No. 32055 – *William R. Via v. Ralph Beckett and Joan Beckett*

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Albright, Chief Justice, dissenting:

I respectfully dissent to the majority opinion because I believe that a genuine issue of material fact exists concerning the location of the property line in this case. As the majority acknowledges, the language of the deed description for the Beckett parcel contains discrepancies. While both the Via deed and the Beckett deed specify the boundary at N 10° 30' W 150 feet, the Beckett deed description contains other language calling the boundary line into question. Specifically, the Beckett deed description states that the boundary is parallel to a boundary line along the Tobin Stover/Daniel Boone lot. That statement is inconsistent with the reference to N 10° 30' W 150 feet. Further, the Beckett deed description references certain monuments and markers, creating additional inconsistencies regarding the location of the disputed boundary. Even the surveys submitted into evidence resulted in contradictory findings regarding the location of the Via/Beckett boundary.

Despite the existence of those inconsistencies, the majority of this Court concludes that the circuit court was correct in granting summary judgment. In providing plenary review of a grant of summary judgment, "the benefit of the doubt" is to be given to the nonmoving party. *Taylor v. Culloden Pub. Serv. Dist.*, 214 W.Va. 639, 644, 591 S.E.2d 197, 202 (2003). Both the circuit court and this Court "must draw any permissible inference

from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). Furthermore, this Court explained in *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987), that "[i]f there is any evidence in the record from any source from which a reasonable inference in the nonmovant's favor may be drawn as to a material fact, the moving party is not entitled to a summary judgment." 178 W.Va. at 769, 364 S.E.2d at 782. A court does not have a right to "try issues of fact; a determination can only be made as to whether there are issues to be tried." *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995).

A subtle inclination may exist to grant summary judgment in particularly weak cases. As observed in *Nance v. Ball*, 134 So.2d 35 (Fla. App. 1961),

> Some cases are clearly disposable by summary judgment. There are also marginal cases posing colorable issues which the trial court may consider so weakly supported as to indicate the futility of a full hearing on the merits. In such a case, where adherence to the rule of caution results in a denial of summary judgment, the court may feel that there has been an unjustified extension of fruitless litigation. Our own experience attests an occasional impulse to amputate at once rather than face the prospect of surgery by painful stages, but herein lies the occasional margin of error.

134 So.2d at 37. In analyzing the issue of the propriety summary judgment, "[c]aution and discernment should go hand in hand where the power to enter summary judgment or decree is exercised, for such a power wields a dangerous potential which could have the effect of

trespass against fundamental and traditional processes for determining the rights of litigants." *Humphrys v. Jarrell*, 104 So.2d 404, 408 (Fla. App. 1958) (citations omitted).

In the present case, while the jury may well have resolved the issues in precisely the same manner as those issues were resolved through the summary judgment mechanism, the fact remains that it is the jury's question to answer, not the court's question. Based upon my opinion that a genuine issue of material fact exists regarding the location of the property boundary in the present case, I believe that summary judgment was improper in this case. I therefore respectfully dissent.

I am authorized to say that Justice Starcher joins me in this dissent.