber which are or were on this land are <u>now</u> hereby conveyed, as they were sold many years ago." (Emphasis supplied). McGraw obtained the remaining 1/3 from heirs of McCarty, some of which purported to convey full title, and other deeds that clearly excluded the timber, saying "The pine and hemlock timber is not conveyed, as it was sold and conveyed by J.W. McCarty in his lifetime." The Pocahontas company purchased timber rights from the McCarty heirs who had reserved the same from their deeds to McGraw. McGraw nevertheless purported to convey all the timber to St. Lawrence Boom and Manufacturing Company without reservation. The Court held that the St. Lawrence company had enough notice to

investigate further than just relying on the deed they got. First, St. Lawrence should have inquired about the predecessors' interest. If it had done so, it would have discovered the outstanding interests of the McCarty heirs who reserved the timber in their deeds. In other words, if St. Lawrence would have looked at prior deeds in the chain of title it would have discovered the outstanding timber interests that the McCarty heirs reserved, which were later conveyed to Pocahontas. Secondly, St. Lawrence should have realized that in the deed to McGraw, the word "now" was erroneous and should have been "not" where thereafter it was declared that the timber had probably been cut years ago. The Court referred to it as a clerical error that should not have been relied upon.

Consequently, to this scrivener's reckoning, this case stands for the simple proposition that there was enough notice to St. Lawrence that it should have conducted a title examination to discover any outstanding interests. In the case *sub judice*, the obvious distinction is that no amount of title examination could have led to a determination of a legal status of the garage that the petitioners assert. There is nothing in the *Pocahontas* holding that mandates reversal of the lower court's ruling with respect to the respondents being *bona fide* purchasers herein.

The lower court's decision is to the effect that it would be unreasonable to take away *bona fide* purchaser status on such mere indication there may have been a problem with the title. The lower court's decision can be reversed only if it is clearly erroneous. Petitioners have made no such showing to this appellate court.

Consequences of the mistake petitioners made should rest on the petitioners who committed the error. The respondents have made no mistake. The stipulated facts taken as true show that the petitioners misplace their blame. First, they should blame the realtor who misinformed the attorney who scribed the deed. Secondly, they should blame themselves for not carefully reviewing an important document such as the deed. When they signed the supposedly erroneous deed, they agreed to its contents. Language in a deed is to be strictly construed against the grantor. *Griffin v. Fairmont Coal Co*, 53 S.E. 24, 59 W. Va. 480 (W.Va., 1905). To rest such mistakes upon the innocent respondents misapplies equitable principles that the law is designed to protect.

Let's review what the respondents knew. They knew that the petitioners signed and recorded a deed conveying a house and garage to the mesne assignee, Mr. Hunt; that there was a deed of trust on the house and garage; that the entire described property was being sold on the courthouse steps; and that the petitioners were purporting to nevertheless include the garage in a sale of the adjacent vet practice property. They did not know anything about the circumstances of the sale to Hunt; the subdivision of the property; or any exercise of domain over the garage. Nothing in this set of facts was sufficient to put them on notice that they should have somehow surmised that maybe the petitioners had put a mistaken description in a deed many years ago, and that they should be obligated to do something about it (when the petitioners themselves did not). The lower court factually determined the *bona fides* of the purchasers. There is scant reason to consider the same to

be erroneous, let alone clearly erroneous.

Moreover, this is not the typical situation where *bona fides* is generally denied to a purchaser. The concept of denial of the benefit of a conveyance to a non *bona fide* purchaser typically applies where such person has information sufficient to be put on notice of an unrecorded prior conveyance adverse to such person's title. See *Wolfe v. Alpizar*, 219 W.Va. 525, 637 S.E.2d 623 (2006), where the court indicated that: "A grantee in a conveyance of land, to be protected against a prior unrecorded deed for the same property, and to a different person, must be a complete purchaser, without notice of the prior deed, and have paid in full the purchase price for the land purchased by him; but he will be protected to the extent of any purchase money paid therefor before such prior deed is recorded." Syllabus, *Alexander v. Andrews*, 135 W.Va. 403, 64 S.E.2d 487 (1951)." Here, there was no such prior unrecorded correct deed to discover. Our situation *sub judice* is more complex and convoluted. There was only a deed of record that was contrary to the intended wishes of the petitioners. The decade old intended wishes of a conveyancer are indeed difficult to discover when the same are outside any easily discoverable record.

The petitioners would have this Court rule that prospective purchasers will hence be required to make extensive investigations to discover myriad aspects of former owners actions regarding property over many years before they can comfortably spend valuable sums for real estate. Buying real estate under such a rule would become a gamble. Banks

may be hesitant to loan purchase money on the declaration from a title attorney that only the record title looks good. Attorneys may be hesitant to pass title without interviews of property owners and purchasers to determine what they know *dehors* the record.

