In The

Supreme Court of Virginia

RECORD NO. 090989

SHIRLEY ANN "SISSY" BAILEY,

Appellant,

v.

TOWN OF SALTVILLE,

Appellee.

BRIEF OF APPELLEE

Christen W. Burkholder (VSB No. 28856)
CHRISTEN W. BURKHOLDER, P.C.
23 Moore Street
Post Office Box 505
Bristol, Virginia 24203
(276) 466-2600 (Telephone)
(276) 466-2122 (Facsimile)
cwblaw@bvunet.net

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

SUBJECT INDEX

Page

TABLE OF CITATIONS ii

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 4

STATEMENT OF FACTS 4

ARGUMENT 9

I. THE TRIAL COURT CORRECTLY HELD THAT A DEED FOR ALL THE LAND IN THE RAILROAD CORRIDOR VESTED A FEE SIMPLE INTEREST IN THE GRANTEE 9

II. ANY CONFLICT BETWEEN THE DEED AND THE AGREEMENT AS TO ISSUES OF TITLE MUST BE RESOLVED BY THE DEED ALONE 12

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE PHRASE "RIGHT OF WAY" IN THE AGREEMENT DID NOT NECESSARILY CONFLICT WITH THE DEED'S CONVEYANCE OF ALL THE LAND IN THE RAILROAD CORRIDOR 14

IV. THE TRIAL COURT CORRECTLY INTERPRETED THE PLAIN LANGUAGE SET FORTH WITHIN THE FOUR CORNERS OF THE 1909 DEED 21

CONCLUSION 23

CERTIFICATE 25

TABLE OF CITATIONS

Page

CASES

Beck v. *Smith*,
260 Va. 452, 538 S.E.2d 312 (2000) 12, 13

Blondell v. *Guntner*,
118 Va. 11, 86 S.E. 897 (1915) 15, 16

Bouche v. *Wagner*,
206 Or. 621, 293 P.2d 203 (1956) 18, 19

Brightwell v. *International-Great Northern Railroad Co.*,
41 S.W.2d 319 (Tex. Civ. App. 1931), *aff'd*,
49 S.W.2d 437 (Tex. 1932)..... 19

Charles v. *McClanahan*,
130 Va. 682, 108 S.E. 858 (1921) 22

Conner v. *Hendrix*,
194 Va. 17, 72 S.E.2d 259 (1952) 11

Davis v. *Henning*,
250 Va. 271, 462 S.E.2d 106 (1995) 10

Davis v. *Tazewell Place Associates*,
254 Va. 257, 492 S.E.2d 162 (1997) 14

Forster v. *Hall*,
265 Va. 293, 576 S.E.2d 746 (2003) 21

Hale v. *Davis*,
170 Va. 68, 195 S.E. 523 (1938) 10, 18

Hite v. *Town of Luray*,
175 Va. 218, 8 S.E.2d 369 (1940) 10

Joy v. *City of St. Louis*,
138 U.S. 1, 11 S. Ct. 243, 34 L. Ed. 843 (1891) 16

Keener v. *Union Pacific Railroad Co.*,
31 F. 126 (D. Colo. 1887) 16

King v. *Norfolk & Western Railway Co.*,
99 Va. 625, 39 S.E. 701 (1901) 10-11

Miller v. *Reynolds*,
216 Va. 852, 223 S.E.2d 883 (1976) 13

Missouri, Kansas & Texas Railway Co. v. *Roberts*,
152 U.S. 114, 14 S. Ct. 496, 38 L. Ed. 377 (1894) 16

Oliver Refining Co. v. *Portsmouth Cotton Oil Refining Corp.*,
109 Va. 513, 64 S.E. 56 (1909) 22

South and Western Railroad Co. v. *Mann*,
108 Va. 557, 62 S.E. 354 (1908) 10, 17

Territory of New Mexico v. *United States Trust Co. of New York*,
172 U.S. 171, 19 S. Ct. 128, 43 L. Ed. 407 (1898) 16, 17

Trout v. *Norfolk & Western Railway Co.*,
107 Va. 576, 59 S.E. 394 (1907) 22

Utsch v. *Utsch*,
266 Va. 124, 581 S.E.2d 507 (2003) 21

Woodson v. *Smith*,
128 Va. 652, 104 S.E. 794 (1920) 13, 14, 22

STATUTES

Va. Code § 55-11 (2007 & Supp. 2009) 11

Va. Code § 1079 (1887) 15

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 090989

SHIRLEY ANN "SISSY" BAILEY,

Appellant,

v.

