

14-0219

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DATE 1-17-14

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA CLERK

JEFFREY NEAL WEATHERHOLT,
Plaintiff,

RS
DEPUTY

v.

Civil Action No. 13-C-52
Honorable H. Charles Carl, III

DANIEL ALLAN WEATHERHOLT and
ANITA DENICE WEATHERHOLT,
Defendants.

JUDGMENT ORDER

This matter came before the Court for a bench trial on December 11, 2013. The Plaintiff was present in person and by counsel, J. David Judy III, and the Defendants were present in person and by counsel, Jason R. Sites. Thereafter, Plaintiff filed Proposed Findings of Fact, Conclusions of Law and Final Order on December 20, 2013, and Defendants submitted a proposed Final Order, which was received by the Court on December 27, 2013.

Upon consideration of the testimony of the witnesses presented and exhibits introduced into evidence, the arguments of counsel, proposed orders submitted by both parties, and pertinent legal authority, the Court makes the following findings of fact and separate conclusions of law pursuant to Rule 52(a) of the West Virginia Rules of Civil Procedure:

Stipulations

The parties have stipulated to the following:

1. The parties have agreed and stipulated, as a matter of law, that a twenty feet (20') wide right of way was deeded to the Plaintiff and exists from Frosty Hollow Road/Hardy County Route 10/1 ("Frosty Hollow Road") to the 6.806 acre tract of real estate of the Plaintiff for purposes of ingress and egress, as demonstrated within the Plaintiff's deed, and through the

property currently owned by the Defendants. The right of way also crosses the real estate of Otis S. Weatherholt, Jr., et ux, before reaching Plaintiff's real estate.

2. The parties have agreed and stipulated that a twelve feet (12') wide utility easement was deeded to Plaintiff and exists on the east side of the twenty feet (20') access right of way from Frosty Hollow Road to the property of the Plaintiff through the real estate of the Defendants. The easement also crosses the real estate of Otis S. Weatherholt, Jr. et ux., before reaching Plaintiff's real estate.

3. The parties have agreed and stipulated that the twenty feet (20') wide access easement is ten feet (10') from either side of the centerline of the existing paved roadway for a total of twenty feet (20'), with the exception of the area at the entrance from Frosty Hollow Road and in the area of the "rock garden" near the home of the Defendants, which is also near the entrance of the access road off of Frosty Hollow Road.

Contested Issues

4. The Court finds that there are three issues for the Court to resolve: (1) the exact location of the twenty feet (20') wide road/access right of way; (2) the injunctive relief demanded by the Plaintiff concerning removal of obstructions from and usage of the rights of way and the related counterclaims in regards to the right of way by Defendants and; (3) whether the Plaintiff's water line under and through the property of the Defendants shall remain in its current location or be removed and relocated inside the twelve feet (12') utility easement.

Findings of Fact Regarding Access Easement

5. The Plaintiff, Jeffrey Neal Weatherholt, and the Defendant, Daniel Allan Weatherholt, are natural brothers. Otis S. Weatherholt, Jr. and Bette G. Weatherholt, his wife, are the parents of Jeffrey Weatherholt and Daniel Weatherholt. Ruth M. Barr is the maternal

grandmother of Jeffrey Weatherholt and Daniel Weatherholt and the mother of Bette Weatherholt.

6. Plaintiff is the fee simple owner of a tract of real estate containing 6.806 acres situate in South Fork District, Hardy County, West Virginia, as evidenced by that Deed recorded in the Office of the County Clerk of Hardy County, West Virginia, in Deed Book No. 247 at page 372, dated June 18, 1998, conveyed unto him from his grandmother, Ruth M. Barr, together with a deeded right of way stated therein for purposes of ingress and egress, twenty feet (20') in width from Frosty Hollow Road, County Route 10/1, to the real estate conveyed to the Plaintiff, together with a second right of way, twelve feet (12') in width, for purposes of placement of utility lines, pipes, hoses, cables, and other equipment and devices necessary for enjoyment of the 6.806 acre tract conveyed to the Plaintiff. The utility easement borders on the east side of the twenty feet (20') access right of way. Each of these easements are appurtenant to the fee simple ownership of the real estate of the Plaintiff.

7. The exact location of the Plaintiff's twenty feet (20') access easement and twelve feet (12') utility easement from Frosty Hollow Road to his real estate were not determined by metes and bounds because a survey was not completed of the easements. However, the approximate location of the twenty feet (20') access easement was "roughly shown" and drawn-in on the Plat of Survey of Plaintiff's real estate attached to the aforesaid deed at Page 374, and is depicted thereon as "farm road." Further, in the aforesaid deed to Plaintiff (Page 247) the location of the right of way was described as follows:

[W]hich right of way shall follow the larger portion of the right of way granted and conveyed by Grantor and Party of the First Part, and her now deceased husband, Victor Barr, to Otis Weatherholt, Jr., and Bette Weatherholt, Husband and Wife, and recorded in the Office of the Clerk of the County Commission of Hardy County, West Virginia, in Deed Book No. 116, at page 584, and said easement shall then continue twenty (20) feet in width, across Grantor's real

estate around and in front of the real estate granted and conveyed to Otis (Seymour) Weatherholt, Jr., and Bette (Gwenn Barr) Weatherholt, in the aforementioned deed, to the aforementioned 6.806 acres being conveyed by this document, and the later portion of which is roughly shown in the "Plat of Survey for Jeff Weatherholt" and is labeled as "Farm Road.

8. Plaintiff acquired sole and total fee simple ownership of the 6.806 acre tract by that subsequent Deed dated August 14, 2009, from Janet Lee Jarrett, formerly Janet Lee Weatherholt, and recorded in Deed Book 312, at page 786 in the Office of the County Commission of Hardy County, West Virginia.

