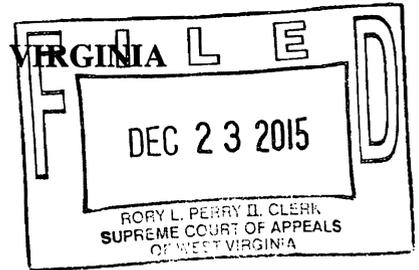


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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**Case No. 15-0972**

**GARY D. HOKE AND BARBARA M. HOKE,  
Defendants Below, Petitioners**

**v.**

**THE BOARD OF EDUCATION OF THE COUNTY OF MONROE,  
Plaintiff Below, Respondent**

-----

**Appeal from the Circuit Court of Monroe County  
The Honorable Robert Irons, Judge  
Civil Action No. 14-C-26**

---

**PETITIONERS' BRIEF  
AND ASSIGNMENTS OF ERROR**

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## TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGE NUMBER</u>
Nature of Case, Relief Sought, Outcome Below	2
Standard of Review	2
Assignments of Error	2
Statement of Facts	3
Argument	5
Prayer and Conclusion	9

**LEGAL AUTHORITY**

*Carpenter v. Luke*, 689 S.E. 2d 247 (2009)

*Cottrill v. Ranson*, 200 W. Va. 691 (1997)

*Greenfield v. Schmidt Baking Co.* 199 W. Va. 447 (2000)

*West Virginia Code* §18-5-6

*West Virginia Code* §18-5-7

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## **NATURE OF CASE, RELIEF SOUGHT, AND OUTCOME BELOW**

1. This case is a civil action wherein the Appellants contest the Court's ruling in favor of Appellees.
2. Relief sought is the return of the real property in question to Appellants.
3. The Court below found that the deed to the property from Appellees to the Appellant was void, thus the property reverted to the Appellees.

## **STANDARD OF REVIEW**

A Circuit Court's entry of summary judgment is review *de novo*.

*Greenfield v. Schmidt Baking Co.*, 199 W. Va. 447 (2000)

## **I. ASSIGNMENTS OF ERROR**

1. The Circuit Court wrongly determined the original deed from Hogshead to Aubrey Reed did not convey the 8/10 of an acre to Reed because said tract was not an exception to the Reed deed because the exception was never executed. Exhibit A to Appendix Item No. 5, Appellants Response to Motion for Summary Judgment.
2. The original deed from Hogsheads to Aubrey Reed (Exhibit A to Appendix Item No. 5), which purportedly conveyed 8/10 of an acre to Appellees was never delivered to Appellees or recorded in Monroe County Clerk's office.
3. The Court ignored a recorded "lease" dated June 14, 1983, (Exhibit B to Appendix Item No. 5) concerning the 8/10 of an acre between the Appellees, the Monroe County Commission and Mr. Aubrey Reed, the Appellants' uncle, of whom they claimed the property through heirship/assignment.
4. There are material issues of fact that exist that the Court ignored in making its

decision, thus negating any summary judgement order being an issue.

## **II. STATEMENT OF FACTS**

1. The first pivotal document in this case is the Deed dated July 1, 1940, Deed Book 72 at page 259, Monroe County Clerk's Office, J. E. Hogshead to Aubrey Reed.

2. On page 2 of said Deed, fifth item, purports to except from the conveyance the 8/10 acre from the conveyance to Reed.

3. The purported exception, however, fails to indicate the day/month/year of the purported conveyance.

4. No evidence was introduced by the Appellees showing the delivery of a deed to said 8/10 acre tract to Appellees nor the recordation of any deed regarding said property in the Monroe County Clerk's office.

5. In the second paragraph of said deed, it states, "There being conveyed by this deed all of the land owned by party of the first part in Monroe County and conveyed as a boundary and not by the acre."

6. The Circuit Court found on page 6 of its order "In effect the Court agrees with the Defendants that the Hogshead-Aubrey Reed deed does not establish title in favor of the Board."

