

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0737

ZENO F. WASSERMAN ET AL.,

*

Case No.

APPELLEES,

*

On Appeal from the Sandusky

County Court of Appeals

vs.

*

Sixth Appellate District

HALDON N. COPSEY ET AL.,

*

Court of Appeals

Case No. S-12-008

APPELLANTS.

*

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS HALDON AND SANDRA COPSEY

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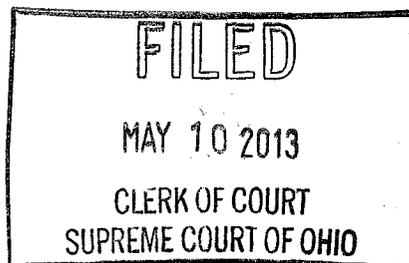


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Explanation of why this case is of Public or Great General Interest

This case involves a transfer of real property. Ownership of real property is one of the fundamental foundations of this country. It is a core principal of our republican form of government, referenced in the Fifth Amendment to the Constitution. “[L]and ownership is a property interest worthy of substantive due process protection... unquestionably a fundamental property interest dating back to the foundation of the American colonies. And ... one would be hard-pressed to find a property interest more worthy of substantive due process protection than [land] ownership.” Nicholas v. Pennsylvania State Univ., 227 F.3d 133 (3rd Cir., 2000) at 141 (internal citations and quotations omitted). Therefore, it is axiomatic that a full consideration of all relevant circumstances should be made by any court forcing the forfeiture of real property, whether that be to a public or private entity.

The trial court here failed to consider the purchase agreement signed by the parties at the auction, and other relevant evidence regarding the boundaries. That document included the terms “more or less” as to quantity. The later deed did not. The trial court and court of appeals held that the doctrine of merger precluded any consideration of the purchase agreement and any testimony regarding markings, in the form of flags, on the property at the time of the auction. The trial courts refusal to consider the evidence was an abuse of its discretion, and resulted in a decision that violates fairness and equity, as well as established legal doctrine. Further, the fashioned remedy of the trial court results in a crooked half- section boundary, and defies any sense of common sense by ignoring the absurdity of the idea that Appellants would intend to sell part of their driveway and the eastern edge of the lot upon which their home sits, and on which over the intervening twenty-years they had grown a garden and planted trees. This area, nor any of the disputed area has ever been claimed by Appellees during the twenty years that they owned the adjoining parcel prior to filing their lawsuit.

The common pleas court abused its discretion when it refused to consider the Purchase

Agreement containing the words “more or less” and testimony that referred to markings on the ground at the time of the auction, considering both to be parol evidence. The trial court did not consider any testimony from Appellants' witnesses regarding the existence of flags marking the boundaries on the day of the auction.

As justification for its decision, the trial court relied on a blind application of the doctrine known as merger by deed. The doctrine of “merger by deed” is a canon of construction that aids courts in determining ... the intent of the parties... [and] ...provides that whenever a deed is delivered and accepted without qualification under a sales contract for real property, the contract is merged into the deed and is essentially extinguished.” See Shah v. Smith, 181 Ohio App.3d 264, 267 (1st Dist., 2009) (noting that the doctrine is not without exceptions and citing Reid v. Sycks, 27 Ohio St. 285, 291 (1875)). That doctrine should not be applied where a mutual mistake was made, and where, as here, there is a claim for reformation. Considering the purchase agreement and the testimony of Appellee Zeno Wasserman, it is clear that there was a failure of the deed to reflect the intent of the parties to convey a parcel containing approximately 75 acres. Instead the deed conveyed a parcel of exactly 75 acres. The trial court precluded the presentation of testimony on the quantity that the parties agreed upon, so the application of the doctrine was improper and unsupported by law. Not only did the court apply the doctrine improperly, but apparently ignored a plain reading of the background cases underlying the general doctrine of merger by deed, which hold that a statement as to the size or quantity in a deed is not a warranty as to its size. Brumbaugh v. Chapman, 45 Ohio St. 360 (1887); Fillegar v. Walker, 54 Ohio App. 262 (1936).

The abuse of discretion standard may be proven where the court engaged in an arbitrary application of the law. Blakemore v. Blakemore, 5 Ohio St.3d 217, 219 (1983). The trial court here not only excluded the relevant evidence described above, but also discounted testimony from Appellee. Zeno Wasserman stated that he understood at the time of the auction the risk that the property was not

exactly 75 acres. Wasserman's testimony strongly supports the conclusion that the parties never agreed that the parcel was a certain size, but rather, as in most real estate transactions the parcel was sold as it was – an “in gross” transaction rather than a “by the acre” sale. And while the trial court refused to allow Appellants to introduce testimony by their witnesses regarding markings on the property at the time of the auction – colored flags marking the western boundary and setting off the homestead lot from the auctioned property, it entertained evidence on the same subject given by Appellee Zeno Wasserman.

