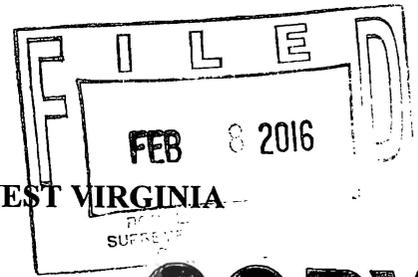


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**COPY**

**GARY D. HOKE and BARBARA M HOKE,  
Defendant's Below, Petitioners**

**Vs.**

**No. 15-0972**

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

**MONROE COUNTY BOARD OF EDUCATION'S SUMMARY RESPONSE TO THE  
PETITIONER'S BRIEF AND ASSIGNMENTS OF ERROR**

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NOW COMES the Board of Education of Monroe County, West Virginia, by and through the Monroe County Prosecuting Attorney, and files this summary response, pursuant to Rule 10(e) of the *West Virginia Rules of Appellate Procedure*, to the *Petitioners' Brief and Assignments of Error*.

As its response to the Petitioners' assignments of error and arguments, the Board of Education of Monroe County, West Virginia states as follows:

**I. THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA CORRECTLY CONCLUDED THAT THE JULY 1, 1940 DEED FROM J. E. HOGSHEAD TO AUBREY F. REED DID NOT CONVEY TITLE TO THE SECOND CREEK SCHOOL PROPERTY.**

The plain and unambiguous language of the July 1, 1940 deed from J. E. Hogshead to Aubrey F. Reed indicates that J. E. Hogshead did not intend to convey the Second Creek School property to the Petitioners' predecessor in title, Aubrey F. Reed. The deed clearly and unambiguously states:

There is *excepted and not conveyed by this deed* the following lots, tracts or parcels of land heretofore sold and conveyed by the party of the first part as follows:

...

FIFTH: That certain lot or parcel of land conveyed by the party of the first part to the Board of Education of Monroe County, by deed bearing the date the \_\_\_\_\_ day \_\_\_\_\_, 19\_\_, and not yet of record and containing Eight Tenths (8/10) of an acre and bounded and described as follows:

BEGINNING at a gum near the branch N 15 E 206 ft. to a fence post by a driveway and with the same S 65-½ E 160 ft. to a point in the middle of the draft road and with the same S 8-½ W 191 ft. to a point near the left hand side of the same and leaving the road N. 81-½ W 137 ft. to a stake on the bank of the above named branch and with the same N 47 W 50 ft. to the beginning.

*Def.'s Resp. to Pl.'s Mot. Sum. Judg. Exhibit A, app 32-33. (Emphasis added).*

The Board of Education agrees that the legal authorities cited by the Petitioners are correct statements of the law. However, the Petitioners have misapplied the law to the undisputed facts of this case. The Petitioners argue that the Second Creek School property was not excepted from the conveyance to Aubrey F. Reed because there was no date for the prior deed to the school property listed in the fifth exception. As such, the Petitioners contend that the exception clause was not expressed in certain and definite language. The next step in the Petitioners convoluted reasoning is that J. E. Hogshead intended to convey all of his property in Monroe County to Aubrey F. Reed "by the boundary." Therefore, according to the Petitioners, by not including the date of a prior deed in the exception clause, J. E. Hogshead intended to convey the Second Creek School property to Aubrey F. Reed.

The law in West Virginia concerning judicial interpretation of written instruments is crystal clear. When the parties to a written instrument have expressed their intent in plain and unambiguous language the instrument is not subject to judicial construction or interpretation but will be enforced accordingly to the intent so expressed. *See* Syl. Pt. 4, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013). In the same case, this Court further held, "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 7, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013) (citation omitted). In the present case, the Circuit Court of Monroe County, West Virginia properly rejected the Petitioners creative interpretation.

The plain language of the July 1, 1940 deed clearly reflects that J. E. Hogshead's did not intend to convey the Second Creek School property to Aubrey F. Reed. The deed provides "There is excepted and not conveyed by this deed the following lots, tracts or parcels of land

heretofore conveyed," and subsequently provides a legal description of the Second Creek School property complete with calls, points, landmarks and boundaries. If J. E. Hogshead intended to convey the school property to Aubrey F. Reed why on earth would he include a provision in the deed which specifically states that the school property is excepted and not conveyed by that deed?! The intent to except the Second Creek School property from the conveyance is expressed in certain and definite language. The fact that the exception does not include the date of the prior deed, or that the prior deed was never recorded, is immaterial in determining the grantor's intent.

