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BEFORE THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

First American Title Insurance Co.,
Appellee,

v. **Docket No. 34705**

Evan LeFever and Beth LeFever,
Appellants,

and

Thomas Firriolo,
Appellee,

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RORY L. PERRY, II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AND

Thomas Firriolo,
Appellee,

v. **Docket No. 34714**
Consolidated

Evan LeFever and Beth LeFever,
Appellants,

and

Anne Chiapella and John Frye,
Respondents.

RESPONDENTS ANNE CHIAPELLA AND JOHN FRYE'S RESPONSE BRIEF

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Restatement of the Law, Second, Contracts, § 205

I. SUPPLEMENT TO APPELLANTS' STATEMENT OF THE CASE, ALLEGED OMISSIONS AND ERRORS IN APPELLANT'S STATEMENT FACTS.

A. Introductory Statement On Factual Disputes.

With one major exception, Appellees Chiapella and Frye have little disagreement with Appellants' concise statement of the facts. Appellants claim that Appellees discovered that the 4.22 Acres was not "available" at the closing on the adjacent 14.3 Acre Tract acquired from Mr. Firriolo. Surprisingly, say Appellants, Anne Chiapella nonetheless went forward with the closing. This assertion is not true. To the contrary, Appellees were assured at closing, with their attorney Donald Cookman present, that the 4.2 Acres *would be available* after termination of a 30 day "right of first refusal" so that no right-of-way would exist over the adjacent 14.3 Acres being purchased. The LeFevers "right of reverter," on which they now base their claim to the 4.22 Acre vacant tract, was never disclosed to Anne Chiapella or John Frye by anyone.[1] Moreover, the so called "right of reverter" was conspicuously absent from the deceptive General Warranty Deed that the LeFevers had delivered to Mr. Firriolo prior to Dr. Chiapella's purchase of the 14.3 Acres.

Anne Chiapella and John Frye discovered the strange LeFever/Firriolo "reverter" agreement on their own, from Circuit Court pleadings found in Morgan County after purchasing the 14.3 Acre companion tract in reliance on statements that only a "right of first refusal" existed which would present no obstacle to acquisition of the 4.22 Acres. Sadly, for your Appellees, their discovery was not made until after they had closed on the 14.3 Acre Tract. Relying upon

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[1]As is more particularly set forth below, the real estate agent had stated that there was a right of first refusal on the 4.22 Acres at the time that Dr. Chiapella signed the contract for her 14.3 Acres. Thomas Firriolo had countered that he had a deed for the 4.22 Acres and Appellees had been assured that the transaction would "fly, " a representation perpetuated at closing and for a month thereafter.

the representations of Firriolo in regard to his deceptive General Warranty LeFever/Firriolo Deed, Appellees had paid the full purchase price to Mr. Firriolo for both the 4.22 Acre Tract and the 14.3 Acre Tract expecting to receive good title to both tracts.

Your Appellees further point out that the unraveling of the LeFever chain of title defect, as well as the resolution of nearly 20 years' dispute over a right-of-way to the 4.22 Acre (former LeFever lot),[2] only occurred as a result of Appellees' involvement.[3] Since the Appellees effected

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[2]The LeFevers originally acquired the 4.22 Acres as a part of the partitionment of a 70.31 Acre Tract by deed dated August 31, 1988, recorded in the Office of the Clerk of the County Commission of Morgan County, in Deed Book 148 at page 40. The 4.22 Acre Tract was to be accessed across a 14.3 Acre Tract acquired by co-partitioner, Fred W. Orr. Almost immediately, Orr sought to relocate the subject 20' right-of-way over his tract so that he could sell his 14.3 Acres to Robert Dunker, Jr., *et ux.* By Quit Claim Deed dated February 6, 1990, and recorded in said Clerk's Office in Deed Book 154 at page 200, from Evan LeFever to Fred W. Orr, the 20' right-of-way was extinguished. Recorded immediately after the Deed was a "fugitive right-of-way relocation plat" which would have relocated the 20' right-of-way. Perpetuating the error, in preparing the deed from Orr to Dunker, attorney David Savasten made no reference to the "fugitive right-of-way relocation plat." Instead, the Orr to Dunker deed conveying the 14.3 Acres, excepted for the extinguished 20' right-of-way, using the old meets and bounds description thereof. This error was thereafter perpetuated in both the chain of title to the servient 14.3 Acre Tract, and the dominant 4.22 Acre Tract through 6 deeds. It was perpetuated by three separate attorneys, including William Carey, Esquire, who prepared a re-conveyance Deed to the LeFevers dated July 31, 2000, and recorded in Deed Book 191 at page 510. This Deed had, in fact, vested the LeFevers with title to the 4.22 Acres at the time Civil Action 01-C-08 was filed by Mr. Firriolo. To the extent that Mr. Firriolo may have come to believe that the right-of-way had been relocated in accord with the "fugitive right-of-way relocation plat," the relocated right-of-way ran directly through a barn structure under construction on Firriolo's 14.3 Acre Tract.

[3]Appellants indicate that they do not know who discovered the errant extinguishment of an easement access to the 4.22 Acres. (Paragraph 19.) In fact, it was the untrained search by Anne Chiapella, that first led to the discovery. Seeking an answer as to why Mr. Firriolo would not deliver the deed to the purchased 4.22 Acres, Dr. Chiapella wound up in the old Morgan County Court House and turned the page *after* the end of the above mentioned deed from Evan LeFever to Fred W. Orr. In Deed Book 154 at page 205 she found the "fugitive right-of-way relocation plat." She then brought copies of the documents to her present counsel. First American Title Insurance has seized upon the extinguishment of the right-of-way to defend its issuance of title insurance on the 14.3 Acres without exception for the clouded title, and (still pending) suit over the 14.3 Acres brought by Firriolo against LeFever.

the resolutions of the title defect and the right-of-way dispute through the Trial Court's equitable consideration of their interests, Appellees' factual perspective should now be appropriate for review on this appeal.

