

IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

CHOICE LANDS, LLC,
A West Virginia limited Liability Company,
Plaintiff Below, Appellant

v.

CASE NO.: 33878

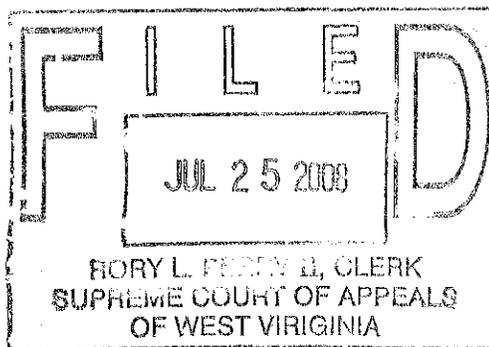
NONDUS TASSEN, individually and as
Executrix for the Estate of Billy L. Tassen,
KENNETH JONES and JOYCE JONES
Defendant Below, Appellees.

And

NONDUS TASSEN, individually and as
Executrix for the Estate of Billy L. Tassen,
Third Party Plaintiff Below, Appellees,

v.

OLD COLONY COMPANY, GMAC AND
BETTY P. SARGENT,
Third Party Defendants Below, Appellees.



BRIEF OF APPELLEES KENNETH AND JOYCE JONES

Now comes your appellees Kenneth and Joyce Jones, by their counsel, R. Lee Booten II, and for their brief in opposition of appellant's petition for appeal they state as follows:

**THE KIND OF PROCEEDING AND
NATURE OF THE RULING OF THE LOWER TRIBUNAL**

As appellant correctly points out in their petition and brief under this same subtitle the appellees Jones moved the court for judgment on the pleadings under Rule 12(c) of the West Virginia Rules of Civil Procedure, and the circuit court after hearing

that matter without taking any evidence thereon granted appellees' motion and entered that order granting that motion on July 20th, 2006. Appellant's state that the court "took no evidence", see appellant's brief page 6. Further, that the circuit court in considering said motion for judgment on the pleadings made " the findings of fact [sic] based on unverified pleadings and arguments of appellees' counsel." See appellant's brief page 15. The jest of appellees' contention is that the circuit court considered no evidence upon said motion for judgment on the pleadings. Contrary to what appellees are eluding to as being an error of law, the circuit court was properly applying Rule 12(c) of Civil Procedure, in that if matters outside the pleadings are presented and not excluded by the court, the motion shall treated as one for summary judgment and disposed of pursuant to Rule 56. Appellant never made that argument below, but correctly cites that the court took no evidence upon plaintiff's motion for judgment on the pleadings, as is proper procedure under Rule 12(c).

Appellant then drug it's feet in allowing the entry of the order, and said order was not entered until almost three months after the April 26th hearing, and not until such time that the appellees filed a trial court rule 24.01(c) objection. Appellant then filed a motion to reconsider, which is not a proper motion under the rules of procedure, and motion for relief from order alternatively, which the court considered under Rule 60(b), and said motion was filed within the four month appeal period. However, appellant has not filed for a stay of execution of the order, but rather sought a two-month extension, which was granted, thereby granting appellant until January 20th, 2007, to file their appeal.

Appellant then choose not to file the appeal within the applicable extended appeal period, and obviously relied upon the court's modification of the appeal period in the court's May 14th, 2007 order, which was not entered until after more wrangling over its language, arising from the hearing held upon appellant's motions held on January 11th, 2007.

Appellees' Jones have set forth in their motion to dismiss this appeal its argument concerning failure to file within the applicable appeal period pursuant to Rule 18(a)(1) of the Rules of Appellate Procedure, and will comment no further upon that issue raised in that motion.

STATEMENT OF FACTS OF THE CASE

This being a motion for judgment on the pleadings the circuit court and this court pursuant to Rule 12(c) are not to consider matters outside the pleadings, otherwise such would have been a summary judgment motion pursuant to Rule 56. As appellant correctly states in its brief no evidence was received by the court, only argument by counsel, and thus the court properly considered its motion under Rule 12(c). That being the case it is unnecessary and improper to state the facts of the case, since the facts to be considered under a Rule 12(c) motion are set forth in the pleadings of the parties.

A review of appellants' designation of record pursuant to Rule 4(c) in this court's rule so states that it designates the entire record of this case, and thus appellee knows of no requirement or necessity for attaching the pleadings in this case to reviewed by the court in regards to the correctness of the circuit court's granting of the motion for judgment on the pleadings, other than stating what pleadings were filed in that case to

insure that the court has all pleadings in which the circuit court reviewed therein. In the event that one or more of those pleadings are missing from the record provided to the court, then in that event appellees Jones reserve the right to supplement the record to provide all pleadings to be considered in regards to this appeal.