TOWN OF SALTVILLE, VIRGINIA,

Appellee.

BRIEF OF APPELLEE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Comes now the Town of Saltville, a Virginia municipal corporation, by counsel, and tenders this brief of appellee in response to the arguments of the appellant in this matter. For the following reasons, the Town respectfully submits that the Circuit Court of Washington County interpreted the written legal instruments at issue in the present case according to fundamental and firmly established principles of Virginia law, and the Town prays that the decision below be affirmed.

STATEMENT OF THE CASE

In this litigation, the trial court adjudicated opposing claims of title to the land in a corridor formerly utilized by a branch line of the Norfolk & Western Railway which connected the towns of Glade Spring and Saltville, Virginia. Norfolk & Western had deeded its ownership to Saltville (App. 19). Ms. Bailey owns property bordering the railroad corridor (App. 24, 27). She disputed the railroad's title to the land in that corridor and contended that Norfolk & Western had held no ownership interest that the railroad company could transfer to the Town.

The pleadings below exhibited true copies of all the instruments of record in the chains of title for both Saltville and Bailey. The parties agreed that each side traced its title back to James L. White and Kate R. White. On July 2, 1909, the Whites executed a deed to Norfolk & Western conveying "all that certain strip or parcel of land" 80 feet in width, 40 feet on the north and 40 feet on the south of the centerline of the railroad track, containing 20.59 acres, more or less. The deed included a survey description of the centerline of the railroad track, and a covenant that the Whites would "warrant generally the land hereby conveyed." The deed was recorded on August 31, 1909 (App. 17-18).

The Whites also signed an agreement with Norfolk & Western on July 2, 1909. That agreement stated that the Whites would convey by deed of even date "the right of way eighty (80) feet wide through the farm" in exchange for the railroad making various improvements to their farm and other considerations such as building a siding on their land and giving the Whites the benefit of reduced freight charges for items shipped by rail. The agreement was recorded on September 20, 1909 (App. 42-44).

Despite the deed setting forth a conveyance of "all the land," Bailey argued that the use of the term "right of way" in the agreement necessarily restricted the deed, an instrument of higher dignity, to the conveyance of only an easement of limited duration. Bailey maintained that any property rights of the railroad had expired before Norfolk & Western transferred its interests to Saltville.

The legal effect of the written instruments at the center of this case presented pure questions of law for the court. Both sides submitted motions for partial summary judgment on the issues of title. The circuit court construed the deed according to well-established and fundamental principles of Virginia law. Giving the words "all the land" used in the deed their natural and ordinary meaning, the trial court held that the Whites had

conveyed a fee simple interest to the railroad, which was now vested in the Town (App. 78).

Subsequent to the adjudication of the title, the parties agreed to dismiss the remaining claims in the case without prejudice, and the trial court's ruling became final for the purposes of appeal (App. 86-89). Saltville respectfully submits there is no error in the decision complained of, and that the trial court's decision accordingly should be affirmed.

QUESTIONS PRESENTED

1. Did the trial court err in finding a fee simple conveyance when the deed transferred all that certain strip of land 80 feet in width to the railroad?

2. Did the trial court err in finding that the term "right of way" in the agreement does not transform the deed for "all the land" into the conveyance of a mere easement?