B. Appellees' Statement of Facts.

On October 7, 2003, Anne Chiapella and her companion and partner, John Frye, came to Morgan County to look at an advertised "Bed and Breakfast" on 14.3 acres of real estate offered at $350,000. ((Transcript, Hearing for October 23, 2007, p. 100 -102, (hereinafter "Tr. Oct. 23, 2007")). The advertisement they had reviewed included an additional adjacent 4.22 Acre tract for $9,500. They were met at the gate by the seller's realtor who then took them to see both parcels. (Tr. Oct. 23, 2007, p. 108). Appellees were induced and pushed by both the realtor and the seller into the deal. They were told that:

1. Mr. Firrolo had terminal colon cancer, (Tr. Oct. 23, 2007, p. 108).

2. The realtor held a competitive offer with a deposit, (Tr. Oct. 23, 2007, p. 109).

3. Mr. Firriolo had an appraisal on the 14.3 acre property for about Six Hundred Thousand Dollars ($600,000.00). (Tr. Oct. 23, 2007, p. 111).

4. While Mr. Firriolo could not come down on the $350,000 price for the "Bed and Breakfast," he could offer the 4.22 Acres for $6,000 to John Frye. (Tr. Oct. 23, 2007, p. 111).

5. That Mr. Firrilo had been trying to get the 4.22 Acres for three years, had finally gotten it, and, during their visit, a neighbor stated she was interested in the 4.22 Acres. (Tr. Oct. 23, 2007, p. 110).

Naively, Chiapella and Frye agreed to buy both parcels later that night. Mention was made of a third party's "right of first refusal" on the 4.22 Acres, but then Mr. Firiollo displayed the deed given him by the LeFevers and indicated that he had the right to sell the 4.22 acres. (Tr.

Oct. 23, 2007, p. 116). [4] Consistent with that general warranty deed containing no reversion of title, nor limitation of ownership, Mr. Firriolo insisted that the transaction consisting of both parcels would fly with the full asking price of $350,000 to be paid for the "Bed and Breakfast" and a discounted price of $6,000 for the 4.22 Acres. (Tr. Oct. 23, 2007, p. 111). John Frye delivered a check for $6,000 to Mr. Firriolo for the 4.22 acres that night. The realtor prepared a contract for only the 14.3 Acre Tract claiming that he had brought only one contract form. (Tr. Oct. 23, 2007, p. 112). [5] The signed contract for the 14.3 Acres called for closing within 90 days. (Tr. Oct. 23, 2007, p. 112). However, almost immediately, Mr. Firriolo called Dr. Frye to set an early closing in order to accommodate Mr. Firriolo's claimed need to liquidate and settle his estate. (Tr. Oct. 23, 2007, p. 112, 113). Per suggestion from the seller and the realtors, John Frye wrote a letter to attorney Donald Cookman that authorized Mr. Cookman to act as their attorney for the closing which Appellees viewed as one transaction consisting of two parcels, unaware that Mr. Cookman represented Mr. Firriolo in the suit now on appeal, involving both parcels. (Tr. Oct. 23, 2007, p. 115). [6]

On October 21, 2003, Anne Chiapella and John Frye appeared for closing in Donald Cookman's office in Romney, West Virginia. Contrary to Appellants' statement of facts,

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[4]A "right of first refusal" does not at all accurately describe the rights that the LeFevers would claim to the 4.22 Acres. As is made clear in their appeal, the LeFevers claim that Mr. Firriolo had only a term of two years. They claim that they had an absolute right of reverter after two years, wholly inconsistent with the General Warranty Deed that they delivered to Thomas Firriolo. Appellees were never provided with the agreement between Firriolo and LeFever. Nor did Mr. Firriolo mention the long standing struggle and civil action that had been pending for two years and remained unresolved.

[5]In *Chiapella v. Firriolo*, 05-C-34 , the realtors claim that they did not check the court house records for a deed to either of the two tracts before listing them. The realtors claim they knew nothing about ownership other than what was told to them by Mr. Firriolo.

[6]The letter to Mr. Cookman from Appellees has been made an exhibit in related action Civil Action 05-C-34 *Chiapella v. Firriolo,* and is undisputed.

(paragraph 13), Chiapella and Frye were not informed of any "unavailability" of the 4.22 Acres at the closing. Instead, they were reassured by Mr. Firriolo, in the presence of Donald Cookman that after the expiration of a 30 day notice period, they would receive title to the 4.22 Acres. (Tr. Oct. 23, 2007, p. 113, 114). At the closing, Anne Chiapella objected to a right-of-way that appeared as an exception on Mr. Cookman's certificate of title which he provided her.[7] However, Appellees were assured that the objectionable right-of-way over the 14.3 Acre "Bed and Breakfast" was irrelevant since they were going to acquire the adjacent 4.22 Acres. (Tr. Oct. 23, 2007, p. 114). Anne Chiapella further requested title insurance from Mr. Cookman and received his promise for same.[8]

One month later, after receiving a promise from Donald Cookman that the acquisition of the 4.22 Acres was a "done deal," (Tr. Oct. 23, 2007, and *see* p. 117, Exhibit 21 to said record), and after struggling for information regarding the sale of the 4.22 acres, Anne Chiapella and John Frye's frustration led them to the Morgan County Court House Circuit Court files and land records. (Tr. Oct. 23, 2007, p. 138; p. 118, 120). There, they found evidence of a law suit involving both of the properties, the one for which they held a deed and the second for which they'd paid, but held no deed. They further discovered that the attorney who had closed on the 14.3 Acres, and promised them the 4.22 Acres, was also the seller's attorney in the law suit , a fact never disclosed to them. (Tr. Oct. 23, 2007, p. 115). Anne Chiapella and John Frye immediately sought new legal counsel, and reviewed the law suit papers with him (Civil Action

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[7]This right-of-way had been extinguished (at least as to location) by deed dated February 6, 1990, and recorded in said Clerk's Office in Deed Book 154 at page 200.

