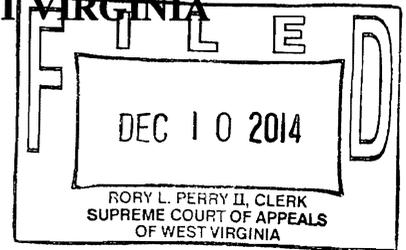


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0898



DONALD E. COTTLE,

Petitioner

Case No. 13-P-20
Honorable Jack Alsop
Circuit Court of Webster County, West Virginia

v.

MARY DAVIS,

Respondent.

BRIEF OF RESPONDENT MARY DAVIS

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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | STATEMENT OF CASE | 1 |
| II. | SUMMARY OF ARGUMENT | 1 |
| III. | STATEMENT REGARDING ORAL ARGUMENT AND DECISION | 2 |
| IV. | STANDARD OF REVIEW | 2 |
| V. | ARGUMENT | 3 |
| | A. The Circuit Court of Webster County Did Not Abuse its Discretion in Denying Petitioners Motion for Default | 3 |
| | B. Rulings on Discovery Issues | 4 |
| | C. Rulings on the Gate | 5 |
| | D. Rulings Regarding the Grave Site | 7 |
| | E. The Subdivision Rules | 8 |
| | F. Evolutionary Theory | 10 |
| | G. The Motion to Amend Judgment or for a New Trial | 11 |
| | H. Motion to Withhold Judgment and Motion to Follow Recommendations of Webster County Health Department and the September 2, 2014 Hearing | 12 |
| VI. | CONCLUSION | 14 |

TABLE OF AUTHORITIES

W.Va. Cases:

| | |
|--|--------|
| <i>Allemong v. Frenzel</i> , 178 W.Va. 601, 363 S.E.2d 487 (1987) | 10 |
| <i>B.F. Specialty Co. v. Charles M. Sledd Co.</i> , 197 W.Va. 463, 475 S.E.2d 555 (1996) | 5 |
| <i>Blair v. Maynard</i> , 174 W.Va. 247, 324 S.E.2d 391, 396 (1984) | 13 |
| <i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995) | 2 |
| <i>Coffman v. Shafer</i> , 186 W.Va. 381, 412 S.E.2d 782 (1991) | 10 |
| <i>Faith United Methodist Church v. Morgan</i> , 231 W.Va. 423, 745 S.E.2d 461 (2013) | 9 |
| <i>Groves v. Roy G. Hildreth and Son, Inc.</i> , 222 W.Va. 309, 664 S.E.2d 531 (2008) | 3 |
| <i>Hamilton Watch Co. v. Atlas Container, Inc.</i> , 156 W.Va. 52, 190 S.E.2d 779 (1972) | 3 |
| <i>Hardwood Group v. Larocco</i> , 219 W. Va. 56, 631 S.E.2d 614 (2006) | 3, 4 |
| <i>Hinerman v. Levin</i> , 172 W.Va. 777, 310 S.E.2d 843 (1983) | 2, 4 |
| <i>Intercity Realty Co. v. Gibson</i> , 154 W.Va. 369, 175 S.E.2d 452 (1970), <i>overruled on other grounds by Cales v. Wills</i> , 212 W.Va. 232, 569 S.E.2d 479 (2002) | 3 |
| <i>Morris v. Nease</i> , 160 W.Va. 774, 238 S.E.2d 844 (1977) | 10, 11 |
| <i>Nutter v. Maynard</i> , 183 W.Va. 247, 395 S.E.2d 491 (1990) | 5 |
| <i>O'Dell v. Stegall</i> , 226 W.Va. 790, 703 S.E.2d 561 (2010) | 8 |
| <i>Parsons v. Consolidated Gas Supply Corp.</i> , 163 W.Va. 464 256 S.E.2d 758 (1979) | 3 |
| <i>Perdue v. Coiner</i> , 156 W.Va. 467, 194 S.E.2d 657 (1973) | 2 |
| <i>Walker v. West Virginia Ethics Comm'n</i> , 201 W.Va. 108, 492 S.E.2d 167 (1997) | 2 |
| <i>Weikle v. Bolling</i> , Memorandum Decision, No. 12-0549, (W.Va. Supreme Court, June 24, 2013)7 | |

Statutes:

W.Va Code § 37-13A-1 7

Rules:

W.Va. Rules of Civil Procedure, Rule 6 5

W.Va. Rules of Civil Procedure, Rule 60(b) 4

Other:

64 W.Va. CSR § 64-9-1, et seq. 8

I. STATEMENT OF THE CASE

Donald E. Cottle, Petitioner, and Mary Davis, Respondent, are neighbors. Deeds of record give Petitioner a 30 foot right-of-way limited for use for ingress and egress. Petitioner's deed also contained a restrictive covenant stating "It is expressly understood that parties of the second part [Petitioner] shall install no septic or sewage of any kind, no septic tank or leach bed on the real estate herein conveyed."