9. Defendants, Daniel Allan Weatherholt and Anita Denice Weatherholt, his wife, are the owners of two separate tracts of real estate containing 3.055 acres and 8.753 acres, respectively, acquired from the aforementioned Ruth M. Barr by that Deed dated March 30, 2001, recorded in the Office of the Clerk of Hardy County, West Virginia, in Deed Book 260, at page 66. Attached to the aforementioned Deed is a Description of Survey for each of the tracts of real estate (Pages 70 and 71) and Plat of Survey (Page 69), which Descriptions each specifically reference the existence of the access right of way, and upon which Plat the approximate location of the access right of way from Frosty Hollow Road through the two tracts of real estate of the Defendants is drawn-in.

10. Located between the real estate owned by the Plaintiff and the Defendants is another tract of real estate containing 4.006 acres conveyed from Ruth M. Barr to Otis and Bette Weatherholt, by that Deed dated May 7, 2002, recorded in the Office of the County Clerk of Hardy County, West Virginia, in Deed Book 266 at page 700. Attached to the aforesaid Deed are a Description of Survey (Pages 704 and 705) and Plat of Survey (Page 703) demonstrating the existence of and approximate location of the twenty feet (20') wide access right of way as it crosses the Defendants' real estate and which also crosses this 4.006 acre tract of real estate of

Otis and Bette Weatherholt, to the real estate of the Plaintiff. The width of the access right of way of Otis and Bette Weatherholt, from Frosty Hollow Road, is of unspecified width. This is the same right of way and exists on exactly the same path as the right of way deeded to the Plaintiff by Ruth M. Barr.

11. Otis and Bette Weatherholt were and are the owners of a second tract of real estate originally containing 1.000 acres more or less, conveyed to them by deed from Victor Barr and Ruth M. Barr, the parents of Bette Weatherholt, dated November 18, 1966, a copy of which is recorded in the Office of the County Clerk of Hardy County, West Virginia, in Deed Book No. 116 at page 584. This 1.00 acre tract is now completely included within the bounds of the 4.006 acre tract as shown on the aforesaid Plat of Survey (Deed Book 266, Page 703).

12. Based upon the testimony of Otis and Bette Weatherholt, the Court finds that they either constructed a new road in parts or improved an existing roadway to install a driveway/roadway from Frosty Hollow Road over the property of Victor and Ruth M. Barr, and now owned by Defendants herein, for access to their original 1.00 acre parcel, upon which 1.00 acre tract Otis and Bette Weatherholt thereafter constructed a home. Their uncontroverted testimony further revealed that this roadway was installed and utilized by them as their right of way since approximately the mid-to-late 1960s, at or about the time they constructed their home in which they continue to reside, and they have continued to utilize this same roadway through the present date.

13. Based on the testimony at trial, the Court finds that in approximately 2005 or 2006, Otis and Bette Weatherholt had their access road paved from the entrance at Frosty Hollow Road, through the two tracts of property of Defendants, to their home. This pavement was installed in approximately the same location as the existing road right of way also shared in part

at this point in time by Plaintiff and Defendants. The pavement was placed on average, twelve feet (12') wide. Specifically, Bette Weatherholt testified that the pavement was placed over the existing roadway, with a slight deviation of a few feet near the rock garden. Otis Weatherholt testified that he had the road paved over the old roadway, but he enlarged the opening at the entrance of Frosty Hollow Road. Defendant Daniel Weatherholt testified that the pavement was installed where the roadway used to be except at the entranceway and the area around the rock garden and that the original driveway was "further over," meaning away from the rock garden.

14. Based upon all testimony and evidence, the Court finds that the paved roadway as it currently exists is located over the exact location of the original roadway with the exception of the entranceway and the area around the rock garden of Defendants.

15. The Court finds that by agreement of the parties and as the evidence supports, the exact location of the Plaintiff's twenty feet (20') wide access right of way, as it crosses the Defendants' real estate, should be ten feet (10') on either side of the centerline of the existing paved roadway except in those two areas noted above.

16. The paved portion of the access right of way lies within the twenty feet (20') easement. At the time of paving, the entrance to the easement at Frosty Hollow Road was expanded and widened, and the paved road was shifted slightly to the west in the area around the rock garden located on the Defendants' real estate. These slight changes in the location of the roadway were done by Otis Weatherholt, with the knowledge and acquiescence of Plaintiff and Defendants and have been used without objection since 2005 or 2006 when the roadway was paved. The result is that the centerline of the road in these locations is not the exact centerline of the twenty feet (20') easement as it existed at the time of the grant.

Findings of Fact Regarding Injunctive Relief

17. From the evidence submitted in the form of picture exhibits, and from the testimony at the trial of this case, the Court finds that the Defendants have constructed, caused, allowed and permitted to be placed and remain, as constant obstructions within the bounds of the twenty feet (20') wide access right of way, certain obstructions and hazards, including but not limited to boards with nails protruding to serve as "speed bumps" (Pl.'s Trial Ex. 5, pictures 1 and 2) and children's toys and equipment (Pl.'s Trial Ex. 5, pictures 3 and 4).

18. The Defendants further constructed and/or placed two wooden out-buildings along the west side of the access right of way. Although not constructed within the bounds of the twenty feet (20') wide easement, the doors of the buildings do open into the bounds of the right of way (Pl.'s Trial Ex. 5, pictures 4, 5, and 6), the doors swing open into the access right of way, and persons utilizing the two buildings must stand within the bounds of the right of way to gain entry and exit into the buildings.

19. The Court further finds that all of the obstructions and hazards as described in Paragraph Nos. 17 and 18 above, with the exception of the wooden speed bumps, have been and are "habitual" in occurrence and nature. Although not making the driveway completely impassible, the obstructions are so close to the twelve feet (12') wide paved roadway so as to have made passage inconvenient and at times unsafe for both Plaintiff and Defendants.