The trial court in applying the “merger by deed” doctrine denied Appellants the opportunity to meet the prerequisites for reformation – mutual mistake. The trial court and the court of appeals ignored more than 160 years of precedence in reworking the doctrine of merger and applying it to deprive Appellants of several acres of farmland, including a portion of their reserved homestead.

Statement of the Case and Facts

Appellees filed an action to quiet title to the parcel in 2009. Appellants counterclaimed for reformation of the deed, seeking to correct the scrivener's error omitting the phrase “more or less”. After summary judgment was denied, a bench trial was held in the common pleas court over a total of 4 days in October 2010 and February 2011. The court issued a verdict in favor of Appellees and appellants appealed to the Sixth District Court of Appeals. The district court affirmed the trial court reasoning that the doctrine of merger by deed was properly applied by the trial court to exclude both the language in the prior purchase agreement and testimony by Appellants' witnesses regarding surrounding circumstances as to the location of the boundaries marked on the property at the time of the auction.

Haldon and Sandra Copsey (Appellants) owned a farm in rural Sandusky County. In the late 1980s, due to the state of the farming business, they, as many other family farmers did in that era,

found themselves on the brink of foreclosure. They decided to sell a portion of their farmland, reserving a homestead lot and about half the farmland. As a result, in 1988 Appellants sold a roughly 75 acre parcel at auction to Appellees. Shortly after the sale, in 1989, a survey commissioned by Appellants found that 75 acres had been transferred and set out the boundaries. Sometime after the closing, Appellee Zeno Wasserman became concerned about the quantity of land he had purchased – he believed he should have received exactly 75 acres, but may have received less. Appellees did not commission their own survey until 2009, which then found that their parcel was about 2.5 acres short. In the intervening years the Sandusky County Engineer’s office had reindexed several monuments in the relevant section, all resulting in apparently less land in Appellees’ parcel. This lawsuit followed.

Argument in Support of Propositions of Law

Proposition of Law I: MERGER BY DEED SHOULD NOT BE APPLIED TO EXCLUDE RELEVANT EVIDENCE OF INTENT OF THE PARTIES WHERE MUTUAL MISTAKE EXISTS

Central to the decision of the appellate court was Fuller v. Drenberg, 3 Ohio St.2d 109 (1965). In Fuller, this court held that “the contract was merged into the deed when the deed was delivered and accepted without qualification, and therefore no cause of action upon the prior agreement thereafter existed.” The Fuller court cited Brumbaugh v. Chapman, 45 Ohio St. 360 (1887) which held that “a description in the deed by metes and bounds, and also containing a certain number of acres, does not constitute a covenant as to the number of acres, although words of estimation, as “more or less” be omitted.” Interestingly, the facts in Brumbaugh are very similar to those presented here. Appellants believe that the wisdom of Brumbaugh is no less relevant despite the passage of time – the acreage referenced in a deed is not a guarantee or warranty of that amount and a purchaser should not be permitted to recover based on the acreage description. In Fillegar v. Walker, 54 Ohio App. 262 (1936), the court held that a purchaser was not entitled to recover damages based upon deficiency in the

acreage statement of the deed. The court noted the difference between purchasers and sellers in such an instance. “[W]here a purchaser claims damages for misrepresentations believed by the seller to be true when made, and the facts justified the seller's belief, there can be no recovery in the absence of a showing by the purchasers of fraud or gross negligence amounting to fraud.” Dillahunty v. Keystone Sav. Ass'n, 36 Ohio App.2d 135, 137.

The court of appeals also relied on Parahoo v. Mancini, 10th Dist. No. 97APE08-1071, 1998 WL 180539 (Apr. 14, 1998) for the proposition that the contract becomes merged into the deed and may not be the basis for a cause of action. In Parahoo sellers contracted with the State for a sale of their backyard after entering the contract to sell to buyers. The Parahoo court held that there was no duty on sellers to disclose the prior sale. Although technically Parahoo involves the amount or quantity of property conveyed, it is really a case about the limits of disclosure required by a seller (the real estate agent was held liable under his fiduciary duty). What is notable in the Parahoo decision, and perhaps applicable here, is that the doctrine of *caveat emptor* shielded the sellers from liability due to the buyer's opportunity to discover the size of the boundaries based on the metes and bounds description. Here an accurate reading of Parahoo cuts against Appellees – they too had the opportunity to examine the property and conduct a survey before the transaction, and as purchasers had that obligation. Also, no cause of action may be based on the prior contract, but the law does not see a defense in the same light.

