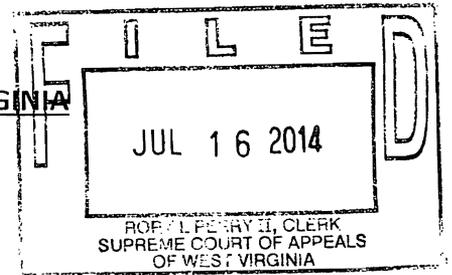


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Daniel Allan Weatherholt, and Anita Denice Weatherholt,
Defendants Below, Petitioners

Vs.)

Docketing No.: 14-0219
(Hardy County Civil Action NO: 13-C-52)

Jeffrey Neal Weatherholt, Plaintiff Below,
Respondent.

PETITIONER'S REPLY BRIEF

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ASSIGNMENTS OF ERROR

1. The Trial Court erred when it denied the Petitioner's timely request for a Jury Trial. Additionally, it should be considered if this Judge should have voluntarily disqualified himself from this matter and if this is plain error;
2. The Trial Court erred when it awarded a permanent injunction as the same was not supported by the facts, there was no obstruction, and no bond was addressed or considered;
3. The Trial Court erred in finding that the Respondent had obtained a prescriptive easement for his water line. Furthermore, the Trial Court erred in the application of real property law to the facts of this case.

STATEMENT OF CASE

Petitioner would stand by the initial statement of case, as contained the Petitioner's Brief, being an accurate description of the matters progression. Petitioner cannot agree with the Respondent's statement of the case, especially on the issue of the jury trial. Additional information is included within the reply argument and is intended to supplement the original argument on this issue.

With respect to Respondent's assertions that the installation of permanent speed bumps is waived, that is incorrect. Pursuant to West Virginia Rules of Appellate Procedure, Rule 10 (c)(3) and the conclusion in Petitioner's Brief it is the intent of the Petitioner not to waive that issue.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner maintains that oral argument is not necessary in this matter pursuant to the West Virginia Rules of Appellate Procedure, Rule 18(a)(4). In the event that the Court decides oral argument necessary then the Petitioner will participate.

ARGUMENT

I. Denial of Petitioner's Right to Trial by Jury

Respondent's brief is inaccurate on this issue. Respondent maintain that because the Petitioner elected to proceed on the counterclaim along with the bench trial on the claim then all right to a jury trial was waived. Respondent argues that Petitioner is not entitled to a jury trial on the issue of the claim itself. This is simply not true and renders the whole process flawed.

Respondent argues that there is no proof of any duress in the decision to waive the jury trial on the counterclaim. There may not be any proof on the record because the same was a conversation, very brief, between clients and counsel at counsel table. It can be presumed that the conversation was similar to:

Client: "does this mean we get our jury trial?"
Attorney: "No, only on the counterclaim."
Client: "But we asked for it on both."
Attorney: "Yes, but for the easement it is still denied."
Client: "So if we want the jury trial on the water line this won't be over today?"
Attorney: "Correct, and if we say we don't trust the Judge and want a jury this may not go well today on the obstructions. I don't know, I think he will be fair, but I don't know, I'm sorry I can't give better advice but I have never been denied a jury trial. This is confusing"
Client: "We need this over today; this is hard on mom and dad."

There is no way to introduce such evidence but it can be deduced as a hypothetical and it is reasonable to believe that it occurred this way. The undersigned is aware that evidence not introduced at trial cannot be introduced on appeal; however, when Respondent opens the door it is only fair to argue a reasonable hypothetical, supported by some of the statements to the court, to rebut the argument instead of being bound by the defenseless posture that is created by this unique fact pattern. Justice is always fair.

Once the jury demand was denied, subsequent decisions are meaningless. If one cannot get a jury trial in the case they are defending, the defect is not cured by an untimely offer of a jury trial on the connected matter in the counterclaim. If a litigant cannot get a jury trial then they must lick their wounds and prepare for appeal to correct the violation of their right a trial by jury.

Petitioner requested a jury trial on the claim and counterclaim. Petitioner believed this is what was going to occur. This is what was understood by Petitioner through most of the

September 12, 2013 scheduling hearing. Following that hearing the Petitioner prepared for a Bench Trial until after it began as was offered to file a motion for a jury trial only for the counterclaim. A change at this time would have significantly changed the strategy and the Petitioner could not have gone forward as planned. This is not just.

Counsel for Petitioner began to question this issue during the pre-trial hearing. (See page 31, line 17 of the transcript designated as volume 2 of the appendix.) The Court basically declared this would be a bench trial. (See page 31, line 21 of the transcript designated as volume 2 of the appendix.) Respondent's Counsel chimed in that Petitioner was not entitled to a jury trial. The Court agreed. Petitioner's Counsel offered that there was a counterclaim. Respondent's Counsel continued to state there was no jury trial. Petitioner's Counsel stated that there would be a question of fact of what is or is not an obstruction. The Court then turned the pleading of the request for a jury trial into a motion and denied the motion. (See page 32, line 13 through page 34, line 16 of the transcript designated as volume 2 of the appendix.)

Then at the bench trial the court, sua sponte, reconsidered the request for a jury trial only on the counterclaim. The Trial Court then stated that he believed the Petitioner was entitled to a jury trial on the counterclaim. The Trial Court said he had looked into it. The Trial Court did not change his ruling or notify the parties of this prior to the commencement of the Bench Trial. The Trial Court did offer a separate trial for the counterclaim. The trial court stated that "the injunctive relief, which is not entitled to a jury trial which is what we're here for today." (See page 15, line 7 of the transcript included as volume 3 of the appendix.) Again, the trial court was prepared for a remedy without adjudication of the merits of the claim. The

Trial court went on to say we can have the whole thing heard today. Petitioners maintained that the complaint and the counterclaim were two closely related matters, being so closely intertwined that they should be tried together. The Trial Court agreed and stated "That's another good reason this is a bench trial." (See page 18, line 6 through line 24 of the transcript designated as volume 3 of the appendix.)

