IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Vs.)

Docketing No.: 22-0422
(Mineral County Civil Action NO: 21-C-51)

R. MICHAEL HAYWOOD AND
JOANN T. HAYWOOD,
Defendants Below, Respondent,

RESPONDENTS' BRIEF

Jason R. Sites
Sites Law Firm, PLLC
PO Box 848
Keyser, West Virginia 26726
(304) 788-4683
jasonsites@lawyer.com
WV Bar # 8638
Counsel for Respondent

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STATEMENT OF CASE

Pursuant to West Virginia Rules of Appellate Procedure, Rule 10(d), Respondents must only include a Statement of the case to correct any inaccuracy or omission. Petitioners' Statement of the Case contains a few inaccurate statements and statements of contested facts.

In the first complete paragraph on Page 2 the Petitioner states that "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) Mr. Haywood testified that he used the shale for several roads in North Point, which is not part of the Culver Tract, and Maple Forest Estates. He also used it on the road he built from Petitioner's Property over to Maple Forest Estate.

In the second paragraph on Page 2 the Petitioner states that "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) Mr. Hansen said ""It is my testimony that I never **saw** Mike Haywood on our property taking shale from the shale pit." (A.R. 49, Line 14) Mr. Haywood testified that Mr. Hansen was there when he was removing shale, they had a conversation, and Mr. Hansen tried to buy the shale reservation off of him. (A.R. 61, Line 4-7)

Most of the rest of the Statement of the Case is a self-serving argument supported by only contested facts. The Procedural Portions are accurate.

SUMMARY OF ARGUMENT

This matter was brought as a "Declaratory Judgment" action with a prayer for the Court to declare the rights and interest of the parties concerning the reservation in the Petitioner's Chain of title to a shale pit. The Clause at issue states "The Grantors also hereby 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." (A.R. 82)

The Petitioner pled that this reservation was ambiguous. Respondent replied that it was not ambiguous and had plain meaning. The matter was tried at a bench trial. Mr. Hansen testified regarding what he thought the sentence meant. His testimony was objected to as he was not a party to the original reservation and his opinion was not relevant. The Court desired to hear from Mr. Haywood, Petitioner did not object, and he testified that the reservation was for shale to be used on property that he was developing. He wasn't going to sell the shale to others. (A.R. 63, Line 23 – A.R. 64, Line 4.) Mr. Haywood further testified that the original conveyance was the result of negotiations and a reduction in price due to the reservation. (A.R. 63, Line 8 – 22)

Upon the conclusion of testimony, the Court determined that in this Declaratory Judgment Action the Court is to determine the rights of the parties. The Court opined that the only intent that is relevant is the intent between Mr. Haywood and Mr. Paugh when the original agreement and Deed was made. Based upon the evidence presented the Court declared that Respondents had access to the shale pit for constructing roads on property that Respondent develops. (A.R. 70, Line 13-23, A.R. 123, 130) Petitioner did not call any rebuttal witness, such as the Grantee of the original Deed that was the origin of the reservation, to testify.

Petitioner is claiming that just because Mr. Hansen has a different, self-serving, opinion of what the reservation means, its ambiguous. Petitioner then relies on rules of construction and interpretation but jumps to the end without following the steps and completely overlooks the duty the Court has to let intent rule construction and give effect to the parties' intent if possible. Simply put, just because Petitioner does not like what the parties intended doesn't make it

ambiguous and when the parties express their true intent that evidence cannot be overlooked by utilizing a last resort rule.

Respondents maintain that it is clear that the reservation contained in the Deeds means the shale is to be used on roadways of property that Respondent develops. The only limitation is that the shale cannot be sold to third parties. *In Arguendo* if the term "development property" is ambiguous, then it's a latent ambiguity, can be determined by the use of extrinsic evidence, and the intent of the original parties can be given effect by a just declaration. The Circuit Court got it right and its ruling should be affirmed on appeal.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary in this matter pursuant to the West Virginia Rules of Appellate Procedure, Rule 18(a)(4).

ARGUMENT

Petitioner's argument is simple. Petitioner does not agree with what the original parties intended and created a fictional belief as to what the intent of those parties was in order to serve Petitioner's interest. Petitioner then incorrectly used the Rules of interpretation and construction to again serve its agenda.

I. The lower court erred in its interpretation of the reservation set forth in the chain of title to Plaintiff's real estate. ..... The lower court erred by deviating from West Virginia law and in its interpretation of the reservation.

Petitioner's real estate contains and express reservation "The Grantors also hereby 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." (A.R.

82) A plain meaning interpretation of this reservation provides that the Respondent has retained ownership in the shale. The use of the shale is limited to their personal use, they can't sell it to others, for the construction of roads within the property that the Respondent's develop. There are no limiting words that the shale can only be used on the "Culver" Tract. There is no term in which the reservation ends. It is clear that the ownership of the shale has been severed from the surface and it is implied that the owner of the shale has the right to access the same.

