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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-0422

THE HANSEN-GIER FAMILY TRUST OF
APRIL 22, 2016, BY ITS TRUSTEES,
CARL C. HANSEN AND VIRGINIA M. GIER,

Petitioner,

DO NOT REMOVE
FROM FILE

v.

Appeal from order of the
Circuit Court of Mineral County
Civil Action No. 21-C-51

R. MICHAEL HAYWOOD AND
JOANN T. HAYWOOD,

Respondents.

PETITIONER'S BRIEF

Submitted on behalf of Petitioner,

The Hansen-Gier Family Trust of April, 22, 2016,
By its Trustees, Carl C. Hansen and Virginia M. Gier,

By:

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I. INTRODUCTION

This case originates out of the Circuit Court of Mineral County, West Virginia, regarding the interpretation of a shale reservation on Petitioner's real estate near Barnum, Mineral County, West Virginia. On April 12, 2022, the circuit court conducted a hearing, and thereafter entered a declaratory judgment order setting forth its interpretation of the shale reservation. The circuit court's order regarding the interpretation of the shale reservation is the subject of this appeal.

II. ASSIGNMENT OF ERROR

a. The circuit court did not apply the rules of interpretation and law set forth by this Court regarding the interpretation of reservations. More specifically, the circuit court disregarded the plain language of the reservation, failed to give force and effect to all terms and limitations of the reservation, and failed to construe the reservation against the grantor.

III. STATEMENT OF THE CASE

The issue before this Court involves the interpretation of a shale reservation. On February 4, 1997, Clyde Culver, d.b.a. Culver Enterprises, conveyed 394.08 acres, more or less, ("Culver Tract") to Respondents, R. Michael Haywood and Joann T. Haywood. (A.R. 2, 75-80). A few months later, and on May 17, 1997, Respondents conveyed a portion of the Culver Tract, that being the surface of 14.86 acres, more or less, to Clyde E. Paugh and Sherry E. Paugh. (A.R. 3, 81-84). The Paugh deed was re-recorded on November 14, 1997, to include a plat. (A.R. 3, 85-89).

Of import to this case, and in the deed to Paugh, Respondents "reserved for themselves, their heirs and assigns, the use of the shale pit which is located on said conveyed real estate for use on ingress and egress roads of the development property." (A.R. 3, 82, 86). At the time of making the reservation, the Respondents had neither developed nor improved any other portion of the

original Culver Tract. (A.R. 6). Respondents' conveyance to Paugh also placed a restriction on the real estate that it may only be used for residential and recreational purposes. (A.R. 82, 86).

Shortly following the Paugh conveyance, Respondents developed two additional parcels, which tracts were in close proximity to the Paugh real estate. (A.R. 5-6). The entrance road to the Paugh real estate also served as an entrance to the other two tracts of real estate. (A.R. 5-6). Notably, Respondent, Mr. Haywood, used the shale pit around this time to construct a road to the remainder of the Culver Tract. (A.R. 60-61).

Carl C. Hansen and Virginia M. Gier acquired the Paugh real estate on October 16, 2003. (A.R. 3, 119-122). Consistent with the restriction that it be used for residential purposes, and in 2006, Mr. Hansen and Ms. Gier constructed a dwelling upon the real estate, which dwelling is in close proximity to the shale pit. (A.R. 5, 108-112). Mr. Hansen and Mrs. Gier have since continued to use the real estate for residential purposes, as a second home, without interruption. (A.R. 42). Mr. Hansen testified that neither Respondents nor their heirs or assigns have accessed or removed shale during the entirety of their ownership of the real estate. (A.R. 42, 49). On May 4, 2016, Carl C. Hansen and Virginia M. Gier conveyed the real estate to the Petitioner for estate planning purposes. (A.R. 3-4, 28-29).

At the time of purchasing the real estate, it was Mr. Hansen's understanding that the reservation for use of shale on ingress and egress roads of the development property had been for purposes of maintaining the road to the Petitioner's real estate and the two other properties served by the same road and right-of-way. (A.R. 30-31, 33-34). Mr. Hansen's belief was bolstered over time since no shale had been removed from the real estate in over twenty years, and the roads to Petitioner's real estate and the other two developed lots had already been built. (A.R. 5, 33-34, 42, 49).