There is no authority for the petitioners to assert that *bona fides* is destroyed where the respondents were given paltry information which may have led them to discover the petitioners made a mistake ten (10) years earlier, as opposed to given information leading to discovery of an unrecorded instrument, for example. To rule otherwise would create bad law where purchasers are required to search for possible unintended mistakes prior owners may have made in transactions. This will throw title examiners into an entire new realm of virtually impossible predictability. Real estate law is ancient and staid. It is intended to encourage easy transfers and reliance on records. Real estate law should not require a purchaser to not only search for mistakes of a remote owner, but to believe the oral claim any former owner may make. Why would the respondents believe the petitioners' realtor's claim that the garage could still be sold by them along with the vet property when there was no other indicia of their ownership, and in the face of a deed they signed conveying it away?

Nevertheless, let's assume *arguendo* that the respondents would have inquired further. What would they have found? They would have discovered the petitioners subdivided the property, made a contract to sell a portion to Mr. Hunt, and that the deed instead conveyed it all to Mr. Hunt. How would they know the petitioners just did not

change their mind and convey it all to Mr. Hunt? Would they be required to believe an oral claim to the contrary? Would the respondents be required to hold up their purchase until sorted out? How would this even work? Do we want to require potential purchasers to submit to such executory claims? Would the respondents be required to apply some legal analysis as to whether the prior owner's claim would be valid if litigated?

This is why we see the cases denying *bona fides* only to purchasers with knowledge that would lead to the discovery of an indisputable fact such as the existence of an unrecorded document contrary to the records on file at the courthouse.

The petitioners who had all the information had not even discovered their own mistake. Yet they claim the respondents were charged with seeking it out. The petitioners should be decreed the ones charged with discovering the mistake. They did not discover their own mistake until after the respondents spent good money purchasing the property at the foreclosure sale. They had a ton more familiarity and information about it than the respondents had.

This scrivener cannot find any case anywhere that required so much work and investigation to become a *bona fide* purchaser as petitioners allege the respondents should have unveiled, based on so little notice of such a problem.

The petitioners' second assignment of error is to the effect that the court required an erroneous burden or proof in it's 23rd paragraph of the Final Order, which stated:

> 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 a 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. The "faith" or "fides" of the defendants is the open debate in this matter. 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 their *mala fides* is on the plaintiffs.

The petitioners somehow urge that this required them to prove that the respondents had a subjective belief that the petitioners' claim was legally correct. "*Mala fides*" as defined by Black's Dictionary as "In or with bad faith." *Bona fides* is defined as "Made in good faith." *Blacks Law Dictionary*, (10th ed. 2014). Consequently, *mala fides* is simply the opposite and absence of *bona fides*. In declaring the petitioners had to prove *mala fides*, the court clearly meant to indicate that the petitioners were required to prove the respondents lacked good faith or *bona fides* in being purchasers. To say the court's language required the petitioners to prove the subjective beliefs of the respondents is nowhere stated or even implicated by the court's language in paragraph 23 of the Final Order. Respondents agree that the test is an objective one as to whether a reasonable person should have acted on such information.

Laches:

Although raised in the lower court in the respondents' Answer and argued in its motion and brief for summary judgment, the lower court's decision rested on other

grounds. The respondents nevertheless believe the same to be applicable and request this Court to consider the same.

There is no statute of limitations applicable to the matters *sub judice*. Instead, the doctrine of laches applies to applications for reformation of deeds. *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). The petitioners conveyed by their own deed, the house and garage at 2205 First Street to Mr. Hunt, mistaken or not, on November 10, 2009. This civil action to un-do this act was filed on May 18, 2020. This is over ten years. It is way beyond typical statutes of limitations that are in place for other types of litigation. Laches is a doctrine of equity, calling for analysis of surrounding facts as applicable to the fairness of litigating matters remotely. There is nothing equitable in taking land owned by the respondents due to a mistake made by the petitioners over ten years ago. Equity does not aid those with unclean hands. The petitioners are at fault; not the respondents. It should be too late for the petitioners to be rewarded for their undiscovered mistake made over ten years earlier.

VI. CONCLUSION

The ruling of the circuit court was correct and should be affirmed.

Respectfully submitted,

Thomas E. White
White Law Office
604 Sixth Street
Moundsville, WV 26041
(304) 845-7008
(304) 845-7016 (fax)
WV Bar #4022
twhite@white-law.com

Counsel for Respondents,
Garen Francis, Diana Francis, and Daniel Francis

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENTS' BRIEF** was had upon the petitioners by mailing a copy thereof to the following, by first class U.S. Mail, this 15th day of February, 2022:

D. Kevin Coleman, 453 Suncrest Towne Centre, Ste 300, Morgantown, WV 26505,

Thomas E. White
Counsel for Respondents,
Garen Francis, Diana Francis, and Daniel Francis

Thomas E. White
White Law Office
604 Sixth Street
Moundsville, WV 26041
(304) 845-7008
(304) 845-7016 (fax)
twhite@white-law.com
WV Bar #4022