

No. 34497

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

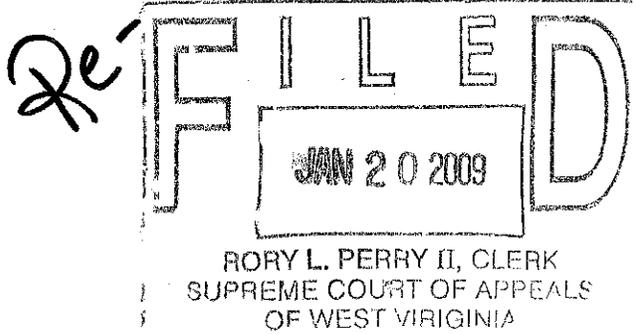
BETTY LOU ZIRKLE CARPENTER,

Plaintiff/Appellee

v.

SHIRLEY BLANIAR LUKE,

Defendant/Appellant



**BRIEF OF APPELLEE
BETTY LOU ZIRKLE CARPENTER**

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BRIEF OF APPELLEE
BETTY LOU ZIRKLE CARPENTER

I. INTRODUCTION

Appellee Betty Lou Zirkle Carpenter ("Appellee") submits this brief in response to the brief filed by Shirley Blaniar Luke ("Appellant"). Appellant petitions this Court to reverse the judgment entered as a matter of law by the Circuit Court of Harrison County and to remand the case for retrial. The entirety of the Appellant's brief rests upon her argument that she enjoys the status of a bona fide purchaser. This Court should uphold the Circuit Court's denial of Appellant's motion to amend its directed verdict because there was no legally sufficient evidentiary basis to support any conclusion other than Appellee possessed record owner of the "Disputed Tract" (fully described in Statement of Facts). Moreover, Appellant's status as a bona fide purchaser is irrelevant to this proceeding because her deed did not purport to convey the Disputed Tract. West Virginia Code § 40-1-9 provides that a conveyance of land is ineffective as against a subsequent bona fide purchaser unless that conveyance is recorded. Appellant's

deed conveys to her 2 acres and 26 square poles and nothing more. The mere fact that Appellant believed that the 2 acres and 26 poles included the Disputed Tract when it did not does not make her a bona fide purchaser of the Disputed Tract. A person is only a bona fide purchaser of what is found in the deed that person records. Absent a finding of adverse possession,¹ Appellant has no valid claim to the Disputed Tract.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellant and Appellee own neighboring realty in Eagle District, Harrison County, West Virginia. Appellee filed this action on December 13, 2006 in the Circuit Court of Harrison County seeking a declaration as to the rights of the parties to a small piece of realty to which both claimed title ("Disputed Tract"). Appellee also sought injunctive relief prohibiting encroachment by Ms. Luke. Ms. Luke answered the complaint with two counter-claims. The first claimed title to the property by deed and by adverse possession, the second claimed unjust enrichment for the value of her improvements to the Disputed Tract in the event that it was determined to belong to Mrs. Carpenter.

Prior to the trial of this matter both parties moved for summary judgment on the issue of record or actual ownership of the Disputed Tract. The Circuit Court denied both motions and this action proceeded to trial on November 13, 2007. At the close of all evidence on November 14, 2007, the Circuit Court of Harrison County entered judgment as a matter of law in favor of Mrs. Carpenter on the issue of actual ownership of the Disputed Tract. Ms. Luke's counter-claims of adverse possession and unjust enrichment were submitted to the jury, along with a third issue of easement by prescription. The jury determined that: 1) Ms. Luke had not proven by

¹ The jury's verdict finding that Defendant/Appellant did not adversely possess the Disputed Tract or obtain easement by prescription has not been appealed. Likewise, the jury's verdict that Plaintiff/Appellee was not unjustly enriched by any improvements made to the Disputed Tract by Defendant/Appellant was not appealed.

clear and convincing evidence that she had adversely possessed the disputed tract; 2) Ms. Luke had not proven by clear and convincing evidence that she had acquired the driveway portion of the tract by prescriptive easement; and 3) Mrs. Carpenter had not been unjustly enriched by Ms. Luke's actions.