In the Spring / Summer of 2021, Petitioner listed its real estate with Pioneer Ridge Realty, a local realtor. (A.R. 5, 42). Respondent, Mr. Haywood, is also a local realtor in Mineral County, West Virginia, but Petitioner elected not to contract with Mr. Haywood to list and sell the real estate. (A.R. 6, 42).

Soon after the listing was made public, and in the summer of 2021, Respondent, R. Michael Haywood, demanded access to the shale pit to remove shale, but did not specify the intended use of the shale. (A.R. 5-6, 43). Mr. Hansen believed that the removal of shale was not warranted because the ingress and egress roads of the development property had been built and did not need maintenance. (A.R. 5). Respondents contended that they could access and remove the shale for any purpose, which was contrary to Mr. Hansen's belief that any shale removed had to be used for use on the ingress and egress roads of the development property. (A.R. 10).

The dispute prompted Petitioner to file its action in the Circuit Court of Mineral County, West Virginia, seeking declaration of the rights and limitations of the shale reservation. (A.R. 1-7). More specifically, Petitioner sought interpretation of the shale reservation's limitation to "ingress and egress roads of the development property." (A.R. 7). In other words, Petitioner claimed that the shale could not be used for any purpose, but was limited to use on "ingress and egress roads of the development property." (A.R. 6-7). On November 17, 2021, Respondents filed an answer and counterclaim seeking declaration that Respondents are entitled to unobstructed access to the shale. (A.R. 8-14).

The matter proceeded to hearing on April 12, 2022, before the Honorable Lynn A. Nelson. (A.R. 20-73). At the hearing, the circuit court received deeds from the chain of title to the real estate, photographs of the shale pit and Petitioner's home, and heard testimony from Mr. Hansen and Respondent, Mr. Haywood. (A.R. 39-70). Mr. Hansen testified regarding his belief and

contention that access and removal of the shale was limited to use on ingress and egress roads of the development property. (A.R. 30).

Contrary to Mr. Hansen's contention, Respondent, R. Michael Haywood testified that the Petitioner's real estate was not part of any of his developments. (A.R. 49). Mr. Haywood further testified that the term "development was any property that I intended to develop." (A.R. 63-64). During cross examination, Mr. Haywood testified that he did not know how anyone else would know what the reservation meant and that at the time the reservation was made, he was developing 1,144 acres of land despite the source tract of the real estate, the Culver Tract, containing only 394.08 acres, more or less. (A.R. 69-70).

From the bench, the circuit court, relying entirely upon the testimony of Respondent, Mr. Haywood, declared that Respondents could access and remove shale, without limitation, "for property that the Defendants develop." (A.R. 70, 123-125). The circuit court's declaration was reduced to a written order entered on May 2, 2022.[1] (A.R. 123-125). In its order, the circuit court dispensed with any requirement that the shale be used for ingress and egress roads. (A.R. 124). The circuit court's order declaring that Respondents may remove shale from Petitioner's real estate, without limitation, is the subject of this appeal.

IV. SUMMARY OF ARGUMENT

The reservation at issue in this case provides that Respondents may "use of the shale pit which is located on said conveyed real estate for use on ingress and egress roads of the development property." The circuit court interpreted the reservation to mean that Respondents could access and remove the shale, without limitation, for "any property Defendants develop."

[1] On May 18, 2022, the Circuit Court of Mineral County entered its Amended Declaratory Judgment Order correcting a clerical mistake relating to Respondents' Counterclaim. (A.R. 130-132).

To reach its conclusion, the circuit court relied entirely upon the self-serving testimony of Respondent, R. Michael Haywood, with no regard for the plain language of the reservation that the shale was limited to use on ingress and egress roads of a specific development property. The circuit court deviated from the law in this State regarding the interpretation of deeds, as it failed to give any weight to the plain language and limitations of the reservations, failed to give force and effect to the reservation's express terms, and failed to interpret the reservation against the grantors. Further, the circuit court's interpretation frustrates and conflicts the covenanted use of the real estate for residential purpose. Therefore, the Petitioner is requesting that this Court reverse the circuit court's interpretation and remand for determination of whether "the development property" applies to Petitioner's real estate and two adjoining parcels or, at most, the source real estate, that being the original Culver Tract.