Respondent Mary Davis's permanent home is on the property. Petitioner uses his one acre tract as a hunting camp for himself and his friends. In May of 2013, relations between the neighbors soured and Respondent requested that Petitioner stay off her property and limit his use of his right of way to ingress and egress. Petitioner requested Respondent to remove all trees on the right of way that encroached upon the right of way. While no one seems to have had any real trouble getting across the right of way, there was, apparently one place where it was tight during heavy snows due to trees along the gravel road. Respondent requested Petitioner to remove the septic system he has on his property. Petitioner and a friend, with Respondent's consent, had been maintaining a very small parcel on the Respondent's property, next to the right of way, that they claimed contained two old graves. When things got difficult between them, Respondent revoked her permission to Petitioner to maintain the alleged graves site. Attempts to reconcile and conciliate the parties failed and this lawsuit followed. Other facts are discussed as necessary herein.

II. SUMMARY OF ARGUMENT

The decision of the Circuit Court of Webster County in this case should be affirmed. The trial court did not abuse its discretion in denying Petitioner's various motions related to default, discovery and evidentiary issues, and the various post trial motions. All the trial court's factual

findings are fully supported by the evidence of record. The trial court correctly applied the law to the facts in the record before it on all issues of law including whether the Petitioner was an authorized person under statutory requirements related to access to graves on private land and in construing the restrictive covenant in Petitioner's deed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with Petitioner that this case may be appropriate for Rule 19 argument although Respondent does not believe that such argument is necessary and that the case can be decided on the record, assuming the Appendix is supplemented so that it consists of all that was agreed to be included, and the briefs of the parties. The case is not appropriate for a Rule 20 argument, although the issue involving the alleged burial ground may be a question of first impression.

IV. STANDARD OF REVIEW

The standard of review of assignments of error challenging specific legal rulings of the circuit court is de novo. *See, e.g.*, Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997); Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

The standard of review on the granting or denial of a Motion for Default, and other procedural motions, is for abuse of discretion. "Appellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering the default judgment." Syl. Pt. 3, *Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983). "On an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, *Perdue v. Coiner*, 156 W.Va.

467, 194 S.E.2d 657 (1973).

V. ARGUMENT

A. THE CIRCUIT COURT OF WEBSTER COUNTY DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONERS MOTION FOR DEFAULT.

Petitioner filed his complaint on September 16, 2013. The summons and complaint were served on respondent on September 17, 2013. The Respondent mailed an answer with a certificate of service on Petitioner on October 9, 2013, twenty-two days after service of the complaint.

A hearing was held on Petitioner's Motion for Default on January 6, 2014. At the hearing, counsel for the Respondent stated "I evidently, inadvertently, added three days to my response time to put the drop date in my calendar, which is what I routinely do and then I usually try to file at least a week before the drop date, but because of other cases I have pending and matters that have been pressing, this one did not get mailed until the day before the drop date." Transcript, Hearing, January 6, 2014, p. 4. The answer was actually received in the Webster County Circuit Clerk's Office on the same day, approximately 4 hours, before Petitioner filed his Motion for Default. *Id.* at 7. The Petitioner did not show any prejudice arising from the two day late filing.

It is well settled that a Motion for Default, like a Motion to Vacate a Default Judgment is addressed to the sound discretion of the trial court. *Hardwood Group v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006); *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W. Va. 52, 190 S.E.2d 779 (1972); *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464 256 S.E.2d 758 (1979); *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970), *overruled on other grounds by Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002). Default judgments are looked upon with disfavor, the law favoring adjudication on the merits. *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W. Va.

309, 664 S.E.2d 531 (2008).

The standard for review is whether the trial court has abused its discretion. Syl. Pt. 3, *Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983). In the exercise of discretion, the trial court considers the factors set out in Gibson and Rule 60(b) of the West Virginia Rules of Civil Procedure: 1) the degree of prejudice to the non-defaulting party; 2) The presence of material issues of fact and meritorious defenses; 3) the significance of the issues at stake; and 4) the degree of intransigence by the defaulting party. *Larocco*, 631 S.E.2d 614.

