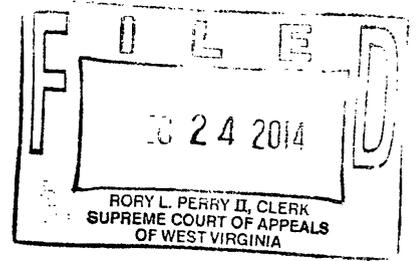


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DONALD E. COTTLE  
PETITIONER

Vs.)            No. 14-0898

MARY DAVIS  
RESPONDENT

Appeal From a final order  
of the Circuit Court of Webster County  
Judge Jack Alsop  
Case #13-P-20

REPLY TO RESPONDENT'S BRIEF

Donald Cottle   
P.O. Box 1028  
Ceredo, WV 25507  
(304) 617-1042

## **TABLE OF CONTENTS**

- 1. TABLE OF AUTHORITIES**
- 2. STATEMENT OF CASE**
- 3. ARGUMENT**
- 4. CONCLUSION**
- 5. CERTIFICATE OF SERVICE**

## **TABLE OF AUTHORITIES**

### **Cases**

Allemong, 178 W. Va. at 606, 363 S.E.2d at 492

B.F. Specialty Co. v. Charles M. Sledd Co.  
, 197 W. Va. 463, 475 S.E.2d 555 (1996)

Blair v. Maynard 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984)

Dillon v. Egnor 188 W.Va. 221, 227, 423 S.E.2d 624, 630 (1992)

*Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921).

Wallace v. St. Clair, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962)." Syl. pt. 2, Allemong v. Frenzel, 178 W. Va. 601, 363 S.E.2d 487 (1987).

Wilson v. WVU Sch. of Med., No. 11-0600, 2011 W. Va. LEXIS 545 (West Virginia Supreme Court, October 21, 2011)

### **Codes**

**1.) WV Code 3-10**

**2.) WV Code 36B-27**

**3.) WV Code 37-13a-1-6**

**4.) WV Code 64-9**

**5.) WV CSR 64-9-4.23**

**6.) WV CSR 64-9-4.24**

**7.) WV CSR 64-4.25**

**8.) WV CSR 64-9-5.4.4**

**9.) WV CSR 64-9-10.5**

## **RULES OF CIVIL PROCEDURE**

**1.)RULE 12**

**2.)RULE 26**

**3.)RULE 26a**

**4.)RULE 26 B1**

**5.) RULE 52(a)**

## STATEMENT OF CASE

This case originated from a dispute over deeded Right of Ways of Donald Cottle across property belonging to Mary Davis of Glade District, Webster County, West Virginia.(Appendix Page 3).

Deeds show Right of Ways to be 30 feet wide and Mary Davis and her attorney, Dan Hardway contested these to be only 12 feet wide.(Appendix Page 3 and 9).

Respondent argued that Petitioner's 30 foot right of way needed to be limited to 12 FEET and be solely for ingress and egress. The lower court of Webster County stated in the Amended Opinion and Final Order of July 9, 2014, that it found this argument unavailing and such a contention to be clearly contradictory to the plain and ordinary meaning of the Grose/Cottle Deed.

Early in bench trial, Mr. Hardway conceded to the 30 foot right of way (built in 1982) as previously existing which is established in Petitioner's deed, on Page 47 of transcript.

But they did not address the original right of way granted to the Christian farm by Deed of September 9, 1929 between Christians and Pritchards, Page 518 of Deed Book

We feel the Respondent and her counsel, Dan Hardway, incited this dispute so that it would ultimately result in the Court of Webster County making a decision on other matters than the Petitioner's right of way.

When filing case, the defendant filed a counter suit regarding a clause in a previous deed stating there shall be no septic system on property I purchased in 1989 from Charles and Judith Grose. This counter-suit was only filed to **Intimidate** in hope of forcing me to drop the original suit against the Respondent and her Attorney Dan Hardway knew the restriction was unlawful and unenforceable.(Appendix Page 12)

In 1989 immediately upon purchasing the property for a dwelling, Petitioner started construction of a home. Completion of home was approximately Mid 1990.