V. STANDARD OF REVIEW

"The determination of whether a deed, contract, or other writing is ambiguous and does not clearly express the intention of the parties is a question of law to be determined by the court." *Harrell v. Cain*, 242 W. Va. 194, 203, 832 S.E.2d 120, 129 (2019). And "because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo;* however, any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard. Accordingly, we hold that a circuit court's entry of a declaratory judgment is reviewed *de novo." Cox v. Amick*, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995). When the facts of a case call upon this Court to interpret a written deed, "we apply a de novo standard of review to the circuit court's interpretation of the contract." *Zimmerer v. Romano*, 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009) (per curiam).

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Trust believes that oral argument is unnecessary because the dispositive issues in this case have been authoritatively decided. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision because this case involves an assignment of error in the application of well-settled law.

VII. ARGUMENT

The language of the reservation provides that use of the shale pit must be "for use on ingress and egress roads of the development property." The circuit court interpreted and modified the reservation to conclude that Respondents may use the shale pit and remove shale for any "property that Defendants develop." The circuit court failed to adhere to this Court's directives regarding the rules of interpretation. Contrary to the law, the circuit court afforded all weight to the self-serving testimony of Respondent, Mr. Haywood, and afforded no weight to the express language of the reservation.

This Court has provided that, when interpreting deeds, "[t]he language of the instrument itself, and not surrounding circumstances, is the first and foremost evidence of the parties' intent. Resort to rules of construction and aids to interpretation, including extrinsic evidence, is proper where the language of an instrument is ambiguous and subject to more than one meaning. And in cases involving reservations and exceptions, any remaining doubt as to intent should be resolved in the grantee's favor." *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 300, 332 S.E.2d 597, 601 (1985).

"The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 799, 806 S.E.2d 448, 455

(2017), quoting Syllabus Point 4, *Estate of Tawney v. Columbia Nat. Res., L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006). "[W]here there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee." *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 799–800, 806 S.E.2d 448, 455–56 (2017); *see also W. Virginia Dep't of Highways v. Farmer*, 159 W. Va. 823, 823, 226 S.E.2d 717, 718 (1976). This rule of construction has a historic origin and has been followed throughout the years. *Hall v. Hartley*, 146 W. Va. 328, 334, 119 S.E.2d 759, 763 (1961).

Further, "[f]orce and effect must be given to every word, phrase and clause employed, if possible." *Henderson Dev. Co. v. United Fuel Gas Co.*, 121 W. Va. 284, 3 S.E.2d 217, 219 (1939).

In this case, and at the outset, the parties disagreed regarding the interpretation of the shale reservation. In that regard, and though not set forth in the circuit court's order, it is apparent that the circuit court determined the reservation to be ambiguous because the circuit court considered extrinsic evidence. And Petitioner pleaded, in its Complaint, that the reservation was ambiguous in that the reservation failed to define the development property.

The issue in this appeal stems not from the circuit court's determination of ambiguity, but from the circuit court's failure to adhere to the rules of interpretation after finding the reservation to be ambiguous. More specifically, the circuit court 1) failed to afford any weight to the express and plain terms of the reservation, 2) failed to give force and effect to all terms of the reservation, and 3) failed to interpret the reservation most strongly against the Respondents. Further, and as a result, the circuit court eliminated Petitioner's natural and free use of the real estate for residential purposes, which conflicts with Respondents' restrictive covenant that the real estate be used for residential purposes.

First, the circuit court did not give any weight to the plain language and express terms of the reservation. At the time of filing this action before the circuit court, Petitioner recognized that the shale reservation may be susceptible to two interpretations because "the development property" could be interpreted to include the two other subdivided parcels serviced by the same entrance road or, at best, the entirety of the source-tract, that being the Culver Tract, that was later developed to become Maple Forrest Estates.

Though susceptible to different interpretations, the plain language of the reservation limits usage of the shale to ingress and egress roads of a specific "development property." In other words, the ambiguity lies in which specific development property relates to the reservation, not whether any such limitation exists.