STATEMENT OF FACTS

The parties litigated competing claims of ownership over the land located in the corridor formerly occupied by a branch line of the Norfolk & Western Railway running from Glade Spring to Saltville, Virginia. The railroad corridor in controversy lies within the territorial jurisdiction of the Circuit Court of Washington County. According to the Interstate Commerce Commission's order effective April 12, 1993, rail service on the line ceased

in 1985 due to mining subsidence on a section of the track. The order permitted Norfolk & Western to abandon the branch line, and on June 16, 1994, the railroad deeded its interests in the corridor to Saltville (App. 19). Bailey owns land adjacent to the railroad line (App. 24, 27).

When the Town announced plans to convert the railroad corridor into a recreation trail, Ms. Bailey claimed the railroad had never owned the land in question and that it had held no title that could be transferred to Saltville. Bailey disrupted the Town's work on the railroad corridor and threatened to have the Town's employees and contractors arrested. Saltville filed suit to establish ownership of the disputed land and the Town's right to use and possess the same (App. 1).

The pleadings set forth all of the instruments of record in the respective chains of title for both the Town and for Ms. Bailey. Saltville's complaint set out and exhibited the chains of title (App. 2-10). The corresponding paragraphs of Bailey's answer (App. 32, ¶¶ 8 & 9) admitted that the exhibits were true copies of the recorded instruments. Likewise, Ms. Bailey's counterclaim attached the agreement between her predecessor in title and the railroad company (App. 37-38). The corresponding paragraph of Saltville's answer to her counterclaim agreed that the same was a true copy (App. 46). The pleadings and exhibits demonstrated that both the

Town and Bailey traced their chains of title back to James L. White and Kate R. White, who had executed an agreement and a deed of conveyance to Norfolk & Western in 1909.

The agreement (App. 42) recited that a controversy had arisen over the extent of an 1856 right of way to the Virginia and Tennessee Railroad Company, Norfolk & Western's predecessor, and that the parties desired "to settle and adjust all questions as to said right of way in an amicable manner." The Whites agreed to "convey by deed of even date herewith, to [Norfolk & Western], the right of way eighty (80) feet wide through the farm known as the Greenfield farm, with such additional width as may be necessary by reason of deep cuts and fills and the right of way through what is known as Stony Point place, extending from the centre of the track forty feet in an eastern or northerly direction, said width of forty feet to be increased where necessary on account of deep cuts and fills" (*Id.*). Ms. Bailey's deeds recite that her land was once part of the Greenfield farm (App. 24, 27). Her property borders the 80-foot wide railroad corridor at issue in this case.

In return for the deed, the railroad agreed to pay the Whites, to build a railroad siding on the Greenfield farm, to make various improvements to their property, and to give them the benefit of reduced freight charges for

items shipped by rail (App. 42-44). One paragraph of the agreement refers to “the land” embraced in the conveyance (App. 43). The agreement never uses the word “easement.” Likewise, the agreement contains no language stating that the railroad corridor will revert to the Whites in the event that the railroad ceases to operate.

The deed from the Whites to the railroad (App. 17) granted and conveyed “all that certain strip or parcel of land” bounded and described in the instrument. The land was precisely described as beginning at a point on the centerline of the track, as measured from a railroad mile marker, where the Whites’ land bordered on that of two other owners. The description states, “thence a strip of land 80 feet in width 40 feet on the north and 40 feet on the south side” of the centerline “together with such additional widths as are necessary for a single track railroad at deep cuts and fills.”

The description of the strip of land travels along the railroad line giving distances from railroad mile markers and references to points where the Whites’ land adjoins the land of others. The width of the strip conveyed alternates between 80 feet and 40 feet as the rail line passes back and forth through the Greenfield farm and the Stony Point place. The deed recites a conveyance of 20.59 acres, more or less. After this rather lengthy and detailed description, the deed next sets forth the survey calls giving the

bearings and distances for the centerline of the track. The deed concludes with a covenant that the Whites "will warrant generally the land hereby conveyed" (App. 18).

The deed never describes the conveyance as anything other than a conveyance of "land." The words "right of way" or "easement" never appear in that instrument. Likewise, the deed contains no reversionary clause, condition subsequent or other language stating that Norfolk & Western's property rights will terminate if the railroad no longer operates. Following recordation of the 1909 deed to the railroad, the deeds in Bailey's chains of title consistently name the railroad right of way line as being the boundary to her land (App. 24, 27).