[8]Hence, the filing by First American Title Ins., to clear title to the 14.3 Acre Tract, Civil Action No. 05-C-94. Of course, since the 4.22 Acres was not conveyed to Appellees until ordered by the Trial Court in the order now on appeal, no title insurance to the 4.22 Acres has been issued for that parcel.

01-C-08 styled *Firriolo v. Lefever*). By then, disputes had arisen between Firriolo and LeFever over performance under the strange settlement agreement containing the "reverter" language. Therefore, Appellees' counsel, Braun Hamstead, filed a motion to intervene in the suit. (See paragraph 8, p. 9, *infra*). Intervenors' motion was initially denied by Judge Steptoe in an order in which the Court found that the case had been already settled. (See paragraph 9 , p. 9 *infra*). However, when Intervenors subsequently discovered that a motion to reform the settlement order had been filed, they renewed their motion to intervene. (See paragraph 15, p. 11, *infra*). The circuit court then set the matter down for hearing on both the Appellees' Motion to Intervene and for taking of evidence and argument on the LeFever/Firriolo motions to reform their agreement. (See paragraph 16, p. 11 *infra*). Prior to the October 23, 2007, hearing, Mr. Firriolo's counsel, Richard Gay, had provided the parties with an appraisal of the vacant 4.22 Acre Lot valuing it at $26,000.00.

At the outset of the hearing, Judge Steptoe announced that he had reconsidered your Appellees' motion to intervene in light of the continued LeFever/Firriolo disputes and motion to reform their agreement, and the Court granted Appellee's motion. (See paragraph 17, p. 11, *infra).*

At the hearing, John Frye took the stand testifying to the above recitation of facts. Also, the Court heard unrebutted expert testimony from an appraiser that the 4.22 Acres was worth $26,000 even given the false hypothetical assumption that title was good and marketable and that it was accessed by an express legal easement of record. (See Tr. of hearing for October 22, 2007).

At the conclusion of the hearing on October 23, 2007, Counsel for your appellees argued that:

1. All binding agreements are imbued with the implied covenant of good faith and fair dealing. (Tr. Oct. 23, 2007, p. 156).

2. If, indeed, good faith was a covenant of the LeFever/Firriolo settlement agreement then LeFever must have intended to honor any fair market value contract procured by Firriolo during the two year term and to accept full market price to release claim to the 4.22 acres. (Tr. Oct. 23, 2007, p. 156, 157).

3. Mr. Firriolo was motivated to enter the settlement so he could take title to the 4.22 Acres long enough to facilitate the sale of the 14.3 Acres over which hung a right-of-way cloud created by that very same 4.22 Acre Tract, (Tr. Oct. 23, 2007, p. 155, 159), and

4. Thus, Firiollo and LeFever would get the benefit of their bargain and Chiapella and Frye would also benefit by liquidating their losses, acquiring the 4.22 Acre Tract, and resolving a multitude of related claims. (Tr. Oct. 23, 2007, p. 159).

Appellants argued that they had " no duty of good faith and fair dealing." (Tr. Oct. 23, 2007, p. 159). The Trial Court had heard the un-rebutted (and, essentially confirmed) testimony of Dr. Frye that Evan LeFever called him to a settlement meeting after the most recent suits were filed. At that meeting near Berkeley Springs, with LeFever's attorney, William Carey present, Mr. LeFever stated that he would convey his interest in, and release his claim to the 4.22 Acres, but the price would involve an "extortion factor." Mr. LeFever's "extortion price" offered Dr. Frye had been $75,000. (Tr. Oct. 23, 2007, p. 140). The Court had also heard Dr. Frye's unrebutted testimony that Appellees had offered very near to the precise fair market value (namely $25,000) during the period of time when the Trial Court had extended Mr. Firriolo's time in which to sell the real estate under the settlement. (Tr. Oct. 23, 2007, p. 141). The Trial Court, exercising its duty and prerogative to weigh the testimony of the witnesses and to

evaluate their credibility, found that Dr. Frye has "...the cleanest hands of anybody involved in this mess." (Tr. Oct. 23, 2007, p. 148).

Trial Court accordingly accepted Appellees' proposal that the LeFevers be paid full market value ($26,000) for the 4.22 Acres. These funds remain in escrow with the Court as the LeFevers refuse to accept them, still seeking to extort an unfair benefit from an illicit scheme in which they are not wholly innocent.[9]

II. Appellees' Statement of the Legal Proceedings Chronology.

As indicated above, it is critical to a fair treatment of the Trial Court's order to review the proceedings in the proper sequence and chronology. Omitted from the above statement of facts, are the proceedings that evolved without Appellees' knowledge. Those proceedings which predate Appellees' motion to intervene, and those which followed are chronologically set forth as follows:

1. Civil Action No. 01-C-08, *Firriolo vs. LeFever*, was filed in February of 2002, (Circuit Court Docket, 01-C-8, Page No. 1). Mr. Firriolo wanted to relocate the right-of-way over the 14.3 Acre Tract that served the 4.22 Acre Tract owned by the LeFevers.