Those pleadings consist of the following: Appellants' complaint filed on June 24th, 2005, which contained exhibits attached thereto being the deed between appellant and appellees Tassens, and a one page certificate and affidavit signed by appellee Tassens, which interestingly was not prepared by the Tassen's counsel, but rather appellant's counsel, with no indication thereupon that the appellees Tassens had counsel at that time, nor if they did have counsel that counsel had approved said certificate and affidavit. Further, attached to appellant's complaint was appellant's plat of survey of the property purchased from appellees Tassens dated August 8th, 2003, which apparently was contemporaneously filed with the deed from appellees Tassens to the appellant as so noted by the Cabell County Circuit Clerk's notation as being the 6th page of that deed filed on August 13th, 2003. Further, appellant's attached the original deed in the appellees Jones' chain of title, that being a deed dated October 16th, 1973, from appellees Tassens to Robert and Helen Casto. Thereafter appellant attached appellees Jones' deed from the Casto's dated June 12th, 1978. Both of those deeds clearly set forth the easement in the Jones' chain of title that is in question in this matter.

Thereafter, in response appellees Jones filed their answer, and a counterclaim for malicious prosecution on July 25th, 2005. The other parties of this action also filed answers and responsive pleadings, however their relevance is questionable,

since appellees Jones' motion for judgment on the pleadings was directed solely to the appellant.

Wherefore, once again appellees Jones' counsel deems unnecessary and improper to set forth any statement of facts, since this a motion for judgment on the pleadings pursuant to Rule 12(c), and being such, and in that appellees Jones agrees with the appellants' counsel that no evidence was received by the court in regards to said motion, then the pleadings in this matter filed between the parties speaks for themselves.

**ASSIGNMENT OF ERRORS RELIED UPON
BY APPELLANT ON APPEAL AND THE MANNER
IN WHICH THEY WERE DECIDED IN LOWER TRIBUNAL**

Appellant alleges that the trial court error in granting the appellees' motion for judgment on the pleadings and cites two grounds for error, the first being that the circuit court prematurely made findings contrary to the appellant's allegations without basis in the record, and secondly the circuit court drew conclusions of law which are contrary to West Virginia law.

The circuit court did in fact make its ruling based upon the restrictive language of Rule 12 (c), and so found that taking all pleadings into account then accepting them as being true, that the appellant had no cause of action against appellees Jones. Further, the circuit court cites the identical case law upon this subject matter as cited by appellant which is set forth in the May 14th, 2007, order and appellees' counsel defers to the circuit court correctly citing of West Virginia case law clearly made therein.

**POINTS AND AUTHORITIES RELIED UPON,
DISCUSSION OF LAW, AND RELIEF PRAYED FOR**

Appellees' counsel absolutely concurs with the appellant's rendition of the standard set forth in Rule 12 (c) for judgment on the pleadings, and that it is very

restrictive in nature. However, citing general policy concerns of this court has no bearing upon the actual issues presented to the circuit court in regards to this motion. The facts of this case are undisputed, and are based upon the deeds, the easements contained in those deeds, and survey plat of appellant and appellees properties, which were attached to the pleadings filed by the appellant. The only fact in this case disputed was the appellant's contention that the appellee Kenneth Jones made no objection to an oral conversation between appellant's managing partner and appellee Tassen in regards to moving the easement in question. Appellee Jones disputes those representations, however, they are not of any importance in regards to any of the issues raised, since appellees' Jones was not a party or privy to the contract for the purchase of the appellant's property from appellees Tassens. If appellant wanted the appellees' Jones to alter or amend their easement contained in their chain of title then they should have obtained writing as so required to amend any issue in regards to real property, and any first year law student knows that principle of law. W. Va. Code §36-1-3. The circuit court brushed this issue aside by merely stating that it was unpersuasive, and obviously it is unpersuasive to rely upon no representations, nor silence by a party not privy to a contract. This is part of the basis for appellees' Jones counterclaim in its answer for malicious prosecution. However, appellant has continued to insert this absurd argument concerning that oral conversation concerning this real estate transaction.

