SUPREME COURT OF FLORIDA

CASE NO.: 70,845

FILED
JUL 12 1987
CLERK, SUPREME COURT
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Deputy Clerk

CONWAY LAND, INC., etc., et al.,

Defendants, Petitioners,

vs.

DAVID E. TERRY, et al.,

Co-Defendants, Respondents.

_____/

PETITIONERS' BRIEF
(with separately bound Appendix)

Fletcher G. Rush
RUSH, MARSHALL, BERGSTROM, REBER, GABRIELSON & JONES, P.A.
55 E. Livingston Street
P. O. Box 3146
Orlando, FL 32802
(305) 425-6624

John A. Reed, Jr.
LOWNDES, DROSDICK, DOSTER, KANTOR & REED, PROFESSIONAL ASSOCIATION
215 North Eola Drive
Post Office Box 2809
Orlando, FL 32802
(305) 843-4600

Attorneys for Defendants, Petitioners
CONWAY LAND, INC., etc., et al.

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Statement of the Case and Facts

This case arises out of a condemnation proceeding in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. Conway Land, Inc., a dissolved Florida corporation, and parties claiming under it were collectively referred to in the trial court as the "Brunetti defendants." They are the Petitioners herein. As a result of the condemnation, the fee simple title to land owned by the Brunetti defendants was taken. Fair compensation for the real property was found by the jury to be $264,000.

The Petitioners derived title to the real property under two deeds executed to predecessors in title by George Terry and Mary E. Terry, his wife, and Magnolia Ranch, Inc., a Florida corporation. Both deeds contain an identical reservation of rights under an oil and gas lease which encumbered the property at the time of the conveyance but which all parties agree has since expired. A copy of one of the deeds is in the Appendix as item #4.

The Respondents, David E. Terry, Mary E. Terry and George A. Terry, Jr., were also defendants in the circuit court action. For convenience, they will be referred to as "the Terry respondents." The Terry respondents claim to be successors in interest to Magnolia Ranch, Inc. and *entitled to participate* in the condemnation award by reason of rights reserved in the deeds to the Petitioners' predecessors in title.

After the entry of the final judgment in the eminent domain proceeding, the Circuit Court held that the reservation created

no compensible interest in the Terry respondents and granted a motion for summary judgment for the Petitioners. The District Court of Appeal for the Fifth District, in a decision rendered on 16 June 1987, held that the reservations created a vested interest in real property which entitled the Terry respondents to compensation from the eminent domain award. Terry, et al. v. Conway Land, Inc., etc., et al., ___ So.2d ___ (Fla. 5th DCA 1987), 12 FLW 1136 (1987) (Appendix #1). Consequently, the judgment of the Circuit Court was reversed. The Petitioners filed a timely motion for rehearing in the District Court (Appendix #2) which was denied (Appendix #3).

The deed reservation in question is quoted in full in the opinion of the District Court of Appeal and reads as follows:

> SUBJECT HOWEVER, to the following:
>
> 1. Taxes and assessments of the County of Orange, Florida, for the year 1954.
>
> 2. That certain oil, mineral, and gas lease and agreement entered into between Magnolia Ranch, Inc., George Terry and Mary Elizabeth Terry, his wife, as parties of the first part, or lessors, and Warren Petroleum Corporation, which said lease and agreement is dated the 24th day of June, 1953, and recorded in Deed Book 951 at page 230-8, in the public records of Orange County, Florida, the rental with respect to which is on an annual basis of fifty cents (50c) per acre, which said oil, mineral and gas lease and agreement to the extent that it embraces the lands aforesaid is hereby assigned, transferred and set over unto party of the second part, the annual rental thereof with respect to which shall be prorated between Magnolia Ranch, Inc. and the party of the second part herein as of the date hereof, except however, parties of the first part do hereby specifically reserve for the account, use, and benefit of Magnolia Ranch, Inc., its successors and assigns forever, one-half of any and all royalties that may be paid or obtained from the lands aforesaid on account of any oil, mineral, minerals, or gas which may be taken from said real property herein

conveyed, provided however, this reservation shall not apply to participation in delay rental which may be paid on account of existing or any future oil, mineral and gas leases and arrangements affecting said real property.

Jurisdictional Issue

Whether the Supreme Court of Florida has jurisdiction to review the decision of the District Court of Appeal, supra, under Section 3(b)(3) of Article V of the Florida Constitution on the ground that the decision expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of law.

Summary of Argument

The majority opinion of the District Court of Appeal recognized the opinion of the Florida Supreme Court in Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939), but failed to apply the rule of decision in Miller to the essentially similar fact situation presented by the record herein. Such action created an express and direct conflict between the District Court's decision and Miller and thereby conferred discretionary jurisdiction on the Florida Supreme Court under Section 3(b)(3) of Article V of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). The conflict was clearly pointed out in the dissenting opinion of Judge Harris which may be referred to by the Court in determining the existence of its discretionary jurisdiction. David v. State, 369 So.2d 943 (Fla. 1979).

