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,

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 REPLY 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. 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.

II. STATEMENT OF THE CASE

The posture and factual background of the case are set forth in Petitioner's Brief, with no further corrections or additions necessary for this reply. The statement set forth in Petitioner's Brief is incorporated by reference.

III. 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).

IV. 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.

V. ARGUMENT

The reservation to be interpreted in this case provides that Respondents "reserve 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." The circuit court's interpretation of the reservation would read: "Respondents reserve 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~~ for any property Respondents develop." (A.R. 124). To get there, the circuit court relied upon Respondents' self-serving testimony and disregarded the express, plain language of the reservation; failed to give all terms of the reservation full force and effect; and failed to interpret the reservation against Respondents.

a. The circuit court did not give any weight to the plain language and express terms of the reservation.

In their brief, Respondents hang their hat upon the self-serving testimony of Mr. Haywood to argue that intent permits the circuit court to disregard and dispense with the express terms of the reservation. To illuminate the flaw in Respondents' argument, it is first necessary to offer brief discussion regarding the ambiguity before the circuit court. "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).

Respondents misconstrue Petitioner's argument regarding the ambiguity of the reservation. The express language of the instrument contains a specific limitation with regard to the usage of

the shale: The reservation requires that the shale be used "on ingress and egress roads of **the** development property." (A.R. 82) (emphasis added).

The ambiguity is not in whether a limitation exists, but the bounds of that limitation. "Intention disclosed, if at all, by inference or implication, is not allowed to prevail over a different intention expressed in terms. *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 300, 332 S.E.2d 597, 601 (1985) citing Syl. pt. 5, *White Flame Coal Company v. Burgess*, 86 W.Va. 16, 102 S.E. 690 (1920). "The language of the instrument itself, and not surrounding circumstances, is the first and foremost evidence of the parties intent." *Id.*

In this case, the use of the shale is limited to a specific development property. As argued in Petitioner's brief, the adjective "the" describes the noun, in this case "development property." And the adjective "the" communicates specificity of a development property. Despite the specificity, the limitation of use on the ingress and egress roads on the development property is susceptible to more than one interpretation, but it is not susceptible to an interpretation where the limitation is removed or disregarded. The limitation may refer to the source tract or may refer to the two adjoining tracts to Petitioner's real estate, but it is not susceptible to an interpretation in which the limitation is removed and discarded.

It is inconceivable to interpret the reservation as having no bounds. No amount of evidence, parol or otherwise, warrants interpreting "the development property" as "any development property." Under the circuit court's interpretation and Respondent's argument, "use on ingress and egress roads of the development property" would permit Respondents' great-great-grandchildren to remove and use the shale on real estate in Colorado 75 years after this case has ended. While an extreme example, it illuminates the fault with Respondent's argument and the circuit court's interpretation. It cannot be said that such a result is a reasonable interpretation of the reservation.

Moreover, ambiguity found to be in one provision or phrase of an instrument does not warrant rewriting the entire provision or phrase. In other words, just because the limitation of "use of the shale on ingress and egress roads of the development property" may be susceptible to two interpretations does not warrant disregarding the limitation in its entirety.

Here, the reservation contains a limitation. The ambiguity lies only in the bounds of the limitation. The circuit court disregarded the limitation, and permitted Respondents' self-serving testimony to defeat the express terms of the reservation. 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 the ingress and egress roads of a specific development property, the circuit court's interpretation is in error.

b. 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.

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 on the development property. In their brief, Respondents did not address the circuit court's failure to give effect to the specific limitation, instead arguing that Mr. Haywood's testimony regarding intent trumps the force and effect of the express limitation.

"Force 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). Respondents' argument, and the circuit court's interpretation of the reservation, renders the limitation that the shale be used for "ingress and egress roads on the development property" superfluous.

