IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Blake Realty, L.L.C.,
Plaintiff Below, Petitioner

v.) No. 25-ICA-191

Sheila K. White,
Defendant Below, Respondent

REPLY OF PETITIONER BLAKE REALTY, L.L.C.

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ARGUMENT

I. RESPONDENT'S COUNTERSTATEMENT OF THE CASE CONTAINS STATEMENTS UNSUPPORTED BY THE RECORD

Respondent's memorandum repeatedly states that Petitioner has conceded it cannot establish the Blakes' intent when they executed the September 10, 1991deed. Respondent's memorandum states:

> In its briefing below, Petitioner acknowledges that it could not prove the Blakes (sic) intent at the time of the execution of the deed as required by law. J.A. 214.

Respondent's brief, p. 2. Respondent repeats this contention:

> Plaintiff acknowledging in briefing below that it could not prove the intent of the Blakes at the time of the execution of the deed as required by law. J.A. 214

Respondent's brief, p. 7. Respondent's brief states this contention a third time:

> That Petitioner acknowledged it could not prove whether or not the grantors intended for the deed to differ from the land contract at the time they sign the deed should be sufficient to affirm the decision below.

Respondent's brief, p. 8. Petitioner's memorandum opposing Respondent's Rule 12(b)(6) motion appears at Page 201 through 215 of the Joint Appendix. Petitioner's memorandum states '[t]he intention of the parties regarding the interest being sold to the Whites is plainly spelled out in the January 1, 1984 land contract." J.A p.214. Petitioner has consistently argued that the land contract executed by all parties unambiguously spells that the Blakes agreed to sell and the Whites agreed to purchase the surface of the disputed tract. Any claim to the contrary is not reflected in the record.

II. CONCLUSIONS OF LAW REGARDING SUFFICIENCY OF EVIDENCE MADE BY THE CIRCUIT COURT WHEN GRANTING RESPONDENT'S RULE 12(B)(6) MOTIONS CONSTITUTE AN ERROR OF LAW

Respondent insists that the order from which Petitioner appeals did not conclude that Petitioner failed to produce evidence sufficient to prevent the granting of Respondent's Rule 12(b)(6) motion. Respondent's brief, p. 6. It bears repeating that no hearings were held either on Respondent's motion for judgment on the pleadings or Respondent's subsequent motion to dismiss Petitioner's amended complaint. The only insight into the Circuit Court's reasoning in granting Respondent's motion to dismiss Petitioner's amended complaint is contained in the March 24, 2025 email from the Circuit Judge's law clerk which states, in its entirety:

> Hello Counsel,
>
> Please be advised of the following ruling in the above matter:
>
> The Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint is GRANTED. The plaintiff fails to state a claim upon which relief (Reformation) may be granted. The Court requests counsel for the Defendants prepare a proposed Order containing findings of fact and conclusions of law and submit the same to the Court for review.

J.A. 225.

Petitioner recognizes that while not a preferred practice, a circuit court may adopt proposed findings of fact and conclusions of law prepared by a party. *See, e.g., Southside Lumber Company v. Stone Construction Company,* 151 W. Va. 439, 152 S.E.2d 721 (1967).

> As an appellate court, we concern ourselves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect the existing law and the trial record.

State ex rel. Cooper v. Caperton, 196 W.Va. 208, 214, 470 S.E.2d 162, 168. (1996).

The parties did not have the benefit of a hearing where the Circuit Court ruled from the bench granting Respondent's motion or, short of ruling, made statements or engaged in a colloquy with counsel that might have indicated the Circuit Court's reasoning regarding the sufficiency of Petitioner's amended complaint. Here, all the parties had to go by was the above referenced email.