Also included were disputes of maintenance of 125 plus years cemetery and a prescriptive Right of Way that I had been using for 25 years, also a US Forest Service Right of Way and Gate. (Appendix Page 3 and 9)

Court of Webster County upheld the deeded Right of Ways of Donald Cottle with an exception of a prescriptive Right of Way. The Court did not agree concerning the cemetery and US Forest Service Right of Way and Gate. (Appendix Page 43)

In the counter suit, the Court decided they could not remove the clause from my deed regarding the septic system, even though this restriction to the property was illegally inserted in the document. The Court would not hear any arguments during the trial and Post Trial Motions about Webster County Health Department Rules and Regulations.

(Appendix Page 43, 65, 66, 69, 72 and 80)

After trial of April 29<sup>th</sup>, 2014, a final order was entered June 11, 2014. Motions were entered to modify this order due to newly found evidence from the Health Department and West Virginia legislature **WV CSR 64-9**. Court would not allow a new trial or amend judgment and denied these motions. A new final order was made July 9, 2014. (Appendix Page 65, 66, 69, 72 and 80)

I filed several other Motions to try and get Court to set hearing for the evidence to be heard and was given a date of September 2, 2014.

(Appendix Page 31, 43, 66, 69 and 74)

On September 2, 2014, The court did not hear any evidence or new testimony from **WV CSR 64-9** and/or subpoenaed witnesses,(subpoenaed witnesses never showed for the Plaintiff in the court), and Judge Alsop denied all motions, then stated the Final order of July 9, 2014 was upheld.

(Appendix Page 72)

## ARGUMENT

### 1. The Circuit Court of Webster County Denied Motion for Default

Counsel for Respondent, Dan Hardway failed to answer complaint in 20 days. Mr. Hardway came up with several excuses for this delay for following Rule 12 of Rules of Civil Procedure. Counsel was three days late with his filing as noted in transcripts of January 6, 2014, Case #13-P-20 Circuit Court of Webster County.

**Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.**

**(a) When presented. — (1) A defendant shall serve an answer within 20 days after the service of the summons.**

### 2. The Court Denied Discovery.

Petitioner filed the Motion to Comply with **Rule 26**, Discovery of Evidence. Petitioner was denied access to evidence to be presented at trial of April 29, 2014. Petitioner was denied all Discovery under WV Rules of Civil Procedure, **Rule 26 A, B1**. Very little, if any, pretrial Discovery was allowed, as noted on Page 67 of the transcripts of the bench trial. Dan Hardway, Counsel for the Respondent, did not file a Pretrial Memorandum or follow the Scheduling Order, which shows the leniency of the Court.

A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.” Syllabus point 1, **B.F. Specialty Co. v. Charles M. Sledd Co.**, 197 W. Va. 463, 475 S.E.2d 555 (1996).

### **3. RULINGS ON GATE AND MISINTERPRETED TESTIMONY**

Court misinterpreted testimony or was misled by the defense regarding the United States Forest Service Gate location and jurisdiction. Court granted a Motion for Interim Protective Order for defendant, granting her 739 feet of United States Forest Service property and full control of the USFS Gate contrary to Judge Alsop's admission in Court transcript **Page 64**, stating "I don't know what rights the United States Government has in regard to that Forest Service Road, and quite frankly, I don't have jurisdiction to determine what rights the US Government has. It has to be done in the United States District Court." This is also discussed on **Page 53** of Court Order shown in the Appendix. Maps shown in Appendix, **Page 98 and 102**.

While Respondent agrees that the gate is located on USFS Property, she still continues to claim ownership and full control of the USFS Gate. US Forest Service Regulations pertaining to gates states no one can have sole control if more than one landowner uses this gate, it must have a daisy chain lock system. Regulations also state that if one owner does not wish the gate to be locked, then it can be removed by the United States Forest Service.