Petitioner was not a party to the original agreement. Petitioner did not call the Grantees of the original conveyance to testify. It is unknown if they even contacted them. Petitioner purchased the property from the original Grantee and was fully aware of the shale reservation. Petitioner was aware that Mr. Haywood was extracting shale from the pit and tried to buy the reservation off of him. (A.R. 61, Line 6)

Petitioner pled that the reservation was ambiguous. Petitioner argues that Mr. Hansen believes this to mean only for use on the initial construction of the road for the two lots that border his property. Respondent testified that it means "any property that I intended to develop." (A.R. 63, Line 24) Petitioner argues that as a result of these different opinions the reservation clause is open to two different interpretations and thus ambiguous. Petitioner offers "The term 'ambiguity, is defined as language reasonably susceptible of two different meaning 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). Petitioner's argument is misplaced and not supported by the facts developed in this case.

The issue presented was for the Court to declare the rights of the parties relating to the reservation clause stating "The Grantors also hereby 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." (A.R. 82) The Petitioner only called Mr. Hansen as a witness and he was not a party to the original agreement memorialized by the Deed. The Witness was objected to on grounds of relevancy but permitted to testify by the court. Petitioner submitted documentary and other evidence and rested its case. Respondent then made statement regarding the position of the case and attempted to narrow the focus down to the true issue, Was the reservation clause ambiguous? Respondent offered to call a witness if the Court wished to hear additional evidence prior to declaration on the issue. The Court did not specifically rule on the issue that the reservation clause was not ambiguous and directed the Respondent to call the witness and give the Petitioner an opportunity to cross-examine him. Mr. Haywood, a party to the original agreement was then called to testify. (A.R. 50-58, and 130-132)

Mr. Haywood testified that regarding the shale pit that had value to him in his land development venture. He testified that the property now owned by Petitioner had a good seam of shale. He testified that he built several roads from the material extracted from that shale seam. (A.R. 59 - 61) Mr. Haywood testified that he used that material on several different roads in North Point and Maple Forest Estates. (A.R. 61 – 62) He testified that he had acquired 1144 contiguous acres from different Grantors and was developing the properties. (A.R. 59) Mr. Haywood testified about the transaction with Mr. Clyde Paugh that resulted in the original reservation. He testified about the negotiations on the reservation and how the

price of the lot was discounted to reflect the consideration for this reservation. (A.R. 63) Mr. Haywood testified specifically on what was meant by development properties as "Development was any property that I intended to develop." (A.R. 63, Line 24) He testified that he is continuing to develop the 1100 acres and with the new phase he is in need of the shale from the seam located on Petitioner's 14 acre tract. (A.R. 65) During cross-examination the Petitioner attempted to get Mr. Haywood to say that he term "Development" could not be understood by others not a party to the agreement. Mr. Haywood basically responded that he know what it meant, he didn't draft it an attorney did, and he was in the process at the time of developing the 1144 acres which he is still developing. (A.R. 69-70)

Petitioner offered no evidence to rebut the testimony provided by Mr. Haywood. Petitioner offered no evidence relating to the reservation of shale other than later deeds. Respondent moved the original Deed to Mr. and Mrs. Paugh into evidence. (A.R. 85)

The Court then made findings of fact and conclusions of law in the Declaratory Judgment Order. (A.R. 130-132.) Petitioner makes the proper Standard of Review in its brief, but it must be remembered that the findings of fact by a trial judge are to be given great weight as the trial judge had the benefit of evaluating the credibility of the witness and should not be disturbed on appeal unless they strike this Honorable Court with the "force of a five-week-old, unrefrigerated fish" as clearly erroneous. *Harrell v. Cain,* 242 W.Va. 194, 832 S.E.2d 120, 128 (2019).

It is well settled law that "the polar star that should guide us in the construction of deeds as of all other contracts is, what was the **intention** of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate

some rule of property." *Totten v. Coal*, 67 W.Va. 639, 642, 68 S.E. 373 (1910). The *Totten* court recognized that the strict construction of Deeds and their technical terms has worked to defeat "the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills." *Id* at 642.

In performance of the Court's task of interpreting a Deed the Court may "look to a variety of evidence, including the parties conduct before and after delivery of the deed, to discern the parties' intent." *Harrell* at 130. "When a deed is inconsistent, confusing or ambiguous on its face, a court **must** look to extrinsic evidence of the parties' intent to construe the deed." *Harrell* at 130. If the Trial Court was of the opinion that the reservation clause was ambiguous, then it is proper to admit parole evidence to clear up the latent ambiguity. *Harrell* at 130 – 131. "No part of a deed should be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, the property intended to be affected." Sylb. Pt 3 *Sally-Mike Properties v. Yokum*, 175 W.Va. 296, 332, S.E.2d 597 (1985).