On November 30, 2007 Ms. Luke moved the Circuit Court, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure to alter or amend the judgment and for a new trial. That motion was denied on December 18, 2007. Ms. Luke filed her Petition for Appeal to this Court on April 15, 2008 claiming that the Circuit Court erred in denying her motion to alter or amend judgment and reversal of that decision and remand of the case for retrial was necessary. This Court granted the Petition on October 29, 2008. The Appellant submitted her appeal brief on December 10, 2008. The Appellee, Betty Lou Zirkle Carpenter hereby responds to that brief.

III. STATEMENT OF THE FACTS

Appellee is the owner of a tract of land located in Eagle District,² Harrison County, West Virginia. She inherited this land in 2005 from her father, Leslie Oren Zirkle. The property conveyed by the will ("Carpenter tract") was the same property that was conveyed to Mr. Zirkle and his late wife, Maxine Estella Zirkle, from Ray O. Zirkle and Mollie M. Zirkle, the Appellee's grandparents, by deed dated November 19, 1960. That deed is on file in the Harrison County Clerk's office, in Deed Book No. 846, at page 538, bounded and described as follows:

Beginning at the middle of the public road and running thence N. 77.5 E. 5.48 Poles to a stake; S. 15E. 10.72 Poles to the middle of said road; thence with the meanders of said road S. 75 W. 4.88 Poles; thence N. 17.5 W. 10.32 Poles to the beginning, containing 55 square poles.

² Although the Deeds of record state that the property is in Eagle District, it is assessed for tax purposes as lying within Clay District.

See November 19, 1960 Deed.³

Appellant is the owner of a 2 acre, 26 square pole tract of land also located in the village of Peora, in Eagle District, Harrison County, West Virginia. Ms. Luke received this property from her father, who had purchased it from David Abruzzino as trustee of the Estate of Byron Jones in 1972. A portion of that property shares boundary lines with the Appellee's property. Three deeds in Ms. Luke's chain of title were introduced into evidence at the trial of this matter. Those deeds were dated 1968, 1972 and 1988 and contained no metes and bounds description but only described the property in terms of area and reference to the prior deed. See 1968 Deed, March 10, 1972 Deed and September 20, 1988 Deed. The only evidence introduced at trial as to the actual boundaries of Ms. Luke's property, were a survey completed by McCoy Land Surveying in 1998, and the testimony of Appellee's surveyor, David Jackson, that the deeds in Ms. Luke's chain of title did not contain a metes and bounds description of her property after 1922. (Test. D. Jackson at 38, 60).⁴

In both chains of title, each deed purports to convey no more or less land than that granted by the predecessor grantor. Hence, every deed in Ms. Luke's chain of title described the property as 2 acres and 26 square poles more or less and states that the deed conveys the same property that was conveyed by the prior deed in the chain. Likewise, every deed in Ms. Carpenter's chain of title describes her property as 55 square poles more or less, contains an identical metes and bounds description as the prior deed, and references the preceding deed.

The public road referenced in the November 19, 1960 deed granting the Carpenter Tract to the Appellee's parents is known alternatively as West Virginia Secondary Route No. 3 and the

³ All of the exhibits referenced in this response were admitted into evidence at trial.

⁴ Transcripts of the trial testimony of David Jackson, Appellee/Plaintiff Betty Lou Zirkle Carpenter and Appellant/Defendant Shirley Blaniar Luke were filed as part of the Circuit Court record for the Court's reference.

Clarksburg and Wheeling Turnpike ("WV Route No. 3"). The physical location of WV Route No. 3 was changed from its original layout with the change shown on a plat dated December 1922, titled "Section of Robinson Run-Peora Road through Property of Chas L. Ashcraft and Others," and completed by the Office of the County Road Engineer, Clarksburg, West Virginia. See December 1922 plat.⁵ What this plat purports to show is the prior course of the roadbed, in comparison with the current course of road. Though not recorded, the 1922 plat passed, along with title to the land, to each successive owner of the Carpenter Tract. (Test. B. Carpenter at 4-6). Accordingly, each successive owner of the Carpenter Tract understood the boundaries of that realty as extending beyond the relocated road.

