

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FIRST AMERICAN TITLE INS. CO.
Plaintiff/Appellee

v.

No. 34705

EVAN LeFEVER and BETH LeFEVER
Defendants/Appellants
THOMAS FIRRIOLO
Defendant/Appellee
and ANNE P. CHIAPPELLA
Defendant/ Appellee

-----consolidated with-----

THOMAS FIRRIOLO
Plaintiff/Appellee

v.

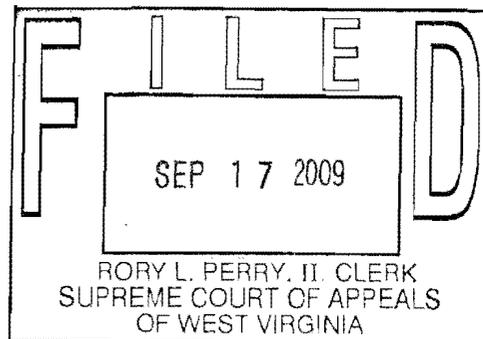
No. 34714

EVAN LeFEVER and BETH LeFEVER.
Defendants/Appellants

v.

ANNE P. CHIAPPELLA and JOHN FRYE
Intervenor/Appellees

Appellants' Reply Brief



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Intervenor/Appellees**

Appellants' Reply Brief

Evan and Beth LeFever reply as follows to the briefs of the appellees First American Title Insurance Company and Chiapella/Frye. No brief was submitted by appellee Thomas Firriolo.

FACTS

FIRST AMERICAN

The title insurance company begins with a section referring to “inaccuracies” by the appellants, but these involve issues of law rather than recitations of fact.

So far as facts are concerned, First American concedes crucial facts put forth by the appellants:

It is uncontested that Appellants and Mr. Orr intended to create a new right of way or easement across the 14 Acre Tract to the 4 Acre Tract.

First American Brief at pg. 5

First American even quotes (pg. 5) the important language in the 1990 LeFever-Orr quitclaim deed, stating that a new easement to the 4.22 acres was to replace the one being relinquished.

Other “facts” set forth by First American are merely legal conclusions – inaccurate legal conclusions – such as the assertion that the easement was extinguished altogether.

Other parts of First American’s recitation of facts pertain to its dispute with its policyholder Anne Chiapella, and do not involve issues in these appeals. Ms. Chiapella’s lawsuit against First American, for not honoring its obligations with regard to her 14.33 acres, is still pending in the Circuit Court of Morgan County as Civil Action 05-C-34. Perhaps First American hopes to obtain some dicta here that will help it in the other case.

CHIAPELLLA/FRYE

These intervenors, latecomers to both the events involved in this litigation and to the litigation itself, look at the facts rather solipsistically – from only their own standpoint. That is natural. It does not, however, shed much light on the issues before this Court.

When Thomas Firriolo and Evan LeFever entered into the September 11, 2003 settlement of Civil Action 01-C-8, Firriolo v. LeFever, as trial was ready to begin, neither of them had ever heard of Anne Chiapella or John Frye. That settlement was consummated by an exchange of land for money. Firriolo had with him when he came to court, supposedly for trial, (a) an already prepared deed and (b) \$9,000 in cashiers checks. Agreeing to the suddenly proposed settlement, LeFever signed Firriolo's deed and took Firriolo's money - with a right to reacquire the land after two years by giving back the money.

Only later, by advertising in newspapers or through realtors, did Mr. Firriolo make his first contact with Chiapella and Frye. Allegedly (in the lawsuit still pending in Circuit Court) he agreed to sell them both pieces of land – 14.33 and 4.22 acres – without telling them about LeFever's reacquisition rights.

Thus Chiapella and Frye weren't involved in the settlement agreement or the events leading up to it, and can contribute nothing to the facts surrounding it.

Chiapella and Frye have several complaints which they believe to be valid – that Thomas Firriolo pulled a fast one and promised to sell them the 4.22 acres

when he had no right to do so, and that that First American tried to finesse its way out of paying on its title insurance policy. So they are suing Firriolo and First American in the separate suit..... They only sought to become parties in C.A. 01-C-8 (Appeal No. 34714) after it had already settled and LeFevers were trying to enforce the settlement.