20. Plaintiff's spouse gives piano lessons from their home and has approximately fifteen students, most of who are brought to the home by their family members, and this has caused an increase in the use of the right of way. Due to safety concerns of Defendants and Otis and Bette Weatherholt, and after complaints to Plaintiff concerning the need for these persons to reduce their speeds, the students and family members were instructed to slow down and maintain

a safe speed while traversing the right of way through Defendants' property. The testimony and evidence presented at trial gave no estimate of any unsafe or unreasonable speed by any person using the roadway. The primary complaint of Defendants and Otis and Bette Weatherholt were for the potential safety of the Defendants' children, ages 15, 11, and 7, while playing in and alongside the roadway. However, no evidence was offered at trial that demonstrated that any of Defendants' children were ever in danger by anyone traveling on the right of way, and the concerns expressed were general in nature.

21. No accidents or injuries have resulted from this use of the right of way. The only specific instances demonstrating any danger to persons was from the testimony of Otis Weatherholt, who testified that he once backed into the road and nearly struck another vehicle, and the testimony of Defendant Daniel Weatherholt, who testified that he was nearly struck by a vehicle while coming out of his barn one morning. Neither of these allegations were the result of alleged excessive speed of any persons using the roadway.

22. Plaintiff testified that the Defendant Daniel Weatherholt attempted to stop him while using the right of way and that piano students and guests have been bothered while using the right of way.

23. By Order of this Court entered July 25, 2013, the Court granted a Temporary Restraining Order that the Defendants may place signs on their property noting that children are at play and to reduce speed, provided the signs do not obstruct traffic in any manner near the roadway. The Court further ordered that anyone using the right of way should use moderate and careful speed because of Defendants' children who reside near the roadway. Bette Weatherholt testified that a "5 mph" speed sign has now been placed on a tree alongside the right of way.

Plaintiff testified that the piano lesson students and families were instructed not to speed and to be careful, and they have done so.

24. While at no time have the Defendants caused the Plaintiff's access easement to be completely impassible nor has Plaintiff been completely denied access to his property, this Court did previously find that the purported wooden speed bumps with nails protruding caused a "hazardous" situation for persons and vehicles using the right of way. Pursuant to an Ex Parte Order of this Court entered on July 17, 2013, Defendants removed the wooden speed bumps and nails, filled holes dug along the roadway with gravel, and removed toys placed near the roadway. The Court also ordered the Defendants to cease parking any vehicles or placing further obstructions within the easement.

25. The Temporary Restraining Order required the Defendants to keep the twelve feet (12') blacktop roadway free of obstruction, prohibited further holes to be dug adjacent to the paved roadway, and prohibited obstructions placed near the paved roadway, thereby ordering that the Defendants could not block the paved driveway and could not place anything along the edge of the roadway.

26. The Court finds based upon Plaintiff's Time-Line (Pl.'s Trial Ex. 11), that Defendants nailed wooden speed bumps into the paved roadway on May 6, 2013. Defendants removed the wooden speed bumps after objection by Plaintiff on May 7, 2013. On or about May 28, 2013, the Defendants again nailed wooden speed bumps into the paved roadway, which they refused to remove after objection by Plaintiff, thus necessitating the filing of this action by Plaintiff on July 16, 2013, seeking temporary and permanent injunctive relief.

27. Defendants failed to prove that the Plaintiff caused the hazardous condition created by the nails protruding from the wooden speed bumps. The Court further finds no

factual basis upon which to allow speed bumps or any other obstructions or impediments to be placed in the twenty feet (20') wide access easement.

28. The approximately twelve feet (12') wide paved roadway is not of sufficient width to permit two vehicles to pass comfortably and safely and there is a need to drop off the side of the paved roadway to permit two cars to pass. There is a need for Plaintiff to maintain the access right of way, to add pavement or gravel along the travel or surface as a berm, and to take such other measures to maintain, improve and repair the roadway.

29. The Court finds that Otis Weatherholt personally expended the cost of paving the shared roadway from Frosty Hollow Road through the entire course of the road as it crosses Defendants' real estate. This was done without the agreement of the Plaintiff or Defendants; however, each of the parties has utilized and benefited from the paved roadway for a period of at least seven years. The Plaintiff has never contributed to the maintenance or repair of the right of way.

30. The Court finds that each of the parties should be required to assist in the "agreed upon" maintenance of the improvement of the pavement on the roadway in an equal manner, except that any party who it can be proved actually caused specific damage to the paved roadway, routine wear and tear excepted, should be solely liable for repairing any specific damage. This in no way means that the parties must repave or make major expenditures to the roadway. Any such repairs, maintenance, or improvements should be done only by agreement of the parties; otherwise, only the party undertaking the repairs, maintenance, or improvements shall be responsible for payment. Therefore, any "agreed upon" repairs, maintenance, or improvements on the roadway should be paid equally by all parties using the road.

Findings of Fact Regarding Utility and Water Line Easement

31. The location of the twelve feet (12') wide utility easement should be twelve feet (12') from the eastern boundary of the final determined location of the Plaintiff's twenty feet (20') wide access easement and the easement is appurtenant to the fee simple ownership of Plaintiff's real estate.

32. From the testimony and evidence introduced at trial, the Court finds that there are actually no utilities located within the Plaintiff's deeded twelve feet (12') utility right of way from Frosty Hollow Road to the real estate of the Plaintiff. The electric lines and telephone lines are located on existing poles which provide electric and phone service to the 4.066 acre tract of Otis and Bette Weatherholt and thence continue to the 6.806 acre tract of Plaintiff.

