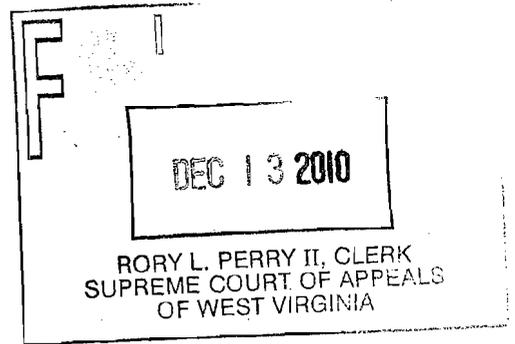


SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF OF APPELLANT

MZRP, LLC, a West Virginia Limited Liability Company

Plaintiff Below, Appellee



vs.) No. 35692

Wayne County Civil Action  
Number 07-C-073

Logan Cannel Coal Company (dissolved);

Jackson Building and Loan Association (dissolved);

Henry Copley;

Defendants Below,

and

Huntington Realty Corporation, a West Virginia Corporation;

Defendant Below, Appellant

Counsel for Appellant:

James W St Clair  
W.Va. State Bar I.D. 3547  
630 1/2 Seventh Avenue  
Huntington, West Virginia 25701  
Phone 304-525-5910

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## I. APPELLANT'S FILINGS WERE TIMELY

MZRP strains its printing cartridge producing pages of arguments asserting that Huntington's motions filings were made outside the prescribed time limits. Huntington responds succinctly by pointing out that MZRP apparently overlooked *W.V.R. Civ.P.*, Rule 6, regarding the computation of time for filings. Huntington filed its Rule 59 motion by mail, which was docketed on September 25, 2009. This is 16 calendar days after the entry of the Order on September 9, 2009. Rule 59 provides that such motions be filed not later than 10 days after entry of the judgment. Yet, computing the running of the 10-day window to file Rule 59 motion is something MZRP overlooks.

Rule 6(a) and (e) provide:

(a) In computing any period of time prescribed or allowed by these rules... the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(e) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Applying these rules to the filings in this case results in the following time line for the 10-day count:

September 9, 2009 - judgment order entered (first day not counted).

September 10 and 11, 2009 - Days 1 and 2 of the count

September 12 and 13, 2009 - Saturday and Sunday (days not counted)

September 14 through 18, 2009 - Days 3 through 7 of the count

September 19 and 20, 2009 - Saturday and Sunday (days not counted)

September 21 through 23, 2009 - Days 8 through 10 of the count.

September 23, 2009 - Date Huntington mailed its Rule 59 motion.

September 25, 2009 - Date Rule 59 Motion was received by Clerk and docketed (within 3 days added for mailing)

Applying the computation of time rules to the events shows that Huntington's Rule 59 Motion was filed within the limitation period.

Further, Huntington ran up against the deadline due to a delay in receiving the judgment order entered on September 9, 2009. On August 2, 2009, counsel for MZRP apparently sent to the Circuit Court a proposed order granting it summary judgment pursuant to the Lower Court's Opinion Letter of April 1, 2009. Counsel for MZRP also included two "stamped" envelopes, one addressed to himself, the other addressed to counsel for Huntington. The Circuit Court Clerk mailed a copy of the September 9 Order to counsel in these pre-stamped envelopes. However, the amount of postage on Huntington's envelope was insufficient, thereby resulting in delivery being delayed until the afternoon of September 17, 2009, when HRC received a notice from the Postal Service of "postage due". Huntington immediately paid the additional postage, received the Order, and within 6 days of receipt, mailed its Rule 59 motion on September 23, 2010. A copy of the insufficient postage envelope was attached to its Rule 59 Motion.

MZRP did not object initially to Huntington's Motion being filed untimely, and further did not object at the hearing before the Circuit Court on November 23, 2009. In fact, everyone present at that hearing understood that denial of Huntington's motion would start the running of the time to appeal. The Circuit Judge said as much at the hearing (Tr. 29, lines 9 - 11): "I am going to deny your motion to reconsider. That is a final judgment. It is appealable.

To me, I would welcome an appeal on a case like this." The Final Order referenced by the Judge was eventually entered on December 15, 2009, which reiterated, .."this order shall constitute an appealable order to the West Virginia Supreme Court of Appeals, if Defendant elects to do so in accordance with the Rules of Court."