* *

The jarring feature of the Chiapella/Frye brief is their constant vituperation of the LeFevers. Like participants in a town hall meeting during August of 2009, they choose to insult and attack their opponents rather than deal with the issues. We shall show that the two main bases for these attacks

- that the LeFevers executed a “deceptive” deed to Firriolo;
- that the LeFevers want to “extort” Chiapella and Frye;

are without substance or merit. There is, though, one reality that should be kept in mind throughout - - Evan and Beth LeFever do not want to relinquish their claim to the 4.22 acres for any price. They want to get the land back and keep it. They want to return to the status quo ante, before all this began.

Q. But you’ve never received the 4.2 acres back?

A. No.

Q. You want it back?

A. Yes.

Q. If you got it back do you want to sell it or do you want to keep it?

A. I don't want to sell it. I want to keep it for now.

Testimony of Evan LeFever
October 23, 2007 transcript at 21-2

Assignment of Error No. 1

THE LOWER COURT WRONGLY RULED THAT, WITH ONE WRITTEN EASEMENT TO THE 4.22 ACRES HAVING BEEN ABANDONED BUT NO RECORD OF A NEW WRITTEN EASEMENT HAVING BEEN CREATED, THERE WAS NO EASEMENT WHATSOEVER ACROSS THE 14.33 ACRES TO THE 4.22 ACRES.

FIRST AMERICAN

It asserts on page 9 of its brief that the appellants, the LeFevers, have the burden of proving an easement by implication. We accept that burden. We accept it and we have met it. We have met it with the evidence presented on pages 12 to 17 of our brief, in the points identified as

- A.
- B.
- C.
- D.
- E.
- F.

Faced with that evidence, First American concedes – as we mentioned on page 2 above - that a replacement right-of-way was intended in 1990. Its argument is that, regardless of the intent, no implied right-of-way can exist until one is recognized by a court and recorded in the courthouse.

We argue to the contrary. We assert that an implied right-of-way has existed throughout the nineteen years from 1990 until now. We assert that an implied right-of-way existed from the moment that Evan LeFever set down his pen after signing the deed relinquishing the original easement. That deed, as set forth in point **D.** of our evidence, refers to “a new right-of-way to serve the 4.22 acres” and no foul-up in the recording of a deed for a replacement right of way can result in what First American refers to (pg. 10 et seq.) as an extinguishment.

The need to file this brief within fifteen days of receiving First American’s brief, and the scarcity of research materials in Morgan County, prevents us from presenting authority on this point at this time. We note that First American has presented no authority to support its position either, and we can think of other areas in the law where something is deemed to exist once the factual requirements are met – before it is legally *recognized* as existing. One example is qualification for tax exemption, where a church or school is considered tax exempt under IRC 501(c)(3) from its beginning and before the IRS finally recognizes it as exempt.

This is not a matter of having an easement established retroactively. It is a matter of acknowledging what has existed all along, what began to exist when Evan LeFever completed his part of the deal on that day in 1990:

Q. When you walked out of David Savasten’s office that day back in 1990, what was your understanding, what was your belief as to whether you would or would not be – have, not be having, but have a replacement easement?

A. Well, I walked out believing that I had the right of way, of course.

Q. And after that, subsequently?

A. I always believed that I had a right of way.

**Testimony of Evan LeFever
October 23, 2007 hearing
Transcript at pg. 10**

We are puzzled by First American's continuing contention (e.g. pg. 15) of its brief, that the LeFever's haven't shown enough need to establish an easement by necessity to the 4.22 acres. Isn't being landlocked enough?.....There are indeed cases that talk about the degree of necessity, but they involve situations where there is another means of access and a court must grapple with the issue of how rough and rugged the alternative way must be before an easement by necessity is decreed for some easier route. Here there is no alternative route. Without an easement across the 14.33 acres, the 4.22 would be landlocked.

In n. 4, pg. 10 of its brief, First American lists four West Virginia cases which purportedly approve the landlocking of a parcel of real estate. We see nothing in any of those cases

Srnsky (trespass; obstruction of justice)

Law (other access available over difficult terrain)

Cox (failure to comply with discovery; land outside park boundaries)

Highway Properties (imprecise description of easement)

that says any such thing.