7. The Court found on page 6 of its order, "The Board's title in the school does not derive from a deed but rather from the Undisputed Possession Statute, West Virginia Code §18-

5-6. The Board holds title to property when it can show that it has held undisputed possession of the property for at least five years... and title cannot be shown by any other claimant.”

8. The Court made a factual finding that was disputed by Appellants, page 6 of its order. “The Board has held title to the school for more than five years. The Defendants are unable to show title to the School. Therefore, the Board holds title to the School.”

9. On or about the 14<sup>th</sup> day of June, 1983, a lease was executed between Aubrey Reed, Grantor, party of the first part, Monroe County Board of Education, party of the second part, and Monroe County Commission party of the third part, Grantees. See Exhibit B to Appendix No. 5.

10. The lease above clearly states, “Whereas, the Monroe County Board of Education desires to convey any interest it might have in the said real property to the Monroe County Commission for use as a polling place and other public purposes.”

11. Said lease states, “Whereas Aubrey Reed desires to lease subject real estate to Monroe County Commission for use as a polling place and other public purposes.”

12. The consideration agreed to for the lease between Monroe County Commission and Aubrey Reed, cash in hand paid One-Dollar (\$1.00).

13. The lease states: “3. That the real estate, together with all appurtenances, improvements, thereto be returned to the party of the first part, his heirs or assigns, as soon as the property is no longer being used for public purposes.”

14. The lease/deed is fully executed by the Board President, all Monroe County Commissioners, and Aubrey Reed, properly notarized and recorded.

15. The Monroe County Commission officially stopped using the school house as a polling place for any public purpose on May 9, 2000, noted by Donald J. Evans Clerk, by Public Notice (See transcript of April 6, 2015 hearing, page 12, lines 14-24 and page 15, lines 1-8).

16. Upon the Monroe County Commission ceasing to use the 8/10 acre as of May 9, 2000, said property reverted to the heirs/assigns of Mr. Aubrey Reed since same was no longer being used for a “public purpose” pursuant to said lease.

17. The Appellants obtained said property as heirs/assigns of Mr. Aubrey Reed’s estate. See Exhibit C to Appellant’s Response to Motion for Summary Judgement, Appendix No. 5.

### **III. ARGUMENT**

18. The Court determined that the Appellees did not have title under the Hogshead Deed, but by virtue of West Virginia Code §18-5-6 because the Appellees possessed the property for more than five (5) years, and that the title could not be shown by any other document. The Court never addressed why Appellants were not a claimant to the title of the property. The Court rightly ruled the Appellees could not claim by the Hogshead deed because no deed was ever received by Appellees nor recorded in the Monroe County Clerk’s office. Since there was no out conveyance of the 8/10 of acre school property, what was the intent expressed in the deed by the

Grantor. The exception in the reservation clause was not certain and/or expressed in definite language because the date of the supposed exception was not dated prior to the July 1, 1940 date of the deed. See *Cottrill v. Ranson*, 200 W. Va. 691 (1997), at Syllabus Point 4, which states,

**4. In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservations must be expressed in certain and definite language.**

Fortunately, the deed clearly on its face, as stated in Item 5 of the factual finding above, clearly indicates the Grantor's intention was to convey all his property it owned in Monroe County by "boundary" to Aubrey Reed. See *Carpenter v. Luke*, 689 S. E. 2d 247 (2009), at Syllabus Point 4, which states:

**4. In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.**

Thus, if exception No. 5 was not conveyed, it was the Grantor's clear intent to convey all his property to Grantee, Aubrey Reed. The Court wrongly ignored this fact. The Court contradicts itself if the Appellees cannot claim under the Hogshead deed, then the property clearly belonged to Aubrey Reed, and the five-year possession statute would not run against Reed and his heirs and assigns. Thus, making said Reed and heirs a claimant under West Virginia Code §18-5-7.