In this case the Petitioner did not show any prejudice resulting from the two day late filing. The presence of material issues and meritorious defenses is borne out by the record of the subsequent proceedings. The issues at stake were of large significance to the parties involved. The defaulting party was not intransigent. The answer was filed a mere two days late, having been received by the Clerk four hours before the Petitioner checked the court file and filed his Motion. Counsel for the Respondent explained the inadvertent mistake he made in calendaring the response due date. It is submitted, in this case, that all the factors support the trial court's ruling and there was no abuse of discretion.

B. RULINGS ON DISCOVERY ISSUES

Petitioner complains of matters in regard to a second set of discovery requests that the Petitioner served on Respondent on January 31, 2014. App. p. 1. Respondent filed a Motion for Additional Time to Respond on February 27, 2014. *Id.* Petitioner filed a Motion seeking an order to comply with discover on March 4, 2014. App. p. 24. As noted in that Motion, Counsel for the Respondent had asked Petitioner for additional time to answer by email, but Petitioner denied the request because he believed he did not have authority to agree to do so. *Id.* Counsel for Respondent

had begun a murder trial in Braxton County Circuit Court on February 18, 2014, which lasted until March 6, 2014. (*State v. Julia Surbaugh*, Webster County Case No. 12-F-14). Respondent filed a response to the discovery request on March 21, 2014. The only document in this sequence included by the Petitioner in the Appendix is his Motion requesting compliance.

A motion on discovery matters is addressed to the discretion of the Court. *Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990). There is no indication in the record that the Motion referenced by the Petitioner was ever brought on for a hearing or ruled on by the trial judge. Responses to the Petitioner's second discovery request was filed on March 21, 2014. App. p. 1.

Petitioner also complains that Respondent's Pre-trial Memorandum was filed late. The Memorandum was due on April 12, 2014, a Saturday, as the Scheduling Order required the Memoranda to be filed two days before the Pretrial Hearing, which was scheduled for April 14, 2014. App. p. 19. The Office of the Clerk of Court of Webster County is not open on Saturdays. The Respondent's Memorandum was filed on the first business day following the due date pursuant to Rule 6 of the West Virginia Rules of Civil Procedure.

Petitioner has not showed, on the basis of the record before the Court, any basis for an assertion that the trial court abused its discretion in such a manner as to amount to an injustice to Petitioner, nor has he shown what the trial court's rulings on the motions were, nor that they were "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." Syl. Pt. 1, *B.F. Specialty Co. V. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996).

C. RULINGS ON THE GATE

Petitioner, in his Complaint, sought to have the trial court order the removal of a gate located

on U.S. Forest Service property, which gate was owned and controlled by Respondent. The trial court, in its final order held that the gate did not unreasonably burden the Petitioner. As the trial court observed, there was an abundance of evidence to support its finding that the gate was not an unreasonable or material interference with the Petitioner's use of his right to use the right of way for ingress and egress. The Petitioner acknowledged that the gate was in its present location when he bought his property. Trans., April 29, 2014, p. 78. It has been there since, at least, 1984. Trans., April 29, 2014, p. 109. Petitioner has a key to the gate. Trans., April 29, 2014, p. 70. The gate is there for the purposes of security in an isolated neighborhood with only one permanent resident. Trans., April 29, 2014, pp. 78, 92, 102. As Fred Mays, an owner of two lots on the property who is building a home there put it: "Well, we are in a remote area. We are about a mile off of Williams River Road. We are surrounded by National Forest and for security reasons, I myself, I can't imagine not having a locked gate there to protect our property. I don't think we would have anything left there." Trans., April 29, 2014, p. 102. Respondents home on the property was, in 1990, burned to the ground, even with the gate. *Id.* Keys were available from the Respondent and it appears that all who wanted one had one, including the local emergency services. Trans., April 29, 2014, pp. 25, 101, 109.

Petitioner was allowed to introduce testimony from his friends who visit occasionally on his property that they were over 50 years of age and would like to have the gate open when they were visiting in case they had need of emergency responders. The other property owners who testified indicated that the gate was there for security, they wanted it there for that purpose and that all residents and the emergency responders had keys to the gate. It was uncontested that the gate was on U.S. Forest Service Property. The Respondent, in this appeal, thinks that the trial court's oral

ruling from the bench at the trial of this case that the Circuit Court of Webster County did not have jurisdiction over the U.S. Forest Service to order them to remove the gate or have it removed conflicts with his ruling that the gate does not materially interfere with his use of the right of way. Those are two separate issues and the trial court correctly ruled on both of those issues, properly applying the law of *Weikle v. Bolling*, Memorandum Decision, No. 12-0549, (W.Va. Supreme Court, June 24, 2013), to the facts of this case.

