

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

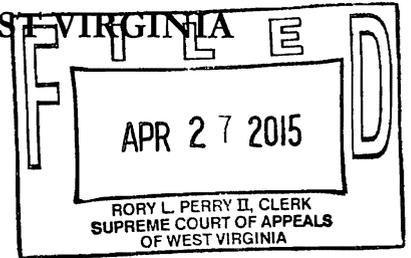
HEARTWOOD FORESTLAND FUND IV
LIMITED PARTNERSHIP, a North Carolina
limited partnership,

Petitioner,

v.

BILLY HOOSIER, JR.,

Respondent.



Appeal No. 14-1110
(Wyoming County Civil Action No. 10-C-34)

REPLY BRIEF OF PETITIONER

Arising from a Final "Order Granting Defendant's Motion for Judgment
as a Matter of Law on Equitable Principles" Entered on
September 26, 2014, in Civil Action No. 10-C-34 in the
Circuit Court of Wyoming County, West Virginia

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III. SUMMARY OF ARGUMENT

Petitioner Heartwood Forestland Fund IV, LP (“Heartwood”), timely filed its opening brief per this Court’s October 31, 2014 Scheduling Order. There, Heartwood cited as an assignment of error the constant delays it faced in its five-year attempt to vindicate its property rights. Illustrating such delays one last time, Respondent Billy Hoosier, Jr. (“Mr. Hoosier”) failed to file his response brief in accordance with this Court’s Scheduling Order. Mr. Hoosier’s delay required this Court to issue an Amended Scheduling Order on March 19, 2015, noting a risk of sanctions in **bold** typeface, before he was willing to file a response. That fact should not be lost on this Court in its review of the five years’ worth of procedural issues and delays in this matter.

And turning to the substance of Mr. Hoosier’s response, he relies on facts with no legal significance, misstates the record, and misconstrues the single case he relies on - *Somerville v. Jacobs*, 153 W. Va. 613, 170 S.E.2d 805 (1969). In so doing, Mr. Hoosier also neglects to address at least two of the five assignments of error raised by Heartwood in its opening brief. Accordingly, and for the reasons more fully explained below, this Court can ultimately dispose of this matter in two ways, both of which result in removal of Mr. Hoosier’s manufactured home from Heartwood’s property: (1) it can find and conclude that Heartwood is entitled to ejectment of Mr. Hoosier’s manufactured home as stated in the Complaint; or (2) it can award Mr. Hoosier specific restitution, i.e. order the return of his manufactured home to his own property at his own expense.

IV. SUPPLEMENTAL STATEMENT REGARDING ORAL ARGUMENT

Mr. Hoosier states that no oral argument is necessary due to the fact that the “law applying to this case is 35 years old.” [Resp. Br. at p. 2.] Again, the sole case cited by Mr. Hoosier is *Somerville v. Jacobs*, 153 W. Va. 613, 170 S.E.2d 805 (1969). While *Somerville* is admittedly forty-six (46) years old, the lower court erred in its application of *Somerville* and should have relied on Restatement principles in determining the appropriate remedy for mistaken improvements to another’s land. Presently, the parties should have the opportunity to advocate proposed syllabus points updating this

State's jurisprudence to conform with the Restatement view on remedies for improvements made on the property of another due to a mistake of fact.

Further, and unmentioned in Mr. Hoosier's response brief, the lower court ordered a private condemnation of property in violation of the United States Constitution and the Constitution of the State of West Virginia. Accordingly, the parties should also have the opportunity to advocate proposed syllabus points updating this State's jurisprudence regarding the unconstitutional exercise of judicial power in the context of forced exchanges of private property.

V. STANDARD OF REVIEW

Heartwood hereby incorporates the standard of review previously provided in its opening brief.

VI. ARGUMENT

A. *Mr. Hoosier mistakenly equates an unreasonable belief with "good faith."*

In his "Statement of Fact," Mr. Hoosier suggests that "all that is required" for "good faith" is his subjective belief that he leveled and dozed the bench for his manufactured home on his own property. Then, in his argument, Mr. Hoosier relies on *Somerville* for the proposition that his "good faith" belief provided the lower court with discretion to award him title to Heartwood's property.

Mr. Hoosier misconstrues *Somerville*, and omits any other discussion of West Virginia case law and Restatement principles relating to the relief available to a mistaken improver of another's land. This Court in *Somerville* held:

An improver of land owned by another, who through a reasonable mistake of fact and in good faith erects a building entirely upon the land of the owner, with reasonable belief that such land was owned by the improver, is entitled ... to purchase the land so improved upon payment to the landowner of the value of the land less the improvements[.]