2. After discovery and pretrial pleadings, the matter matured for trial in September, 2003.

3. With the jury waiting, the Trial Court was advised of a settlement on September 11, 2003. (Docket, 01-C-8, page No. 289) .

[9]The LeFevers, acting through their attorney, Mr. Carey, at the very least had a duty to insert into the deed given Mr. Firriolo notice of their reverter claim. Had they done so, at least Mr. Firriolo would not be able to point to the fee simple deed from LeFever as his defense to Dr. Chiapella's law suit for the fraud committed upon her.

4. In its settlement directives, the Court required that Donald Cookman prepare the settlement and dismissal order and that both attorneys sign it (Docket, 01-C-8, p. No. 291). Closing on the sale of the 4.22 Acre Tract was to take place within 45 days whereupon the Court order was to have been recorded along with the deed (Docket, 01-C-8, page Nos. 290, 291, 289.)[10]

5. The order evidencing the dismissal and settlement, however, was not entered until December 16, 2003, (Docket, 01-C-8, p. No 312), following a telephone status hearing conference of December 4, 2003 (Docket, 01-C-8, p. No. 306).

6. However, Mr. Carey failed to execute the dismissal order. (Docket, 01-C-8, p. No. 312).

7. Ironically, Mr. Firriolo then discharged the one attorney who had signed the Settlement Order, namely, Mr. Cookman (Docket, 01-C-8, p. No.326).

8. Mr. Firriolo then engaged James Kratovil, Esquire, to set the settlement aside (Docket, 01-C-8, p. No.330).

9. Mr. Kratovil filed the motion to set aside the settlement and dismissal order on March 18, 2004. (Docket, 01-C-8, p. No. 330).

10. By this time, Appellees had discovered the existence of the suit from records in the Morgan County Court House and they filed their Motion to Intervene with a Memorandum of Authority on April 7, 2004. (Docket, 01-C-8, p. No. 334).

11. As indicated above, Appellees' initial motion for leave to intervene was denied on or about July 19, 2004, because the court perceived that the motion had been filed too late, after the matter had been settled and concluded (Docket, 01-C-8, p. No. 350).

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[10]Neither the deed nor the Court Order was ever recorded as required by the Trial Judge.

12. Meanwhile, on November 7, 2005, First American Title Insurance filed the second suit now on appeal, being the Declaratory Judgement Action to quiet title. This suit responded to the title insurance claim asserted by Anne Chiapella grounded on First American's failure to identify the cloud on her title to her insured 14.3 Acre Tract.[11] (Docket, 05-C-94, p. No. 1).

13. Despite Judge Steptoe's optimism over the Firriolo/LeFever settlement, over a year after denying Appellees' motion to intervene, the settlement had still not been executed. On December 21, 2005, the Court scheduled a hearing for February 16, 2006, in 01-C-8. (Docket, 01-C-8, p. No. 390).

14. By this time, Richard Gay had been substituted as Mr. Firriolo's legal counsel, but still the settlement agreement in 01-C-08 had not been executed. (See Docket 01-C-08, p. 390 noticing Garretson, associate in Richard Gay's office).

15. On May 15, 2006, the Court entered an Order extending the time for Mr. Firriolo to find a buyer for the 4.22 Acres (Docket, 01-C-8, p. No.422).

16. On September 25, 2006, the Trial Court ordered global mediation in the two cases, now on appeal together with the damages case brought by Anne Chiapella (05-C-34) (Docket, 01-C-8, p. No.452).

17. Mediator Oscar Bean was appointed. After a lengthy mediation session between all parties, nothing was settled. (See Consolidated Report of Mediator filed on December 26, 2006, Docket, 01-C-8, p. No.457).

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[11]Dr. Chiapella's title insurance claim is asserted in Civil Action No. 05-C-34, which has been stayed pending these two consolidated appeals. In her motion for summary judgement against First American in Civil Action No. 05-C-34, Dr. Chiapella argues that the express language of her title policy required that First American give notice of known defects or clouds in the title. The existence of a pending law suit over title to her 14.3 Acres was surely such a cloud, a fact undisclosed to Dr. Chiapella by the agent, Donald Cookman, who was secretly serving as legal counsel for the seller in the very suit that clouded her title at the time of the closing.

18. On March 12, 2007, with LeFever/Firriolo motions again pending to reform the settlement order, Chiapella and Frye filed a renewed Motion to Intervene in 01-C-08. (Docket, 01-C-8, p. No.466).

19. With the LeFever/Firriolo settlement still unresolved, a memo was sent out by the Court in all related cases (Docket, 01-C-8, p. No.452), followed by additional motions from Mr. Firriolo (Docket, 01-C-8, p. No.493), and a hearing was ultimately scheduled for October 23, 2007, on Mr. Firriolo's Motion to Reform the Settlement and Appellees' Motion To Intervene. (Undocketed)

20. At the hearing the Court first addressed Appellees' motion to intervene. Clearly the case had not been closed by October 23, 2007, under the prior dismissal order. Therefore the Court permitted intervention since Dr. Chiapella had unwittingly purchased the 14.3 Acres while the suit was pending over her real estate. Since it was apparent that Dr. Frye and Dr. Chiapella were joint ventures in the transaction, and Dr. Frye held the contract from Mr. Firriolo for the 4.22 Acres, Dr. Frye too was permitted to intervene.