Indeed, Highway Properties is notable for enunciating the exact points asserted by the LeFevers on pages 25-6 of their brief with regard to Assignment of Error No. 2 - - that merger does not extinguish an easement unless there is total uniformity of ownership in the two parcels and that easements by necessity are not terminated by merger.

CHIAPELLLA/FRYE

They want this Court to focus on what happened to them and ignore, as the Circuit Court ignored in its ruling on Civil Action 01-C-8 (Appeal No. 34714), the core controversy as to the incomplete Orr-LeFever exchange of easements in 1990.

In making its October 23, 2007 ruling in Civil Action 01-C-8, the Circuit Court devised what it considered an equitable solution without even deciding whether the 4.22 acres had been left without an easement.

THE COURT:.....I'm not saying that there's no right of way here, but I am saying that if there is a right of way it's one that exists by necessity. And that would have to be litigated.

Civil Action 01-C-8
October 23, 2007 transcript excerpt
Pg. 15

That is where the Circuit Court went wrong. Instead of dealing with the new issue presented to it and then getting back on track with everything else, the lower court by-passed the basic easement issue¹ and proceeded to declare its own off-the-cuff solution to the overall controversies.

¹ It was not until several months later, in March of 2008, in the other case being appealed (Civil Action 05-C-34) that the Circuit ruled that the 4.22 acres had no easement because of abandonment and merger.

All this is complicated by the incomplete Orr-LeFever easement exchange in 1990 having been discovered after the September 11, 2003 settlement agreement rather than before. If it had been discovered even a few days before, a scenario such as this might have occurred:

THE COURT: Gentlemen, we have a trial coming up next Tuesday. About whether an easement should be moved from one place to another.

LAWYER 1: Yes, Your Honor.

LAWYER 2: There may be a complication, Your Honor.

THE COURT: What's that?

LAWYER 2: It looks like the small piece of land gave up its easement about fifteen years ago and never got another one in return.

THE COURT: So you're saying it has no easement at all, that it's landlocked?

LAWYER 2: We may be arguing that.

LAWYER 1: I remember reading something once about implied easements.

THE COURT: Gentlemen, let's continue the trial. I want both of you to give me memoranda about this. We should straighten out this new issue before we deal with anything else.

Whether before the settlement or afterward, determining the effect of the incomplete 1990 exchange of easements – our Assignment of Error No. 1 – is the only logical first step in clearing this thicket of events and issues. The late discovery

of the 1990 confusion, not before the settlement but two years later when LeFever tried to enforce the settlement, makes it even more important that the cause of the confusion be straightened out before dealing with anything else.

*

This case could be assigned reading in law schools, to teach students about implied easements.....Two adjoining landowners plan to change the location of an easement crossing Blackacre to Whiteacre. The courthouse records show a deed abandoning the easement to Whiteacre, with a paragraph stating:

WHEREAS, the party of the first part has or will be acquiring a new right-of-way to serve the said parcel of 4.22 acres and no longer needs the use of the aforesaid right-of-way..

But the courthouse records do not show any deed creating a new replacement easement. Sixteen years later, the new owner of Blackacre claims that Whiteacre is landlocked - - but the court holds that the circumstances require an easement to be implied in the absence of one that is written.

Let us analogize.

Suppose that some mean person had a piece of land whose only access was by an easement across his neighbor. Desiring to make things difficult for his children – mean people do strange things – he left the land to them in his will but, before he died, he signed a deed abandoning the easement.....”I’ll leave ‘em landlocked,” he laughs on his deathbed.

Is there any doubt, in such a situation, that the children could go to a court and

have the easement re-instated? Even a mean, nasty, person cannot intentionally cut off his piece of land from the rest of the world. Nor can an honest trusting person like Evan LeFever do so unintentionally, giving up an easement with the understanding that he will receive another one and then learning sixteen years later that no deed for the second easement seems to exist.

The appellants LeFever have wholly met their burden of proving an ongoing uninterrupted easement, by implication and by necessity, leading across the 14.33 acres to the otherwise landlocked 4.22 acres.