The chain of title to the Carpenter Tract indicates that the boundaries were set prior to the relocation of WV Route No. 3 in December 1922. See April 10, 1947 Deed, April 9, 1938 Deed, April 4, 1938 Deed, June 21, 1924 Deed, March 13, 1919 Deed, and March 3, 1916 Deed. Due to the relocation of WV Route No. 3, the road now crosses through the Carpenter Tract, leaving a 2,234 square foot portion of the Carpenter Tract on the western side of WV Route No. 3. See Plat of Survey for Leslie Oren Zirkle dated December 1998, by D.L. Wheeler & Associates, Inc., and Plat of Survey for Betty Lou Zirkle Carpenter dated October 18, 2006, by David L. Jackson.⁶

At trial, various witnesses testified that Appellee's father had openly treated the Disputed Tract as his own from the time he took ownership. Appellee, and her husband, David Carpenter, provided testimony regarding the conflict between her father, Mr. Zirkle, and Ms. Luke regarding ownership of the Disputed Tract. (Test B. Carpenter at 4-6, 18, 20). Appellee, Mr.

⁵ Plaintiff/Appellee still has the original plat in her possession.

⁶ For clarification, the October 2006 Plat of Survey was color coded to show the specific location of the Carpenter tract (yellow), the location of the old roadway (blue), and the location of WV Route No. 3 as it exists today (red).

Carpenter and other fact witnesses testified that Mr. Zirkle used the Disputed Tract as a parking area for several years. Id. at 4, 7. In later years, Mr. Zirkle and his wife were given permission by a neighbor to park their vehicle in their driveway. Id. at 9. Both Mr. and Mrs. Zirkle were in bad health and the neighbor's driveway was easier to access as it was directly across the street from Mr. Zirkle's home. Id. at 9-10.

Visitors to the Zirkle home continued to park on the Disputed Tract. Appellee and Mr. Carpenter both testified that Mr. Zirkle permitted Ms. Luke and her father to use a portion of the Disputed Tract as a driveway for many years. (Test B. Carpenter at 10-12). The area where that original driveway was located had been used as a walking path by the previous owners, with the permission of both generations of Zirkles. Id. at 4-6, 18, 20. In the early 1990's, however, Ms. Luke began constructing a new driveway on the property that encompassed a much larger portion of the Disputed Tract. It was at that time that Mr. Zirkle began making regular complaints to Ms. Luke. Mrs. Carpenter testified regarding her father's aggravation over the issue and that she took photographs during the construction of the new driveway at the direction of her father.⁷ Id. at 14. Appellee further testified that her father had his land surveyed in 1998 in a further attempt to prove the true boundary lines of his property. Id. at 21.

In 1998, Appellant had her property surveyed by McCoy Land Surveying as well. The plat of survey mistakenly shows the eastern boundary of the "Blaniar Tract" running with the center-line of the now existing roadway rather than the original road location. The McCoy plat of survey shows an overlap of 1,919 square feet onto the Carpenter Tract. See Plat of 2.35 Acres Surveyed for Shirley Blaniar dated November 1998 and filed with the aforesaid Clerk's office on December 7, 1998. The McCoy survey was recorded again on July 25, 2004 in Deed Book No.

⁷ Numerous photographs depicting the Disputed Tract throughout the years were admitted into evidence. However, the photographs are not relevant to the issues currently before this Court.

1395 at page 1298. See Plat of 2.35 Acres Surveyed for Shirley Blaniar dated November 1998 and filed with the aforesaid Clerk's office on July 25, 2004. The only notable difference in the two surveys is that the initially recorded document contains a small triangle drawn on the lower portion of the Blaniar tract where the now Disputed Tract is located, while the survey recorded in 2004 does not. When questioned at trial, Appellant denied that she had her land surveyed because of a dispute with Mr. Zirkle and stated that she did not know why the survey had been recorded twice or who had drawn the triangle shape on the survey. (Test. S. Luke at 18-19, 23.)

At the trial of this matter, David Jackson, the professional surveyor who had performed the 2006 survey on the property, testified that the moving of West Virginia Route No. 3 did not change the boundary lines between the two properties. (Test. D. Jackson at 18.) Mr. Jackson further testified that it is not uncommon to find deeds with descriptions using roads or even trees as boundary markers. He explained that property owners do not lose portions of their property simply because a tree is cut down or a road is relocated. Id. Appellant offered no witness or other evidence to rebut the testimony of Mr. Jackson.

IV. STANDARD OF REVIEW

Appellant has asked this Court to reverse the Circuit Court's denial of her motion to alter or amend its directed verdict and to remand the case for retrial pursuant to West Virginia Rule of Civil Procedure 59.