21. After conducting the hearing and taking evidence on October 23, 2007, Appellees were permitted to acquire the 4.22 Acres for a total of $26,000, finally resolving over six years of litigation between Mr. Firriolo and the LeFevers (Docket, p. No. 511). As indicated above, the resolution of the Firriolo/LeFever dispute has also greatly mitigated the losses of Anne Chiapella whose 14.3 Acres is no longer subject to a title cloud arising from an unrecorded easement claim.

22. Meanwhile, motions for summary judgement were filed in the case that had been brought by First American Title Insurance, (C.A. No. 05-C-94) to clear the title to the 14.3 Acres from the easement for the 4.22 Acres. These motions ultimately were heard by the Trial Court on March 21, 2008.

23. At the conclusion of the hearing on March 21, 2008, the Court entered its ruling on the record and counsel for First American offered to prepare the written order. Appellants' arguments in regard to whether or not a right-of-way (way of necessity) exists over the 14.3 Acres are purely academic, unless this Court reverses the Trial Court decision in 01-C-08. On March 21, 2008, Dr. Chiapella owned both the 14.3 Acres and the 4.22 Acres rendering the former 05-C-94 case in controversy moot. [12]

III. Appellees' Argument and Supporting Authorities Chiapella and Frye's Response to Assignment of Error No. 1.

JUDGE STEPTOE APPLIED WELL ESTABLISHED PRINCIPALS OF REAL ESTATE LAW TO THE FACTS AND DID NOT ERR IN RULING THAT NO EXPRESS EASEMENT EXISTED FOR THE 4.22 ACRE TRACT AND THAT HYPOTHETICAL QUESTIONS OF EASEMENT BY IMPLICATION, PRESCRIPTION OR NECESSITY WERE RENDERED MOOT.

Appellants' first argument is disingenuously grounded in a false assertion. LeFevers state that the Court found: "...there was no easement whatsoever across the 14.33 acres to the 4.22 Acres." The Trial Court did not make such a finding. Instead, the Trial Court expressly stated that the issues of an implied right-of-way over the 14.3 Acres would be left for another day if it became necessary to determine a right-of-way for the 4.22 Acres. In that regard, however, the Trial Court opined that: "Well, if the land must be conveyed to [Dr. Frye] that becomes a moot issue." (Tr. Oct. 23, 2007, p. 158, rendered in *Firriolo v. LeFever*, 01-C-08). What makes the first assignment of error even more disingenuous is that the LeFever's counsel, Mr. Carey, conceded at said hearing that the right-of-way had been extinguished and that there was no

[12]However, First American became a bit greedy and attempted to include in the 05-C-94 final order a finding that there was no title insurance coverage for claims pertaining to the easement. The Trial Court had not made such a finding. Dr. Chiapella and Frye objected to the form of the Order, and the Trial Court deleted paragraph 27 of First American's proposed order removing the attempted gratuitous finding.

written right-of-way. In support of an objection which he made, Mr. Carey stated: "...it's an implied right-of-way, your Honor. It's not a written recorded right-of-way." (Tr. Oct. 23, 2007, p. 91).

As is emphasized in the above chronologies, it is critical to a proper consideration of the consolidated appeals, that the appealed decisions be considered in the order in which they were made. The Trial Court decided *Firriolo v. LeFever*, 01-C-08 first. By the time the Court decided Civil Action 05-C-94, Appellees owned both tracts and the right-of-way issue was moot. Appellants' creative invitation to treat the American Title Insurance judgment as if it were rendered before the right-of-way issue had been mooted, works insult to the trial judge's thorough knowledge of real estate law and his application thereof to the facts.

As is also outlined above, the impetus for the *Firriolo v. LeFever* suit was the problematic right-of-way for the 4.22 Acres. Mr. Firriolo had wanted to market his "Bed and Breakfast" and an apartment/barn shell situate on 14.3 Acres. However, Mr. Firriolo believed that the right-of-way ran near the "Bed and Breakfast" and through the apartment/barn to the adjoining LeFever 4.22 Acre Tract. Unable to obtain concessions, Mr. Firriolo sued Mr. LeFever to relocate the right-of-way. Instead, the suit was settled by delivery of the previously mentioned deceptive deed to Mr. Firriolo which contained no reversion of title. Mr. Firriolo immediately advertised the 14.3 Acre Bed and Breakfast for $350,000 and the 4.22 Acres for $9,500. He sold both to Chiapella and Frye, discounting the 4.22 Acres to $6,000 which was paid by check, but for which Mr. Firriolo never delivered a deed.

By the time *Firriolo v. LeFever* reached the final hearing now on appeal, four years had elapsed since their "settlement." Your Appellees, who had been misled or defrauded by Mr.

Firriolo,[13] were still attempting to intervene in the suit so they could resolve the easement cloud on the 14.3 Acres. The LeFevers were not a part of their deal with Mr. Firriolo that had discounted the purchase price for the 4.22 Acres to $6,000. Therefore, the LeFevers were not bound by the discounted purchase price. That portion of your Appellees' losses resulting from their trusting naivete was not passed on to the LeFevers. Instead, the LeFevers were paid fair market value for their real estate even though they had provided Mr. Firriolo with a deceptive deed containing no reversionary rights. The decision that LeFevers now appeal gratuitously assumes that the LeFevers were not a part of any scheme by Mr. Firriolo to defraud a prospective purchaser into purchasing the 4.22 Acres so Mr. Firriolo could claim that title to the 14.3 Acres was cleared of any right-of-way encumbrance. However, to assum that the LeFevers were not a part of such a scheme is to assume that they entered the settlement agreement with Mr. Firriolo in good faith, one should therefore assume that the LeFevers were obligated to accept fair market value for their real estate.