D. RULINGS REGARDING THE GRAVE SITE

W.Va Code § 37-13A-1 regulates access to cemeteries and graves located on private property. Under the terms of that statute, access is limited to “a family member, close friend or descendant of a deceased person” who is buried there or someone who has written permission from such a person or persons engaged in genealogy research. The evidence adduced at trial was questionable as to whether there was even a grave site on the property. No one, however, could offer any testimony of any actual knowledge of who, if any one was buried there. Petitioner’s witness, Lee Bennett, testified that he did not know who was buried there nor whether anyone buried there was a member of his family. Trans., April 29, 2014, p. 28. Petitioner acknowledged that he was not related to, nor a friend of anyone who was buried there. Trans., April 29, 2014, pp. 83-84. He did not offer any evidence that he had written permission from the descendent or friend of anyone buried there to access the property. The Petitioner tendered no evidence that he was engaged in genealogy research or that there was any genealogical information to be gleaned from the site. The trial court properly ruled that the Petitioner was not an authorized person under the statute. The evidence of record fully supports the trial court’s ruling.

E. THE SUBDIVISION RULES.

This issue was not presented to the trial court and was not argued in the trial court by the Petitioner except for Petitioner's argument that if the property had been subdivided, he had prescriptive right of ways on all subdivision roads. Trans., April 29, 2014, p. 88. Petitioner has cited no authority that a subdivision of property gives anyone a prescriptive easement of any kind.

The Petitioner had the burden of showing the existence of any claimed prescriptive easement by clear and convincing evidence showing that his use was adverse, continuous and uninterrupted for ten years or more, was known or should have been known to the owner, and identified a starting and ending point, line and width of the land adversely used, and the manner or purpose of the adverse use. *O'Dell v. Stegall*, 226 W.Va. 790, 703 S.E.2d 561 (2010). The Petitioner offered no evidence, let alone clear and convincing evidence, on any of those points and, consequently, the trial court's ruling was proper and supported by the evidence of record.

If the Petitioner is using the cited regulations, 64 W.Va. CSR § 64-9-1, et seq., to refer to his claim that the trial court should have removed the restrictive covenant from his deed, then the issue was not before the trial court. And, even if it were, it is inapplicable in this situation as his property was purchased for the purpose of providing a hunting camp and he accepted transfer of the property with a restrictive covenant prohibiting any type of sewer system on the property. This case does not involve a planned subdivision for residential purposes. There was a large plot of land. Over a period of several years, the owner of the land sold three or four lots, separately, to individual purchasers. In the case of the Respondent, the seller of the land bargained with him to have him give up the right to have any sewer facility on his property, a bargain Respondent accepted. If, as argued by the Petitioner, the attorney who drafted the deed should have advised him that such a covenant was

unlawful, then his claim is against his attorney who was not a party to this litigation.

The testimony at trial was clear that the restrictive covenant was to run to the benefit of the other landowners of property so as to prevent contamination of a spring on the property. A prior purchaser of property, Fred Mays's, deed grants him an easement for his life time to access and use the spring. The spring can be a source of water to other landowners. While there was some testimony that the owner of the property prior in interest to the Respondent may have at one time intended to put a camp site on the property, the restrictive covenant in the deed was not conditioned on such a development and, indeed, made no reference to such a limiting factor. The trial court properly applied the law to give effect to the language of the parties expressed in their deed. Syl. Pt. 8, *Faith United Methodist Church v. Morgan*, 231 W.Va. 423, 745 S.E.2d 461 (2013).

Finally, it should be noted, that Mr. Grose, Petitioner and Respondent's predecessor in interest in the real estate involved in this case, sale of real estate herein did not constitute a subdivision for legal purpose at the time under the ordinances of Webster County. At that time, Webster County did not have a Planning Commission or a Subdivision and Land Development Ordinance under Chapter 8A of the West Virginia Code. Mr. Grose, in giving certain lots on his land in the 1980's did not file a subdivision plan or plat. None was required. Mr. Grose sold 6 parcels in 6 separate transactions spanning a period of approximately 8 years, with the last sale being of all the remainder of the land he owned. An examination of the deeds, the plats filed with the deeds, shows that none of the sales was done pursuant to any subdivision plan. He sold one lot to Thomas and Lillian Bailes by a deed dated October 29, 1982. App. p. 103. He sold one lot to Robert E. Kamm, Jr., by deed dated July 28, 1983. Trans., April 29, 2014, pp. 69, 85, Resp. Ex. No. 5. He sold two lots to Fred Mays by deeds dated May 3, 1985 and August 13, 1986. Trans., April 29,

2014, pp. 67, 85, Resp. Ex. Nos. 1 and 4. He sold a one acre tract to Petitioner by deed dated December 21, 1989. App. p. 90. Finally, he sold the remaining land he owned to Respondent and her husband by deed dated April 12, 1990. App. p. 99.