Interim Protective Order on **Page 26** of the Appendix shows that Judge Alsop judged and sentenced without the courtesy of human exchange in less than six hours and made the order permanent in his Final Order of July 9, 2014.

As Respondent's Counsel stated on **Page 6**, Respondent' home in 1990 was burned to the ground. The correct facts are on or about October of 1991, the Respondent's cinder block camp burned and the lock had to be removed by local emergency services taking an extra thirty minutes as stated on **Page 102** of transcript.

Richard Rose (WV Emergency Service director) was subpoenaed to testify to the facts about the 55 emergency vehicles of which not one of them have a key to this USFS gate as shown by the extra 30 minutes it took for Mr. Rose to cut off lock during the 1991 fire of Respondent's camp. No keys were ever presented to his office.

No evidence or testimony was given by Respondent in bench trial of lower court concerning ownership or title of gate which is **753** feet outside boundaries of Respondent's deed.

Petitioner feels the trial court did not rule correctly or properly on this issue.

#### **4. RIGHT TO MAINTAIN CEMETERY**

Petitioner has maintained this 125 year old cemetery for the past 25 years, which is located on his right of way and believes he has done so in accordance with **WV Codes 37-13A-1-6**. As testified by Mr. Lee Bennett on **Page 20**, that his father asks us to care for the cemetery. Mr. Bennett also referred to Zeph Christian naming the deceased as Bennett's on Page 18-20 and **Page 32**. The testimony on Page 32-33 of the transcripts is that the center of the cemetery is 14 feet from the center of the road right of way, not as shown in Respondent's Brief.

The court misinterpreted or misconstrued the evidence presented at trial regarding the Bennett-Williamson cemetery, Petitioner and Mr. Bennett, a distant relative of those buried there, had built a fence around the cemetery two years prior with Respondent's permission. Found on **Page 18** of the transcript.

Petitioner feels the trial court did not rule correctly or properly on this issue.

#### **5. SUBDIVISION RULES ON FOLLOWING WV CODE OF STATE REGULATIONS**

Respondent states in Brief that property of Charles and Judith Grose, was not subdivided, but was a large plot of land that he sold three or four lots to individual purchasers. See original map, Page 101 and 102 of the Appendix.

When actually, 50 plus acres owned by the Grose's had eight divisions of lots sold to individuals during approximately eight years of the Grose ownership, prior to selling remaining acreage to Frank Davis, April 12, 1990.

**WV CSR 64-9-4.23** states:

“The division of land into two or more lots, tracts, parcels, plats, sites, areas, units, interests or other division, any of which are less than two acres in size with an average frontage of less than one hundred fifty feet for the purpose of dwelling or establishment development and including the division of land by deed, metes and bounds description, lease, map, plat or other instrument, or by act of construction.”

**WV CSR 64-9-10.5** states:

“The division of land through public or private auction, sale or through the terms of a will shall constitute a subdivision under the provisions of these regulations. It shall be the responsibility of the owner of such land or executor of the will to meet all requirements of these regulations.”

When I purchased my property in December 1989, for building a dwelling, Charlie Grose stated that his intent for the remaining 50 acres was to develop a campground, shown on Plat Map, **Page 101 and 102** of the Appendix.

This covenant was added to my deed because of a spring located 120+ feet from my property line. This spring was to provide water for the proposed campground. No other property or lots sold from this plat had any restrictions on the deeds except for the property I purchased. In April of 1990 the remainder of his approximately 50 acre plat was sold to Frank Davis, shown on **Page 99** of the Appendix. Due to the sale of this property to Frank Davis, the campground was never developed. No utilities were available on this secluded/undeveloped property. Mr. Frank Davis passed away October 23, 2005, at that time property went to Mary Davis by Webster County, WV **Will Book 25**, Pg. 570.

Respondent purchased all other property/lots except for Fred Mays and Petitioner's.

Petitioner feels that the trial court did not follow subdivision laws of the state of West Virginia and therefore should be reversed.