Moreover, the LeFevers' lot did not have a legal right-of-way access. As conceded by the appraiser testifying at the final hearing, in reality, the LeFever 4.22 Acre Tract was worth nothing. No bona fide purchaser will purchase a $26,000 lot knowing that he will effectively be

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[13]At first blush, it would appear that Mr. Firriolo simply defrauded Chiapella and Frye at the time he induced them to sign the purchase contract and pay $6,000 for the 4.22 Acres. Yet it should probably be conceded at this pre-trial stage of *Chiapella v. Firriolo* (CA No. 05-C-34) that there was some room for confusion on Mr. Firriolo's part. The settlement agreement can be accurately described as unusual. Mr. Cookman, who represented Mr. Firriolo in the suit and who counseled Mr. Firriolo in signing the agreement, was by his own admission, suffering from extreme alcoholism. He remembers little of the pertinent events. Mr. Firriolo was delivered a deceptive General Warranty Deed by the Lefevers granting him fee simple absolute title and without reservation. Whether the injury to Chiapella and Frye results from Mr. Firriolo's fraud or mistake, he was directly enabled by the LeFevers who should not be heard to now complain of Chiapella and Frye's reliance on Mr. Firriolo. Unlike Mr. Firriolo, the LeFevers do not claim that their attorney, William Carey, Esquire, suffered from any disability when he counseled the LeFevers to sign and deliver the Deed conveying absolute title to Mr. Firriolo.

purchasing a law suit. The law suit to establish an implied easement, or way of necessity, could easily cost more than the price of the lot. Therefore, the Trial Court's decision gratuitously affords LeFevers the benefit of their assumption that a legal right-of-way existed when they entered into the settlement agreement with Firriolo and signed the deceptive deed to him.

As above set forth, by the time the Court rendered its decision in 05-C-94, Chiapella and Frye were effectively vested with ownership of both the would-be "dominant estate" and the would be "servient" 14.3 Acres. The right-of-way issue was then factually moot and legally mergered out of existence.

Understandably, First American Title argued in its motion for summary judgment that since the old right-of-way had already been abandoned of record and extinguished, no right-of-way or impediment exists over the 14.3 Acres. By that theory, First American's liability risks are mitigated under the policy of title insurance it has issued. Appellees have filed claims against First American, whose agent, Donald Cookman, effectively promised Appellees good title to the 4.22 Acres, and upon whom these Appellees relied for title insurance on both parcels. Therefore, First American was happy to have Judge Steptoe order Appellees to pay the additional $20,000 out of her pocket thus acquiring the 4.22 Acres. Assuming the acquisition is allowed to stand, it has cleared the right-of-way cloud affecting the title insurance policy First American issued her on the 14.3 Acres and facilitated Appellees' ability to obtain title insurance on the 4.22 Acres.[14] First American has neither reimbursed Dr. Chiapella for the additional purchase price on the 4.22 Acres nor for the attorney fees and litigation expenses she incurred to secure the right to pay the

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[14]Anne Chiapella and John Frye have unequivocally testified that they viewed the purchase of the two parcels as one transaction. Mr. Cookman was commissioned to close on both parcels and to issue title insurance. A theory of recovery in Civil Action No. 05-C-34, is that First American Title Insurance still owes Dr. Chiapella a policy of title insurance on the 4.22 Acres together with $20,000 plus legal costs incurred in the successful intervention.

additional $20,000.

Because the right-of-way issue is moot, Appellants' discussion of the law applicable to the intent of the parties incident to the extinguishment of the old easement is academic. However, Chiapella and Frye acknowledge the various theories upon which an easement might be established over their 14.3 Acre Tract in the event that the Trial Court's order in 01-C-08 is set aside.

There appears to be no evidentiary support for an "easement by prescription" because the vacant 4.22 Acres has not historically been accessed through the 14.3 for the requisite 10 years, if ever. The LeFevers' "easement by implication," theory, based on the "fugitive right-of-way relocation plat" may present a valid claim. However, the plat of the intended relocated easement is recorded immediately after, but not within, the deed intended to incorporate it. A third theory "easement by necessity," poses the greatest risk of uncertainty and diminution in value to the 14.3 Acre servient estate. Yet it may be the most viable theory for a right-of-way should Appellees lose title to the 4.22 Acre Tract through this appeal.

IV. Chiapella and Frye's Response to Assignment of Error No. 2.

SINCE ANY EASEMENT OVER THE 14.3 ACRES WAS EXTINGUISHED BY MERGER FOLLOWING THE ORDER ENTERED IN CIVIL ACTION 01-C-O8, THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR.

Appellants' second assignment of error is as equally disingenuous as is their first. The entire suit, Civil Action 05-C-94 was rendered moot by the decision in Civil Action 01-C-08 wherein the doctrine of merger terminated any easement with title vested in Anne Chiapella to both tracts. Accordingly, whether or not the settlement deed from the LeFevers to Mr. Firriolo worked a merger of title is academic. Dr. Chiapella is presently vested with title to both parcels.[15]

[15]As anticipated by the Trial Court, Dr. Frye assigned his contract for the 4.22 Acres to Anne Chiapella. Anne Chiapella owns both tracts.

V. Appellees' Response to Assignment of Error No. 3.

THE TRIAL COURT DID NOT SET ASIDE THE SETTLEMENT BUT MERELY IMPUTED IT WITH GOOD FAITH WHERE THE PARTIES DISPUTED THEIR OWN AGREEMENT AFTER FOUR YEARS OF HAGGLING.