Even were it to be considered that Mr. Grose's sale of a one acre lot to Petitioner in 1989 constituted a "subdivision" for purposes of 64 W.Va. CSR § 64-9-1, et seq., and that Mr. Grose was in violation of those rules at the time of the sale, such violation would not result in violation of a bargained-for restrictive easement in the deed that was designed to work in favor of prior purchasers, the owner and any successors in interest. Any action that Petitioner might have in the situation would have been a cause of action against Mr. Grose. *See, e.g., Coffman v. Shafer*, 186 W.Va. 381, 412 S.E.2d 782 (1991).

Finally, the cases cited by Petitioner in support of his argument that the trial court did not properly apply the law in construing the restrictive covenant are inapposite. For example, he properly cites the second syllabus point of *Allemong v. Frenzel*, 178 W.Va. 601, 363 S.E.2d 487 (1987), for how such covenants are to be construed. He does not, however, consider the third syllabus point of the same case, *citing* Syl. pt. 1, *Morris v. Nease*, 160 W.Va. 774, 238 S.E.2d 844 (1977), which provides: "Valid restrictive covenants applying to a residential neighborhood cannot be nullified by changes in the neighborhood's character unless the changes are so radical as effectively to destroy the essential objects and purposes of the neighborhood's original plan of development." There is no evidence in this case that there has been any radical change in the neighborhood since Petitioner purchased his property. The record fully and completely supports the trial court's ruling on the issue of the restrictive covenant in the Petitioner's deed, which ruling should be affirmed.

F. EVOLUTIONARY THEORY.

“Valid restrictive covenants applying to a residential neighborhood cannot be nullified by changes in the neighborhood's character unless the changes are so radical as effectively to destroy the essential objects and purposes of the neighborhood's original plan of development.” *Id.* There is no evidence in this case that there has been any radical change in the neighborhood since Petitioner purchased his property. record fully and completely supports the trial court's ruling on the issue of the restrictive covenant in the Petitioner's deed, which ruling should be affirmed.

G. THE MOTION TO AMEND JUDGMENT OR FOR A NEW TRIAL.

On June 11, 2014, the trial court entered an Opinion and Final Order Following Bench Trial. App. p. 1. (This Order is not reproduced in the Appendix filed by Petitioner, although its inclusion was agreed to by the parties.) The trial court entered an Amended Opinion and Final Order Following Bench Trial on July 9, 2014, which corrected one typo in the original Order. App. p. 43. Petitioner filed his Motion For Amending Judgment or New Trial on June 18, 2014, after the original Opinion and Order in this case. App. pp. 1, 31. This motion was denied by Order entered on July 9, 2014, the same date the Court's Amended Opinion and Final Order was filed. App. p. 1-2, 43-65. Defendant's Motion for Amending Judgment or New Trial of June 18, 2014, did not allege any new matter, but asked rather that the trial court reevaluate its findings of fact. The Motion itself says nothing about the testimony of George Clutter of the Webster County Health Department.

Now, on appeal, the Petitioner alleges that his Motion should have been granted because he had not been allowed to offer hearsay evidence and had not been allowed to interrupt the trial to call Mr. Clutter to see if he was available to come and testify. In support of alleging this as error he sites his unfamiliarity with the rules. However, he knew that he had to have witnesses available to testify

as he called each and everyone he wanted to for that purpose with the exception of Mr. Clutter. As such, the trial court, which went out of its way to be fair to the Petitioner throughout the course of this proceeding, did not abuse its discretion in denying the Petitioner a delay in the middle of the trial to try to find Mr. Clutter.

To the extent that this assignment of error relies upon the trial court declining to find any of the items in the June 18 Motion to have been an allegation of mistake, inadvertence, excusable neglect, unavoidable cause, or newly discovered evidence, it is clear from an examination of the Motion itself that it does not allege any of those matters, but merely requests the court to reevaluate its previous findings. As such, the trial court did not abuse its discretion and its rulings in this case should be affirmed.