Syl, *Somerville* (emphasis added). Certainly, Mr. Hoosier may have believed that he was dozing and leveling the bench on his own property. But his belief was unreasonable - he admittedly failed to have

a survey performed and acted at his own peril. Comment e to Section 10 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) explains the importance of the reasonableness of the mistake and the exercise of due care by the mistaken improver:

Finally, the concepts of good faith, notice, and negligence all appear to combine in decisions that deny relief because of *constructive notice* on the part of a mistaken improver. The same combination of ideas underlies decisions that require that the improver have made a ‘reasonable mistake,’ or that the improver’s claim of title have been ‘honest and reasonable.’ Whatever the form of words, the legal objective is to deny relief to a party who neglected a reasonable opportunity to avoid the nonconsensual transfer that is the basis of the restitution claim.

(Emphasis added). Like *Somerville*, the Restatement view thus observes that a party who acts unreasonably should be denied relief - not given a windfall result as in this case. This Court similarly reasoned that mistaken improvers are liable for their mistakes if the exercise of care could have avoided the mistake: “If the fact of a mistake could have been discovered by giving the matter 10 minutes attention at the proper time, it would seem that it was her duty to have given this attention, while there was no duty resting upon defendants in that behalf.” *Cautley v. Morgan*, 51 W. Va. 304, 41 S.E. 201, 204 (1902).

Mr. Hoosier cannot stick his head in the ground as to the facts, and then later equate his willing ignorance with “good faith.” Allowing him to do so improperly conflates the notions of “good faith” and “reasonableness,” and can only yield an absurd result. Accordingly, this Court should find Mr. Hoosier’s response unpersuasive in this regard.

B. Mr. Hoosier’s claims regarding his wife’s ownership of the manufactured home and parcel are irrelevant and unsupported by the record.

Mr. Hoosier suggests that the “Court correctly found that there are other persons ... who have property rights to the home, but who were not made parties to this action.” [Resp. Br. at p. 2.] First, this is unsupported by the record. Mr. Hoosier is the sole grantee listed on the deed to his parcel, and is the sole grantor of a deed of trust relating to the manufactured home on this parcel. [AR

52-61.] Nothing in the record supports Mr. Hoosier's claim that his wife has an ownership interest in any of the property at issue in this matter.

Further, even if Mr. Hoosier's wife has an interest in the property at issue in this matter, Mr. Hoosier has had five years to file a motion to dismiss for failure to join an indispensable party under Rule 12(b)(7) of the West Virginia Rules of Civil Procedure. Such a motion "should be made early in the proceedings, and... a court should, in equity and good conscience, consider the timing of the motion, and the reasons for the delay..." Cleckley, Davis & Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(7)[1] at n. 1004 (3d. ed. 2008). Here, the equities plainly militate against dismissing this matter.

Last, Mr. Hoosier's claims regarding his wife's ownership of the home do not advance the substantive, material issues before the lower court and this Court. Mr. Hoosier makes this claim in an attempt to tug at this Court's heartstrings and to divert it from the real issues. Accordingly, this Court should find these ownership claims irrelevant in its determination of the issues presented in this appeal.

C. *Mr. Hoosier's claim that his manufactured home is permanently affixed does not render it immovable.*

In his response, Mr. Hoosier argues that this matter "involves a house in which people live that has a permanent foundation." [Resp. Br. at p. 4.] But manufactured homes are routinely moved, and Mr. Hoosier conceded that his manufactured home could be removed from Heartwood's property. [AR 122 at ¶ 2.] Accordingly, this Court should have no hesitation in ordering that Mr. Hoosier remove his manufactured home from Heartwood's property.

D. *Mr. Hoosier's claim that Heartwood can utilize other routes for its business operations is unsupported by the record.*

Mr. Hoosier claims as follows:

Lastly, the lower court was correct that Petitioner filed maps of survey showing that the Respondent's actual lot is contiguous to the real estate which Petitioner seeks to access. Petitioner's Brief in this Appeal shows

that map as well, and it is apparent from that map that the Respondent owns property contiguous not only to the lot at issue herein, but also to the Petitioner's other real estate upon which Petitioner intends to manage and harvest trees. Respondent has offered to exchange properties, thereby allowing access to the timber land.