While the parties agreed that the 1909 deed was in the chain of title for each side, they disputed the meaning and legal effect of that instrument. Saltville submitted that Norfolk & Western had acquired full fee simple ownership of the railroad corridor, which it subsequently conveyed to the Town. Bailey contended that Norfolk & Western had acquired only limited rights to the corridor, which were extinguished prior to the conveyance from the railroad to the Town.

With all of the relevant legal instruments before the trial court, both parties moved for summary judgment as to the issues of title (App. 53-56,

57-60). After the submission of comprehensive written briefs and oral argument by the parties, the circuit court issued a letter opinion dated December 15, 2006, holding that the deed in question had conveyed a fee simple interest to the railroad which subsequently vested in the Town of Saltville (App. 78). Accordingly, the trial court granted Saltville's motion for summary judgment and denied the cross-motion by Bailey. An order incorporating the letter opinion was entered on January 3, 2007 (App. 83).

Thereafter, the parties agreed to dismiss all remaining claims in the litigation without prejudice so that the trial court's adjudication of the title would become final for the purposes of appeal. From a final order entered on February 18, 2009 (App. 86), Bailey now appeals. She repeats her argument that the agreement between the Whites and the railroad should restrict the nature of the title transferred by the deed. For the following reasons, Saltville respectfully argues there is no merit in Bailey's position, and the trial court should accordingly be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT A DEED FOR ALL THE LAND IN THE RAILROAD CORRIDOR VESTED A FEE SIMPLE INTEREST IN THE GRANTEE.

The ownership claims of both parties depend upon the nature of the interest conveyed by Mr. and Mrs. White to the Norfolk & Western Railway

Company in 1909. The granting clause of the deed reads thus: "the parties of the first part do grant and convey unto the party of the second part all that certain strip or parcel of land situate in the County of Washington and State of Virginia, bounded and described as follows." Thereafter, the deed sets forth a precise description of a "strip of land 80 feet in width 40 feet on the north and 40 feet on the south" side of the centerline of the railroad track as it travels through the Greenfield farm, part of which is now Bailey's property. The strip of land is said to contain 20.59 acres more or less, and the deed gives bearings and distances for the centerline of the railroad track. Immediately following the conclusion of the description, the deed states, "And the parties of the first part covenant that they will warrant generally the land hereby conveyed" (App. 17-18).

Under familiar principles, deeds are to be construed by giving the words used their natural and ordinary meaning. *E.g.*, *Davis* v. *Henning*, 250 Va. 271, 274, 462 S.E.2d 106, 108 (1995); *Hale* v. *Davis*, 170 Va. 68, 71, 195 S.E. 523, 524 (1938). The language in the deed is to be taken most strongly against the grantor and most favorably to the grantee. *Hite* v. *Town of Luray*, 175 Va. 218, 224, 8 S.E.2d 369, 371 (1940); *South and Western Railroad Co.* v. *Mann*, 108 Va. 557, 559, 62 S.E. 354, 355 (1908); *King* v. *Norfolk & Western Railway Co.*, 99 Va. 625, 628, 39 S.E. 701, 702

(1901). It is the duty of the court to give the proper meaning to every word used in the instrument if possible. Likewise, it is not permissible to interpret that which has no need of interpretation. *Conner* v. *Hendrix*, 194 Va. 17, 25, 72 S.E.2d 259, 265 (1952).

The deed from the Whites to Norfolk & Western describes the conveyance as "all that certain strip or parcel of land." The description given by metes and bounds is a "strip of land" 80 feet in width, being 40 feet on either side of the centerline of the railroad track. At the conclusion of the instrument, the Whites covenant that they will warrant generally "the land hereby conveyed." When the quoted words are given their natural and ordinary meaning, the conclusion is inescapable that the Whites transferred complete ownership to Norfolk & Western of the land located within the 80-foot wide railroad corridor.