This Court reviews the ruling of the trial court in denying a motion to alter or amend pursuant to Rule 59(e) under "the same standard that would apply to the underlying judgment upon which the motion is based. . . ." Syl. Pt. 1 Wickland v. Am. Travelers Ins. Co., 204 W. Va. 430, 513 S.E.2d 657 (1998). Here, that would be the standard applicable to judgment as a matter of law pursuant to Rule 50. "The appellate standard of review for the granting of a motion for a

directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*.”
Syl. Pt. 3 Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996).

V. ARGUMENT

Three issues were decided at the Circuit Court level. First, who actually possessed record title to the Disputed Tract? Second, assuming Plaintiff/Appellee held record title, had Defendant/Appellant acquired all or a portion of the Disputed Tract by adverse possession? While the Appellant does not couch her brief in terms of the adverse possession issue, she erroneously uses the facts probative of that argument to support her bona fide purchaser argument. Finally, assuming Plaintiff/Appellee held record title, had she been unjustly enriched by improvements made to the Disputed Tract by the Defendant/Appellant.

The Appellant now seeks reversal of the Court’s finding on the issue of record ownership. The Appellant has attempted to confuse the Court by conflating the two issues, treating the evidence probative of one claim as probative of the other and introducing several red herring arguments that were neither addressed nor decided in the Circuit Court. The issues for decision by this Court remain simple: Was the Circuit Court correct in its conclusion that there was no legally sufficient evidentiary basis for the jury to find for the Appellant on the issue of record ownership? Because the Circuit Court was correct in determining that there was no evidentiary basis for a jury to find for the Appellant on the issue of record ownership, this Court should uphold that decision.

A. The Trial Court Correctly Concluded as a Matter of Law that Ms. Carpenter is the Actual Owner of the Disputed Tract

In her brief, Appellant asserts that the Circuit Court erred in ruling that Appellee was the actual owner of the Disputed Tract because, according to the Appellant, she was a bona fide purchaser for value without notice. The focus of the issue of record ownership at trial was

whether the “public road” as contained in Mrs. Carpenter’s chain of title meant the turnpike as it existed prior to relocation in 1922 or whether it meant WV Route 3 as it exists today. Ms. Luke introduced no evidence that she was the record owner of the Disputed Tract or that the “public road” had any meaning other than that set forth by Appellee. Once the Circuit Court correctly determined as a matter of law that “public road” had the meaning advocated by Mrs. Carpenter, the Court implicitly determined that Ms. Luke did not, and could not, have record ownership of the Disputed Tract. Essentially, because the Disputed Tract was not conveyed to her in her deed, she could not be a bona fide purchaser with respect to it. Accordingly, while Appellant may not have been on notice of who actually owned the Disputed Tract, her erroneous belief that she owned it, did not grant her title, absent adverse possession.

1. There Was No Legally Sufficient Evidentiary Basis for a Jury to Find for the Appellant

The Circuit Court below was asked to declare, as between Appellant and Appellee, who held record title to the Disputed Tract. In essence, the Circuit Court was tasked with giving meaning to the phrase “public road” as contained in the deeds in Mrs. Carpenter’s chain of title. If the Court determined that “public road” meant the pre-1922 roadbed, then the Disputed Tract belonged to Appellee and she would win. If, on the other hand, “public road” meant the roadbed as it exists today, then the property did not belong to the Appellee. The only evidence introduced as to the boundaries of Mrs. Carpenter’s holdings and the meaning of “public road” was the testimony of David Jackson that public road meant the pre-1922 public road, and therefore the Disputed Tract belonged to Mrs. Carpenter. The Appellant introduced no evidence to the contrary; therefore there was no evidentiary basis for the jury to find other than for the Appellee. Accordingly, the Court correctly entered judgment as a matter of law, and correctly denied the Appellant’s motion for reconsideration.

Rule 50(a) provides the standard for judgment as a matter of law.⁸ The Rule states that, “if during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party” On appeal, the reviewing court will sustain the entry of a directed verdict “when only one reasonable conclusion as to the verdict could be reached.” Syl. Pt. 3 Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996). Hence, if the evidence viewed in the light most favorable to the Appellant could not support a finding for her, the entry of judgment as a matter of law was proper and must be upheld.