Petitioner is not arguing that the Circuit Court's wholesale adoption of Respondent's proposed order granting her Rule 12(b)(6) motion constitutes reversible error. However, numerous findings and conclusions in the order indicating the Circuit Court's reasoning in granting the motion are conjectural at best. Respondent disputes Petitioner's contention that the Circuit Court's order "did not require Petitioner to produce evidence in order to withstand a motion to dismiss." Respondent's memorandum, p. 6. The order, prepared by Respondent and adopted *verbatim* by the Circuit Court, contains the following conclusions:

> 33. "To justify a court of equity in decreeing reformation of a deed, the evidence produced on the part of one seeking such reformation must be strong, clear and convincing." Syl. Pt. 5, *Edmiston v. Wilson,* 146 W. Va. 511, 511–12, 120 S.E.2d 491, 492–93 (1961).
>
> ***
>
> 35. Here, the existence of a mutual mistake by virtue of a scrivener's error depends upon the intent of the parties at the time of the signing of the Deed in 1991 and must be proved by strong, clear and convincing evidence.
>
> ***
>
> 39. The law in West Virginia, **then, requires that Plaintiff produce "clear and convincing**" evidence that the parties did not intend to modify the terms of the Land Contract at the time of the execution of the Deed.
>
> ***
>
> 57. There is no set of facts which the Plaintiff could prove with strong, clear and convincing evidence which would entitle it to relief on Count I

of the Amended Complaint, the reformation of the unambiguous Deed (sic).

J.A. pp. 5, 6, 8.

Having included these conclusions in the proposed order, Respondent's counsel is now at pains to argue that these paragraphs don't mean what they unambiguously say. In Respondent's telling, Petitioner was required to produce clear and convincing evidence to prevail on its reformation claim; the evidence produced by Petitioner was insufficient to prevail on that claim; and Petitioner could produce no evidence that would entitle it to relief. None of these considerations are appropriate when a circuit court is asked to rule on a Rule 12(b)(6) motion. When considering a Rule 12(b)(6) motion, the question to be decided by a circuit court is whether, if averments in a complaint **are taken as true**, plaintiff would be entitled to relief. Petitioner's amended complaint plainly met this standard. Whether Petitioner could produce the necessary evidence to prevail on its claims should not have been considered by the Circuit Court when deciding Respondent's Rule 12(b)(6) motion.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE SEPTEMBER 10, 1991 DEED WAS UNAMBIGUOUS

Respondent argues that the Circuit Court did not err in concluding that the September 10, 1991 deed was unambiguous. Respondent's memorandum, p. 12. As before the Circuit Court, the Respondent's strategy on appeal hinges almost entirely on convincing this Court to ignore the January 1, 1984 land contract. Citing syllabus point 4 in *Spitznogle v. Durbin, 230 W. Va.* 398, 738 S.E.2d 562 (2013), Respondent contends "courts do not consider land contracts themselves as evidence that the parties do not intend to modify the agreement at the time it was consummated by

deed." Respondent's memorandum, p. 8. *Spitznogle* contains no such holding. In fact, syllabus point 4 of *Spitznogle* states:

> Until consummated by deed, an executory contract of sale is subject to modification by agreement of the parties; **and where an act is done which without** fraud or **mistake** is tendered by one of them, and accepted as full performance by the other with knowledge of his legal rights and equities, the acceptor and those claiming under him are not competent to assert that some part of the original agreement remains to be performed." Syl. Pt. 8, *James Sons Co. v. Hutchinson,* 79 W.Va. 389, 90 S.E. 1047 (1916). (Emphasis added)

Spitznogle provides no support for Respondent's arguments. *Spitznogle* sought specific performance of a written land contract dated September 1, 1999 where the Durbins agreed to sell 138 acres in Marshall County to the Spitznogles for $60,000.00 payable in monthly installments over 10 years. When the land contract was executed, the Durbins owned the 138 acres in fee, subject to a life estate in the oil and gas reserved by the Durbins' predecessor in title, Scherich. No language was included in the land contract excepting the Durbin's remainder interest in the oil and gas from the sale. 230 W. Va at 401, 738 S.E.2d. at at 565.