33. The Court further finds from the evidence, testimony, and admission of Plaintiff that the Plaintiff's water line from Frosty Hollow Road, which crosses under and through the real estate of the Defendants, is not located within the bounds of the twelve feet (12') wide utility easement granted to Plaintiff.

34. From the testimony and evidence at trial, the Court finds that the Plaintiff's water line was constructed in 1998 or 1999 with the knowledge and assistance of Otis Weatherholt, through what was then property owned by Ruth M. Barr, to the home of the Plaintiff. Based upon the uncontroverted testimony of Plaintiff, the Court finds that he did not obtain the permission of his grandmother, Ruth M. Barr, prior to constructing the water line outside the confines of his twelve feet (12') wide utility easement, that he built the water line in its current location with the knowledge and even assistance of his father, Otis Weatherholt, and that a friend of his father's installed the line in its current location after having trouble digging the line within the twelve feet (12') wide utility easement.

35. After installing the water line outside the confines of the utility easement, Plaintiff informed the owner, Ruth M. Barr, of the location of the water line and she did not object or take any subsequent action so long as she owned the property to have Plaintiff remove or relocate the water line.

36. Ruth M. Barr subsequently sold her real estate, through which the Plaintiff's water line was constructed, to Defendants by deed dated March 30, 2001. Defendant Daniel Weatherholt's testimony confirmed that he was aware of the location of the water line, as it crossed through and under his real estate, during the construction of his home in 2001. The Court finds that Otis Weatherholt and the Defendant Daniel Weatherholt had knowledge of the exact location of the water line as it crossed the real estate then owned by Ruth M. Barr.

37. Plaintiff, who is an attorney, prepared the deed to the Defendants and the deeds from his grandmother, Ruth M. Barr, to his 6.806 acre tract, and to his parents for their 4.006 acre tract. The deed to Defendants did not include language specifically referencing the twenty feet (20') wide access easement or the twelve feet (12') wide utility easement, but the deed did contain the recitation in the first paragraph (Deed Book 260, at Page 66) that the real estate was conveyed unto Defendants, "together with any and all improvements thereon, and all rights, rights of way, easements, waters, minerals, oil and gas and appurtenances thereunto belonging ..." and this same reference is contained in the Ad Habendum Clause on Page 67 of the deed.

38. The Plaintiff's deed (Deed Book 247, page 372) was recorded on June 18, 1998, in the Office of the Clerk of the County Commission of Hardy County, West Virginia. This deed from Ruth M. Barr to Plaintiff did contain specific language as to the existence and general locations of the twenty feet (20') wide access right of way and the twelve feet (12') wide utility

easement, which constitutes constructive notice to the public and Defendants of the existence of these easements.

39. The Defendants had actual knowledge of the existence and exact location of the Plaintiff's water line prior to constructing their home in 2001, a period of more than ten years, prior to objecting to it by the filing of their counterclaim in this action on August 8, 2013. Specifically, Defendant Daniel Weatherholt testified that he knew the Plaintiff had an access easement over the existing roadway from Frosty Hollow Road to his home and that he knew sometime in 2001 after receiving his deed from Ruth M. Barr, which was recorded on April 3, 2001, when he began excavating to build his home. Defendant Daniel Weatherholt also testified that although he was aware of the existence and location of the water line and access road easements, he was unaware of the deeded location of the twelve feet (12') wide utility easement and was unaware that the access road easement was twenty feet (20') in width until 2011.

40. The Court finds that the Defendants took no adverse action and made no objection to the Plaintiff as to the location of the water line from the fall of 2001 until the filing of the Counter Claim in this action by Certificate dated August 5, 2013, a period of more than ten years. The Court further finds that the Defendants acquiesced to the location of the water line for a period exceeding ten years.

Conclusions of Law

Location of the Access Right of Way and Utility Easement

41. As stipulated and agreed, Plaintiff does own and possess a twenty feet (20') wide access right of way from Frosty Hollow Road over and upon the real estate of the Defendants. This right of way was deeded to Plaintiff to provide ingress and egress to and from his real estate and Frosty Hollow Road, crossing the real estate now owned by Defendants, and also crossing

real estate now owned by Otis and Bette Weatherholt, all of which real estate was owned by Ruth M. Barr at the time she conveyed the 6.806 acre tract of real estate to Plaintiff. This right of way is appurtenant to Plaintiff's real estate.

42. Also by stipulation and agreement, the location of this twenty feet (20') wide access easement was agreed upon by the parties as being ten feet (10') on either side of the centerline of the paved roadway for a total of twenty feet (20'), with the exception of the area at the entranceway from Frosty Hollow Road and the area around the rock garden near the Defendants' home. The location of the right of way in these two areas is contested and shall be determined by the Court.

43. The Court finds that the twenty feet (20') wide right of way was not surveyed at the time of the granting of the easement to Plaintiff in June of 1998, and therefore, the location of the right of way should be ten feet (10') on either side of the centerline of the roadway as it existed at the time of the conveyance of the right of way. The evidence at trial indicates that the paved driveway now is not in the exact same location as it was then. The entranceway has now been expanded and covers what was the original roadway, and if shifted it is only a few feet one way or the other and not of significance as to the location of the original roadway. Therefore, the Court finds that the location of the right of way should be ten feet (10') on either side of the centerline of the now existing paved roadway as it leaves Frosty Hollow Road and travels onto the real estate of the Defendants. This centerline of the now existing paved roadway and entranceway shall be surveyed and the width of the right of way shall be ten feet (10') from either side of the centerline at this location. The centerline shall then continue with the roadway until it reaches a point near where the rock garden of Defendants begins on the east side of the paved roadway. Then the centerline shall be merged to the location of the right of way in its modified

form as set forth in Paragraph 44 below to accommodate, in a reasonably calculated manner, the location of the right of way as it passes the rock garden of Defendants.