At trial, the only evidence on the meaning to be assigned to the calls and descriptions contained in the deeds to the Carpenter Tract was that put on by the Appellee in the form of testimony by David Jackson. Mr. Jackson is a professional surveyor with some thirty-five years experience. (Test. D. Jackson at 2). Mrs. Carpenter called Mr. Jackson to testify as both a fact and expert witness. Mr. Jackson testified that he surveyed Mrs. Carpenter’s property with the assistance of the December, 1922 plat. Id. at 4. The plat and the deeds in Mrs. Carpenter’s chain of title back to 1916 were introduced into evidence at trial.

Counsel for the Appellant cross-examined Mr. Jackson as to the contents of the deeds in Mrs. Carpenter’s chain of title. (Test. D. Jackson at 26-38). Mr. Jackson indicated that each placed the boundary at the “public road.” Id. Mr. Jackson further testified that the calls in a deed for the boundaries of a piece of land are interpreted as of the time the land was cleft from a larger parcel. Id. at 60. In other words, when you look for the date of a deed, you look for the

⁸ At trial, the Circuit Court found that Defendant/Appellant had been fully heard on the issue and had provided no evidence to rebut the testimony of David Jackson that the road referenced in Plaintiff/Appellee’s chain of title referred to the road as it existed prior to 1922. Accordingly, the court granted judgment as a matter of law as to record ownership in favor of Plaintiff/Appellee. The court’s stated basis for its finding was Rule 54(b), meaning that the judgment was final and ripe for appeal. However, the court’s evidentiary basis was clearly stated as that found under Rule 50(a), granting judgment as a matter of law.

date when that description first arose. Id. at 60, 61. Because of this convention, according to Mr. Jackson, the “public road” referenced in Mrs. Carpenter’s deeds would therefore mean the road as it existed prior to its movement in 1922. Id. at 22.

Mr. Jackson also testified that old turnpikes were often moved with the advent of the automobile and that this is a fairly common situation for surveyors to encounter. (Test. D. Jackson at 17). As a result, when surveying near an older turnpike, the surveyor must keep his eyes open and attempt to ascertain the meaning of the road described in the deed. Id. Mr. Jackson testified that even without the unrecorded 1922 plat, he would have sought out the old roadbed because the calls in Mrs. Carpenter’s deed could not be reconciled. Id. at 62.

The only evidence that Ms. Luke put forth with respect to the extent of her record ownership were three deeds in her chain of title and a survey which she twice recorded. The three deeds were dated 1968, 1972 and 1988. These merely state that her property consists of 2 acres and 26 square poles and reference the prior deed. These deeds contain no metes and bounds description or any other information which would support Ms. Luke’s claim to the Disputed Tract and do not reference the public road in any way. On cross-examination, the Appellant questioned Mr. Jackson regarding the three deeds in Appellant’s chain of title. He testified that the only legal descriptions in her chain of title were in conveyances prior to 1922. (Test. D. Jackson at 38, 60). Ms. Luke also introduced a survey completed in 1998, which purported to show her property as extending to the current roadway. **She did not introduce the testimony of the surveyor to authenticate the survey or testify as to its accuracy or the methods used in completing it and Appellant’s counsel admitted on the record that Ms. Luke was not qualified to interpret the survey.** (Test. S. Luke at 22). However, it is clear from Ms. Luke’s testimony that in reaching her conclusion that she owned the Disputed Tract

she relied only on the deeds she and her father recorded prior the 1998 survey and, thus, she was not aware that Ms. Carpenter's property line ran with the center of the public road until 1998.

In essence, none of the deeds Appellant introduced into evidence purport to convey the Disputed Tract to Ms. Luke or her predecessors in title. In fact, according to the only expert to testify on the subject, all of the deeds introduced indicate that the Disputed Tract belongs to Mrs. Carpenter. Ms. Luke put forth absolutely no evidence to rebut this assertion. She did not introduce a single deed, real estate contract, or mortgage agreement, or elicit any testimony which would indicate that she, as opposed to Appellee owned the Disputed Tract. Instead, Ms. Luke offered her subjective opinion that it was hers.⁹

In sum, Appellee introduced evidence, in the form of deeds containing identical metes and bounds descriptions back to 1916 and the testimony of an expert surveyor who indicated that those deeds make her the record owner of the Disputed Tract. Appellant, on the other hand, put forth no evidence suggesting that she was the record owner of the property. Viewing this evidence in the light most favorable to the Appellant, there was but one way that a jury could find, and that is in favor of Mrs. Carpenter. Accordingly, the Court correctly directed a verdict and correctly denied Ms. Luke's motion for reconsideration.