19. The Court completely ignored the impact the lease entered in to between Aubrey Reed, Monroe County Board of Education, and Monroe County Commission, Exhibit B to Appendix Item 5. This lease agreement addressed the issue of what interest each party had to the parcel, 8/10 acre, in question. The parties agreed to resolve any question about their interests by reducing same to writing. The Board of Education transferred any interest they claimed to have to Monroe County Commission. The Monroe County Commission leased the school house property as a polling place or for any other public purposes. The lease is dated June 14, 1983, signed and notarized by all parties. The leased confirms the property reverts to Aubrey Reed, his heirs or assigns as soon as it stops being used for public purposes. This legal and binding document establishes two legally significant issues:

- (1) Establishes who the owner of the remainder interest of the property is if it stops being used for public purposes.
- (2) Transferred any interest that Monroe County Board of Education had to said property to Monroe County Commission.

The Circuit Court ignored the significance of said document and treated the property as belonging to the Monroe County Board of Education when in said document the Board transferred any and all interest to same to the Monroe County Commission.

Legally, the Monroe County board of Education could not transfer anything by deed after

June 14, 1983, because they did not own same.

By Public Notice from Donald J. Evans, Clerk of the Monroe County Commission, effective May 9, 2000, the property in question was no longer used for public purposes and, pursuant to the lease, immediately reverted to Appellants because they used said property and purchased same from the Estate of Aubrey Reed.

The Court ignored the fact of the existence of the lease agreement and the fact that Hogshead had sold the property to Reed by the boundary and not acre. The Court also ignored the fact that Hogshead's stated intent in the deed was to sell "all" his property in Monroe County to Reed. Thus, logically, if the exception of the 8/10 acre for whatever reason was not executed, it was the intent of Hogshead for Reed to have same.

20. It is clear on the face of the "lease" the parties to said lease understood there was a problem with the Hogshead to Reed deed and came to an agreement of how the issue of no exception of the 8/10 acre would be handled. Said parties agreed that the Audrey Reed heirs/assigns would receive the property if and when it ceased being used for public purpose. The property on May 9, 2000, ceased being used for public purposes and same went into the Estate of Aubrey Reed and was purchased by his nephew/assigns.

#### **PRAYER AND CONCLUSION**

In considering the facts of this case, it is clear the Circuit Court failed to carefully review

the July 1, 1940 deed from Hogshead to Aubrey Reed. The Court rightly determined the Appellees had no claim to the 8/10 acre because a deed was never delivered to them. However, the Court misconstrued under the deed who owned the 8/10 of an acre if the exception was not executed for same. Under the case law cited the subject deed stated it was the Grantor's clear intention to sell "all" his Monroe County property to Reed by the boundary since the boundary clearly included the exception not conveyed. The Grantor had no claim to the 8/10 tract. The Court completely ignored the 1983 lease between all parties that had or could have had a claim for said property. The important point is the Appellees conveyed any and all interest it had to the property to Monroe County Commission. So how could they have anything to convey after June 14, 1983?

This Court is respectfully requested to vacate the Circuit Court's decision and rule the subject property is owned by the Appellants or instruct the Circuit Court to specifically consider the 1953 lease and make its decision on the basis of the lease.

APPELLANTS

BY COUNSEL



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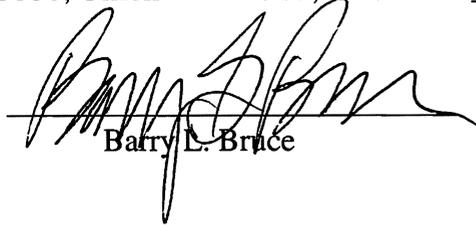
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**CERTIFICATE OF SERVICE**

I, Barry L. Bruce, Barry L. Bruce and Associates, L. C., Counsel for Petitioners/Appellants, certify that I have on this date served upon Justin St. Clair, Counsel for Respondents/Appellees a true and correct copy of the foregoing Appendix and Brief by U. S. Mail, first-class postage prepaid to P. O. Box 350, Union WV 24983, on this the 22<sup>nd</sup> day of December, 2015.

  
Barry L. Bruce