Like the first two assignments of error, the third assignment of error mis-characterizes the Court's Decision. The LeFevers assign as error that the Trial Court "set aside" their settlement agreement with Firriolo. To the contrary, the Trial Court was ultimately not asked to set aside the settlement agreement and did not do so.[16] At the most, the Court reformed the express agreement although not precisely in the manner requested by Mr. Firriolo. Mr. Firriolo sought reformation to retain ownership of the 4.22 Acre Tract (Tr. Oct 23, 2007, p. 142). However, he would not commit to conveying the 4.22 Acres to Dr. Frye (Tr. Oct 23, 2007, p. 147) who had "...the cleanest hands of anybody involved in this mess." (Tr. Oct 23, 2007, p. 148). So, to the extent that reformation was required, the Trial Court simply imbued the settlement agreement with the covenant of good faith.

The LeFevers had moved to Indiana in 1993. (Tr. Oct 23, 2007, p. 5). They owned no other property in Morgan County, had no personal interest in the property, and saw it merely as an investment. They were paid fair market value for the 4.22 Acres as originally intended but precluded from exploiting Appellees' predicament.

On one hand, the LeFevers now punctuate the sanctity of the Court's order ratifying their agreement. On the other hand they argue that good faith was not a covenant of their agreement. Despite arguments now made in hindsight, Evan LeFever's testimony at the final hearing is revealing. His testimony is conspicuously more in line with the Court's Decision and with the

[16]The following interaction took place: "The Court: Are you asking me to set it aside?" " Mr. Gay: I'm asking you to reform. I'm not asking you to set it aside now." (Tr. Oct. 23, 2007, p. 145).

truth than with his lawyer's argument on this appeal. Mr. LeFever testified that "...[Mr. Firriolo] could have sold it within the two years."(Tr. Oct 23, 2007, p. 21; 31). Ignoring the extension which the Trial Court had given Mr. Firriolo in which to sell the property, and the $25,000 offer made during that period, Mr. LeFever further testified "But that didn't happen." (Tr. Oct 23, 2007, p. 21, 34, 35). Given Appellees' predicament, Mr. LeFever's intentions seem to have now changed. Now Mr. LeFever says: "I just want to keep it for now." (Tr. Oct 23, 2007, p. 22). As Appellees have suggested elsewhere in their brief, perhaps the Trial Court decision did not reform the settlement from the LeFevers' perspective. Perhaps the decision is wholly consistent with the LeFevers' original intentions. In construing the terms of a contract, the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent. *Ray H. Olyaie vs. General Electric Capital Business Asset Funding Corp.,* 217 Fed. Appx. 606; 2007 U.S. App. LEXIS 678.

Moreover, estoppel should bar a contrary interpretation of the settlement agreement. The LeFevers concealed material facts concerning their claim to the 4.22 Acres when they delivered the deceptive deed to Firriolo, absent the two year term and contingent remainder. They further concealed the material fact of their "right of reverter" by failing to record evidence of the claimed reverter interest as expressly ordered by the Trial Court.[17] In reliance on the claim by Mr. Firriolo, based on the deceptive deed which he held from LeFever, the Appellees changed their position.

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[17]As set forth above, the Trial Court ordered the parties to record both the deed from LeFever to Firriolo and the Order evidencing the settlement agreement. Even though the deed deceptively omitted the "right of reverter, recordation of the deed and the Dismissal Order would have protected Appellants . Had these documents been recorded in the land books, Mr. Cookman would have either disclosed them to Appellees at closing on the 14.3 Acres or First American Title Insurance and/or Mr. Cookman's malpractice carrier would now be advancing Appellees' huge litigation costs incurred in the various civil actions to cure title, including these appeals.

Dr. Chiapella paid for and took title to the 14.3 Acres. Dr. Chiapella relied on Mr. Firriolo's representation that he could deliver good title to the 4.22 Acres and moot the issue of the right-of-way. Therefore, the party who has failed to act, when he should have, and whose willful disregard of the interests of third parties such as Dr. Chiapella, "...will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud." *Norfolk & Western Ry. Co. V. Perdue*, 40 W. Va. 442, Syl. 4; 21 S.E. 755. Strictly applying principals of estoppel, Appellants should be limited to payment of $6,000 from Appellees, $3,500 from Mr. Firriolo, and Appellees should get the $4.22 Acres. Appellees have asked for less from the Trial Court. Nonetheless, Appellants are not grateful.

As indicated above, unless the LeFevers intended all along to use the deed given Mr. Firriolo as a vehicle to later extort monies from either Mr. Firriolo or an unsuspecting third party purchaser, the Trial Court merely applied "good faith intent " to the words of their agreement. In effect, the LeFevers would now complain that they had the right to use the deed to "extort" monies from their settlement. They attempted to do just that in the meeting with John Frye in Hancock during the extended contract term in response to a good faith fair market offer of $25,000.00. Nonetheless, they have been paid full market value for their real estate which, at best, they conveyed recklessly to Mr. Firriolo by deed reserving none of the rights they assert on appeal.

VI. Appellees' Response to Assignment of Error No. 4.

THE TRIAL COURT'S ACTION IN REFORMING THE SETTLEMENT AGREEMENT TO IMBUE IT WITH GOOD FAITH WAS ONLY UNFAIR IF THE LEFEVERS WERE ENTITLED TO USE THE SETTLEMENT AGREEMENT FOR EXTORTION.

