

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

Case Number: 33063

JOHN SMITH and
KATHERINE SUE SMITH, his wife,

Petitioners,

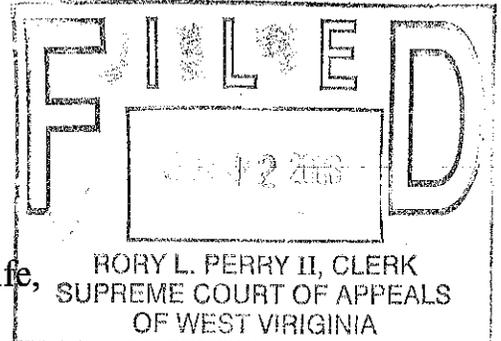
and

IRMA SMITH,

Respondent.

APPELLANTS' REPLY

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I. The kind of proceeding and nature of the ruling in the lower tribunal.

Plaintiffs reassert the procedural history as stated in their original Brief and incorporate it herein as if fully recited verbatim.

II. Statement of the facts of the case.

Plaintiffs disagree with the statement of the case presented by Defendant as to several key points which are more fully discussed below.

Defendant avers that the property in question has clearly defined boundaries on three sides, being a public road, a public alley and the main line of the CSX railway. Plaintiffs averred at trial, and maintain today that the public road is not a clearly defined boundary. In fact, Plaintiffs aver that one boundary of the Defendant's property actual crosses the public road.

Defendant further avers that the Plaintiffs have significant confusion over the proper boundaries and ownership of the parking lot. The testimony is clear as to the boundaries the Plaintiffs aver. The issue of the parking lot is one of use. A lay person would easily construe use of an area a type of ownership. Further, Plaintiffs unequivocally stated that the reservation was for use of the parking lot.

Defendant then asserted that the boundary of the property crossing a public road was contrary to common sense and reason and was not corroborated at trial. Plaintiffs aver that they showed the Defendant that her

property line crossed the road before the deed was executed. Confusion over the proper boundary line by Mr. Smith was the difference in what he believed at the time of the deed execution and what he believed at trial. At execution he felt the property line was the "old fence line," approximately three feet behind the Sewell Valley Bank building. By the time of trial, after much personal research, he felt the proper boundary was the wall of the Sewell Valley Bank building.

A very important aspect discussed by both parties is the use of the parking lot and the "apple butter festival." As indicated by the record, this is not truly a "festival," merely a small gathering of the Plaintiffs' friends and family each October to make apple butter and play music together. It was termed a festival at trial for the ease and convenience of the parties, not because it was a true festival. The deed did not call merely for ingress and egress, but for "use" of the parking lot.

Finally, Defendant states that the Trial Court found that there was no mutual mistake. This is not in line with the Order Pursuant to Bench Trial. The Trial Court based its ruling on the grounds that ambiguity in a deed is to be construed against the grantor and in favor of the grantee, and that ambiguity is to be construed against the party who prepared the document.

The Trial Court circumvented the issue of mutual mistake which would permit parole evidence to be considered.

III. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

Plaintiffs aver that the Trial Court abused its discretion in the final order by not reaching the issues of mutual mistake. The Trial Court couched its decision in other legal principles other than what was argued by the parties. There was no ambiguity in the deed; however there was an issue of mutual mistake, which would permit parole evidence to be entered. Further, Plaintiffs aver there is no ambiguity in the term "use" as stated in the reservation clause of the deed.

Plaintiffs further contend some of the pertinent factual findings were clearly erroneous based upon the transcript and proceedings below.

Finally, Plaintiffs aver that this Honorable Court reviews questions of law *de novo*, such as the question of the applicability of mutual mistake and parole evidence relative to a deed of conveyance.

IV. Points and authorities relied upon, a discussion of law, and the relief prayed for.

A) Whether the trial court incorrectly applied the legal principles of mutual mistake in reformation of a deed.

Plaintiffs would aver that the Trial Court never reached the issue of mutual mistake in the reformation of the deed, and that if said subject was broached, the Trial Court misapplied the legal principles thereof, both abusing its discretion and allowing this Honorable Court to review the issue of law *de novo*.