Looking at the language of the reservation, the adjective "the" describes the noun, in this case "development property." And the adjective "the" communicates specificity of a development property. For example, if someone says, "the car," they are describing the noun "car" as referring to a specific car. This is different than saying "a car" or "any car," which could mean any one car anywhere in the world. Based upon the plain language, the usage of the shale is limited to a specific "development property." The circuit court's interpretation dispenses with the limitation and permits usage of the shale on any "property that Defendants develop."

Further, the circuit court failed to consider the language of the instrument itself as the "first and foremost evidence of the parties' intent" at the time the shale was reserved. *Sally-Mike Properties*, 175 W. Va. at 300. The shale reservation was made in the deed from Respondents to Paugh in 1997, and refers to a specific development property. (A.R. 75-78). Under the circuit court's broad interpretation, however, the shale may be used for property that Respondents did not own at the time of making the reservation. In other words, though the reservation was limited to

use on roads in "the development property," the circuit court's interpretation of the reservation would permit use of the shale on property Respondents may not yet own. Because the circuit court failed to give any weight to the plain language of the reservation as the first and foremost evidence of the parties' intent and because the circuit court dispensed with the limitation that the shale be used on a specific development property, the circuit court's interpretation is in error.

Second, the circuit court failed to give all terms of the reservation full force and effect when it dispensed with the express limitation that the shale be used for ingress and egress roads. Despite the express limitation that the shale be used on "ingress and egress roads of the development property," the circuit court concluded that the shale may be used for "property that Defendants develop," without limitation. The circuit court's interpretation disregards this Court's holding in *Henderson Dev. Co.* that all terms of the reservation be given full force and effect.

Third, the circuit court failed to construe the reservation against the Respondents, who are the grantors in the chain of title to this reservation. To the contrary, the circuit court interpreted the reservation in the broadest sense possible and against the Petitioner, who is the grantee in the chain of title. At the time the reservation was made, the real estate had been part of a larger tract of real estate containing 394.08 acres, more or less, referred to as the Culver Tract, and at that time, the Petitioner's real estate was not part of any development property. (A.R. 3, 6, 49). Nonetheless, two additional tracts were subsequently subdivided and developed by Respondents near the same time, and the subdivided parcels were developed with the same access road as Petitioner's real estate. (A.R. 5-6).

During the hearing on April 12, 2022, the circuit court received the deeds in the chain-of-title, received pictures of the shale pit, and heard the sworn testimony of Carl Hansen and Respondent, R. Michael Haywood. (A.R. 20-73). Mr. Hansen testified that, at the time he

purchased the real estate and based upon the language of the reservation, he believed that usage of the shale was limited to the ingress and egress roads of Petitioner's real estate and the two adjoining, developed parcels serviced by the same entrance road. (A.R. 30).

Respondent, R. Michael Haywood, disagreed with Mr. Hansen's understanding of the reservation, but conceded that he did not know how anyone else would know what the reservation meant. (A.R. 69-70). Mr. Haywood continued to testify that, at the time the reservation was made, he was developing 1,144 acres of land. (A.R. 69-70). Mr. Haywood contended the reservation included any property he develops, but when asked why the reservation did not say "any property he develops," Mr. Haywood responded he did not know why the reservation did not say that, as his attorney drafted the reservation. (A.R. 69-70).

Based upon all of the evidence presented to the circuit court, Petitioner's contention that the reservation referred only to Petitioner's real estate and the adjoining two tracts is a reasonable interpretation of the reservation. Another reasonable interpretation, although less favorable to the Petitioner, was that the development property applied to the source-tract of real estate containing 394.08 acres, that being the entire Culver Tract.

Respondents, however, sought an interpretation that the reservation permitted use of the shale on any property Respondents develop. Respondents' position was based entirely upon Mr. Haywood's self-serving testimony and is not a reasonable interpretation of the reservation for the reasons set forth *supra*. Assuming *arguendo*, that Respondents' contention is a reasonable interpretation of the reservation, it is the broadest interpretation that could be gleaned.

And contrary to the well-established law in West Virginia, the circuit court adopted the interpretation of the reservation most favorable to the Respondents, declaring that the reservation permitted Respondents to access and remove shale for any property that they develop, without

limitation. The circuit court's interpretation is contrary to this Court's holdings that the reservation be interpreted "most strongly against the grantor." *W. Virginia Dep't of Highways*, 159 W. Va. at 823. The circuit court failed to interpret the reservation against the Respondents, and grantors in the chain of title, in the face of other reasonable, more restrictive interpretations.