Nowhere in the deed is the interest being granted to the railroad by the Whites described as anything other than a conveyance of land. There are no words of limitation anywhere in the deed to modify the words of grant. *See* Va. Code § 55-11 (2007 & Supp. 2009). There is no reversionary clause or condition subsequent. No language restricts the use of the property or establishes a termination date for Norfolk & Western's property rights. Nothing in the deed states that the grant is restricted to an

easement, which will terminate in the event that the railroad ceases operations.

Ms. Bailey's argument to restrict or reduce the scope of the ownership interest acquired by Norfolk & Western from the Whites necessarily asks the court to ignore the plain and ordinary meaning of the words "all that certain strip or parcel of land," "strip of land" and "the land hereby conveyed." Bailey's position is completely contrary to the principles of Virginia law set forth above. Accordingly, the Town of Saltville respectfully submits that "all the land" clearly and naturally means a fee simple interest in the land being conveyed. Therefore, Ms. Bailey's claims of ownership are not well founded under the law of Virginia and should be denied.

II. ANY CONFLICT BETWEEN THE DEED AND THE AGREEMENT AS TO ISSUES OF TITLE MUST BE RESOLVED BY THE DEED ALONE.

Ms. Bailey asserts that the phrase "right of way" necessarily and as a matter of law means "only an easement" and that the language of the agreement, therefore, must prevail over the terms of the deed. Bailey's argument cannot succeed, however, because under the doctrine of merger any issues of title must be determined by the deed alone, which is an instrument of higher dignity than the contract. *Beck* v. *Smith*, 260 Va. 452, 455, 538 S.E.2d 312, 314 (2000). Under well-settled principles of law, a

deed is a transfer of title. The deed is the final expression of the agreements between the parties as to every subject which the deed undertakes to deal with and any conflicts between the terms of the agreement and the terms of the deed are resolved by the deed. *Id*. at 456, 538 S.E.2d at 314-15; *Woodson* v. *Smith*, 128 Va. 652, 656, 104 S.E. 794, 795 (1920). Therefore, even if Bailey's construction of the phrase "right of way" in the agreement is correct, the deed's grant of "all the land" is what must determine the nature of the title at issue in this case.

It is true that certain provisions of an agreement for the sale of real estate may escape the doctrine of merger and survive the execution of a deed: (1) if they do not affect the title to the property; (2) if they are not addressed in the deed; and (3) if they do not conflict with the deed. *Beck*, 260 Va. at 456, 538 S.E.2d at 315. Only those agreements which do not qualify or in any way affect the title to the land will survive and not be merged into the deed. *Miller* v. *Reynolds*, 216 Va. 852, 855-56, 223 S.E.2d 883, 885 (1976).

By contrast, in the present case, Bailey seeks to use the agreement to change the very nature and quality of the title transferred to the railroad by the deed at issue. Based on the agreement, she asks the court to re-write the deed's unambiguous transfer of all the land in the 80 foot wide

railroad corridor and to convert that transfer into a mere easement, which is clearly less than all the land. Her construction of the phrase "right of way" in the agreement presents an irreconcilable conflict with the terms of the deed as to the passage of title. Therefore, the deed must prevail. *Davis* v. *Tazewell Place Associates*, 254 Va. 257, 263-64, 492 S.E.2d 162, 165 (1997); *Woodson*, 128 Va. at 656, 104 S.E. at 795.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE PHRASE "RIGHT OF WAY" IN THE AGREEMENT DID NOT NECESSARILY CONFLICT WITH THE DEED'S CONVEYANCE OF ALL THE LAND IN THE RAILROAD CORRIDOR.

The lynchpin of Ms. Bailey's position is that the words "right of way" in the agreement should, by operation of law, rewrite the deed's grant of "all the land" and preclude the transfer of any ownership interest other than a mere easement which exists only for so long as the railroad operates on the line. Her position requires the court to ignore the ordinary and natural meaning of the words used in the deed. To do so, the court must depart from Virginia's long established and well-settled rules for the construction of deeds, which are set forth in section I of this argument. The court must also set aside the doctrine of merger discussed in section II of this argument. In addition, there are case authorities predating the 1909 deed and

agreement at issue which do not support Ms. Bailey's narrow and restrictive interpretation of the phrase "right of way."