The Petitioner was never given a jury trial as plead in the answer. Respondent cites *Timberline Four Seasons Resort Management Co., Inc. v. Herlan*, 223 W.Va. 730, 679 S.E.2d 329 (2009); *Camden-Clark Memorial Hosp. Cor. V. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002.) as standing for the proposition that one is not entitled to a jury trial regarding an injunction. It is clear that the granting of an injunction is the duty of the court. This is the remedy if the facts support such a remedy. There must be a cause of action, plaintiff must prevail, and then the remedy is granted. If the remedy prayed for is an injunction then the Court will decree the remedy as the jury can only provide for monetary damages.

In this matter the Respondent claimed an obstruction and maintains that claim (see page 2, line 5 or Respondent's Brief.) Petitioners is entitled to a jury trial on the issue of "has the easement been obstructed" and if the jury finds that is has then the Court may render and injunctions if the facts support such a remedy.

The cases relied upon by Respondent do not say that you are not entitled to a jury trial. In fact the case of *The State Road Commission of West Virginia, a corporation, et al. v. Williard L. Oakes et al*, 150 W.Va. 709, 149 S.E.2d 293 (1966) specifically mentions that this was a bench trial in lieu of a jury trial upon the third amended complaint at page 295. This suggests that the parties agreed upon a bench trial not that a jury trial is impermissible.

American Jurisprudence 2d, Injunctions § 292 is clear that since real estate is involved the constitutional right to a jury trial is available. Furthermore, the *Camden-Clark Memorial Hosp. Cor v. Turner*. Case, cited by Respondent, speaks to this issue. At syllabus point 11 the jury is to hear the legal claim before the ruling on injunctive relief. This was regarding a counterclaim but the law is that the counterclaim is heard first. That case involved employment issues of a trespass and wrongful discharge that were intertwined. This case involves issues of nuisance and trespass surrounding easements that are much intertwined.

A jury should have decided if this was a nuisance, or obstruction, and if there was a trespass then if after so decided the Court would determine if an injunctions was the proper remedy. The *Camden-Clark* case reiterates "We have often declared the importance of the right to trial by jury in this State. In a recent case dealing with consumer contracts that called for arbitration instead of jury trials, this Court, after citing our Constitution, reaffirmed the central importance of our jury system:

These constitutional rights---- of open access to the courts to seek justice, and to trial by jury ---- are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws--- to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals--- tribunals that involve, in the case of the jury, member of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but the benefit of all of us. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends."

Id at page 761.

The facts are that the issue in the claim was an obstruction to an easement. The fact was disputed. The Trial Court basically denied that this question of fact existed and there was no right to a trial by jury. Even on the date of trial the Trial Court was proceeding on the

remedy phase. The Trial Court stated that we were there for injunctive relief. Nevertheless, the trial court made findings of fact on this issue in the Judgment Order. (See Judgment Order page 7 of the appendix.) Respondent even states that the Trial Court was correct in its findings from the evidence at the trial that there were obstructions habitual in nature. (See Respondent's Brief at page 18 second paragraph.) There were disputed material facts involving the Complaint that the Trier of fact needed to determine. Petitioner requested that the Trier of fact be a jury and was denied.

A nuisance to an easement is an action that may be tried by jury. The cause of action must be decided. Damages sought could be compensatory and decided by the jury. If the relief prayed for in a permanent injunction then the court will decide whether to grant the remedy. This is the proper order. Where in the law do you start at the end? In Criminal Law there must be a conviction before sentencing. In Juvenile Law there must be an adjudication before disposition. In Civil Law there must be liability before damages. The cause of action must be decided before the remedy is ripe.

CONCLUSION

Petitioners request this Honorable Court review this matter in total and afford the following relief;

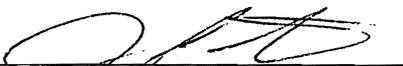
1. Hold that a concrete or asphalt speed bump installed for the legitimate purpose of promoting safety when signs have not worked is not an obstruction to a private easement. Such a speed bump does not render the easement impassible or unsafe and does not meet the definition of an obstruction;

2. That the Trial Court was clearly erroneous in finding that the other obstructions complained of habitual and unsafe based upon the testimony of the Respondent that they were not a problem;
3. That the Trial Court erred and abused its discretion in the award of the harsh remedy of a permanent injunction;
4. That the Trial Court was clearly erroneous in its finding regarding the prescriptive easement;
5. That the Trial Court erred and abused its discretion in applying the law of real property and prescriptive easements to the facts of this case in the judgment for the Respondent resulting in the acquisition of a prescriptive easement;
6. Reverse the decision of the Trial Court and remand back with directions that and order be entered denying the injunction, permitting the installation of speed bumps, and entering a judgment in favor of the Petitioner with respect to count I of the counterclaim with the relief they prayed for;

In Arguendo

7. That the Trial Court erred in the denial of the constitutional right of the Petitioners to a jury trial and remand the matter back for the purpose of a jury trial on the merits.

Respectfully Submitted,



Jason R. Sites
West Virginia Bar # 8638
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Jason R. Sites, hereby certify that I served a true copy of the foregoing Petitioner's Reply Brief upon J. David Judy, III. Esq., Counsel for Respondent, at his address of PO Box 636, Moorefield, West Virginia 26836, by US Mail, first class, postage prepaid, on this the 15 day of July, 2014.



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