In addition to the foregoing three arguments, Petitioner is compelled to set forth two additional considerations. The circuit court's interpretation that Respondents, their heirs, and assigns, may forever access and remove shale from Petitioner's real estate, without limitation, creates an unreasonable burden on Petitioner's right to use and enjoy its surface estate for residential purposes. Reading the entirety of the reservation reveals an intention to limit the usage of the shale; the only question is the bounds of that limitation, i.e. for usage on Petitioner's real estate and the adjoining two developed parcels or the entirety of the 394.08-acre source-tract.

The obvious intention to limit the reservation is bolstered by Respondents' inclusion of a restrictive covenant on the real estate that it be used for residential purposes. (A.R. 82, 86). Consistent with that restriction, Mr. Hansen and Mrs. Gier constructed a dwelling upon the real estate, which they have used for residential purposes from 2006 to the present. (A.R. 5). The dwelling is in relatively close proximity to the shale pit, and without limitation to the use of the shale pit, that being for ingress and egress roads of the development property, Petitioner's ability to continue its free and natural use of the real estate for residential purposes is frustrated, if not eliminated. Because Respondents themselves directed that the real estate be used for residential purposes, it is impossible to reconcile Respondents' present position that unlimited amounts of shale may be removed from the real estate.

Moreover, the circuit court's broad interpretation of the reservation and disregard of its plain, express terms and limitations creates a dangerous precedent. This Court has held, "It is not

the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 484, 128 S.E.2d 626, 628 (1962). In this case, the circuit court has rewritten the reservation to be much broader than any reasonable interpretation, which the circuit court based upon the self-serving testimony of Respondent, Mr. Haywood.

Bona-fide purchasers of real estate in West Virginia must be able to rely upon the plain language of an express reservation to know the thing they are purchasing. In this case, any bona-fide, reasonable purchaser of this real estate would have concluded that the reservation applied to usage of shale on the ingress and egress roads of Petitioner's real estate and adjoining parcels or the source-tract. It is difficult to conceive that a reasonable person would have understood the reservation to permit usage of the shale on any property anywhere in the world. The circuit court has rewritten the reservation and dispensed with its limitations based upon the self-serving testimony of Mr. Haywood, subjecting Petitioner and its real to an inconceivable burden. The circuit court's ruling sets a precedent that any reservation may be re-written at the whim of the person seeking its enforcement.

VIII. CONCLUSION

In sum, the circuit court erred in its interpretation of the shale reservation by affording all weight to the testimony of Respondent, Mr. Haywood, and affording no weight to the express terms and plain language of the reservation. The circuit court disregard the specificity of "the development property" and concluded that the shale may be used for any "property that Defendants develop," now or in the future. The circuit court disregarded and abandoned the express limitation

that the shale be used on ingress and egress roads. And the circuit court failed to interpret the reservation most strongly against the grantor.

Further, circuit court's broad interpretation of the reservation creates an unreasonable burden, if not outright prevention, of Petitioner's natural and free usage of the real estate for residential purposes as covenanted by Respondents. Therefore, Petitioner respectfully requests that this Court reverse the circuit court's interpretation of the shale reservation and remand to the circuit court for determination of whether "the development property" applies to the source-tract of real estate or Petitioner's real estate and the adjoining two-tracts of real estate.

Respectfully Submitted,

THE HANSEN-GIER FAMILY TRUST OF APRIL 22, 2016, by its Trustees, CARL C. HANSEN and VIRGINIA M. GIER, *Petitioner,*

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Appeal from order of the Circuit
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R. MICHAEL HAYWOOD AND
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Respondents.

CERTIFICATE OF SERVICE

I, Jonathan G. Brill, a practicing attorney before the bar of this Honorable Court, certify that I served the foregoing *Petitioner's Brief* and *Appendix Record* upon Respondents by mailing a true copy to their Counsel, Jason R. Sites, to his office address of 112 N Main Street, Keyser, West Virginia, 26726, on August 31, 2022.

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