44. The Court finds that the location of the original roadway was also slightly altered or shifted a few feet east of its original location at the time it was paved in the area around the rock garden of the Defendants. Therefore, the Court concludes that the location of the twenty feet (20') wide right of way as it passes the rock garden of Defendants near their home shall be twenty feet (20') measured from the edge of the existing pavement running along the east side of the road to a point running twenty feet (20') to the west. Once the existing paved roadway passes the rock garden of Defendants on both the north and south, the location of the twenty feet (20') wide access easement shall be merged or tapered back in a reasonable manner as quickly as possible to be ten feet (10') on either side of the centerline of the existing paved roadway. This shall be done in such a manner so as not to alter the location of the right of way as it passes the two outbuildings of Defendants.

45. Therefore, the location of the twenty feet (20') wide right of way shall at all times be described as ten feet (10') from either side of the centerline of the paved roadway except that portion of the roadway adjacent to the rock garden of the Defendants. At the rock garden, including merging or tapering in a reasonable manner before and after reaching the area adjacent to the rock garden, the location of the twenty feet (20') easement shall be determined to be twenty feet (20') from the edge of the existing pavement on the east side of the paved roadway to a point running twenty feet (20') west therefrom, and then tapering or merging back to the centerline of the existing pavement for the remainder of the easement as it crosses the Defendants' real estate.

46. The Court concludes that the twenty feet (20') wide right of way should be surveyed from its entrance at Frosty Hollow Road through the Defendants' property based upon the description as set forth above and each of the parties should pay one-half of the costs thereof, including recording fees for recording the Plat in the Hardy County Clerk's Office.

47. The Court further recommends that the Plaintiff and his parents reach an agreement as to the location of the twenty feet (20') wide easement as it continues from Defendants' real estate across the real estate of Otis and Bette Weatherholt to Plaintiff's property, and that this portion of the easement also be surveyed so as to alleviate any future problems concerning the location of the right of way.

48. The Court concludes that the location of the twelve feet (12') wide utility easement shall be twelve feet from the eastern edge or boundary of the above described twenty feet (20') road or access easement and should also be surveyed at the equal cost of the parties.

Injunctive Relief

49. In Plaintiff's Complaint, he requests that the Defendants remove barriers and obstructions within the rights of way and roadway. Plaintiff requests that the Court order the Defendants to remove all obstructions placed within both the twenty feet (20') access and twelve feet (12') utility rights of way, including speed bumps, logs and firewood, children's toys, Defendants' flower bed, and the holes dug along the edge of the travel surface of the way. Plaintiff further requests that the Court order Defendants to stop parking their vehicles, backhoe, and other equipment within the rights of way. Plaintiff further requests that the Court allow any trees situate within the right of way be allowed to be cut or trimmed as necessary to clear the rights of way. Lastly, Plaintiff requests that the Court allow Plaintiff to maintain the rights of

way, to add gravel along the travel surface of the roadway as a berm, and to level up the access right of way for purposes of unobstructed access.

50. Based upon the evidence, the Court finds that the access roadway has been used for ingress and egress from Frosty Hollow Road through the real estate of the Defendants and through the real estate of Otis and Bette Weatherholt, to the real estate of the Plaintiff, for a period of approximately fourteen years. The Court further finds that the roadway has been historically unobstructed, with the exception of a cattle guard that was removed years ago and some dirt piles which were placed prior to the paving of the roadway and which were removed after an approximate two-week period.

51. The Court finds that the Defendants have either constructed and/or placed buildings near the road right of way and near the existing travel portion of the roadway, through the property of the Defendants, which causes doors to be periodically opened from those buildings into the right of way. Based upon the rulings in this case as to the determined location of the twenty feet (20') wide access easement, the Court finds that the two buildings are less than two feet (2') from the boundary of the easement. The evidence at trial also clearly demonstrates that various impediments have been placed by the Defendants within the right of way, whether by the Defendants themselves, or by their children. Photographs introduced at trial show vehicles, equipment, piles of wood, dirt, toys, and other obstructions placed within the rights of way leading from Frosty Hollow Road to the property of the Plaintiff. The Court finds that these obstructions are habitual in nature and have caused the use of the right of way to be unsafe and inconvenient, to both the Plaintiff and the Defendants.

52. Based thereon, the Court concludes that the Defendants have violated the rights of the Plaintiff to an open twenty feet (20') right of way for purposes of ingress and egress.

53. The Court further finds that the approximately twelve feet (12') of pavement now serving as the travel portion of the right of way is insufficient to allow two cars to pass comfortably and safely and there is a need for vehicles to have the ability to drop off of the paved portion of the roadway to allow two vehicles to pass comfortably and safely. There is a need for Plaintiff to maintain the access right of way, to add pavement or gravel along the travel or surface as a berm, and to take such other measures necessary to maintain, improve and repair the roadway.

54. Therefore, the Court concludes that all of the obstructions placed within the twenty feet (20') access right of way from Frosty Hollow Road to the property of the Plaintiff must be permanently removed and the entirety of the twenty feet (20') right of way must be maintained open and without obstruction at all times.

55. The Court further finds that in several of the photographs, the Defendants have actually plowed ground and cultivated ground as a garden within the twenty feet (20') wide access right of way. This use of the right of way by the Defendants violates the rights of the Plaintiff as a deeded access right of way. The Court concludes that the Defendants must be prohibited from digging or cultivating land within the twenty feet (20') deeded access right of way from Frosty Hollow Road to the property of the Plaintiff, to protect the sanctity of that deeded right of way and the appurtenant ownership interests of the Plaintiff in and to that right of way.