Lastly, "The 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 reservation and exception, any remaining doubt as to intent should be resolved in the grantee's favor." *Id* at 601.

The relevant facts were provided by the testimony of Mr. Haywood and were not objected to or disputed. The trial court understood its task was to declare the rights of the parties. The trial court understood that the polar star was to give effect to the intent of the parties to the agreement as stated in the *Harrell* case.

The trial court could have ruled that the deed was not ambiguous and declared the meaning. Petitioner pled that the clause was ambiguous and advanced that theory at trial. Petitioner offered no evidence that the Deed was ambiguous other than the deed itself. The Court heard argument from both parties as to what they thought the reservation meant. However, the mere fact that parties do not agree on what a clause means does not render the same ambiguous, ambiguity is a question for the Court as a matter of law. Petitioner cannot now argue that the trial court erred by not giving meaning to the plain language of the deed itself. The first step in construction under the *Sally-Mike Properties* case did not result in declaration by the Court.

The trial court then followed what it **must** under the *Sally-Mike Properties* case and heard extrinsic evidence. As stated above Mr. Haywood testified that he used the shale from the property on various tracts before and after the conveyance to Paugh. This is contrary to Petitioner's theory that the shale was only to be used on the two lots that border his property. These actions are relevant in the determination of intent. Mr. Haywood testified that he probably removed 150 loads of shale and this clearly does not square with the theory that the shale was only used on Petitioner's little driveway.

Mr. Haywood testified that the reservation of shale was negotiated and the price was reduced to reflect this negotiation. This evidence is relevant to the intent of the parties.

It was proffered that Mr. Paugh built his cabin in a location that was not affected by the shale pit extraction. (A.R. 55) This proffer was not objected to and no evidence was provided by Petitioner that this was not correct because it is true. This action by Mr. Paugh is relevant to the intent of the parties.

Mr. Haywood testified as to what he owned, what he was developing and what the intent of the reservation was. No evidence was submitted by the Petitioner to contradict the testimony. This evidence is extremely relevant to the intent of the parties.

Upon consideration of all extrinsic evidence submitted the Court was able to determine the intent of the parties to the agreement, construct and interpret the document to give effect to that intent and avoid declaring the provision void. At this point a declaration was made and the trial court ruled. The ruling was just, supported by the evidence and the procedure followed to get to the declaration was proper under the law. This ends the matter.

Petitioner is hanging its hat on the third step in the *Sally-Mike Properties* case. Petitioner accurately states the dicta that "And in cases involving reservation and exceptions, any remaining doubt as to intent should be resolved in the grantee's favor." *Sally-Mike Properties* at 601. This matter never made it to that step. In cases where you may not have extrinsic evidence available or even after the admission of extrinsic evidence there is still doubt in the trier of fact then the default is to rule in the Grantee's favor. The key word is "any **remaining** doubt." In the present case the trial judge did not have any remaining doubt. The trial judge was able to determine the intent of the parties from the document, facts surrounding the transaction, the actions of the parties and the testimony regarding the intent.

It simply does not square with justice that a party can formulate a self-serving opinion on what a contract means when they were not a party to the agreement, not offer any evidence to support their opinion, not object to the introduction of extrinsic evidence that will aid the trier of fact in answering the question and then say you can't do that you have to rule for me if I say its ambiguous. Such an attempt cannot result in the very thing the *Totten* court was speaking of 112 years ago when they feared strict rules of construction would defeat the manifest intention thus ruling that "**intention must rule construction.**" *Totten* at 642.

In a declaratory judgment action, the Court reviews the evidence and declares the rights and interests of the parties. The Circuit Court was correct in declaring the rights of the parties and the Order of the Court should not be overturned on appeal.

CONCLUSION

When applying the findings of fact made by the Trail Judge to the Conclusions of law the verdict was proper and just. The Circuit Court heard the evidence, weighed the evidence and declared the rights of the parties.

Respondents request this Honorable Court afford the following relief;

1. Affirm the rulings of the Circuit Court;
2. Find that the Trail Judge's "findings of fact" were not clearly erroneous;
3. Find that he Trial Judge's "Conclusions of law" were proper;
4. Find that when applying the findings of fact to the conclusions of law the Trial Judge properly arrived at a just verdict;

Respectfully Submitted,

Jason R. Sites
West Virginia Bar # 8638
Counsel for Respondents

CERTIFICATE OF SERVICE

I, Jason R. Sites, hereby certify that I served a true copy of the foregoing Respondent's Brief upon Jonathan G. Brill, Esq., Counsel for Petitioner, at his address of 332 E. Main Street, Romney, West Virginia 26726, by US Mail, first class, postage prepaid, on this the 15 day of October, 2022.

Jason R. Sites,
Sites Law Firm, PLLC.
PO Box 848
Keyser, West Virginia 26726
(304) 788-4683
WV Bar # 8638
Counsel for Respondents