Having correctly concluded that the 1940 deed did not transfer title of the school property to Aubrey F. Reed, the Court concluded that the Monroe County Board of Education held title to the school property pursuant to W.Va. Code § 18-5-6. W.Va. Code §18-5-6, provides,

The county board shall have title to any land or school site which for five years has been in the undisputed possession of the county board or any board of education of a magisterial district, or subdistrict or independent district, and to which title cannot be shown by any other claimant. Such land shall be held and used for school purposes, as provided by section eight of this article.

It is undisputed that the Monroe County Board of Education constructed and operated a school house on the Second Creek School property for several decades. *See Def.'s Resp. to Pl.'s Mot. Sum. Judg. Exhibit B*, app 35.<sup>1</sup> The Petitioners are the only individuals who have asserted a claim of title to the Second Creek School property.<sup>2</sup> The Petitioners' claim is derived from Aubrey F. Reed and, as discussed *supra*, Aubrey F. Reed never held title to the Second Creek School property. Accordingly, the Circuit Court's conclusion that no other claimant could show title to the Second Creek School property was correct and the Monroe County Board of Education holds title to the school property pursuant to W.Va. Code § 18-5-6.

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<sup>1</sup> The lease provided by the Petitioners in support of their claim specifically states, "WHEREAS, the Board of Education of Monroe County has openly and notoriously used the property for many years." The lease is dated June 14, 1983, nearly 43 years after Aubrey F. Reed acquired his property from J. E. Hogshead.

<sup>2</sup> Black Law Dictionary defines "claimant" as, "one who claims or asserts a right, demand or claim." *Black's Law Dictionary* 170 (Abridged 6th ed., West 1991).

**II. THE FACT THAT THE DEED FROM J. E. HOGSHEAD TO THE MONROE COUNTY BOARD OF EDUCATION WAS NEVER RECORDED DOES NOT IMPROVE THE PETITIONERS' CLAIM OF TITLE.**

The Petitioners repeatedly attempt to make issue of the fact that the deed from J. E. Hogshead to the Monroe County Board of Education was never recorded. In their second Assignment of Error the Petitioners claim that the deed from J. E. Hogshead to the Monroe County Board of Education was never delivered or recorded. This statement is only partially correct. The deed was never recorded. However, there is nothing in the record to support the assertion that the deed was not delivered. In fact, in the language of the 1940 deed J. E. Hogshead clearly states that the Second Creek School property had already been conveyed to the Monroe County Board of Education. Moreover, the Board constructed and operated a school on the property for several decades.

The fact that a deed has not been recorded does not render the deed invalid. *See Jones v. Wolfe*, 203 W.Va 613, 509 S.E.2d 894, 896 (1998) ("Recording of the deed is not critical and acknowledgment is not essential to its validity.") West Virginia law also provides that a grantee whose deed is lost may bring a suit in equity to establish his title to the property on the record. *See generally Cartright v. Cartright*, 70 W.Va. 507, 74 S.E. 655 (1912). Thus, the lack of recording does not invalidate the conveyance of the school property from J. E. Hogshead to the Board.

Finally, the issue of whether the deed from J. E. Hogshead to the Board of Education was ever delivered need not be litigated because it is not relevant to the outcome of this case. The issue is of no relevance because the Circuit Court of Monroe County properly concluded that the Monroe County Board of Education held title to the property pursuant to W.Va. Code §18-5-6. Even if the Petitioners could prove that the deed from J. E. Hogshead to the Board of Education

was never delivered, the Petitioners acknowledge that the Board of Education had undisputed possession of the property for more than five years and, as discussed above, the Petitioners cannot establish title to the property through their predecessor, Aubrey F. Reed.

**III. THE 1983 LEASE BETWEEN THE MONROE COUNTY BOARD OF EDUCATION, THE MONROE COUNTY COMMISSION AND AUBREY F. REED DOES NOT TRANSFER TITLE TO THE SCHOOL PROPERTY.**

The Monroe County Circuit Court's *Order Granting Plaintiff's Motion for Summary Judgment* contains no mention of the 1983 lease between the Monroe County Board of Education, the Monroe County Commission and Aubrey F. Reed. Obviously, the Court found no merit to the Petitioners argument that the lease was compelling evidence of their title to the Second Creek School property. The Court was correct to ignore the 1983 lease for two reasons.

First, the lease does not convey any interest in the Second Creed School property from the Monroe County Board of Education to the Monroe County Commission. The lease contains no words of conveyance or recitation of consideration to accomplish a conveyance of the school property from the Monroe County Board of Education. The lease merely recites that the Monroe County Board of Education desires to convey the school property to the Monroe County Commission for use as a polling place and other public purposes. This statement alone is not enough to transfer title to the property.