56. The Court finds that the parties are obligated to assist in the maintenance of the right of way from Frosty Hollow Road through Defendant's property. Each party should be required to contribute to the maintenance and up-keep of the right of way. The evidence demonstrates that a third party, namely Otis Weatherholt, expended the cost of paving the

roadway from Frosty Hollow Road through the entire course of the road as it crosses Defendants' real estate. This was done without the agreement of the Plaintiff or Defendants; however, each of the parties has utilized and benefited from the paved roadway for a period of at least seven years.

57. The Court concludes that each of the parties should be required to assist in the "agreed upon" maintenance of the improvement of the pavement on the driveway in an equal manner, except that any party who it can be proved actually caused specific damage to the paved driveway, routine wear and tear excepted, should be solely liable for repairing any specific damage. This in no way means that the parties must repave or make major expenditures to the roadway and any such repairs, maintenance, or improvements should be done only by agreement of the parties; otherwise, only the party undertaking the repairs, maintenance, or improvements shall pay for them. Therefore, any future "agreed upon" repairs, maintenance, or improvements on the roadway shall be paid equally by all parties using the road, meaning Plaintiff and Defendants would each pay one-third (1/3) of the agreed upon costs of the maintenance of the road as it crosses the Defendants' real estate. The evidence presented is that until now the Plaintiff has not contributed to the maintenance of the roadway.

Plaintiff's Water Line

58. Prescriptive easements are similar to the doctrine of adverse possession. See *Veach v. Day*, 172 W.Va. 276, 278, 304 S.E.2d 860, 863 (1983) (per curiam). The case that established the elements of a prescriptive easement was *Town of Paden City v. Felton*. 136 W.Va. 127, 66 S.E.2d 280 (1951). The Supreme Court of Appeals of West Virginia recently articulated the elements of a prescriptive easement:

(1) the adverse use of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to

the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used.

Syl. pt. 1, *O'Dell v. Stegall*, 703 S.E.2d 561 (2010); see also, W.Va. Code § 55-2-1 (providing for the ten year statute of limitation). The burden of proving an easement rests on the party claiming such right and all elements of prescriptive use must be shown by clear and convincing proof. Syl. pt. 2, *O'Dell* (quoting *Beckley Nat. Exchange Bank v. Lilly*, syl. pt. 2, 116 W.Va. 608, 182 S.E.2d 767 (1935)).

59. “ ‘Adverse use’ does not imply that the person claiming a prescriptive easement has animosity, personal hostility, or ill will toward the landowner; the uncommunicated mental state of the person is irrelevant. Instead, adverse use is measured by the observable actions and statements of the person claiming a prescriptive easement and the owner of the land.” Syl. pt. 4, *O'Dell*. An “adverse use” of land is a wrongful use, made without the express or implied permission of the owner of the land and it creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to the law. Syl. pt. 5, *O'Dell*. “In the context of prescriptive easements, a use of another's land that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated.” Syl. pt. 6, *O'Dell*.

60. The second element of a prescriptive easement is continuous and uninterrupted use for at least ten years.

For an adverse use to be “continuous,” the person claiming a prescriptive easement must show that there was no abandonment of the adverse use during the ten-year prescriptive period, or recognition by the person that he or she was using the land with the owner's permission. Additionally, the adverse use need not have been regular, constant or daily to be “continuous,” but it must have been more

than occasional or sporadic. All that is necessary is that the person prove that the land was used as often as required by the nature of the easement sought, and with enough regularity to give the owner notice that the person was a wrongdoer asserting an easement.

Syl. pt. 8, *O'Dell*. Seasonal or periodical easements may be acquired by prescription. *Id.*

For an adverse use to be “uninterrupted,” the person claiming a prescriptive easement must show that the owner of the land did not overtly assert ownership of the land during the ten-year prescriptive period. Mere unheeded requests, protests, objections, or threats of prosecution or litigation by the landowner that the person stop are insufficient to interrupt an adverse usage. If any act by the landowner succeeded in causing the person to discontinue the adverse use, no matter how brief the discontinuance, then the adverse use was interrupted.

Syl. pt. 9, *O'Dell*.

61. The third element of a prescriptive easement is that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use. “The person claiming a prescriptive easement must show that the wrongful use was visible and apparent, was not made stealthily or in secret, and was so conspicuous and obvious that a reasonable prudent owner of land would have noticed.” Syl. pt. 10, *O'Dell*.

62. The fourth element is regarding the location and purpose of the prescriptive easement. “A right of way acquired by prescription for one purpose cannot be broadened or diverted, and its character and extent are determined by the use made of it during the period of prescription.” Syl. pt. 11, *O'Dell* (quoting syl. pt. 3, *Monk v. Gillenwater*, 141 W.Va. 27, 87 S.E.2d 537 (1955)). “The precise location of an easement sought to be established should be described either by metes and bounds or in some other definite way.” Syl. pt. 12, *O'Dell*, (quoting syl. pt. 1, in part, *Nutter v. Kerby*, 120 W.Va. 532, 199 S.E. 455 (1938)). Therefore,

A person claiming a prescriptive easement must prove the reasonably precise location of the starting and ending points of the land that was used adversely, the line that the use followed across the land, and the width of the land that was

adversely used. Furthermore, the manner or purpose in which the person adversely used the land must be established. This is because a right of way acquired by a prescriptive easement cannot be broadened, diverted or moved; its purpose and location are determined solely by the adverse use made of the land during the ten-year prescriptive period.