Appellant has attempted to raise an argument concerning the language of the easement, specifically the lack of language showing the appellees Jones easement permitted crossing what is herein referred to as Lot 13. As the circuit court noted in the May 14th, 2007 order that allegation was not raised by appellant in it's pleadings, nor

initially raised in opposition to the motion for judgment on the pleadings, but rather was raised in the motion to reconsider as newly discovered evidence. The circuit court quickly brushed this argument aside, since it was obviously not newly discovered evidence being in existence for more than 27 years, and thus appellant's attempt to introduce a new argument in its motion to reconsider was properly denied. The circuit court found due to the fact that the easement in question had existed in the chain of title and in actuality for over 27 years. That a reasonable inspection of the deeds in the chain of title, and of the property in question, would have clearly demonstrated this undisputedable fact to the appellant, who has continued to ignore it's own duty to inspect a piece of property that they were purchasing.

Next in its motion to reconsider the appellant's attempted to introduce a new survey which was not presented previously to the court showing its Lot 13 argument, however that new survey presents no additional light to this subject, and will not be commented upon any further. In summary the circuit court correctly applied the standards set forth in Rule 12 (c) by simply reviewing the pleadings and exhibits attached thereto in so finding that appellant had no cause action against appellees' Jones who were not a party or privy to the property transaction between the appellant and appellees' Tassens.

Appellant on page 14 so states that the circuit court erred in making findings based upon unsworn pleadings. The circuit court's decision upon a motion for judgment on the pleadings are made upon unsworn pleadings, and appellant's citing of Boggs v. Settle, 145 S.E.2d 146(West Virginia 1965), that a circuit court can not make alleged findings of facts based upon unsworn statements has no applicability in regards to this case. The circuit court of Cabell County simply reviewed the pleadings and exhibits

attached thereto. Likewise appellant's attempt to introduce an affidavit of its managing partner in regards to its response to the motion was outside the pleadings which the circuit court properly ignored, since once again this is a matter to be considered upon the pleadings and exhibits alone assuming that they are true.

Appellant correctly cites the standard for review of granting of a motion under Rule 12 (c), as contained in their argument labeled in subsection A beginning on page 10 of their brief. However, in their subsection B beginning on page 14 appellant contradicts itself in attempting to cite a different standard. Appellees' counsel makes no further comment upon this argument, and is confident that this court will see through an attempt to cite case law not applying to the facts in this matter, and contrary to the standards set forth to review a Rule 12 (c) motion.

The appellant's next argument beginning on page 17 so states that the circuit court's finding that a reasonable inspection of the property would have disclosed the easement prior to its purchase is plainly wrong, and once again is a ludicrous argument. The easement in question was contained in the parties chain of title as was provided by the appellant in their pleadings and exhibits filed in this matter. The appellant's own surveyor sets forth the location of that easement on its survey map, which was filed with the original pleadings, and as shown on its subsequent survey attached to its brief. Appellant's own evidence attached to its pleadings shows the location of that easement, and how stupid can you be to state that the circuit court was wrong in making that finding when it was readily apparent not only from their own survey but also from inspecting the property. Appellees' counsel will not attempt to respond to this ludicrous argument any further.

Appellant's next try is to contend that the appellees' Jones continued use of that easement may or may not be true. The pleadings show that it is true, and the only evidence indicates that was true, and appellant has no argument that it was not true, since it is contained in the deeds in the chain of title in question. The parties to that chain of title are appellees' Jones and Tassens, and they both confirmed that the easement had been unaltered for the past 27 years. That fact is uncontraverted, and the appellant's attempt to raise this issue is without any support, and is not any mentioned in its pleadings. Quite frankly as an appeal counsel I would be ashamed to raise such an obviously unsupported argument.

Appellant mentions on the bottom of page 16 that the circuit court's findings that Lot 13 was owned by the Tassens who does not object to the motion for judgment on the pleadings is wrong. The fact of the matter is the Tassens did own Lot 13 at the time of the creation of the easement. Appellees' Tassens has sold the underlying property to that easement to the appellant, but the easement in question was created 27 years prior to that transaction, and the fact that the appellant now owns the property is of no consequence. This is an easement of record, and the circuit court's finding that the Tassens owned Lot 13 is in reference to the ownership at the time of creation of the easement, and not at the time of arguing the motion.

Appellant argues on page 19 that the court erred in finding that the alleged easement in question exists in the appellees' Jones chain of title. A review of the appellees' pleadings so shows that the appellant initially alleges that the easement in question was contained in Jones' chain of title, and they attached the deed showing that

the easement as contained in that chain of title, and this argument is contrary to their own pleadings.