By at least as early as 1887, twenty-two years before the 1909 instruments at issue in the present case, Virginia had recognized that a railroad company could acquire and hold a fee simple title to the corridor of land containing the railroad's "right of way." Section 1079 of the 1887 Code required railroads to obtain fee simple ownership of any land condemned for the railroad line. *Blondell* v. *Guntner*, 118 Va. 11, 12, 86 S.E. 897, 897 (1915). In this case, the railroad had acquired 4.2 acres of Blondell's land by condemnation and subsequently sold a smaller parcel of that acreage to Guntner. Blondell brought an action in ejectment against Guntner claiming that the land had reverted to Blondell because it was no longer held by the railroad. The court rejected Blondell's position and affirmed the judgment in favor of Guntner, who had obtained title from the railroad. *Id*. at 14-15, 86 S.E. at 898.

Blondell shows that a railroad obtained a fee simple interest when condemning land for its right of way. Nevertheless, Bailey contends that the railroad in the present case should be restricted to an easement of limited duration based upon the phrase "right of way" in the agreement, even though Norfolk & Western purchased the property and obtained a

deed for all the land in the disputed corridor. Such a result is completely at odds with the reasoning of *Blondell*. Certainly the railroad should be able to acquire the same ownership interest by purchase that it was authorized to take by condemnation.

Additionally, in 1898 the Supreme Court of the United States considered the meaning of the term "right of way." *Territory of New Mexico* v. *United States Trust Co. of New York*, 172 U.S. 171, 19 S. Ct. 128, 43 L. Ed. 407. The court stated as follows:

> The term "right of way" has a twofold significance. It is sometimes used to mean the mere intangible right to cross, -- a right of crossing, a right of way. It is often used to otherwise indicate that strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed.

Id. at 182, 19 S. Ct. at ____, 43 L. Ed. at ____ *citing Keener* v. *[Union Pacific] Railroad Co.*, 31 F. 126, 128 (D. Colo. 1887). The court went on to note:

> Mr. Justice Blatchford said in *Joy* v. *[City of] St. Louis*, 138 U.S. 1, 44, 11 S. Ct. 243, 256, 34 L. Ed. 843, ____ (1891), "Now, the term "right of way" has a twofold signification. It is sometimes used to describe a right belonging to a party, -- a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed." That is, the land itself, not a right of passage over it. So, this court in *[Missouri, Kansas & Texas] Railway Co.* v. *Roberts*, 152 U.S. 114, 14 S. Ct. 496, 38 L. Ed. 377 (1894), passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee.

172 U.S. at 182, 19 S. Ct. at ____, 43 L. Ed. at ____. These Supreme Court of the United States precedents from the 1890s squarely reject the core proposition of Bailey's argument. They hold that a railroad "right of way" can refer to fee simple ownership of the land in the corridor where the roadbed is constructed. Accordingly, there is simply no merit in the proposition that "right of way" in the agreement must transform the deed by operation of law into the conveyance of something less than "all the land" described in that instrument.

In 1908, one year before the instruments at issue in this proceeding, this court decided *South and Western Railroad Co.* v. *Mann*, 108 Va. 557, 62 S.E. 354 (1908). The sole question for decision was what land had the railroad acquired by virtue of the deed at issue. The court held:

> We cannot fail to identify with reasonable certainty the ground intended to be included in the deed. As we have seen, it conveys a strip of land through the farm, extending for such width on each side of the centerline of the railroad, with such additional width at cuttings and embankments as may be required for the construction and maintenance of a double-track railroad on the . . . survey.

108 Va. at 560, 62 S.E. at 355. While the court clearly held that a strip of land had been conveyed by this deed, the court also used the term right of way. *Id*. at 558, 62 S.E. at 354.