The issue of delay in this case is similar to one previously addressed by this Court in the case of *N&W Railroad Company vs Sharp et al*, 395 S.E.2d 527 (W.Va. 1990). In that case the issue was whether landowners filed their exceptions within the 10-day time limit after the Commissioners determined fair market value in an eminent domain proceeding. This Court held that the time limit to file objections begins to run when the parties were notified of the Commissioners' ruling. That case affirmed *State ex rel Peck v Goshorn*, 249 S.E.2d 765 (1978), which held "failure to afford such notice constitutes a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the US and Article III, Sec.10 of the Constitution of West Virginia."

In *Thompson vs Immigration and Naturalization Service*, 375 U.S. 384 (1964), a petitioner seeking to be naturalized had his petition denied at the hearing level. The rules of that proceeding required his post-trial motions be served within 10 days after entry of the judgment. Petitioner filed his motions 12 days after entry of the judgment because he was not promptly served with a copy of the judgment order. However, his motion was served within ten days after his counsel received notice of entry of hearing examiner's ruling. Petitioner also asserted that the Government failed to object to the timeliness of the filing of his motion at the hearing level. The Supreme Court agreed, holding that the delay was not caused by Petitioner, and the Government waived its right to object.

Huntington does not suggest anyone tried to gain an unfair advantage by placing inadequate postage on the envelope containing the Order. It was an oversight or a mistake. Yet, had MZRP complained before the trial court about the timeliness of the Rule 59 Motion, then Huntington could have filed its petition for appeal within the required four months from the date of entry of the judgment on September 9, 2010. Under the circumstances, though, it appears to be a bit overzealous for MZRP to wait until after Huntington files its appeal to raise the issue, especially when its inadequate postage contributed to the delay in the filing the motion.

## II. MZRP IGNORES THE BIG ISSUE

Some of MZRP's arguments remind one of a scene in the movie *The Wizard of Oz*, wherein Dorothy and her friends return to the Wizard with the witch's broom. As Dorothy cowers in front of the billowing smoke and plumes of fire, her dog Toto trots over to the side of the room, bites a small curtain, and tugs it back, revealing that the Wizard is really a man operating a machine. After being exposed, the man booms out to Dorothy, "Pay no attention to the man behind the curtain!"

The man behind the curtain in this case, which MZRP would have us ignore, are the two words "Moses Fork". The deed which MZRP acquired was for a parcel of property, being 100 acres in quantity, and oriented on Moses Fork. The difficulty for Appellee's position is now, and always has been, that the tract it now seeks to acquire is not located within the Moses Fork watershed, but is within the 12 Pole drainage area. The 1893 deed from Vinson to Logan Cannel does not describe a 100 acre parcel on Moses Fork, but rather a 100 A parcel on 12 Pole. The Assessor made an error in the 1894 Land Books, the year the property was first assessed to Logan Cannel, by designating it as Moses Fork. Consequently, the 100 A 12 Pole tract went

delinquent, with Logan Cannel and its successors thereafter paying taxes on a phantom tract that did not exist. Therefore, the property which MZRP contends was assessed and then went delinquent in the name of Logan Cannel did not exist, and as such, the deed received from the Deputy Commissioner was for a non-existent tract.

The Wayne County Commission, sitting as the County Court, made this same determination in relieving Mr. Copley from an erroneous assessment. The Court found that, "This parcel (the 100 acres on Moses Fork) does not exist." MZRP, at page 19 of their brief, calls our attention away from this revelation by trying to divine and speculate some reasons for the ruling, even though the County Court did not make any such findings or conclusions. Rather than being distracted by MZRP's imaginings, Huntington suggests this Court pay attention to the ruling, which means what it says and says what it means - there is no 100 A parcel on Moses Fork. No such parcel could properly be assessed to Logan Cannel, Huntington Realty, Mr. Copley, or anyone else for that matter: It cannot because, simply, the 100 A parcel does not exist on Moses Fork.

MZRP also seeks to draw attention away from the legal description in its deed by arguing that what it acquired at the tax sale was Tax Certificate no. 504432. (Appellee Brief, p. 16) This tax certificate was not produced, and is therefore not part of the record. But more importantly, at issue in this case is not a tax certificate, but rather is a deed. More pointedly, it is whether the legal description in the 2005 tax deed can be used to acquire title to a parcel described in a 1893 deed. The tax certificate is part of the smoke and fire Appellee seeks to generate.