2. Bona Fide Purchaser

i. Ms. Luke Has No Ownership Interest In The Disputed Tract, Thus The Recording Act Does Not Protect Her

Though the issue was not specifically addressed at trial, Appellant contends that the Circuit Court erred in directing a verdict on behalf of the Appellee because she was a bona fide purchaser for value. The Appellee does not now dispute, and has never disputed, the Appellant's

⁹ Ms. Luke did, as she demonstrates in her brief, put forth evidence with respect to her use of the land, but that evidence was only probative of her claim of adverse possession. That evidence is not at all relevant to the singular issue of record possession or her alleged status as a bona fide purchaser.

status as a bona fide purchaser with respect to the property conveyed in her duly recorded deed. She is therefore protected, from the claims of subsequent grantees with respect to that property, by way of the West Virginia Recording Act, W. Va. Code § 40-1-9. Ms. Luke is not entitled to claim the Act's protection with respect to property not conveyed to her by that deed. Accordingly, because the Circuit Court correctly determined that the Disputed Tract was not conveyed to her by her deed, she could not be a bona fide purchaser of that property and her status as a bona fide purchaser with respect to her property is irrelevant to this action or this appeal.

West Virginia Code § 40-1-9 provides that a conveyance of land is ineffective as against a subsequent bona fide purchaser unless that conveyance is recorded. The purpose of the Act "is to protect a bona fide purchaser of land against creditors of the grantor, and against other persons to whom the grantor may have undertaken to execute title papers pertaining to the land embraced in the recorded instrument." Syl. Pt. 2 City of Bluefield v. Taylor, 179 W. Va. 6, 365 S.E.2d 51 (1987). The statute applies where a common grantor conveys an interest in the same property to two or more grantees. The statute is a notice statute and it protects all subsequent bona fide purchasers who take without notice.

Appellant contends in her brief that because her father paid value for the property and because neither she nor he had notice of Appellee's claim, she is a bona fide purchaser protected from Appellee's claim. No one disputes that Mr. Luke gave value for his property and no one disputes that Appellant and Mr. Luke took the property conveyed in their deeds without notice of claims by others to the land conveyed in those deeds. These facts are not, however, relevant to this action, or this appeal, because the Disputed Tract was not conveyed by those deeds, and no evidence was introduced at trial to show otherwise.

Ms. Luke introduced into evidence at trial a 1968 deed, the 1972 deed to her father, and her 1988 deed. Those deeds contained a very basic description which stated the area of land conveyed, 2 acres and 26 square poles. None of the deeds reference the road, contain a metes and bounds description, indicate that they encompass the Disputed Tract or otherwise specify which 2 acres and 26 square poles they conveyed. The deed merely purports to convey the property owned by the grantor and conveyed by the previous grantor.

The only evidence introduced with respect to the deeds in Appellant's chain of title prior to 1968 was the testimony of David Jackson that one would have to go back further than 1922 to find a deed containing a metes and bounds description of her property.¹⁰ Therefore, deeds both pre- and post-1922 contain the identical 2 acres, 26 square poles description and no deed in Appellant's chain of title purports to convey any more property than that conveyed in the previous deed. All of the evidence introduced at trial suggests that Appellant, by her deed, owns the same property as her predecessor in title owned in 1921. Appellant did not introduce any deed or conveyance which would contradict this point or support the position that the Disputed Tract was somehow conveyed to her or her predecessors in title after the road was moved. What's more, as David Jackson testified, in order to set the bounds of Appellant's property, one would have to look to deeds when the property was divided from larger pieces, which was before the road moved in 1922.

Despite the dearth of evidence to support her position, the Appellant persists in her assertion that the Disputed Tract somehow belongs to her because she, or her father, allege to have not known about the Appellee's claim. Appellant's assertion is essentially that because she either did not look at the deeds in her chain of title or misinterpreted them, she believed that the

¹⁰ As far back as 1911 in the Appellant's chain of title, the deeds contain no more than the same 2 acre, 26 square pole description.

