In The

Supreme Court of Virginia

RECORD NO. 090989

SHIRLEY ANN "SISSY" BAILEY,

Appellant,

v.

TOWN OF SALTVILLE,

Appellee.

REPLY BRIEF OF APPELLANT

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VIRGINIA: IN THE SUPREME COURT

SHIRLEY ANN "SISSY" BAILEY,	}	
	}	
Appellant,	}	
	}	
v.	}	Record No. 090989
	}	
TOWN OF SALTVILLE,	}	
	}	
Appellee.	}	
	}	

REPLY BRIEF OF APPELLANT

In the Brief of Appellee, the Town of Saltville raises two arguments which are not addressed in the Opening Brief of Appellant. First, Saltville claims that the doctrine of merger applies as to the deed at issue in this case. The trial court correctly held that the 1909 Agreement and 1909 Deed must both be considered, and Saltville did not assign cross-error as to that ruling. Second, Saltville contends that the case of *Blondell v. Gunter*, 118 Va. 11, 86 S.E. 897 (1915), supports the position that the railway company acquired a fee simple interest in 1909. Nonetheless, *Blondell*

is based on the application of a specific statute which clearly has no application here.

I. ADDITIONAL QUESTIONS PRESENTED

1. Where the Circuit Court held that it would not make a ruling on whether the 1909 Agreement is merged into the 1909 Deed, and also held that both the agreement and the deed should be considered as part of one transaction, but where the Appellee, Town of Saltville, did not assign cross-error as to those rulings in its Brief in Opposition, is Saltville foreclosed from raising the merger argument anew on this appeal? (Response to Appellee's Questions Presented)

2. Does this Court's holding concerning the specific wording of an 1887 condemnation statute support the Appellee's position that the 1909 Agreement and 1909 Deed conveyed a fee simple interest? (Response to Appellee's Questions Presented)

II. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

A. Saltville Failed To Assign Cross-error as to The Circuit Court's Holdings as to the Doctrine of Merger and the Doctrine of Integrated Business Transactions.

The Town of Saltville repeatedly invokes the doctrine of merger to support its contention that only the deed should be considered in deciding whether the original grantors conveyed an easement or a fee simple to the railway company in 1909. Brief of Appellee at pp. 12-14, 22. The trial court ruled to the contrary and Saltville did not assign cross-error in its Brief in Opposition. While Bailey contends that the trial court's ruling was correct on the merits, Saltville is foreclosed from this argument for failure to assign cross-error as required by Rule 5:18.

The contentions of the parties were clearly submitted to the trial court. Saltville argued that the doctrine of merger applied while Bailey contended that the doctrine of integrated business

transactions was the proper rule. The Circuit Court in its letter opinion held as follows:

> The Court will not make a ruling whether the agreement is merged into the deed, but will accept defendant's argument that both the agreement and the deed should be considered as part of one transaction because the Court does not see a conflict between the documents.

The trial court thus decided the issue squarely and unambiguously.

Rule 5:18(b) of the Rules of the Supreme Court of Virginia provides that a "brief in opposition may include assignments of cross-error and, except in cases of appeals of right to this Court, no cross-error not then assigned will be noticed by this Court."

Where an appellee fails to assign cross-error, the finding of the trial court is the law of the case and is binding for the purposes of appeal. *E.g.*, *Today Homes, Inc. v. Williams*, 272 Va. 462, 634 S.E.2d 737 (2006). This rule applies even where the appellee is asserting a ground for affirmance of the trial court. *Virginia*

Polytechnic Institute and State University v. Quesenberry, 277 Va. 420, 674 S.E.2d 854 (2009).

Saltville failed to assign cross-error to the clear rulings of the trial court. Consequently, further consideration of the matter is precluded.

B. Cases Interpreting Virginia's 1887 Condemnation Statute Have No Applicability To The Present Case.

To support its position that the railway company acquired a fee simple interest by virtue of the 1909 Deed, Saltville cites this Court's decision in *Blondell v. Gunter*, 118 Va. 11, 86 S.E. 897 (1915). The *Blondell* case involved the application of Section 1079 of the Code of 1887, which provided that the title to land taken by condemnation proceedings "shall be absolutely vested in the company, county, city, town, institution, or asylum, in fee simple . . . ."

Obviously, the former eminent domain statute has no application to the 1909 transaction here at issue, because the statute was not employed by the railway company. Saltville's argument overlooks an

earlier decision of this Court holding that property transfers by agreement are subject to the rules of private contract, not eminent domain:

> Where such a corporation attempts to acquire title to lands by purchase from the occupant or supposed owner, we know of no rule of law which exempts it from the ordinary principles of law applicable to private individuals purchasing under like circumstances. A corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in the acquisition and use of its property, the exercise of its powers, and the transaction of its business, stands upon the same footing as private individuals.

Fulkerson v. Taylor, 102 Va. 314, 321, 46 S.E. 309, 311 (1904). Clearly, *Blondell* is based on the specific wording of the 1887 eminent domain statute and its holding has no application to this case.

III. CONCLUSION

The Appellant, Shirley Ann Bailey, requests that the Court reject Saltville's arguments based on the doctrine of merger and on the 1887 condemnation statute and hold that the Circuit Court of Washington County erred in deciding that the Town of Saltville had acquired a fee simple

title to the land by virtue of the quitclaim deed from Norfolk & Western Railway.

Respectfully submitted,
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CERTIFICATE

The undersigned counsel for Shirley Ann "Sissy" Bailey hereby certifies that Rule 5:26(d) has been complied with on October 14, 2009, and that he has caused fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Reply Brief of Appellant to be hand-filed with the Clerk of the Supreme Court of Virginia, and also has caused three (3) paper copies of the Reply Brief to be served, via U.S. Mail, postage prepaid, upon opposing counsel, Christen W. Burkholder, Christen W. Burkholder, P.C., P.O. Box 505, Bristol, VA 24203-0505, Counsel for the Appellee.

By: _____
Counsel for Appellant