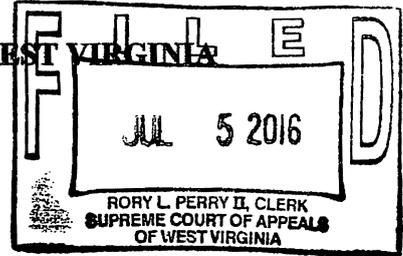


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Docket No. 16-0069

DWG Oil & Gas Acquisitions, LLC,

Plaintiff Below, Petitioner

v.

Appeal from a final order of
the Circuit Court of Marshall County
(14-C-22)

Southern Country Farms, Inc., Harlan Kittle
and Barbara Kittle, and Lori D. Carpenter,

Defendants Below, Respondents

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Beckley National Exchange Bank v. Lilly, 116 W.Va. 608, 182 S.E. 767 (1935) 3

Black's Law Dictionary, Seventh Abridged Edition (2000) 1

Collins v. Stalnaker, 131 W.Va. 543, 48 S.E.2d 430 (1948) 4

Erwin v. Bethlehem Steel Corp., 134 W.Va. 900, 62 S.E.2d 337 (1950) 4

G. W. Auto Center, Inc. v. Yoursco, 167 W.Va. 648, 280 S.E.2d 327 (1981) 4

Haymaker v. General Tire, Inc., 187 W.Va. 532, 420 S.E.2d 292 (1992) 2

Kanawha Banking & Trust Co. v. Gilbert, 131 W.Va. 88, 46 S.E.2d 225 (1947) 2

Malamphy v. Potomac Edison Co., 140 W.Va. 269, 83 S.E.2d 755 (1954) 3

Swope v. Pageton Pocahontas Coal Co., 129 W.Va. 813, 41 S.E.2d 691 (1947) 4

Yoho v. Borg-Warner Chemicals, 185 W.Va. 265, 406 S.E.2d 696 (1991) 2

On April 28, 2016, Petitioner DWG Oil & Gas Acquisitions, LLC (“Petitioner” or “DWG”) submitted its initial brief in this matter, which was followed by the June 11, 2016 brief by Respondent Southern Country Farms, Inc. (“SCF”), but no other Respondent participated in briefing. Petitioner replies here to the brief of SCF.¹

ARGUMENT

I. SCF’S RELIANCE ON A CONTEMPORANEOUSLY EXECUTED LEGAL INSTRUMENT NOT ONLY HAS NO BASIS IN LAW, BUT IS ALSO MISPLACED IN THAT THE LANGUAGE OF THAT DEED, IF CONSIDERED ALONGSIDE CAMPBELL DEED #1, SUPPORTS PETITIONER’S POSITION AS TO THE EFFECT OF THE EXCEPTION AND RESERVATION LANGUAGE

SCF asserts that the Circuit Court was justified in its reliance upon extrinsic evidence to construe the language of the Campbell Deeds at issue. (SCF Brief 8). SCF is correct that the Court did not consider any oral statements from parties which would constitute “parol evidence”; however, the Court effectively relied on extrinsic evidence in the form of a deed recorded on the same date as Campbell Deed #1, without any basis in law for doing so. “Extrinsic evidence” is defined as “[e]vidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or *the circumstances surrounding the agreement.*” Black’s Law Dictionary, Abridged Seventh Edition (2000) (emphasis added).

¹ Petitioner utilizes the same labels as in its initial brief: the approximately 142-acre surface tract at issue is referred to as the “Subject Tract,” and the oil and gas underlying the Subject Tract is referred to as the “Subject Oil and Gas.” DWG does not here address the contentions of SCF concerning the claimed “extinguishment” of the prior reservation and exception of the Subject Oil and Gas, appearing on pages 9-10 of SCF’s brief, because DWG previously addressed the issue in depth in its initial brief, in Section III, pages 10-13.

As recognized in SCF's brief, "[w]here the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it made contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement." Haymaker v. General Tire, Inc., 187 W.Va. 532, 420 S.E.2d 292 (1992); Yoho v. Borg-Warner Chemicals, 185 W.Va. 365, 266, 406 S.E.2d 696, 697 (1991); Kanawha Banking & Trust Co. v. Gilbert, 131 W.Va. 88, 101, 46 S.E.2d 225, 232-33 (1947). Though the Circuit Court did not take evidence on the record in the proceedings below, the Court did rely on the contemporaneously executed deed to construe Campbell Deed #1, and this is in direct contravention of the rule stated above. Notably, in Kanawha Banking, 131 W.Va. 88, the Court found a contract's key language to be free from ambiguity, 46 S.E.2d at 235-36, and thus held that extrinsic evidence, namely "numerous and voluminous letters and documents introduced by the plaintiffs," was inadmissible to explain the contract's terms. Id. at 232, 235-36.