Syl. pt. 13, *O'Dell*. “The manner in which a prescriptive easement may be used is defined by the manner in which the easement was used historically.” *O'Dell*, 703 S.E.2d at 591. The entire history of the usage must be evaluated. *Id.*

63. Here, the Court finds that the Plaintiff has proven by clear and convincing evidence that he has a prescriptive easement with regard to the water line. Plaintiff testified that the water line was placed in 1998 or 1999. Otis Weatherholt testified that he assisted and participated in the construction of the water line and Defendant Daniel Weatherholt testified that he knew of the existence of the water line in its current location prior to constructing his home in 2001. The Court finds there was no evidence of permission having been asked or received by the Plaintiff from Ruth M. Barr, the owner of the property prior to Defendants, with regard to the location of the water line. In fact, Plaintiff testified that he had the water line installed before he told his grandmother about it and that he never asked for her permission to put the water line in its current location.

64. Defendant Daniel Weatherholt admitted that he has known of the existence of the water line in its current location since 2001 and has never requested the Plaintiff remove it until this lawsuit arose and Defendant filed a Counterclaim in August, 2013. Based upon the testimony and evidence at trial, the Court finds that the water line was placed openly, without permission, adverse to the owner of the property, and that it has knowingly existed openly and continuously, without objection, for a period of more than ten years. Therefore, the Court

concludes that the Plaintiff has a prescriptive easement appurtenant to his real estate for the location of the water line in its current location.

65. The Court further finds that Defendants had actual notice of the location of the water line from the summer of 2001 through the date of the filing of this action. During that time, Defendants made no objection to the location of the water line. Therefore, the Court finds that the Defendants acquiesced to the location of the water line through their real estate and, as such, are estopped to deny the existence and location of the water line.

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that:

A. The parties shall obtain a survey and plat of the right of way with approval of the Court such that the centerline of the paved driveway from Frosty Hollow Road, County Route 10/1 to the boundary of the real estate of the Defendants with Otis S. Weatherholt, Jr., and Bette G. Weatherholt, his wife, ten feet (10') on either side of the centerline thereof shall be located, marked on the ground, and on the plat, with survey markers to be placed at such locations as to demonstrate the outer boundary of the twenty feet (20') right of way, with the exception thereof being the area around the rock garden of Defendants.

B. The location of the twenty feet (20') wide right of way as it passes the rock garden of Defendants near their home shall be twenty feet (20') measured from the edge of the existing pavement running with the rock garden along the east side of the road to a point running twenty feet (20') to the west. Once the existing paved roadway passes the rock garden of Defendants on both the north and south, the location of the twenty feet (20') wide access easement shall be merged or tapered back in a reasonable manner as quickly as possible to be ten feet (10') on either side of the centerline of the existing paved roadway. This shall also be done in such a

manner so as not to disturb the location of the Defendants' two outbuildings in relation to the right of way.

C. The surveyor shall also mark the twelve feet (12') utility right of way, as it passes through the property of the Defendants from Frosty Hollow Road, and locate it on a plat of survey. All costs of the surveyor and the expenses of the survey shall be borne half and half by the Plaintiff and the Defendants. The description and plat shall be filed in the land records at the equal expense of the Plaintiff and the Defendants.

D. Plaintiff is granted a Permanent Restraining Order against the Defendants whereby the Defendants are permanently enjoined and prohibited from placing any impediments or obstructions within the travel portion of the right of way, or within the entirety of the twenty feet (20') right of way itself. Defendants are specifically prohibited from placing any obstruction, vehicle, equipment, or other debris or toys within the entire twenty feet (20') right of way at any time.

E. The doors on Defendants' buildings are required to be shut at all times except when use is absolutely necessary. Otherwise, the Defendants are required to either use or create other doors into the buildings, or move the buildings a sufficient distance from the right of way to allow the doors to be open without extending within the twenty feet (20') right of way. In any event, the Defendants' use of the buildings shall be done so as not to infringe upon Plaintiff's unobstructed use of the right of way. It shall be the Defendants' duty to utilize the doors into their buildings in such a manner so as not to impede, interfere or obstruct the Plaintiff's use of his right of way. Defendants shall also exercise a sufficient degree of caution and safety so as to avoid injury to person or property. Therefore, the use of the doorways shall be done at Defendants' own risk. Defendants have stressed that safety is a primary concern for them and

their children; therefore, the Defendants are encouraged to use other doors to the buildings, or if there are none, they should consider constructing doors that do not open into the right of way.

F. Defendants are further prohibited from undertaking any gardening, cultivation, plowing, digging or doing any other damage within or to the twenty feet (20') wide access right of way.

G. Defendants are permanently enjoined from interfering in any way, shape or form, with the use of the access right of way by the Plaintiff or by his family, friends, or invitees. With this said, the Plaintiff shall advise his family, friends, and invitees that use of the access right of way shall be reasonable, without excessive speed, and with a view toward the safety of others who also share in the use of that right of way, and who own real estate adjoining the access right of way. Plaintiff shall continuously instruct all such family, friends or invitees to observe a safe speed limit and use caution, specifically being cognizant and aware of the use of the roadway by Defendants' children.

H. Should the Plaintiff and his family, friends, or invitees fail to observe a safe speed and cautious use of the roadway, then upon good evidence, cause shown, and a proper Petition of the Defendants, the Court may consider the installation of speed bumps or take further remedial measures, but at this time the Court does not find that the Defendants have demonstrated the need for speed bumps to be installed.

I. Plaintiff shall be permitted to maintain gravel or paved berms along the paved portion of the right of way and make such other improvements to the right of way as he deems reasonable and necessary for the maintenance and improvement of his right of way, including but not limited to, the right to make the roadway wide enough to permit two cars to pass safely and comfortably. Plaintiff is further granted unobstructed access within the entire twenty feet

(20') wide easement for purposes of making all repairs, maintenance and improvements to the easement, and for trimming trees or brush or other debris that may be within the easement.