Argument

1. The Supreme Court has jurisdiction to entertain this appeal because the decision of the Fifth District Court of Appeal in this action directly conflicts with a decision of the Florida Supreme Court in the case of Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939).

In the Miller case, supra, the Florida Supreme Court held that a royalty interest in extracted oil constituted personal property. The District Court of Appeal, although aware of Miller, simply ignored its application to the substantially similar facts before it. The District Court in this case held that a reservation of a royalty interest in oil, minerals or gas that "may be taken" from real property constitutes a vested interest in real property. In so doing, the District Court placed itself in conflict with the Miller decision.

The error of the majority in the court below was recognized by the dissenting judge, who stated:

> The applicable language in the reservation provided:
>
> . . . except however, parties of the first part do hereby specifically reserve for the account, use, and benefit of Magnolia Ranch, Inc., its successors and assigns forever, one-half of any and all royalties that may be paid or obtained from the lands aforesaid on account of any oil, mineral, minerals, or gas which may be taken from said real property herein conveyed. . . (Emphasis added.)
>
> Clearly this language does not vest title in the oil, gas or minerals as they exist in the real estate. It merely reserves the right to receive payment from the sale of said oil, gas and minerals once they are "taken from the said real property."
>
> The majority cite Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939) as adopting the view that a royalty interest in unsevered oil is an interest in real property. That is so. But Miller also adopts the view that an interest such as we have in the case at bar is not an interest in unsevered oil, gas and minerals and is, therefore, personal property.

* * *

> It is submitted that under the Miller decision this constitutes personal property.

* * *

> As indicated earlier I believe this is in direct conflict with our Supreme Court's ruling in Miller that such an interest in severed oil is personalty.

Had the District Court of Appeal applied the principle of the Miller decision to the essentially identical fact pattern presented in the present case, the appropriate conclusion would have been an affirmance of the judgment of the Circuit Court.

2. The Supreme Court should exercise its discretionary jurisdiction to correct the error of the Fifth District.

The District Court of Appeal not only rendered a decision in direct confict with a decision on the same point by the Florida Supreme Court, it committed a serious error in holding the reserved interest to be vested. Had it recognized the interest as contingent and not vested, it should have held the interest void under the rule against perpetuities. Section 689.22, Fla. Stat. 1985. Sound public policy counsels against holding that a perpetual speculative interest such as created by the reservation in question escapes the rule against perpetuities, that policy being the policy on which the rule itself is founded, namely that property should not be perpetually burdened by uncertain interests. The proper characterization and legal effect of reservations similar to that which was before the lower court are of great importance to land owners, title insurers, developers and governmental agencies which are called upon from time to time

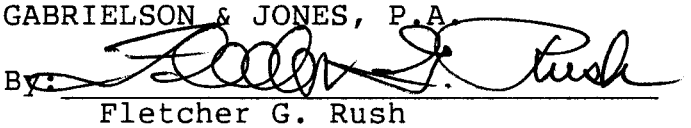
to exercise the power of eminent domain. For the foregoing reasons, this case presents questions of great public importance.

Conclusion

For the foregoing reasons, it is submitted that this Court has discretionary jurisdiction to entertain this appeal pursuant to Section 3 of Article V of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) by virtue of the conflict between the decision in the court below and the decision rendered by this Court in Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939). Furthermore, the case involves important questions of policy which are appropriate for decision by the Court and are of interest to a large segment of the public.

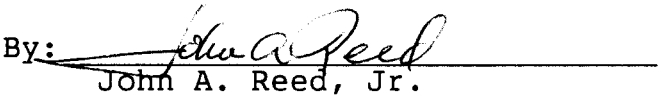
DATED this 15th day of July, 1987.

RUSH, MARSHALL, BERGSTROM, REBER, GABRIELSON & JONES, P.A.

By: 
Fletcher G. Rush

55 E. Livingston Street
P. O. Box 3146
Orlando, FL 32802
(305) 425-6624

LOWNDES, DROSDICK, DOSTER, KANTOR & REED, PROFESSIONAL ASSOCIATION

By: 
John A. Reed, Jr.

215 North Eola Drive
Post Office Box 2809
Orlando, FL 32802
(305) 843-4600

Attorneys for Defendants, Petitioners
CONWAY LAND, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Brief and separately bound Appendix thereto were furnished by U.S. Mail to ROBERT N. REYNOLDS and ARNOLD D. BARR, ESQS., 9100 S. Dadeland Blvd., Miami FL 33156, Attorneys for Co-Defendants, Respondents; and to RICHARD W. LASSITER, ESQ., P.O. Box 1273, Orlando, FL 32802, Attorney for Plaintiff, Respondent City of Orlando, this 15th day of July, 1987.

John A. Reed, Jr.