Assignment of Error No. 2

THE LOWER COURT WRONGLY RULED THAT, EVEN IF THERE WERE AN EASEMENT ACROSS THE 14.33 ACRES TO THE 4.22 ACRES, IT WAS EXTINGUISHED WHEN THE TWO TRACTS WERE TEMPORARILY OWNED BY THOMAS FIRRIOLO – EVEN THOUGH HIS OWNERSHIP OF THE 4.22 ACRES WAS TEMPORARY AND WAS NOT ABSOLUTE BUT BOUND BY COURT-ORDERED RESTRICTIONS.

Both appellees, the title insurance company and intervenors Chiapella/Frye, repeat their Circuit Court contention that Firriolo's temporary ownership of the 4.22 acres extinguished the easement leading to it.

FIRST AMERICAN

The title insurer repeats the general rule as to merger, but disputes the exceptions to the general rule set forth by the LeFever's on pages 25-6 of their brief. At the end of page 11 of its brief, First American scoffs at the principles of law set out by Thompson on Real Property, Powell on Real Property, Corpus Juris Secundum, American Jurisprudence, and the English treatise by Burn. The

LeFevers present no authority from West Virginia, says the insurer....We reply that Highway Properties, *supra*, should suffice and if more West Virginia authority be needed, this case can be it. Let this case be the vehicle by which our state repeats its acceptance of the position so uniformly held by the rest of the legal world – that unity of seisin is required before the doctrine of merger can apply, and that merger does not apply to easements by necessity.

CHIAPELLA/FRYE

Appellees point out that the September 11, 2003, deed from LeFevers to Firriolo, done in accord with and reliance on the settlement agreement of that same day, conveying the 4.22 acres in exchange for \$9,000, did not mention the LeFevers' right to reacquire the land after two years. They castigate² the LeFevers for this omission,

Appellants point out that the deed was not prepared by them, but by Firriolo's lawyer Donald Cookman. It contains the following note:

This instrument was prepared by Donald P. Cookman of Riley & Cookman, PLLC, Attorney at Law, P.O. Box 1728, Romney, West Virginia, 2675% (sic), without benefit of a title examination or report.

If that deed had any defects or deficiencies, therefore, they are to be attributable to and held against him who created it - - Thomas Firriolo.

² For example – “Mr. Firriolo was delivered a deceptive General Warranty Deed by the LeFevers.....” Chiapella/Frye brief at pg. 17, n. 13.

The LeFevers are not to be blamed if the deed prepared by Mr. Firriolo was somehow flawed.

Assignment of Error No. 3

THE LOWER COURT WRONGLY SET ASIDE A SETTLEMENT AGREEMENT UPON WHICH THE APPELLANTS, EVAN AND BETH LeFEVER, HAD RELIED WHEN THEY DEEDED THEIR 4.22 ACRES TO THOMAS FIRRIOLO.

FIRST AMERICAN

Not involved in Civil Action 01-C-8 (Appeal No. 34714), the title insurer does not mention this issue in its brief.

CHIAPELLLA/FRYE

They begin by expostulating, fussing, over a point which the LeFevers acknowledged in n. 7, pg. 29 of their brief. What the Circuit Court did to the settlement agreement was labeled as “reforming” it, but the reformation was so drastic as to amount to setting it aside and substituting a concoction of its own. We will not quibble over words. Let it be called a reforming, a setting aside, a scrapping, an obliteration, or whatever. No matter what it be called, it was wrong.

They then refer to the “sanctity” of the Circuit Court’s order, without saying much to defend the decision to so radically re-do it.

Not mentioned at all are the authorities stating that a contract/court order can only be altered by a court basic and fundamental mistakes, not mistakes such as

those here which we characterize³ as minor, peripheral, and easily cured.

Not mentioned at all is the strong statement by Corbin⁴ that a contract can be reformed only if one of the parties has not relied on it – as the LeFevers relied when they deeded away the 4.22 acres.

Instead of confronting these legal points, Chiapella and Frye resort stridently to an accusation which appears all throughout their brief – that the LeFevers are trying to extort money from them. We can't address this charge every time it is made, as it is made repeatedly, so we refer to pg. 25 infra.

Assignment of Error No. 4

THE LOWER COURT, HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT, DEvised A NEW "SOLUTION" THAT WAS GROSSLY UNFAIR AND INEQUITABLE TO THE LeFEVERS.