Disputed Tract was hers, and because this was her belief, the tract has become hers because she personally did not have actual notice of any indications to the contrary. This argument is incredulous and, if a true statement of the law, would mean that any grantee receiving title by an ambiguous instrument could unilaterally annex whatever portions of their neighbor's property they believed, rightly or wrongly, to be theirs and fit within that ambiguous description. The Recording Act is a shield, and should not be used as a sword. It protects the bona fide purchaser to the extent of the land conveyed to them and no further. The fact that Ms. Luke was actually mistaken about which specific land was conveyed to her does not make her without notice; it simply means she failed to understand the extent of the grantor's holdings and the meaning of her deed.

In summation, Appellant can only be a bona fide purchaser under the Recording Act to the extent of the property she purchased as reflected in the deed conveying that property. She is protected from claims to that property by her status. However, she does not own the Disputed Tract, and, therefore, is not protected from claims against it. Once the Court concluded as a matter of law that the deeds in Mrs. Carpenter's chain of title conveyed the Disputed Tract and that the deeds in Ms. Luke's did not, her status became irrelevant. In short: she could not be a bona fide purchaser of land she did not purchase.

ii. The Wells Case is Irrelevant as This Was not an Action for the Reformation of a Deed

In her brief, the Appellant cites Wells v. Ford, 180 W. Va. 166, 375 S.E.2d 798 (1988) for the proposition that, "Equity will not reform and correct a deed on account of mistake unless it is shown by clear, convincing, and unequivocal evidence that the mistake was mutual, but if the rights of an innocent purchaser for value have intervened, the reformation and correction will not be made." Id. at 169, 375 S.E.2d at 801. While this is presumably a correct statement of the

law, it is inapplicable to this action and this appeal for two reasons. First, the Appellee did not ask the Circuit Court to reform her deed and second, even assuming that she did, the concept is inapplicable to this action because the legal description in the Appellee's deed contained the Disputed Tract.

The Wells case cited by the Plaintiff illustrates a situation where the reformation of a deed is sought. In that case, the two co-owners of a piece of realty subdivided the property, and their intentions did not match the plat prepared by the surveyor. Id. at 167, 375 S.E.2d at 799. As a consequence, the rear portion of a garage was located on the wrong side of the property line. Id. One of the original co-owners still held the front portion of the property and when a dispute arose between them and the current owners of the rear, the original owner sought reformation of the deed to reflect her and her sister's intentions when the property was subdivided. Id. at 168, 375 S.E.2d at 800.

In her complaint, the Appellee sought two forms of equitable relief. In Count One, she sought an injunction prohibiting the Appellant from encroaching upon her land. In Count Two she sought a declaration that the Disputed Tract belonged to her. Neither count involved the reformation of a deed. Likewise, the evidence introduced by the Appellee at the trial of this matter did not establish a cause of action for the reformation of a deed. In fact, the only evidence introduced by either party on the meaning of the deeds in question, as discussed above, was the testimony of David Jackson.

Mr. Jackson testified that the deeds in Mrs. Carpenter's chain of title established her property lines in conformity with the old road. In other words, the deeds matched Mrs. Carpenter's belief as to her property's bounds. This is in line with the evidence introduced at trial. Specifically, David Jackson testified that the description in Mrs. Carpenter's deed placed

the boundary line at the old turnpike. The Wells case, or any deed reformation case, involves the exact opposite situation where as a result of a mistake, the deeds in two adjoining chains of title do not currently match the belief or intent of the party seeking reformation that existed at the time the property was divided. The Luke and Carpenter properties were divided prior to 1922, no evidence was put forth as to a mistake in the division, and neither sought the reformation of a deed. What was sought was a declaration as to the rights in the property between Mrs. Carpenter and Ms. Luke. Simply put, the Wells case is inapplicable to this action as it does not, and practically speaking, could not, involve the reformation of Mrs. Carpenter's deed, as Mrs. Carpenter's deed contains the intended meaning.