## 6. RESTRICTIVE COVENANT

This subdivided property that the Petitioner, Donald Cottle purchased in 1989 had a restrictive covenant prohibiting any type of septic system on his property. This restriction was added to the deed unlawfully, in conflict with the **WV CSR 64-9** Regulation. When the Davis' purchased the property and the campground was no longer an option. Respondent's statement on Page 8 that the Respondent had bargained with him to give up the right to Sewer Facility on this property, a bargain RESPONDENT accepted. This statement cannot be correct, Respondent did not purchase her property until April 1990 which is 5 months after Petitioner purchased his property which he had almost completed his two bedroom, 1000 square foot home. The testimony at the trial was that the restriction was to benefit the campground that was never constructed.

"The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.' **Wallace v. St. Clair**, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962)." Syl. pt. 2, **Allemon v. Frenzel**, 178 W. Va. 601, 363 S.E.2d 487 (1987).

Testimony during the bench trial shows no one has been to the spring in 25 years. Page 13 of the transcript.

No other property or lots or previous lots sold from this plat had any restrictions on the deed except for the property I purchased from Charles and Judith Grose. At this time no utilities for available on this property.

Respondent's Counsel continues to insist that my dwelling is not a home but "just a hunting camp", when in fact my home was built in 1990 prior to Frank Davis purchasing his property and is used only a few weeks per year for hunting. Remainder of the year it is used as a home and recreational purposes for family and friends.

**W. Va. Code § 36B-27(2005)**"Residential purposes, means use for dwelling or recreational uses or both."

2. "In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith." Syl. Pt. 1, *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803

Therefore, I feel this restrictive covenant in my deed, ( party of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on the real estate herein conveyed.) is invalid and unlawful.

Petitioner feels the trial court did not rule correctly on this issue and should be reversed or remanded.

## **7. SUBDIVIDED PROPERTY EVOLVED**

All sub-divided property has evolved since their original sale from Charles and Judith Grose, prior to the undeveloped campground and water and electric becoming available.

This was a secluded family farm a mile away from blacktop road, at the time of Charles and Judith Grose purchasing this property there were no homes, no water or utilities available of any kind. Electric did not become available until the late 1990's. Petitioner had no way into property other than woodland path, had to fully construct roadway into his property. The only thing on the entire property was a small cinder block camp of the Grose's and a small camper belonging to Fred Mays.

This property has evolved and radical changes have been made to the properties original plan of development. Since that time, I built my home in 1990, Frank Davis rebuilt their camp following the fire, Davis's made a home in approximately 1995, electric became available on or about 1997 to the Davis's and 2007 for Petitioner.

With electric being available, wells were needed and sewage for homes. Mr. Mays began construction of a new home on or about 2011 and is at this time still under construction, as shown throughout **transcripts and testimony during trial of April 29, 2014.**

Property and Homes have evolved since the purchase of lots beginning around 1984 and radical changes have been made to all landowners properties and due to these changes I live at this home about 200 days per year.

" We have "recognized the commonly accepted legal proposition that changes in a neighborhood's character can nullify restrictive covenants affecting property within the neighborhood." **Allemond, 178 W. Va. at 606, 363 S.E.2d at 492.**

The Petitioner believes these changes to the original neighborhood are radical and therefore the issue of the restrictive covenant in the Petitioner's deed should be removed and should be remanded to the lower court to do so.

## **8. MOTION TO AMEND JUDGMENT OR NEW TRIAL**

Re-evaluation of facts based on **WV CSR 64-9** and misinterpreted findings. Motions were filed in timely manner under WV Rules of Civil Procedure. The misinterpreted facts as noted on **Page 74** of the transcript that Webster County Health representative, George Clutter gave me a list of rules for septic system. Dan Hardway objected, the court sustained, said Mr. Clutter had to testify for the list, I was not allowed to read in court. I then ask if I could call him at that time and was told no.

The trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

**State ex rel. Dillon v. Egnor  
188 Wva. 221, 227, 423 S.E.2d 624, 630 (1992)**

These legislative rules, Department of Health, 64 CSR, Series 9, Sewage System Rules are displayed on **Page 80** of the Appendix.