FIRST AMERICAN

This appellee does not address this point; does not dispute that the Circuit Court's order was grossly unfair and inequitable to the LeFevers.

CHIAPPELLA/FRYE

Here again, these intervening appellees complain that Evan and Beth LeFever – after being sued and hounded by people they barely know – offered to end the mess by letting the 4.22 acres go for a price which Chiapella and Frye think is too high.

³ Appellants' Brief at 32

⁴ Appellants' Brief at 29-30

In making this accusation, Chiapella and Frye distort a remark by Evan LeFever. When the parties were gathered several years ago for an informal meeting to hash things out, the topic of money came up. Evan LeFever - sued by Firriolo because of a misunderstood telephone conversation (C.A. 01-C-8); sued by a title insurance company because of a recent discovery that his 1990 exchange of easements with Fred Orr had never been completed (C.A. 05-C-94); sued by Chiapella and Frye for reasons never made clear (C.A. 5-C-34)⁵ - was asked what he would take to surrender his rights to the 4.22 acres. He didn't want to sell. He wanted to reacquire the 4.22 acres as he had been promised that he could do, and keep it. But when asked for a price, he threw out one that he considered fair and - considering himself the victim of extortion by all the lawsuits in which he had become entangled - referred to it as his "extortion price".....Now Chiapella and Frye twist what he said and try to make it seem that he was doing the extorting. They accuse him of greed. They are wrong and, we suspect, intentionally wrong.

Evan and Beth LeFever have not struggled through all this litigation, resisting the Circuit Court cases and then filing this appeal, just to get more money for the land. They want to keep the land. The 4.22 acres was their's before any of this started, and they want to keep it.

⁵ They eventually dismissed him from Civil Action 05-C-34, which is still pending in Morgan County.

*

Chiapella and Frye say that the LeFevers had a “good faith” obligation to let them buy the 4.22 acres at some reasonable price. The LeFevers disagree.

- We disagree on technical legal grounds: Chiapella and Frye were not part of the Firriolo-LeFever settlement agreement, so how could it give them some legally enforceable right? To call them third-party beneficiaries, an argument not made, would be a stretch.
- We disagree on substantive grounds. The contents of the settlement agreement do not give any rights to outsiders who come along later and want to buy the land. The settlement agreement gave the LeFevers an absolute right to approve or disapprove any sale of the 4.22 acres by Mr. Firriolo during the two years that he was to have the land. They could say yes or they could say no. They had a veto over any sale.

A veto is a veto. Whether with the President and a bill from Congress or the United States and the United Nations, a veto creates an absolute right – without reason or explanation – to prevent something from happening⁶.

A person with a veto has no “good faith” obligation to approve something just because somebody pops up who wants to have it approved. We are big fans of Section 205 of the Restatement of Contracts, which says that every contract carries an implied covenant of good faith and fair dealing, with the full range of tort damages available against anyone who breaches in bad faith. We hope that this Court will rule some day soon that Section 205 applies to any contract where one of its participants is in West Virginia, not just to those with fiduciary duties such as

⁶ Neither the US Constitution or the UN Charter uses the word “veto.” Like the settlement agreement, they just create a veto without naming it.

insurance contracts and the like.

Here, however, Chiapella and Frye were not participants in or parties to the settlement agreement. Here, however, the LeFevers had a veto and not an obligation to sell what they didn't want to sell:

5.....and the Defendants shall have thirty (30) days from the receipt of such communication of the terms of the contract to approve or disapprove of the sale, in writing....

The power "to approve or disapprove" is the power of veto.

Assignment of Error No. 5

HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT AND WRONGLY EXTINGUISHED THE LeFEVERS' RIGHT TO REACQUIRE THE 4.22 ACRES, THE LOWER COURT FORCED THAT LAND TO BE SOLD WITH UNFAIRLY LOW COMPENSATION TO THE LeFEVERS.

We will only reply that the \$75,000 for which the LeFevers reluctantly offered⁷ to relinquish their rights to the 4.22 acres was:

- a) in line with the prevailing market prices (appellants' brief at pg. 38);
- b) what Chiapella/Frye accuse them of "greed" for offering.