3. Rule 54(b) is Irrelevant to this Action

In her brief the Appellant contends that the Circuit Court "erred in finding there was no reason to delay judgment in favor of Appellee." (Appellant's Br. at 18.) While the Appellant is correct in her argument that, "Use of Rule 54(b), of course, should not be routine and should be reserved only for the infrequent harsh case," the Rule is irrelevant to this Appeal. See Id. quoting Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 550, 584 S.E.2d 176, 184 n. 16 (2003).

The footnote cited by the Appellant goes on to read, " See Also Bryan v. Big Two Mile Gas Co., 213 W. Va. 110, 116, 577 S.E.2d 258, 264 (2001) (noting the principal that an appellate court should normally have before it all of the controversy that was brought to the lower court.)" This sentence illustrates that Rule 54(b) permits the Circuit Court to render judgment on a single claim and therefore make that claim appealable prior to the disposition of the whole action. The Rule provides no standard for decision, only permits that decision to be appealed once reached.

Generally, the party opposing Rule 54(b) certification is the party opposing an appeal. The rationale is that the non-appealing party does not want to fight a war on two fronts or risk

delaying resolution of the non-final claims. It is unclear why the Appellant opposes her own appeal. This entire trial took three days and involved three issues. The Court ruled on the issue of record ownership at the close of evidence and the two remaining issues went to the jury. All three claims are now final and appealable and accordingly, Rule 54(b) is inapplicable. While the Court finalized its judgment as a matter of law on record ownership pursuant to Rule 54(b), the evidentiary basis of that finding was that Appellant had been fully heard on the issue and had provided no evidence to rebut the testimony of David Jackson that the road referenced in Plaintiff/Appellee's chain of title referred to the road as it existed prior to 1922. Accordingly, the Court correctly granted Judgment as a matter of law in favor of the Appellee.

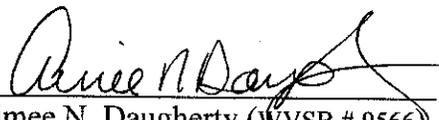
B. Other Issues Not Raised on Appeal

Three issues were decided at the Circuit Court level. (1) Who possessed record title to the Disputed Tract; (2) Assuming Plaintiff/Appellee held record title, had Defendant/Appellant acquired all or a portion of the Disputed Tract by adverse possession; and (3) Assuming Plaintiff/Appellee held record title, had she been unjustly enriched by improvements made to the Disputed Tract by the Defendant/Appellant. The only issue Appellant raises on appeal is the court's finding as a matter of law that Appellee possessed record ownership of the Disputed Tract. The jury's verdict finding that Defendant/Appellant had not adversely possessed the Disputed Tract or obtained easement by prescription has not been appealed. Likewise, the jury's finding that Plaintiff/Appellee was not unjustly enriched by any improvements made to the Disputed Tract by Defendant/Appellant was not appealed. See Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) (holding that "issues not raised on appeal or merely mentioned in passing are deemed waived." (citation omitted)).

VI. CONCLUSION

The Appellant contends that the Circuit Court erred in concluding that Appellee was the record owner at the Disputed Tract because she was a bona fide purchaser. Even assuming that this issue was addressed at trial, it is irrelevant to the Court's determination below or this appeal. The only evidence regarding record ownership with respect to the Disputed Tract consisted of the deeds in Appellee's chain of title and the testimony of David Jackson that the property belonged to Appellee. Appellant introduced no evidence whatsoever that would rebut that assertion and support her claim to record ownership. Accordingly, the court granted judgment as a matter of law in favor of Appellee. Once the Circuit Court correctly concluded that no deeds in Appellant's chain of title purported to convey the Disputed Tract, her status became irrelevant because one cannot be a bona fide purchaser of property she did not purchase. Appellee requests the Court deny Appellant's requested relief and affirm the decision of the Circuit Court that Betty Lou Zirkle Carpenter is the record owner of the Disputed Tract.

Submitted this 16th day of January, 2009.



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No. 34497

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BETTY LOU ZIRKLE CARPENTER,

Plaintiff/Appellee

v.

SHIRLEY BLANIAR LUKE,

Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2008, I served the foregoing "Brief of Appellee Betty Lou Zirkle Carpenter" upon counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

Julie Gower Romain
The Law Offices of Julie Gower Romain
211 Adams St., Suite 600
Fairmont, WV 26554



A handwritten signature in black ink, appearing to read "Julie Gower Romain", is written over a horizontal line.