[Resp. Br. at p. 4.] First, Mr. Hoosier's deposition transcript makes clear that while there were discussions as to switching properties, those discussions were unsuccessful, and Heartwood was unable to find an alternate route to its timber. [AR at pp. 48-49.] And second, the uncontroverted testimony of Craig Kaderavek illustrates that Heartwood tried to work with Mr. Hoosier and other landowners in the vicinity to no avail. [*Id.* at pp. 176-77.] Accordingly, this Court should find that Heartwood has no other available routes to allow it to manage and harvest timber on its property.

E. This Court should determine that Mr. Hoosier agrees with Heartwood's position as to at least two of its five assignments of error.

Rule 10(d) of the West Virginia Rules of Appellate Procedure provides the following: "If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." Here, Respondent's brief fails to address at least two of the five assignments of error made by Heartwood.

Specifically, Heartwood made the following assignments of error in its opening brief:

- I. The lower court violated the Fifth Amendment to the United States Constitution and Article 9, Section 3, of the Constitution of the State of West Virginia, by ordering Plaintiff-Petitioner Heartwood Forestland Fund IV, LP, to transfer certain of its Wyoming County, West Virginia, property to Defendant-Respondent Billy Hoosier, Jr.
- II. The lower court misapplied this Court's decision in *Somerville v. Jacobs*, 153 W. Va. 613, 170 S.E.2d 805 (1969) when it ordered Plaintiff-Petitioner Heartwood Forestland Fund IV, LP, to transfer certain of its Wyoming County, West Virginia, property to Defendant-Respondent Billy Hoosier, Jr.
- III. The lower court erroneously concluded that this Court has not relied upon Restatement principles with respect to the proper remedy in the context of mistaken improvements to the land of another, and ordered a forced exchange of property that has no basis in West Virginia law or any Restatement principle.

- IV. The lower court's September 26, 2014, "Order Granting Defendant's Motion for Judgment as a Matter of Law on Equitable Principles" relies upon "facts" which have no evidentiary basis in the record.
- V. The lower court abused its discretion in this matter by repeatedly delaying a resolution of this matter, and, ultimately, by failing to adhere to West Virginia Trial Court Rule 24.01 relating to the submission of proposed orders.

Mr. Hoosier's response clearly fails to address Assignment Nos. I and V, and, accordingly, this Court should assume that Mr. Hoosier agrees with these assignments of error. Further, Mr. Hoosier's cursory treatment of the remaining assignments of error relating to West Virginia law and Restatement principles should be deemed non-responsive to the extent it fails to address specific legal and factual issues presented in this appeal.

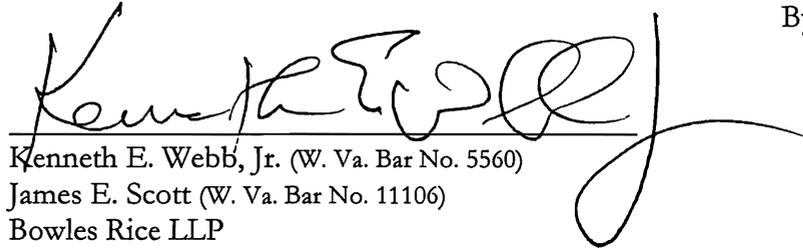
VII. CONCLUSION

This Court should reverse the decision of the Circuit Court of Wyoming County, and order that Defendant-Respondent, Mr. Billy Hoosier, finally remove his manufactured home from property owned by Plaintiff-Petitioner, Heartwood Forestland Fund IV, LP.

Respectfully submitted.

PETITIONER

By Counsel

A large, stylized handwritten signature in black ink, appearing to read "Kenneth E. Webb, Jr.", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

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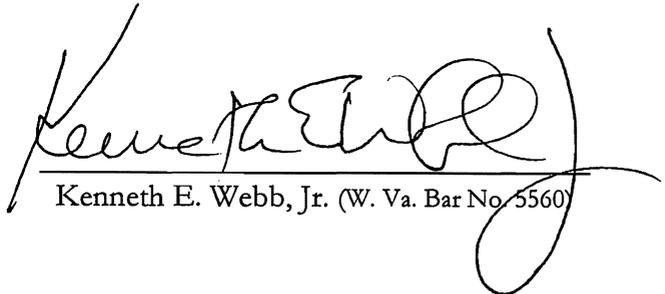
Appeal No. 14-1110
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CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., counsel for Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing *Reply Brief of Petitioner* by U.S. Mail upon:

Timothy P. Lupardus, Esquire
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Counsel for Respondent

this 27th day of April, 2015.



Kenneth E. Webb, Jr. (W. Va. Bar No. 5560)