In 1938, this court also held that the use of the term right of way in connection with a metes and bounds description would not convert the conveyance from a fee simple interest to a mere easement. *Hale*, 170 Va. at 71, 195 S.E. at 524. Where the deed in question gave a metes and bounds description, a fee was conveyed to the railroad even though the term right of way was used. However, where the deed used the language "a right of way over and through all of [the grantor's] other land" only an easement was thereby created. *Id*.

When speaking of the right of way, the 1909 agreement between the Whites and the Norfolk & Western specifically says that the right of way through the farm will be conveyed by the deed. The deed then gives a very precise description of the land being conveyed, including the metes and bounds of the centerline. The deed does not state that it is only conveying a right of passage over and through the White's farm. Therefore, the trial court correctly held that the deed conveyed a fee simple interest to Norfolk & Western.

The Oregon Supreme Court's decision in *Bouche* v. *Wagner*, 206 Or. 621, 293 P.2d 203 (1956) presents a fact pattern that is quite similar to the present case. The strip of land in question had been acquired by deeds dated 1921 and 1918, and it had been used for a logging railroad track.

The deeds contained metes and bounds descriptions of the strips, and one deed made a reference to "the railroad right of way herein conveyed." 206 Or. at 624, 293 P.2d at 206. In 1931 or 1932, use of the railroad was abandoned, and some of the rails and crossties were removed. The lumber company was dissolved in 1936 and subsequently quitclaimed its interest to the defendants. The plaintiffs were owners of property through which the corridor ran, and they based their claims of ownership upon the identical argument that is being asserted by Ms. Bailey here: that the company operating the railroad had obtained only an easement in the property which expired upon the cessation of railroad operations. *Id*. at 627-28, 293 P.2d at 207-08.

The Oregon Supreme Court thoroughly rejected this position and cited the Supreme Court of the United States precedents set forth above. *Id*. at 631, 293 P.2d at 209. The Texas Court of Civil Appeals also relied upon these same precedents when it considered the argument that "right of way" necessarily means an easement, and it likewise concluded that the 1871 deed at issue in that case had also transferred a fee simple title to the railroad. *Brightwell* v. *International-Great Northern Railroad Co.*, 41 S.W.2d 319 (Tex. Civ. App. 1931), *aff'd*, 49 S.W.2d 437 (Tex. 1932).

Saltville respectfully argues that Ms. Bailey's contention that the meaning of the term right of way was clearly established both in general usage and in legal usage as of July 2, 1909, as only the right to pass over lands owned by another is contrary to the authorities set forth herein and cannot be sustained. The foregoing authorities all support the rejection of Ms. Bailey's argument.

In addition, it must be noted that the word "easement" was as perfectly good a part of the legal vocabulary in 1909 as it is today. Therefore, under Ms. Bailey's assertion, it is quite surprising that "easement" never appears in either of the written legal instruments at the center of this case. She posits that the Whites employed the phrase "right of way" as a legal term of art to establish precisely the character of the title to be transferred to Norfolk & Western by the deed. If they intended to convey only an easement, it is clearly contradictory for them to then execute a deed for "all the land" in that corridor which the 1909 deed takes such pains to describe in excruciating detail. It makes far more sense to conclude, as the trial court did, that the term "right of way" in the agreement simply described the corridor of land being purchased by the railroad and that there was no conflict between the terms of the two instruments. Accordingly, there is no error in the circuit court's decision, and the same should be affirmed.

IV. THE TRIAL COURT CORRECTLY INTERPRETED THE PLAIN LANGUAGE SET FORTH WITHIN THE FOUR CORNERS OF THE 1909 DEED.

Ms. Bailey maintains that the trial court should have interpreted the language of the deed based upon the meaning that she ascribes to the words "right of way" in the agreement. However, when the language of a deed is clear, unambiguous, and explicit, a court interpreting it should look no further than the four corners of the instrument under review. *E.g.*, *Utsch* v. *Utsch*, 266 Va. 124, 129, 581 S.E.2d 507, 509 (2003). In such cases, parol evidence of the circumstances at the time of the deed's creation is not to be considered in giving effect to the clear, unambiguous, and explicit language of the deed. *Forster* v. *Hall*, 265 Va. 293, 301, 576 S.E.2d 746, 750 (2003). Whether a deed or other writing is ambiguous is not a question of fact, but one of law. *Utsch*, 266 Va. at 129, 581 S.E.2d at 509.