Defendant avers that the Plaintiffs had differing opinions as to the location of the rear property line. Close examination of the transcript and record below would prove this statement untrue. Mr. Smith did state that he believed that the true boundary was the rear of the bank building; however, upon further questioning it is clear that this is opinion based upon what the deed to the property he retained cites. It is also clear that at the time of the conveyance Mr. Smith believed the property line to be, as he showed the Defendant, the old fence line, a three feet behind the bank building. (Transcript at 36, 39, 44, 45).

Mrs. Smith's testimony actually mirrors that of her husband, when read in full. Mrs. Smith stated that the boundary line, as shown to the Defendant, was "... below where the tree used to be, that it went right straight. John didn't have much room to put the well in or the tanks. And I told her it went straight down through there because that's where the fence was." (Transcript at 66).

As previously stated, testimony from the paralegal at Mr. Mann's office (the attorney who prepared the deed) was that there was a clear understanding of what was to be conveyed, what was to be used by the Plaintiffs and what was to be used by the Defendant. (Transcript at 77).

The Defendant herself eventually admitted she walked the property and was shown "generally" where the boundaries existed. (Transcript at 97, 98). She also stated she did not have a survey done before purchasing the property and could not ascertain the boundaries from the metes and bounds description absent a survey. (Transcript at 96, 97).

Finally, Defendant argues that it would be unusual for a property's boundary to extend across a public road or end in the middle of buildings attached to a structure. Plaintiffs aver that the nearest Interstate at some point dissects land that used to be one parcel and that the property description at hand existed prior to the public road. Further, Plaintiffs aver they built the buildings that attached to the bank building when they owned both properties. The buildings only share a wall with the bank, or one another, and in no way pre-date, or are as old as the bank building itself.

For the reasons stated above and in the original Brief, the trial court should be reversed and a reformed deed outlining the boundaries agreed upon should be issued.

B) Whether the trial court incorrectly applied the legal principles of property law in West Virginia by limiting the use of the parking lot as described in the reservation clause of the deed.

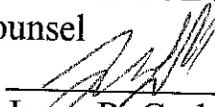
The Defendant avers that the term “use” in the reservation clause is claimed by Plaintiffs to be expanded beyond its common and ordinary meaning. Plaintiffs rely upon, as stated previously, the term “use” as defined by a lay man’s dictionary. The parking of a bus, as had been done for fourteen years, is not beyond the normal use of a parking lot. (Transcript at 47, 48). Additionally, the use would include a small gathering of friends and family to prepare apple butter, an age old tradition. (Transcript at 46, 47). Further, though not discussed at trial, this use could easily mean use for visitor parking, yard sales, car washing, and a plethora of other events for which a parking lot is normally used. The Trial Court incorrectly applied case law and common definitions by limiting the reservation clause of the deed in regards to the use of the parking lot. In order to accomplish a reservation for the “use” any other way would be impractical and clog the land record with voluminous deeds outlining each specific detail of reservation clauses. If the meaning of the term “use” was merely ingress and egress, such terms would have been used in drafting the reservation clause.

For the reasons stated above, the trial court should be reversed and the reservation in the deed regarding use of the parking lot should be restored to mean any use, including parking, ingress and egress, activities, the parking of the bus, social events and visitor parking.

The trial court should be overruled and reversed on both the issue of the proper boundaries of the property and the meaning of the reservation clause in the deed.

Respectfully submitted this the 12th day of June, 2006.

JOHNS SMITH
KATHERINE SUE SMITH
By Counsel



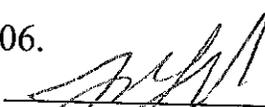
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CERTIFICATE OF SERVICE

I, hereby certify that a true and exact copy of the foregoing has been mailed by U.S. Mail, postage prepaid to all interested parties as follows:

Richard M. Gunnoe
Attorney at Law
114 James Street
Hinton, WV 25951

This the 12th day of June, 2006.



Jason R. Grubb (ID# 9559)
Counsel for Petitioners