The lease provides, in pertinent part:

NOW, THEREFORE, THIS LEASE WITNESSETH: THAT for and in consideration of the sum of ONE DOLLAR (\$1.00), cash in hand paid and other good and valuable consideration, not herein mentioned the receipt and sufficient of all of which is hereby acknowledged, the said party of the first part does lease and let to the Monroe County Commission the following described real estate for the sum of One Dollar (\$1.00) per year for use as a polling place and for other public purposes[.]

*Def.'s Resp. to Pl.'s Mot. Sum. Judg. Exhibit B*, app 35-36. Aubrey F. Reed is identified as the party of the first part in the lease. The only consideration listed in the lease is One Dollar paid by the Monroe County Commission to Aubrey F. Reed. The lease does not contain any recitation or acknowledgement of consideration between the Monroe County Board of Education and the Monroe County Commission, nor does it contain any notation that the Monroe County Board of Education "sold, granted or conveyed" the school property to the Monroe County Commission.

Deeds are subject to the same principles of interpretation and construction that govern contracts. Syl. Pt. 3, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013). With regard to the necessity of consideration, this Court has held, "[a] promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, is void." *Id.* at Syl. Pt. 4 (citation omitted). Finally, the Court held, "[a] valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." *Id.* at Syl. Pt. 5 (citation omitted). In the case *sub judice*, the lease fails to transfer title of the school property from the Board to the Commission because it lists no consideration, valuable or otherwise, between the Monroe County Board of Education and the Monroe County Commission.

Additionally, the lease contains no words of conveyance granting and conveying the school property from the Monroe County Commission to Aubrey F. Reed. The lease merely provides,

3. That the real estate, together with all appurtenances and 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.

*Def.'s Resp. to Pl.'s Mot. Sum. Judg. Exhibit B*, app 36. The Monroe County Commission did not convey anything to Aubrey F. Reed in the lease, the Commission was duped into acknowledging a reversionary interest that did not exist. Aubrey F. Reed had no claim to the property.

The second reason that the Monroe County Circuit Court was correct to ignore the 1983 lease is because both the Monroe County Board of Education and the Monroe County Commission lacked the statutory authority to convey property to an individual for no consideration. A county board of education can only dispose of property in the manner authorized by statute. This Court has held,

The board of education of a school district is a corporation created by statute with functions of a public nature expressly given, and no other. It can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute.

Syl. Pt. 1, *Dooley v. Board of Education*, 80 W.Va. 648 (1917). W.Va. Code §18-5-7 dictates the method by which a county board of education may convey property to any individual or entity other than a charitable organization. W.Va. Code §18-5-7 does not permit a board of education to convey title of school property to an individual or to a government body for no consideration. The property must be sold at public auction to the highest bidder; or, in rural communities where the original purchase was for less than fair market value, sold to the heirs or assigns of the original grantor for the original price; or, the property may be sold to another government body for adequate consideration.<sup>3</sup>

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<sup>3</sup> W.Va. Code §18-5-7 dictates the method by which a county board of education may transfer property to another government body, W. Va. Code §18-5-7(f) provides,

Notwithstanding any provision of this section to the contrary, the provisions of this section concerning sale or lease at public auction may not apply to a county board selling, leasing or otherwise disposing of its property for a public use to the state of West Virginia, or its political subdivisions, including county commissions, *for an adequate consideration without considering alone the present commercial or market value of the property.* (emphasis added)

W.Va. Code §7-3-3 dictates the method by which a county commission may convey property. Here again, this statute does not permit a county commission to transfer property to an individual without a public auction unless the property is worth less than one thousand dollars. In the present case, the 1983 lease purports to transfer title to the school property, without a public auction, to Aubrey F. Reed for nothing, or, at most, one dollar. The Second Creek School property consists of nearly one acre with a schoolhouse situated on it. It is inconceivable that this tract is worth less than one thousand dollars, and it is certainly worth more than one dollar.

In sum, the lease fails to cite any consideration between the Monroe County Board of Education and the Monroe County Commission, and consideration of only One Dollar between Aubrey F. Reed and the Monroe County Commission. The Monroe County Board of Education and the Monroe County Commission did not have statutory authority to convey title to property in the manner contemplated by, and for the nominal price listed in, the 1983 lease. Accordingly, the lease is void insofar as it attempts to transfer title to the Second Creek School property to the Petitioners' predecessor in title, Aubrey F. Reed.