Judge Alsop stated that Motions were denied because as such failed to allege any mistake, inadvertence, excusable neglect, unavoidable cause, newly discovered evidence, fraud or any other matter as such relief could be granted, as noted on **Page 31** of Appendix. There were six findings of misinterpreted facts and judgment.

Petitioner filed the Motion on June 18, 2014, in a timely manner, partly as an objection to the original order of June 11, 2014 and partly to reevaluate the finding of facts and to allow testimony suppressed as "hearsay" from the Webster County Health Department Rules and Regulations, presented at trial. **See WV CSR 64-9.** This information was given to Petitioner and Mr. Bennett at meeting with the Webster County Health Department as stated on Page 39 and 40 of transcripts. This meeting also resulted in finding of information that Respondent had never applied for a septic system permit. Therefore, a good reason for the lower court and Counsel to want new information suppressed.

Petitioner feels that Court would not hear all evidence in this case and believes this should be remanded to lower court with recommendations.

## **9. MOTION TO FOLLOW RECOMMENDATIONS OF WEBSTER COUNTY HEALTH DEPARTMENT**

Motion to Follow Recommendations of Webster County Health Department was filed on August 22, 2014. The first Motion stated that on June 25, 2014, Webster County Health Department representative, George Clutter, inspected the existing property of Petitioner, in Webster County, WV.

This inspection was for purpose of compliance of the final order. Upon inspection, Mr. Clutter determined there was no approved septic system on the site, Mr. Clutter stated that under **WV Code 64 CSR-9**, this property requires an approved septic disposal system. Under existing code **WV 64 CSR 9** makes section 3 of the the above court order and restriction in the plaintiff's deed illegal.

This property must comply with state and county health laws **Title 64-9**, as stated on Page 68 of the Appendix, Health Department Letter.

Petitioner was issued a Well Permit from the West Virginia Department of Health and Human Resources on April 17, 2007. Permit Number DW-51-07-05, Reference **Page 93** of the Appendix. Further directing the Health Department representative to ask for compliance of **WV CSR 64-9-4.25** Well and **4.24** Wastewater laws, therefore confirming a need for septic system disposal.

The Circuit Court's disregard for the unlawful restriction shows that it violates most of, but specifically **5.4.4** of the **WV CSR 64**. "Shall not violate any federal, state or local laws or regulations governing water pollution for sewage disposal."

"This Court has long held, and recently affirmed, that any court order that is in contravention of West Virginia law is void and of no consequence." See e.g, **Wilson v. WVU Sch. of Med., No. 11-0600, 2011 W. Va. LEXIS 545**

The Order Impedes, Rather than Furthers, the rights as homeowner or landowner of WV. Also Order Conflicts with Nationwide Obligations in Federal EPA regulations regarding sewage and gray water.

Respondent's objection to Petitioner's septic system was due only to a spring that was supposed to be used for the proposed/non-existent campground previously mentioned in this brief. This spring has never been used and the Webster County Representative, George Clutter, states that this spring has not been in use for over 25 years. Under state regulations **64-9** a proposed septic system has to be **25 feet** from streams. My property line to the spring is over **120 feet**, therefore the proposed septic area looked at by the Health Department would be at least **275 feet** from this spring. And even in the event someone would want to use the spring, it would be over **10** times the requirement of the state law.

The Circuit Court's decision appears to totally disregard the provisions of **WV CSR 64 Section 9**, Legislative Rules Dept. of Health Sewage Systems Rules, legally adopted under prior acts **1931** and **1983**.

“This shows the restriction invalid and unlawful based upon Rules and Regulations of dwellings for sub-divided property, which requires the Health Dept. to over see the division of land into two or more lots, tracts, partials, plats, sights, areas, units, interests or other division of which are less than two acres in size. In size with an average frontage of less than 150 feet for the purpose of a dwelling or establishment, development, including the division of land by deed, meets and bounds description, lease map, plat, or any other instrument, or by act of construction.”