CONCLUSION

Nothing submitted by the appellees in their briefs places any doubt on the accuracy or validity, factual or legal, of the points presented by the appellants. All our assignments of error remain exactly that - - errors, and reversible errors.

⁷ Settlement offers are not supposed to be admissible. W.V.R.E. 408.

Besides reaching wrong legal conclusions, the Circuit Court was wrong in how it tackled the overall situation before it. When it was discovered during the ongoing legal wrangling that the 1990 exchange of easements between Orr and LeFever had never been completed, and claims were raised that that 4.22 acres was landlocked, etc., the lower court should have put everything else on hold and dealt with that before resuming work on the original controversies.

Instead, the Circuit Court by-passed the easement issue in 01-C-8, manufactured its own supposedly equitable solution in that case, and finally ruled – superficially and wrongly – a few months later in 05-C-34 that the 4.22 acres had no easement.

*

At risk of repetition and over-emphasis, let us repeat that the LeFeveres relied on the settlement agreement when they deeded the 4.22 acres to Mr. Firriolo on September 11, 2003. For that land to eventually end up being owned by the outside newcomers Chiapella/Frye, instead of going back to the LeFeveres as the settlement called for, would be hugely unjust.....If the mutual mistake of fact between Firriolo and LeFever was so significant as to justify jettisoning the settlement, and not “minor, peripheral and easily cured” as we contend, the only reasonable step for the court to take would have been to restore the parties to the situation they were in before the settlement was reached. It should have ordered:

1. that Firriolo re-convey the land to the LeFeveres;
2. that the LeFeveres return the \$9,000 to Firriolo.

* *

After reaching its decision, this Court will have to organize its ruling and write an opinion.

We suggest that among the syllabus points for this consolidated appeal might be something like the following:

1. *A half-completed exchange of easements, where someone abandons an existing right-of-way but never receives another one back because of some unidentifiable error, does not leave a piece real estate landlocked. In such a situation, an implied easement will be recognized.*

2. *An easement is not extinguished because of merger when a person becomes owner of two pieces of land, with one piece owned freely and absolutely but with the other piece owned only temporarily and subject to court-ordered restrictions that (a) give an outside person a veto on whether it can be sold; (b) give that outside person a right to reacquire the land after two years if it is not sold.*

3. *It is reversible error for a court to set aside or drastically re-write a settlement agreement which the same court had approved four years previously and upon which one of the parties relied when deeding away a parcel of real estate*

* * *

An appellate court, upon reversal, will often remand a case to the lower court for “action consistent with this opinion.” Here, hoping to have a reversal, we

suggest that the appropriate course of action would be:

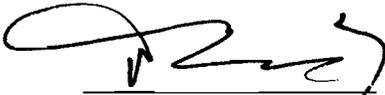
a) the 4.22 acres to be reconveyed by Chiapella and Frye to Evan and Beth LeFever.

b) the reconveyance to be by general warranty deed and to include an easement across the 14.33 acres. Unless a different route can be agreed on now, the route of the easement should be the same⁸ as that agreed on in 1990 by Orr and LeFever, and surveyed by Berkeley Land Surveys for the lost deed from Orr to LeFever.

c) All money previously paid for the 4.22 acres to be reimbursed in a manner determined by the Circuit Court to be fair. We say this from a reluctance to become involved in financial matters between those parties opposing us in this litigation.

RESPECTFULLY SUBMITTED on this 15th day of September, 2009.

EVAN LeFEVER
BETH LeFEVER
By Counsel



William B. Carey
Attorney for Appellants
P.O. Box 207
Berkeley Springs, W. Va. 25411
W. Va. State Bar No. 636

⁸ Record C.A. 05-C-94 at pg. 251

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Copy of this reply brief mailed on this 18 day of September, 2009,
to:

Ryan J. King, Esq.
Blumling & Gusky LLP
200 Koppers Building
Pittsburgh, Pa. 15219
Counsel for First Amer. Title Ins. Co.

Braun A. Hamstead, Esq.
1902 West King Street
Martinsburg, W. Va. 25401
Counsel for Anne Chiapella and John Frye

Mr. Thomas Firriolo
303 Jennings Lane
Greenwood, S.C. 29646
Pro Se Appellee



William B. Carey
Attorney at Law
Berkeley Springs, W. Va.