On September 9, 2009, the Spitznogles made the final payment due under the land contract. Despite acknowledging receipt of payment in full, the Durbins refused to tender a deed conveying the 138 acres. On October 7, 2009, the Spitznogles filed suit in Marshall County seeking to compel specific performance under the land contract and an order directing the Durbins to tender a deed conveying the 138 acres, surface and minerals, to the Spitznogles. Two months later, and during the pendency of the lawsuit, the Durbins tendered a deed to the Spitznogles conveying the 138 acres, excepting and reserving all minerals from the conveyance. The deed was recorded by the Spitznogles. *Id.*

The Spitznogles then moved for summary judgment, arguing that the failure of the Durbins to include language in the land contract excepting and reserving the Durbins' oil, gas and minerals from the transaction entitled the Spitznogles to a deed conveying the minerals. The Durbins argued that the acceptance and recording of the deed by the Spitznogles resulted in the merger and extinguishment of the land contract. The Circuit Court of Marshall agreed with the Durbins and denied Spitznogles' motion for summary judgment. The Circuit Court, *sua sponte,* granted summary judgment in favor of the Durbins, concluding" [s]ince the deed contained provisions reserving the mineral rights to the [Durbins], the deed controls and the [Durbins] are entitled to ownership of the mineral interests." *Id.*

On appeal, the West Virginia Supreme Court **reversed**, concluding that the Spitznogles' acceptance of the deed **did not result in a merger of the land contract and the deed**. 230 W. Va at 403, 738 S.E.2d. at 567. The Supreme Court remanded the matter with directions that the Circuit Court enter summary judgment in favor of the Spitznogles and require that the Durbins convey the oil, gas and minerals in the disputed tract per the terms of the land contract. 230 W. Va at 406, 738 S.E.2d. at 570, *Spitznogle* thus supports Petitioner's position; namely, that the parties are bound by the unambiguous terms of the January 1, 1984 land contract.

Respondent's efforts to have the Court ignore the effect and import of the January 1, 1984 land contract are understandable. However, those efforts must be rejected. Unlike the present case, in most deed reformation cases, proof that a deed resulted from a mutual mistake depends on testimony of the parties to the

transaction, third parties, and other indirect evidence. *Melott v. West*, 76 W. Va. 739, 86 S.E. 759 (1915) is a case in point. *Melott* concerned a dispute regarding realty located in Wetzel County. Melott claimed that defendant West agreed to purchase Melott's one half interest in a 41 acre tract, excepting the coal, oil, gas from the sale. West was to pay Melott the purchase price in an initial installment with the balance due in one year. Melott was a minor when she agreed to the transaction. Upon reaching majority, and having received the entire purchase price, Melott executed a deed prepared by an attorney, Hall, who was unfamiliar with the background of the transaction. Hall erroneously included the coal in the deed to West. Upon realizing the mistake, Melott asked West to convey the coal to her. West refused and Melott sued, claiming that the inclusion of the coal in the conveyance to West was the result of a mutual mistake. West denied that a mistake had been made and further denied any agreement with Melott. 76 W. Va. at 741, 86 S.E. at 760.

The Circuit Court dismissed Mellott's action, finding that Mellott had not demonstrated an agreement excepting the coal from the sale or the existence of a mutual mistake regarding the deed. The Supreme Court reversed, noting:

> If the bare denial of one of the parties to a deed, when confronted by an array of witnesses and corroborating facts and circumstances overcoming him, will cut off the relief of reformation, then **a case for reformation could rarely be established except by a previous written agreement,** for rarely does it occur that one of the parties to the instrument does not put in a denial. (Emphasis added)

76 W. Va. at 746, 86 S.E. at 762. Here, there exists a "previous written agreement" executed by the parties unambiguously describing their intention to purchase and convey only the surface of the property. Respondent argues Petitioner must first prove a negative before this Court can enforce the land contract; namely, Petitioner

must prove that between the date of execution of the land contract and delivery of the deed, the Blakes did not modify the terms of the land contract but rather agreed to convey the property in fee. As in *Spitznogle, supra*, the land contract controls the transaction between the Blakes and the Whites and requires reformation of the September 10, 1991 deed.