**IV. EVEN IF THE PETITIONERS WERE THE HEIRS AND ASSIGNS OF J.E. HOGSHEAD THEY ARE NOT ENTITLED TO EXERCISE THE RIGHT TO PURCHASE THE SECOND CREEK SCHOOL PROPERTY PURSUANT TO W.VA. CODE §18-5-7(b) BECAUSE THEY CANNOT DEMONSTRATE THAT THE ORIGINAL SALE WAS FOR LESS THAN FAIR MARKET VALUE.**

In order for the heirs or assigns of an original grantor to have the right to purchase land no longer needed for school purposes the original sale to a board of education must have been for a price less than fair market value at the time. W.Va. Code § 18-5-7(b), provides, in pertinent part,

Notwithstanding the provisions of subsection (a) of this section, in rural communities, the grantor of the lands or his or her heirs or assigns has the right to purchase at the sale, the land, exclusive of the buildings on the land and the

mineral rights, at the same price for which it was originally sold: *Provided, That the sale to the board was not a voluntary arms length transaction for valuable consideration approximating the fair market value of the property at the time of the sale to the board*[.] (emphasis added)

The statute provides that the right to repurchase school property pursuant to W.Va. Code §18-5-7(b), is conditioned on the terms of the original sale. In the case at bar, the original deed has been lost. We do not know the terms of the original transaction between J.E. Hogshead and the Monroe County Board of Education. All parties to the transaction have passed away. The deed from J. E. Hogshead, dated July 1, 1940, states that the school property had already been conveyed to the Monroe County Board of Education. A person born on the date of that deed, July 1, 1940, would be nearly 76 years old today. As such, even if the Court had concluded that the Petitioners were the heirs or assigns of J. E. Hogshead, they could not demonstrate their right to repurchase the land pursuant to W.Va. Code §18-5-7(b) because the Petitioners have no evidence that the original sale was for less than fair market value in 1940. Moreover, there is no method by which the Board of Education can determine the original sales price.

### CONCLUSION

This Court employs a *de novo* standard of review to a circuit court's entry of summary judgment. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va 189, 451 S.E.2d 755 (1994). This Court has directed that, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In this case, the Monroe County Circuit Court correctly concluded that there were no genuine issues of fact to be tried. The facts of this case are predominantly included in recorded instruments which were submitted as evidence in the proceedings below, and which have been reproduced for this Court in the

Petitioner's Appendix. There was no need for further inquiry to clarify the application of the law.

The Monroe County Circuit Court correctly concluded that the Monroe County Board of Education held title to the Second Creek School property pursuant to W.Va. Code §18-5-6, because it was undisputed that the Board was in possession of the property for more than five years and the Petitioners could not show title to the property. The Petitioners cannot demonstrate title to the property through their predecessor in title, Aubrey F. Reed, because his deed specifically excluded the property. The Petitioners cannot demonstrate title to the property by virtue of the 1983 lease because any conveyance contemplated thereby is void for lack of consideration and neither the Monroe County Board of Education, nor the Monroe County Commission had statutory authority to convey the property in the manner contemplated by the lease.

Finally, the Petitioners cannot demonstrate that they even have a right to purchase the school property pursuant to W.Va. Code §18-5-7(b) because the Petitioners have no evidence that the original sale to the Board was for less than fair market value in 1940. For these reasons the Monroe County Board of Education respectfully requests this Honorable Court to affirm the Monroe County Circuit Court's grant of summary judgment to the Board and denial of summary judgment to the Petitioners.

Respectfully submitted this 8th day of February, 2016.

THE BOARD OF  
EDUCATION OF THE  
COUNTY OF MONROE,  
By Counsel

A handwritten signature in black ink, appearing to read 'Justin R. St Clair', is written over a horizontal line. The signature is stylized and somewhat abstract.

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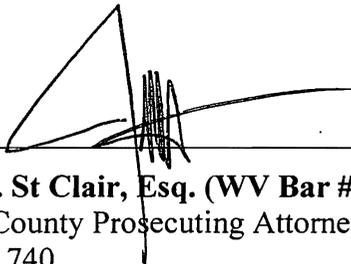
**THE BOARD OF EDUCATION OF THE COUNTY OF MONROE,  
Plaintiff Below, Respondent.**

**CERTIFICATE OF SERVICE**

I, Justin R. St. Clair, Prosecuting Attorney of Monroe County, West Virginia, do hereby certify that the attached MONROE COUNTY BOARD OF EDUCATION'S SUMMARY RESPONSE TO THE PETITIONER'S BRIEF AND ASSIGNMENTS OF ERROR has been served upon the Defendant's counsel of record, Barry L. Bruce, by depositing a true and correct copy thereof in the United States mail, postage pre-paid, addressed as follows:

Barry L. Bruce, Esq.  
Barry L. Bruce & Associates, L.C.  
P.O. Box 388  
Lewisburg, West Virginia 24901

this 8th day of February, 2016.



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