In 1907, two years prior to Mr. and Mrs. White's conveyance to the railroad, this court had before it a separate case involving the Norfolk & Western. The plaintiff had executed a deed conveying a strip of land in fee simple to the railroad. The deed stated a consideration in money had been paid for the conveyance. The landowner claimed that as additional consideration for the transfer, the railroad had also agreed to construct a passageway for cattle from one side of the track to the other. The court

rejected the plaintiff's attempts to use parol evidence to contradict the terms of the deed. The court flatly stated: (1) parol evidence is inadmissible to alter or contradict the legal import of a deed; and (2) parol evidence is incompetent to add any covenant to a deed, or to enlarge or contradict any covenant or create a reservation. *Trout* v. *Norfolk & Western Railway Co.*, 107 Va. 576, 582, 59 S.E. 394, 397 (1907).

In 1909, the very same year as Mr. and Mrs. White's deed, this court cited *Trout* again and held "no rule is better settled than that where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed." *Oliver Refining Co.* v. *Portsmouth Cotton Oil Refining Corp.*, 109 Va. 513, 521, 64 S.E. 56, 59 (1909). Consistent with the principles applicable to the doctrine of merger, this court has repeatedly held "the deed must be regarded as the sole and final expression of the agreement between the parties as to every subject which it undertakes to deal with. All inconsistencies between the prior contract and the deed must be determined by the later alone, and previous negotiations or agreements, verbal or written, cannot be set up for the purpose of contradicting it. *E.g.*, *Charles* v. *McClanahan*, 130 Va. 682, 686, 108 S.E. 858, 860 (1921); *Woodson*, 128 Va. at 656, 104 S.E. at 795.

Even if Ms. Bailey could succeed in establishing her argument that "right of way" as a matter of law can only mean an easement of limited duration, the case authorities set forth above as well as the doctrine of merger discussed in section II, would still prevent her from using the agreement to rewrite the plain language contained in the deed itself. Bailey may not set up other agreements, documents or testimony in an effort to contradict the plain meaning of the deed whereby the Whites conveyed to the Norfolk & Western "all that certain parcel or strip of land" in the railroad corridor. As a matter of law, this deed is plain, clear and unambiguous. It vested the Norfolk & Western with a complete fee simple title to the land in question, which the railroad subsequently deeded over to the Town of Saltville, and the circuit court committed no error when it so found.

CONCLUSION

For the foregoing reasons, the appellee, Town of Saltville, Virginia, respectfully submits that the opinion dated December 15, 2006 and the order entered on January 3, 2007 by the Circuit Court of Washington County in this proceeding contain no errors of law and should be affirmed.

TOWN OF SALTVILLE, VIRGINIA

By Counsel

CHRISTEN W. BURKHOLDER, P.C.
23 Moore Street
Post Office Box 505
Bristol, VA 24203-0505
(276) 466-2600 Voice
(276) 466-2122 Fax
cwblaw@bvunet.net

By: Christen W. Burkholder
Christen W. Burkholder
VSB No. 28856
Counsel for Appellee
Town of Saltville, Virginia

CERTIFICATE

This is to certify that on this 30th day of September, 2009, counsel for the appellee has caused fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing brief of appellee to be filed by hand with the Clerk of the Supreme Court of Virginia and has caused three (3) paper copies of the foregoing brief of appellee to be served on counsel for the appellant by first class mail, postage prepaid, in compliance with Rule 5:26(d). Counsel served:

James R. Henderson, IV, Esq.
Henderson & Forster, PLLC
208 West Main Street, Suite 300
Post Office Box 487
Tazewell, VA 24651

Counsel for Appellant
Shirley Ann Bailey

By: Christen W. Burkholder

Christen W. Burkholder
VSB No. 28856
Counsel for Appellee
Town of Saltville, Virginia