H. MOTION TO WITHHOLD JUDGMENT AND MOTION TO FOLLOW RECOMMENDATIONS OF WEBSTER COUNTY HEALTH DEPARTMENT AND THE SEPTEMBER 2, 2014 HEARING.

On August 22, 2014, Petitioner filed a Motion to Withhold Judgment and a Motion to Follow Webster County Health Department Recommendations in which he raised the issues with the state sewage regulations and the possible testimony of George Clutter.

The trial court, by Order entered July 7, had the case for a hearing on September 2, 2014. App. p. 34. At that hearing the trial court reviewed the status of the case and noted that the Respondent had filed the August 22, 2014 Motion. The trial court reiterated that it considered the sceptic issue to be purely a matter of interpretation of the language of the restrictive covenant and that nothing new had been alleged. The trial court then, in a proper exercise of its discretion, denied the Petitioner's Motions and advised him to seek appellate review, which he now has done.

While it is true that under the case law of this state, a trial court should make reasonable

accommodation so that a *pro se* litigant receives a fair trial, such accommodations do not require the trial judge to act as the *pro se* litigant's attorney nor to abandon his discretionary range of control over parties and proceedings. The trial judge is not to allow such accommodations to result in prejudice to adverse parties. *Blair v. Maynard*, 174 W.Va. 247, 324 S.E.2d 391, 396 (1984). Such accommodation does not extend to allowing the *pro se* litigant to continue to challenge a final ruling after it has been entered and the appeal period has expired as it had in this case at this hearing. The trial court, quite correctly and properly, denied the motions and advised the Petitioner that his remedy lay in taking an appeal. Similarly, such accommodations do not require the trial court to give the *pro se* litigant the right to introduce any and all evidence the *pro se* litigant desires regardless of that evidence's materiality, relevance or admissibility.

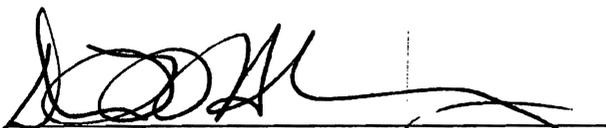
As noted in *Blair*, "This 'reasonable accommodation' is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts. Therefore, ultimately, the *pro se* litigant must bear the responsibility and accept the consequences of any mistakes and errors." *Id.* The Petitioner may have mistakenly not called George Clutter to testify at the scheduled trial in this matter. But, in the context of the case about which his testimony was sought – the interpretation of the language of a restrictive easement – the proposed testimony of Mr. Clutter was immaterial and irrelevant. At trial, Petitioner sought to elicit testimony about what Mr. Clutter may have said about the Respondent's septic system which system was not in issue in the case. Trans., April 29, 2014, p. 40. The trial court properly exercised its discretion in sustaining an objection on relevancy grounds. Later in the hearing, it appeared that Petitioner want to offer testimony from Mr. Clutter about the laws related to septic systems. *Id.* at 74-75. At that time, the trial court properly upheld a hearsay objection. The Petitioner asked to "use the phone to call him" to which the Court

responded, "No, we are going to precede." *Id.* at 75. The issue in this case was the restrictive easement, not the county sanitary regulations. The trial court properly exercised its discretion and its duty to accommodate the pro se litigant while maintaining control of the proceedings and preventing undue prejudice to any party.

VI. CONCLUSION

The trial court properly exercised its discretion at all stages of the proceeding below. The trial court properly applied the law to the facts in the proceeding below. The trial court's factual findings are fully supported by the evidence of record. For the foregoing reasons, and others appearing of record in this matter, the Respondent Mary Davis respectfully requests this Court to affirm the ruling of the Circuit Court of Webster County.

Respectfully submitted this the 9th day of December, 2014.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0898

DONALD E. COTTLE,

Petitioner

Case No. 13-P-20

Honorable Jack Alsop

v.

Circuit Court of Webster County, West Virginia

MARY DAVIS,

Respondent.

CERTIFICATE OF SERVICE

I, Dan L. Hardway, counsel for the Respondent and Petitioner Below, Mary Davis, do hereby certify that the foregoing **Brief of Respondent Mary Davis** has been served upon the Petitioner by placing a true copy thereof into an envelope addressed to him at his address of record as follows and depositing said envelope in a repository of the United States Postal Service with sufficient First Class postage thereon for delivery on this the 9th day of December March, 2014:

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