Proposition of Law II: A TRIAL COURT SHOULD ALLOW PAROL EVIDENCE TO SHOW MUTUAL MISTAKE IN A CLAIM FOR REFORMATION

Appellants here counterclaimed for reformation of the deed. Where the written deed of the transaction does not conform to the actual or intended agreement, it is the role of the court to allow reformation to carry out the intent of the parties. McLouth v. Rathbone (1850), 19 Ohio 21, 25.

Reformation is an equitable remedy that allows a court to change the language in a contract where the parties' true intentions have not been expressed due to a 'mutual mistake' - meaning a common mistake by all the parties to the contract. A deed, in particular, may be reformed where words have been excluded from the deed that have resulted in the transfer of a greater or smaller estate than intended." (Citations omitted.). Huber v. Knock, Hamilton App. No. C-080071, 2008-Ohio-5900, 2008 WL 4891562, at ¶ 6, citing Stewart v. Gordon, 60 Ohio St. 170 (1899) and Frate v. Rimenik, 115 Ohio St. 11 (1926). See also Wells Fargo Bank, N.A. v. Bowman, 5th Dist. No. 2011CA00099, 2012 WL 474167 (applying reformation to remove name of one purchaser).

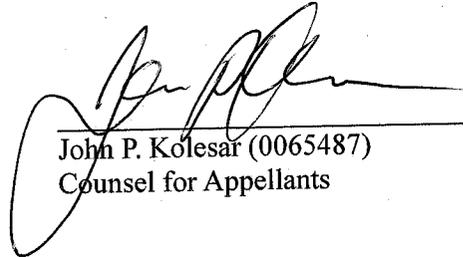
In Clayton v. Freet (1860), 10 Ohio St. 544, 545, this court, citing Davenport v. Sovil (1856) 6 Ohio St.459, 463-464, held that parol evidence may be admitted to show a mistake. In Davenport v. Sovil (1856) 6 Ohio St.459, 463-464, the Court held that "[c]ontracts concerning lands, then, may be reformed, on the ground of mutual mistake of the parties to them; and when thus reformed may, in the same proceeding, be enforced; and such mistake may be proved by parol." Id. In Osborne, Inc. v. Medina Supply Co., Medina App. No. 2918-M, 2926-M, 1999 WL 1260865, the Fourth District Court of Appeals reasoned that although parties may deny the mistake at the time of trial in their testimony that does not mean there was no mutual mistake.

In any case, Appellee Zeno Wasserman admitted in his testimony at trial that he knew he might get "more or less" than 75 acres. Thus, Appellants proved by clear and convincing evidence that a mutual mistake was made regarding the intended conveyance. There is even more evidence of the intended agreement in the language of the purchase agreement, and it undeniably indicates the simplicity of the error that was made. The remedy of reformation should have been employed to resolve this simple error. To allow this matter to be resolved as a boundary dispute is simply not intellectually honest and does not comport with equity.

Conclusion

Because the trial court improperly applied the doctrine of merger, which denied Appellants the opportunity to present their case for reformation, and in so doing deprived Appellants of their rightful property, this case demands review by this court – if for no other reason than to clarify the law in this area and ensure that in the future a simple scrivener’s error is not litigated as a boundary line dispute. Appellants urge this court to accept jurisdiction and set the matter for full briefing and argument of the issues.

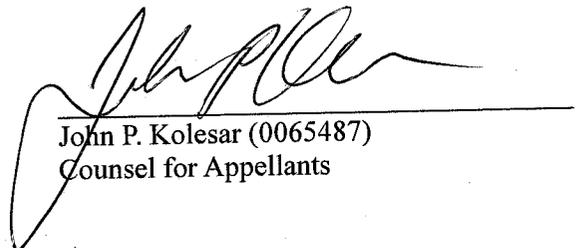
Respectfully submitted,



John P. Kolesar (0065487)
Counsel for Appellants

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was delivered by hand to counsel for Appellees, John Zinkand, Zinkand Law Office, 210 South Park Avenue, Fremont, OH 43420 on May 10, 2013.



John P. Kolesar (0065487)
Counsel for Appellants

APPENDIX

State of Ohio, Sandusky County, SS:
I hereby certify that this is a true copy of
the original document now on file in my
office this 13 day of April
2013
TRACY M. OVERMYER
Sandusky County Clerk of Courts
By: Debra Hamm
Deputy Clerk

SANDUSKY COUNTY
COURT OF APPEALS
FILED

MAR 29 2013

TRACY M. OVERMYER
CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Zeno F. Wasserman, et al.