Moreover, the circuit court's interpretation conflicts with the remaining provisions of the deed from Respondents that the real estate be used for residential purposes. The limitation on the reservation is bolstered by Respondents' inclusion of a covenant within the chain-of-title that the real estate be used for residential purposes. Unlimited, unrestricted use and removal of the shale renders the real estate unsuitable for residential purposes. Indeed, unlimited and unrestricted removal of the shale will inevitably impact the structural integrity of Petitioner's home.

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. Under Respondents' argument, intent would trump plain language, which has never been the law of the State of West Virginia. The circuit court's interpretation, and Respondents' argument, disregards this Court's holding in *Henderson Dev. Co.* that all terms of the reservation be given full force and effect.

c. The circuit court failed to construe the reservation against the Respondents, who are the grantors in the chain of title to this reservation.

The circuit court disregarded this Court's pronouncement that the reservation be interpreted against Respondents. "[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.*, 239 W. Va. at 799–800; see also *W. Virginia Dep't of Highways v. Farmer*, 159 W. Va. 823, 823, 226 S.E.2d 717, 718 (1976). "An ambiguous document is always construed against the drafter." *Harrell*, 242 W. Va. at 205.

Regarding the bounds of the limitation in the reservation, Petitioner's contention that the reservation refers only to Petitioner's real estate and the adjoining two tracts is a reasonable interpretation of the reservation. Another reasonable interpretation was that "the development property" referred to the source-tract of real estate containing 394.08 acres.

Respondents argued that the reservation permits use of the shale on any property Respondents develop, but Respondents could not explain how to discern such a broad interpretation from the language in the reservation. During cross-examination of Respondent, Mr. Haywood, the following exchange occurred:

> MR. BRILL: The provision was for (reading) use on ingress and egress roads of the development property.
>
> MR. HAYWOOD: Yeah, yeah, that pertains to the development, and that was the entire property, you know.
>
> MR. BRILL: Mr. Haywood, how would anybody else in the world know what that meant, but you?
>
> MR. HAYWOOD: Well, is says development.
>
> MR. BRILL: And I agree, Mr. Haywood, is does say "the development property." What I'm asking you is how would anybody else know that, that meant all of your property?
>
> MR. HAYWOOD: Well, I don't know. It wasn't for me to interpret. (A.R. 69).

Assuming *arguendo*, that Respondents' contention is a reasonable interpretation of the reservation, it is the broadest interpretation that could be gleaned, and least favorable to the Petitioner-Grantee. 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," and the circuit court failed to interpret the reservation against the Respondents in the face of other reasonable, more restrictive interpretations. *W. Virginia Dep't of Highways*, 159 W. Va. at 823.

VI. CONCLUSION

Permitting the Respondents' self-serving testimony to erase the express limitation creates a dangerous precedent of permitting contracts, deeds, wills, or other instruments to be rewritten at the whim of the person seeking its enforcement. "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). The ambiguity in this case is not the existence of a limitation, but the bounds of that limitation.

Interpreting "for use on ingress and egress roads of **the development property**" as use "for any property that the [Respondents'] develop," without limitation, strikes with the "force of a five-week-old, unrefrigerated fish." *Harrell v. Cain*, 242 W. Va. at 202. Accordingly, 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*,

By: _____

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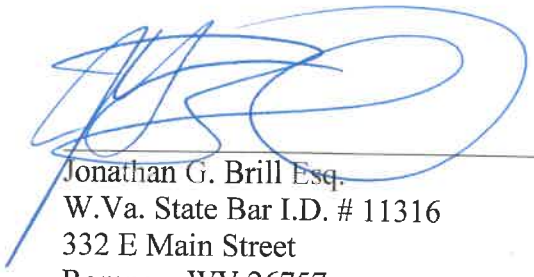
CERTIFICATE OF SERVICE

I, Jonathan G. Brill, a practicing attorney before the bar of this Honorable Court, certify that I served the foregoing *Petitioner's Reply Brief* upon Respondents by mailing a true copy to their Counsel, Jason R. Sites, at his office address of 112 N Main Street, Keyser, West Virginia, 26726, on November 4, 2022.



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