The decision by this Court in *Bailey v. Baker*, 68 S.E.2d 74 (W.Va. 1952), is another matter that MZRP would have us ignore. Contrary to Appellee, and with all due respect

to the lower court, that case is directly on point and is therefore dispositive. In *Bailey*, the tax deed description contained two elements - a quantity of land (lot), and a location (no. 182). Likewise, in this case, the tax deed has a quantity of land (100 A), and a location (Moses Fork). In both cases, the quantities were accurate, but the locations were wrong - wrong by being non-existent. Both MZRP and the lower court tried to slide by the non-existent location issue by suggesting that the quantity is all that is important. The correct location could be determined by looking behind the deed to the chain of title, thereby finding the 1893 deed to Logan Cannel, and then making the correlation. This precise argument raised by the dissenting opinion in *Bailey*, that being that all one needs to do is look behind the tax deed and determine what was really intended. Yet, the dissent is the dissent. The opinion of the Court in *Bailey* held that the scrivener's error in writing 182 instead of 1 & 2 was such as deviation so as to produce a void assessment for Lot 182. The Supreme Court declined to allow such a slide by in *Bailey* because descriptions of assessments are important. Likewise, in this case the Assessor made an obvious mistake by writing that Logan Cannel was assessed for a 100 A tract located on Moses Fork: It had been assessed previously as 100 A on Broadcamp, but switched to Moses Fork after the conveyance from Vinson to Logan Cannel. The ruling in *Bailey* should be reaffirmed and its holding applied again in this case to determine that what MZRP acquired was a non-existent parcel sold under a void assessment.

### III. STANDING IN THIS ACTION

Huntington does not suggest it was entitled to notice of the tax sale for the 100A parcel on Moses Fork. And, for that matter, no one else was entitled to receive such notice because, again, that property on Moses Fork does not exist. Huntington was brought into this

civil action because MZRP named it in the complaint as a party defendant. Thereafter, MZRP did not seek to dismiss Huntington from this proceeding under *W.V.R. Civ.P, Rule 21*.

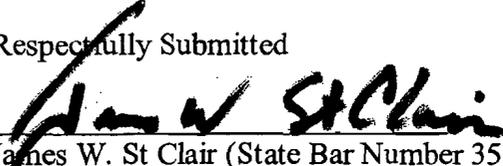
To reiterate, Huntington does not attack MZRP's deed to the 100A tract on Moses Fork. That is a deed grants and conveys to MZRP a phantom piece of realty. However, Huntington takes exception to MZRP trying to judicially relocate the non-existent property by re-designating it away from the Moses Fork area and claiming it is within the 12 Pole watershed.

The 100 A tract owned by Logan Cannel is now and has been since 1894 in the hands of the State Auditor due to the void assessment made on the Land Books. See Syl.pt. 1, *Bailey v. Baker*, supra. Huntington owns property adjacent to the Logan Cannel tract, and would like the opportunity to bid on it at a tax sale, provided the tract is properly designated and certified as such for sale. Therefore, Huntington acts out of its own self-interest in pursuing this appeal. Yet, a consequential benefit would be derived by the citizens of Wayne County, who would probably receive greater revenue from a proper tax sale of the Logan Cannel tract than the \$55.00 the County received from MZRP's bid for the phantom property.

#### IV CONCLUSION

For the foregoing reasons and those contained in its primary Brief, Huntington respectfully prays that the decision of the Circuit Court of Wayne County, West Virginia, be reversed, that it be determined that Appellee did not acquire by deed the 12 Pole tract described in the 1893 deed, and for such other relief as the Honorable Court deem appropriate.

Respectfully Submitted

  
James W. St Clair (State Bar Number 3547)  
Attorney for the Appellant  
630 1/2 Seventh Avenue  
Huntington, West Virginia  
Phone 304-525-5910

**CERTIFICATE OF SERVICE**

The undersigned counsel for Huntington Realty Corporation certifies that a copy of the attached Reply Brief to the Supreme Court of Appeals of West Virginia has been served upon plaintiff's counsel of record by mailing by First-Class mail, postage prepaid to the follow person:

Edward M. Kowal, Jr.  
Leslie Dillon  
Campbell Woods  
P. O. Box 1835  
Huntington, West Virginia 25719-1835

Done this 10th day of December, 2010



James W. St Clair (WV State Bar 3547)  
Attorney for the Appellant  
630 ½ Seventh Avenue  
Huntington, West Virginia 25701  
Phone (304) 525-5910  
email: jwstclair01@hotmail.com