IV. DISMISSAL OF PETITIONER'S DECLARATORY RELIEF CLAIM WAS ERROR

Finally, Respondent argues that the Circuit Court did not err in dismissing Petitioner's declaratory relief claim. Respondent's brief, p. 16. The March 24, 2025 email from the Circuit Judge's law clerk advising of the Court's granting of Respondent's Rule 12(b)(6) motion made no reference to Petitioner's declaratory relief claim. Rather, the law clerk indicated "[t]he Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint is GRANTED. The plaintiff fails to state a claim upon which relief (Reformation) may be granted…" J.A. 225. Count I of Petitioner's amended complaint alleged a claim for reformation while Count II sought declaratory relief. Despite no mention being made of Count II or declaratory relief in the clerk's email, Respondent included the following conclusion in her proposed order"

> 58. Plaintiff's second count, seeking Declaratory Relief, thus also fails as it is wholly dependent upon Plaintiff establishing its claim under Count I.

J. A. 8.

Respondent claims Petitioner did not assign error regarding the Circuit Court's dismissal of Petitioner's claim for declaratory relief. Respondent's brief, p. 16. Petitioner's Notice of Appeal states:

> The Circuit Court erred in concluding that Petitioner was not entitled to relief under any set of facts. Given the inherent ambiguity in the

> September 10, 1991 deed created by reference therein to the January 1, 1984 land contract, the Circuit Court was required to consider extrinsic evidence to resolve that ambiguity….

Petitioner's Notice of Appeal, §17, Paragraph 5. Concerning the requirements of a petitioner's brief, Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure states, in relevant part:

> Assignments of Error: The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein.

Assignment of Error C in Petitioner's brief states "the Circuit Court erred in concluding that Petitioner was not entitled to relief under any set of facts." In its Summary of Argument, Petitioner stated:

> The Circuit Court's conclusion that the September 10, 1991 deed was unambiguous is both factually and legally erroneous. Ambiguity appears on the face of the deed. Thus the Circuit Court's conclusion that Petitioner is not entitled to declaratory relief was an error of law requiring reversal.

Petitioner's brief, p. 9.

Relief in the form of declaration of the parties' respective rights as requested in Count II of Petitioner's amended complaint obviously falls within the scope of Petitioner's Notice of Appeal and Assignment of Error C contained in Petitioner's brief.

Respondent then argues that the September 10, 1991 deed is "plainly unambiguous" and that, therefore, dismissal of Petitioner's declaratory relief claim was harmless error. Respondent's brief, p. 15. However, at no point does Respondent address the effect of the inclusion language in the September 10, 1991 deed

referencing that the conveyance is made pursuant to the January 1, 1984 land contract. The conveyance of the property in fee is wholly inconsistent with the provisions of the land contract. Comparing the two documents, the ambiguity is patent on the face of the documents.

Denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is required where a complaint is "intelligibly sufficient for a Circuit Court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522. Petitioner's amended complaint plainly met the standard. Thus, even if the Circuit Court was justified in its dismissal Petitioner's reformation claim, Petitioner's claim for declaratory relief should not have been dismissed.

CONCLUSION

Petitioner's amended complaint stated a cause of action in equity for reformation of the September 10, 1991 deed and, in addition or in the alternative, for declaratory relief in the form of interpretation of said deed. The Circuit Court erred in granting Respondent's motion to dismiss Petitioner's amended complaint.

Respectfully submitted.
Blake Realty, L.L.C., Petitioner,
by counsel

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CERTIFICATE OF SERVICE

I certify that on August 25, 2025, I served Petitioner's Reply Brief upon counsel for Respondent listed below via the Court's electronic filing system.

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