J. Plaintiff and the Defendants shall be required to assist in the “agreed upon” maintenance of the improvement of the pavement on the roadway in an equal manner, except that any party who it can be proved actually caused specific damage to the paved roadway, routine wear and tear excepted, should be solely liable for repairing any specific damage. This in no way requires that the parties must repave or make major expenditures to the roadway and any such repairs, maintenance, or improvements shall be done only by agreement of the parties; otherwise, only the party undertaking the repairs, maintenance, or improvements shall pay for them. Therefore, any “agreed upon” repairs, maintenance, or improvements on the roadway shall be paid equally by all parties using the road, which at this time shall require that the Plaintiff and Defendants would each pay one-third (1/3) of the agreed upon costs of the maintenance of the road as it crosses the Defendant’s real estate.

K. The water line of the Plaintiff, in its current location, is an appurtenant prescriptive easement of the Plaintiff through the real estate of the Defendants. Because the water line from Frosty Hollow Road to the property of the Plaintiff is located off the utility easement granted by deed, it is necessary, as a matter of practicality, to allow sufficient room to make repairs to the water line if they become necessary. The Plaintiff is hereby granted a maintenance and repair easement five feet (5') on either side of the existing water line in the event that any maintenance or repair is necessary through the property of the Defendants.

L. Defendants are further prohibited from taking any action which would damage or interfere with the water line in its current location from the public water supply and tap adjacent to Frosty Hollow Road and as the water line exists through the property of the Defendants.

M. Defendants shall place no permanent improvement, construction or obstruction that would interfere with the installation, inspection, repair, replacement and maintenance of any utility lines utilizing the easement. The natural contour or surface of the utility easement shall not be interfered with in any manner. However, as there are currently no utilities located within the easement, the Defendants are not prohibited from parking vehicles, machinery, equipment, cutting and storing firewood, or from cultivating or gardening the land within this utility easement that does not interfere with Plaintiff's use of the easement. This does not permit the placement of buildings or sheds, lean-to's or other permanent improvements or construction, but rather personal property of a portable, mobile, and/or movable nature, not permanent in nature and that is easily removable upon request. Any property placed in the easement by Defendants shall be immediately removed by Defendants upon request of Plaintiff for his legitimate use of the utility easement for its intended purposes. Additionally, Defendants shall be entitled to no damages to any crops within the easement if the damage occurs by the Plaintiff's use of the right of way for the purposes as set forth in this paragraph and as intended, as Defendants are fully aware that this could occur.

N. Further, because the Defendants' rock garden and private paved driveway are located within the bounds of the twelve feet (12') wide utility easement in its permanent location as determined by the Court, the Court does now Order that the Defendants shall not be required to cut any of the trees or remove the rocks or other trees, bushes, flowers, and other improvements within the rock garden at this time. This would only be required if Plaintiff demonstrates the necessity to do so in order to utilize his utility easement for the purposes for which it was granted. As there are currently no utilities located within the easement and it appears that the Plaintiff has all utilities serving his home in place, there appears no pressing

need to disturb either the rock garden or the paved private driveway of Defendants. The Court does further Order that before undertaking any use of the utility easement which would disturb the rock garden or private driveway in any way, Plaintiff shall first provide advance written notice to Defendants along with his stated reason for so doing, thereby affording Defendants sufficient time to protest or negotiate some other resolution to the matter prior to beginning work.

O. Although the twelve feet (12') utility easement, as contained in Plaintiff's deed, is not currently being utilized by the Plaintiff or the property of the Plaintiff, the rights of the Plaintiff in and to that utility easement shall not be interfered with by the Defendants or their successors in title, or by anyone on their behalf.

P. The Court hereby denies any relief requested in Count II of the Defendants' Counterclaim as to the Hardy County planning or zoning issues raised by the Defendants against the Plaintiff. This is not the proper forum, and those matters are not properly before the Court in this action and are hereby **DISMISSED with prejudice**.

Q. The Court hereby denies the relief requested in Count IV of the Defendants' Counterclaim with prejudice, as no evidence or argument was offered at trial on the issue of Plaintiff's commercial use of the roadway. Notwithstanding that, the Court does Order that as there were no restrictions or limitations placed on Plaintiff's use of his right of way, the Defendants have no right to restrict the commercial use and Plaintiff's commercial use is not an unreasonable burden on the right of way. By prior Trial Order, entered on January 2, 2014, the Court dismissed Count IV of the Defendants' Counterclaim "without prejudice." The Court now finds that was a clerical mistake arising from oversight and pursuant to Rule 60(a) of the West

Virginia Rules of Civil Procedure, the Court now corrects that mistake. Therefore, the Court concludes that Count IV of the Counterclaim is **DISMISSED with prejudice**.

R. Each of these rulings in regard to the twenty feet (20') access easement and the twelve feet (12') utility easement shall be deemed as covenants running with the land and shall be binding upon the parties hereto, their heirs, successors and assigns. Counsel for Plaintiff shall record a copy of this Judgment Order in the Office of the Clerk of the County Commission of Hardy County, West Virginia, in the Grantor/Grantee Index and Deed Books.

S. The parties shall equally split the court costs assessed in this action.

T. Each party shall bear their own attorney's fees.

U. A copy of the Plat of Survey and Description of Survey of the twenty feet (20') wide access easement and the twelve feet (12') wide utility easement, shall be recorded by Counsel for Plaintiff, and each party shall pay one-half of all costs associated therewith.

It is further **ORDERED**:

- ❖ The Circuit Clerk shall send true copies of this Order to all counsel of record.
- ❖ The Court notes the objections and exception of the parties to any adverse findings or rulings herein.
- ❖ Nothing further remaining to be done in this matter, the Circuit Clerk shall remove this action from the docket and place it among the matters ended.

ENTERED this 15th day of January, 2014.


H. CHARLES CARL, III, JUDGE