Appellees' on page 21 further continues in their argument concerning the fact that Lot 13 was not mentioned in the appellees' Jones easement. Appellees' Jones concede that fact, since the chain of title containing the language of that easement is clearly set forth therein and is part of the pleadings in this matter. But if in fact appellant does not want the appellees' Jones to cross Lot 13, then appellees Jones have the right to cross Lot 14 which is within the specific language of their easement. Appellees Jones have no objection to this court modifying the circuit court's order to so find that appellees' Jones easement should be moved to Lot 14 as contained in their chain of title, but the effect of moving this easement to Lot 14 would take an additional amount of appellant's property, which is exactly what appellant is attempting to avoid. The appellant is attempting to quash and extinguish the appellees' Jones easement contained in their chain of title and existed for the past 27 years, and the argument that the appellees' do not have the right to cross Lot 13, even though the original grantors the Tassens placed the easement on their property across Lot 13 and not Lot 14. Once again, if the appellant wants to move the easement to Lot 14 have at it, but extinguishing the total easement by the fact that it crosses Lot 13 instead of Lot 14 is not supported by any statute or case law.

Lastly, on page 24 of its brief appellant makes an absurd estoppel argument, that in a property transaction not involving appellees' Jones that appellee Kenneth Jones' mere silence concerning a discussion between appellant and appellees' Tassens amounted to an estoppel. How stupid and embarrassing to make an estoppel or

detrimental reliance argument in regards to a property transaction. The statute of frauds in West Virginia so provides that any transaction concerning real estate must be in writing. W. Va. Code §36-1-3. If in fact appellees' Jones consented to the movement of that easement or the canceling of that easement then appellant should have obtained a writing to that effect. No such writing was ever even attempted to be presented to appellees Jones, and the absurdity of this argument merits no further consideration, and as stated by the circuit court was simply unpersuasive.

SUMMARY AND PRAYER FOR RELIEF

In summary, this is a classic example of lawsuit abuse. This is the very thing that West Virginia courts are criticized for by condoning. The appellant has filed a lawsuit against appellees' Jones to try to cancel their easement that has existed in their chain of title and in actuality for the past 27 years, when the appellees' Jones were not parties to the property transaction between the appellant and the appellees' Tassens. They have the further unmitigated gull to allege damages against appellees' Jones. Appellees' Jones have a counterclaim against the appellant in this matter, and obviously that underlying counterclaim for malicious prosecution serves as part of the basis of why appellant has so vigorously fought the granting of this motion for judgment on the pleadings, since the granting of the motion for the judgment on the pleadings in essence so provides that you have no cause of action in the first place, as was the case in this matter.

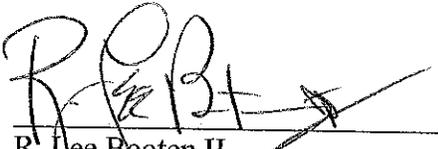
Appellees' Jones counsel would point the court's attention to the very language of the circuit court's order of May 14th, 2007, wherein the circuit court made its findings based upon the pleadings and exhibits attached thereto as is proper under Rule

12 (c) in consideration on a motion for judgment on the pleadings. Taking all of those pleadings as true as is the standard under Rule 12 (c) for the consideration of that motion the circuit court so found that there was no cause of action against the appellees' Jones, and properly granted that motion. As mentioned above appellees' counsel hereby states that this is a classic example of lawsuit abuse. Appellant is obviously a large company with lots of money to spend to cancel an easement with a party in which it had no transaction. This type of litigation can not be condoned in West Virginia, and it is appellees' counsel full intention of pursuing its counterclaim for malicious prosecution based upon this unfounded action, and the circuit court findings made solely upon the pleadings in this matter points out the absurdity of the appellant's allegations in its complaint and in its appeal to this court.

Wherefore, appellees' Jones hereby prays to the court to deny the appellant's appeal, and further that they set forth a strongly worded opinion of the absurdity of the appellant's complaint against a party in which it had no privy of contract, and no right to bring this suit from its inception, and for such other and further relief as the court deems just.

**KENNETH AND JOYCE JONES,
APPELLEES,**

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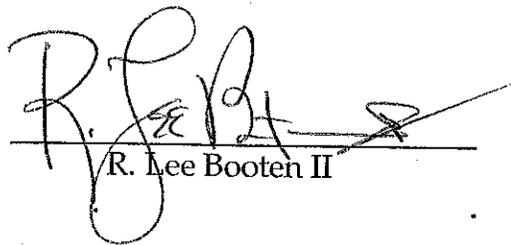
CERTIFICATE OF SERVICE

I, R. Lee Booten II, counsel for Kenneth and Joyce Jones, do hereby certify that the service of Brief of Appellees Kenneth and Joyce Jones upon the below named counsel by mailing a true copy thereof on this 24th day of July, 2008.

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