Even if SCF's articulated position conformed with precedent, reading the contemporaneously executed deed alongside Campbell Deed #1 supports Petitioner's position. Petitioner agrees with SCF that almost exactly the same reservation and exception language appears in both Campbell Deed #1 and the deed which SCF identifies as "Campbell Deed #0." (SCF Brief 6-7). One must, however, pay close attention to the granting and reservation and exception language appearing in the latter instrument: "Fifty acres of land being the South West Fifty Acres conveyed by the Deed made to P.P. Campbell, Jr. this day and excepted there from, All the coal Oil and Gas with with the right to sell lease release and operate. [*sic*]." The use of "there from" in Campbell Deed #0, which clearly pertains to the tract being conveyed in that deed, only serves to support the recognition of the fact that P. P. Campbell Sr.'s intent was

likewise that “therefrom” pertained only to the Subject Tract conveyed via Campbell Deed #1, and not to any other tract, conveyance, or instrument. The inescapable conclusion is that, via Campbell Deed #1’s language, “[e]xcepting *therefrom* Fifty acres on west side of the 146 acre tract also reserving *therefrom* all the coal oil and gas with permission to sell lease release and operate the same [*sic*],” P. P., Campbell Sr. intended to exclude from that conveyance (1) the 50 acres *in fee simple* (conveyed in Campbell Deed #0); and (2) the *coal, oil, and gas in and under* the Subject Tract conveyed in Campbell Deed #1.

SCF adds no weight to its argument by pointing out the differing reservation language in Campbell Deed #0 (“The same is reserved to the first party . . .”) (SCF Brief 7), as the sentence immediately preceding utilized only the word “excepted,” rather than using forms of both “reserving” and “excepting” in the same sentence, as was done in Campbell Deed #1. As discussed in DWG’s initial brief, the academic distinction between an “exception” and a “reservation,” expounded upon in Malamphy v. Potomac Edison Co., 140 W.Va. 269, 83 S.E.2d 755, 758 (1954), is commonly disregarded in the drafting of deeds, as reference to a “reservation” may be treated as an exception “if it is necessary in order to carry out the plain purposes of the instrument,” Id., citing Beckley Natl. Exchange Bank v. Lilly, 116 W.Va. 608, 621, 182 S.E. 767 (1935). Accordingly, even though the words “exception and reservation” are not used jointly and uniformly in the Campbell Deeds, the intent of the grantor in each instrument with respect to prior exceptions and reservations is obvious and unequivocal.

II. SCF CONTENDS THAT RESERVATIONS OR EXCEPTIONS ARE TO BE CONSTRUED AGAINST THE GRANTOR, YET FAILS TO ACKNOWLEDGE THAT THIS RULE IS APPLIED ONLY WHERE A LEGITIMATE AMBIGUITY AND RESULTANT UNCERTAINTY AS TO THE GRANTOR'S INTENT EXISTS

As discussed at length in Petitioner's initial brief and in this reply, no ambiguity exists as to the initial reservation or the incorporation of the same into the latter Campbell Deeds, and thus any cases cited by SCF which stand for the proposition that reservations or exceptions should be strictly construed against the grantor (SCF Brief 10-11) (and, in any event, such cases stand for much more nuanced rules concerning the effect of exception and reservation language) are inapplicable. In each of the controlling authorities upon which SCF appears to hang its hat in this regard, the Court found some degree of ambiguity or lack of clarity as to intent in the pertinent language, or such cases are otherwise readily distinguished from this case. In Erwin v. Bethlehem Steel Corp., 134 W.Va. 900, 62 S.E.2d 337, 346 (1950), the Court concluded that the grantor and surface owner in a deed conveying most of the underlying coal to another party did not expressly dispose of the right of subjacent support. In G. W. Auto Center, Inc. v. Yoursco, 167 W.Va. 648, 280 S.E.2d 327, 329-30 (1981), the Court held that language reserving the right to receive rents, appearing only in a prior *lease*, but not in a prior *deed* in the chain of title, was not incorporated into a subsequent deed by a general exception clause. The Court in Collins v. Stalnaker, 131 W.Va. 543, 48 S.E.2d 430 (1948), faced with a scenario involving a stranger to the deed at issue, concluded that a reservation of proceeds from gas wells to be drilled in the future on a tract did not constitute a reservation of the oil and gas in place under the tract. In stark contrast to the present matter, the Court in Swope v. Pageton Pocahontas Coal Co., 129 W.Va. 813, 41 S.E.2d 691 (1947) was presented with a situation in which both a general description of the property to be conveyed, as well as a particular description which did not

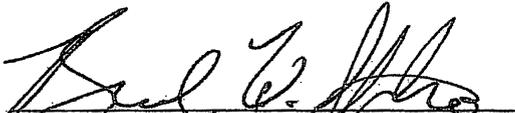
embrace all of the property subject to the general description, appeared in the deed at issue. There, the Court held that a conveyance of “all the coal owned” by a party in a particular tax district effected a conveyance of exactly that, rather than only a conveyance of the tracts described with specificity in the deed, which did not include four other tracts of coal not so particularly described. Id. at 819. None of the above cases shares facts similar to the instant case.

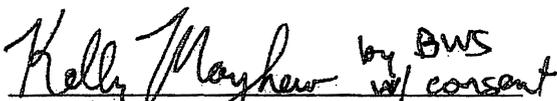
CONCLUSION

Based on the foregoing, Petitioner respectfully renews its request that this Court enter judgment in its favor, reverse the decision below of the Circuit Court of Marshall County, remand the matter for issuance of an order by the Circuit Court reflecting such reversal, and award all other relief that it deems just and proper.

Respectfully submitted this 1st day of July, 2016.

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By Counsel.


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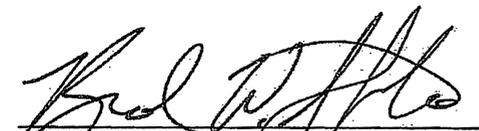
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2016, I served the foregoing "*Petitioner's Reply Brief*" upon all parties of record by depositing a true copy thereof in the United States mail, postage prepaid, envelopes addressed as follows:

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