As is pointed out above, the Trial Court's action neither set aside the parties' agreement nor was it unfair. It is impossible to evaluate the LeFevers' equitable claims without asking how

the LeFevers intended to benefit from the settlement agreement. Unlike Mr. Firriolo's counsel who was acting under a disability, the LeFevers were advised by competent counsel, at the time, William Carey, Esquire. Were the LeFevers simply taking advantage of Mr. Firriolo and the fact that his attorney was disabled by chronic alcohol abuse? Was it their intent to later extort money from an innocent purchaser? Indeed, we know that Mr. LeFever did subsequently attempt to extort money, $75,000.00, from Dr. Frye. The LeFevers knew that the 4.22 Acres set up an extraordinary burden upon the 14.3 Acres. The right-of-way to the 4.22 Acres was the express reason that Mr. Firriolo had filed the suit. The settlement agreement would not serve the intended purpose unless the LeFevers were obligated to accept fair market value for the 4.22 Acres.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement of the Law, Second, Contracts, §205. The factual circumstances before the Court are not unlike those contained within Illustration 6 of the Restatement of Contracts.

> "6. A contract to perform services for B for such compensation 'as you, in your sole judgment, may decide is reasonable.' After A has performed the services, B refuses to make any determination of the value of the services. A is entitled to their value as determined by a court." *Ibid*, Illustration 6.

In the case at bar, having agreed that Firriolo would have a specified time in which to sell the property, LeFever then declined to place a fair sale price on it. LeFever now says that he has decided to keep the property.

The implied covenant of good faith and fair dealing has been applied in West Virginia, including insurance contracts, *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va.585, 396 S.E.2d 766 (1990), and law partnership agreements, *Lawyer Disciplinary Bd. v. Coleman*, 219 W.Va. 790; 639 S.E.2d 882 (2006).

LeFever knew that the agreement was to be used for the purpose of curing the right-of-way impediment by bundling the 4.2 Acres for sale with the 14.3 Acres. The covenant of good faith therefore properly applies as a part of the contract. The fact that the sale of the 4.22 Acre real estate was expressly contemplated by the contract, distinguishes this case from cases in which attempts have made to attach good faith and fair dealing as a covenant outside the parameters of the contract sought to be enforced. *See,* for example, *Miller v. Massachusetts Mut. Life Ins. Co. Et al*, 193 W.Va. 240; 455 S.E.2d 700 (1995), in which application of the good faith and fair dealing covenant was erroneously applied by plaintiffs to an employee at will contract. Where Appellees and Appellants disagree in the case at bar, is on the degree to which the settlement agreement permits arbitrary and even mean conduct on the part of the LeFevers. Even in employee at will contracts, the employer may not terminate the employee based a wrong or unlawful motive or reason. *Ibid.*

VII. Appellees' Response to Assignment of Error No. 5.

THE 4.22 ACRE TRACT WAS PURCHASED BY APPELLEES FOR FAIR MARKET VALUE.

The evidence of fair market value provided to the Trial Court was un-rebutted. The hearing was properly noticed for the taking of evidence and argument. The LeFevers waived their right to provide expert rebuttal evidence. Months later, the Appellants improperly now submit to this court new "evidence" which was not previously submitted to the Trial Court or provided to the parties. Appellants offer no justification for violating the Rules of Civil Procedure, or for violating the rights of the other parties to the cross examination of evidence. The appraisal exhibit to Appellants' brief should be stricken and not considered by this Honorable Court for the first time on appeal.

As is also pointed out above in this Brief, the appraisal upon which the Court based the fair market value assumed, to the benefit of the LeFevers, a factual falsehood. It assumed that record clear title to a right-of-way existed for the 4.22 Acres. Absent this hypothetical assumption, according to the appraiser, Mr. Keesecker, the 4.22 Acres had essentially no value for no one wants to "buy a law suit."

Conclusion

This case presents an very unusual opportunity for the law to work a fair result for parties to a settlement agreement even though neither appeared in Court with entirely clean hands. The Trial Court's ruling was invited by Dr. Frye and Dr. Chiapella who invested an additional $20,000, plus attorney fees and expenses, to mitigate their losses and damages. Indeed, these Third Party Intervenors and Appellees have paid dearly for their naivete and for the trust they invested in Morgan County citizens, Morgan County real estate agents and Morgan County attorneys.

By contrast, Appellants' greed is astonishingly conspicuous in this appeal. Appellants have been treated meaningly by the Trial Judge. The grounds upon which the Appellants seek reversal of the Trial Court's decision might lead to the conclusion that the LeFevers should have been required to forfeit the property which they titled in the name of Thomas Firriolo who should have, in turn, been required to convey it to Appellees for no consideration. From Appellees' view, LeFever should not have filed this appeal.

The Trial Court decision should be upheld.

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BEFORE THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

First American Title Insurance Co.,
Appellee,

v. **Docket No. 34705**

Evan LeFever and Beth LeFever,
Appellants,

and

Thomas Firriolo,
Appellee,

AND

Thomas Firriolo,
Appellee,

v. **Docket No. 34714**
Consolidated

Evan LeFever and Beth LeFever,
Appellants,

and

Anne Chiapella and John Frye,
Respondents.

CERTIFICATE OF SERVICE

I, Braun A. Hamstead, counsel for the Respondents in this action, do hereby certify that I have served a true copy of the ***Respondents Chiapella and Frye's Response Brief***, upon the below listed counsel of record to their respective addresses by United States Mail, first class, postage prepaid on 31st day of August, 2009:

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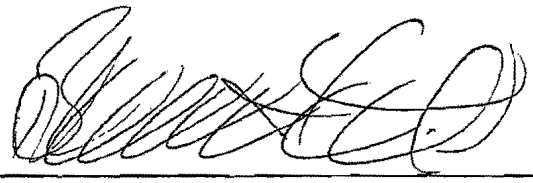

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