Court of Appeals No. S-12-008

Appellees

Trial Court No. 09CV671

v.

Haldon N. Copsey, et al.

DECISION AND JUDGMENT

Appellants

Decided: **MAR 29 2013**

* * * * *

John L. Zinkand, for appellees.

John P. Kolesar, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas on appellees' complaint to quiet title to real estate. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} On September 9, 1988, appellees Zeno and Emma Wasserman ("Wassermans") purchased at auction an agricultural strip of land in Sandusky County,

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Ohio, from appellants Haldon and Sandra Copsey ("Copseys"). It is undisputed that the offer to purchase signed at the auction described the property as a strip of equal width and "75 acres more or less * * *," while the deed conveying the land identified the parcel of land as being 75 total acres. The record reflects that in 1989, Copseys commissioned a survey which found 75 acres, but with different boundary lines than shown in prior survey records. It appears that the parties lived on and farmed their respective properties uneventfully until 2009, when Wassermans, concerned that the boundary lines as they understood them were different from those stated in the 1989 survey, commissioned a survey. According to the record, the 2009 survey relied on different points of reference than the 1989 survey. In fact, over the years, there were several surveys done on the same parcel of land, depicting different boundary lines. At issue then was which survey accurately depicted the true dimensions of the parcel of land. In anticipation of transferring ownership of the parcel of land to their son, Wassermans filed a complaint to quiet title to the real estate on June 9, 2009, praying that Wassermans be declared the true and lawful owners of the 75 acres described in the 2009 survey and that their title be quieted against any claim or interest of Copseys.

{¶ 3} After discovery was completed and summary judgment motions filed by both parties were denied, the matter was tried to the court over the course of four days in October 2010 and February 2011. At trial, Copseys argued that the underlying contract to purchase the land that was executed by the parties in 1988 stated that the parcel sold was 75 acres "more or less." Wassermans asked the court to quiet title to the 75 acres

they believed they purchased, to clearly establish the location of the boundary lines of the property utilizing the 2009 survey plat and legal description to reflect 75 acres, and to grant a permanent injunction.

{¶ 4} By judgment entry filed February 17, 2012, the trial court ruled that the contract to purchase merged into the deed. The trial court found that the deed was unambiguous on its face, that the deed was prepared by the seller against whom any ambiguities must be construed, and that there was no evidence of mutual mistake as to the intent of the parties. The trial court concluded that Wassermans were entitled to have their title in the property quieted and set forth the boundary lines of the premises as designated in the 2009 survey. The trial court also granted Wassermans' request for a permanent injunction and restrained Copseys from crossing the west line of the 75 acres as established by the court.

{¶ 5} Copseys now appeal, setting forth the following assignment of error:

I. The trial court erred by applying the Doctrine of Merger and improperly excluding parol evidence limiting testimony regarding the intent of the parties at the time of the sale of the real estate in 1988.

{¶ 6} At trial, Copseys produced the offer to purchase which stated that the parties agreed for Wassermans to purchase 75 acres "more or less." However, the trial court, as a result of a motion in limine filed by Wassermans, excluded the offer to purchase, all testimony regarding flags set on the property on the day of the auction, and testimony as to boundaries by lay witnesses. Copseys argued in the trial court, and assert on appeal,

that the offer to purchase, which included the language “more or less” not found in the deed, should be considered.

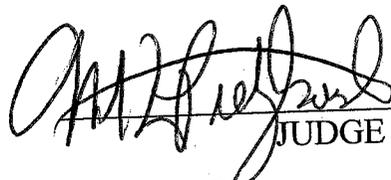
{¶ 7} The doctrine of merger by deed holds that “when a deed is delivered and accepted without qualification pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists.” *Parahoo v. Mancini*, 10th Dist. No. 97APE08-1071, 1998 WL 180539 (Apr. 14, 1998), citing *Fuller v. Drenberg*, 3 Ohio St.2d 109, 111, 209 N.E.2d 417 (1965). See also *Osborne, Inc. v. Medina Supply Co.*, 9th Dist. Nos. 2918-M, 2926-M, 1999 WL 1260865 (Dec. 22, 1999). Based on the foregoing, Copseys’ reliance on the offer to purchase is unavailing because it was merged into the deed when the deed was delivered and accepted without qualification. See *Fuller, supra*. Therefore, we find that the trial court did not err by concluding that Wassermans’ title should be quieted and boundary lines established pursuant to the 2009 survey. Appellants’ sole assignment of error is not well-taken.

{¶ 8} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.



JUDGE

Thomas J. Osowik, J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.