In transcript of September 2, 2014 hearing, as noted, the Court did not consider this Motion or any Post Trial Motions, but stated I must seek Appellate review. Court did not consider evidence or testimony of the Health Department relevant to these proceedings or to the trial of April 29.

While this trial began from an incited dispute over Right of Way, the Respondent brought up the restriction in Petitioner's deed and therefore results in the State and Federal Health Department Regulations.

Therefore, Petitioner feels the restrictive covenant in his deed, (party of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on real estate herein conveyed.) is invalid and unlawful and should be remanded to lower court with recommendations to be removed from Petitioner's deed.

## **10. SEPTEMBER 2, 2014 HEARING**

Court scheduled a hearing on September 2, 2014, which I was under the impression that this was to hear new evidence and/or subpoenaed witnesses, George Clutter, Webster County Health Department and Mr. Richard Rose, Director of 911 Services. Refer to **Page 1** of the Appendix, Docket Sheet, **Lines 54, 55 and 60.**

Subpoenaed witnesses did not show for the Petitioner, for reasons not known or explained.

Judge Alsop did not hear or consider new evidence from subpoenaed witnesses and said that the order of July 9, 2014 was upheld and is his final order. **Reference transcript from September 2, 2014.**

**Rule 52(a)** [of the West Virginia Rules of Civil Procedure] mandatorily requires the trial court, in all actions tried upon the facts without a jury, to find the facts specially and state separately its conclusions of law thereon before the entry of judgment. The failure to do so constitutes neglect of duty on the part of the trial court, and if it appears on appeal that the rule has not been complied with, the case may be remanded for compliance.

When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party. Most importantly, the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

**State ex rel. Dillon v. Egnor**  
**188 W.Va. 221, 227, 423 S.E.2D 624, 630 (1992)**

The court must not overlook the rules to the prejudice of any party. The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.

**Blair v. Maynard**  
**174 W.Va. 247, 253, 324 S.E.2D 391, 396 (1984)**

I feel that this decision shows prejudice, therefore affecting my property to the point of forcing me to break laws, WV codes and statutes. This should support the Petitioner's recommendations to follow Health Department laws and this decision should be reversed.

## **11. CONCLUSION**

The Circuit Court of Webster County did not properly consider all evidence, therefore made a decision based on incomplete and misinterpreted information which will affect Petitioner's home and property. Although I would like the West Virginia Supreme Court to consider all arguments described in this brief, which shows the Circuit Court's direction of prejudice, I am most concerned with the Numbers 5, 6, 7, 8, 9 and 10 of the argument in the brief, which concerns the restrictive covenant in my property deed. I feel it has been clearly shown to be an unlawful covenant and Petitioner believes to be an unenforceable covenant of his deed and home.

I ask the Court to reverse the Circuit Court's decision on the restrictive covenant and order the restriction to be removed from my deed by the lower Court by sending a strong message to the Circuit Court that this type of incited dispute should not be allowed and may even impose sanctions in these matters. The Supreme Court can help the process move more quickly, and perhaps at the very least spare the Plaintiff a second trip to the Circuit Court.

Donald E. Cottle



P.O. Box 1028

Ceredo, WV 25507

(304) 617-1042

[doncottle@yahoo.com](mailto:doncottle@yahoo.com)

## CERTIFICATE OF SERVICE

I, Donald Cottle, do hereby certify that I have sent true and accurate copies of the Petitioner's Reply to Respondent's Brief, to the West Virginia Supreme Court of Appeals and a copy to Dan Hardway, Counsel for Respondent, at his address of record and by depositing said record in the United States Mail with sufficient postage for delivery on this 23rd day of December, 2014.

Donald Cottle  
P.O. Box 1028  
Ceredo, WV 25507  
(304) 617-1042  
doncottle@yahoo.com

Donald Cottle

A handwritten signature in black ink, appearing to read "Donald Cottle", written over a horizontal line.