

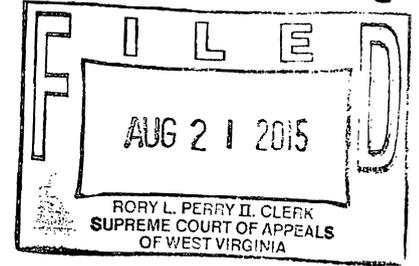
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Pamela Jean Hayes, Plaintiff Below,
Petitioner**

vs. No. 15-0518

**Larry Brady, and Dawna Michelle Boone Brady,
Defendants Below, Respondents**

COPY



PETITIONER'S BRIEF

J. Burton Hunter, III
J. Burton Hunter, III and Associates, PLLC
Counsel for the Petitioner
One West Main Street
Buckhannon, WV 26201
304-472-7477
304-472-0641 (facsimile)
hunterjb@hunterlawfirm.net
WV State Bar ID 1827

TABLE OF CONTENTS

	PAGE
Table of Authorities	3
Assignments of Error	6
Statement of the Facts and Case	6
Summary of Argument	14
Statement Regarding Oral Argument	17
Argument	17
Conclusion	36
Verification	37
Certificate of Service	38

TABLE OF AUTHORITIES

1. 5th Amendment of the US Constitution, **pg. 35**
2. 14th Amendment of the US Constitution, **pg. 35**
3. “A Survey of the Law of Easements in West Virginia”, 112 W.Va. Law Rev. 637, **pg. 21**
4. Bego v. Bego, 177 W.Va. 74, 350 S.E.2d 701 (1986), **pg. 18**
5. Bell v. Hagmann, 200 Va. 626, 107 S.E.2d 426 (1959), **pg. 28**
6. Berkeley County Pub. Serv. Dist. V. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968), **pg. 28**
7. Blair v. Maynard, 174 W. Va. 247, 324 S.E.2d 391 (1984), **pg. 18, 19**
8. Bragg v. Peytona Lumber Co., 102 W.va. 587, 135 S.E. 841 (1926), **pg. 28**
9. Butler v. Carlyle, 84 W.Va. 753, 100 S.E. 736 (1919), **pg. 28**
10. Carper v. United Fuel Gas Co., 78 W.Va. 433, 89 S.E. 12 (1884), **pg. 28**
11. Charleton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (1923), **pg. 29**
12. Cobb v. Daugherty, 693 S.E.2d 800 (2010), **pg. 21, 22, 24**
13. Conklyn v. Shenandoah Milling Co., 68 W.Va. 567, 71 S.E. 274 (1911), **pg. 28**
14. Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (N.D.W.Va. 1970), **pg. 29**
15. Conservation Commission v. Price, 193 Conn. 414, 479 A.2d 187 (1984), **pg. 19**
16. Cunningham v. Riley, 180 W.Va. 146, 375 S.E.2d 778 (1988), **pg. 32, 33**
17. Dotson v. Milliken, 209 U.S. 237, 28 S.Ct. 489, 53 L.Ed. 768 (1908), **pg. 32**
18. Everett v. Brown, 174 W.Va. 35, 321 S.E.2d 685, (1984), **pg. 31**
19. Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996), **pg. 28**
20. Garrett v. Patton, 81 W.Va. 771, 95 S.E. 437 (1918), **pg. 28**

21. Glass v. Hulbert, 102 Mass. 24, 3 Am.Rep. 418, **pg. 31**
22. Griffin v. Coal Co., 59 W.Va. 4801, 53 S.E. 24 (905), **pg. 27**
23. Hanly v. Watterson, 39 W.Va. 214, 19 S.E. 536 (1894), **pg. 30**
24. Heatherly v. Farmers' Bank, 31 W.Va. 70, 5 S.E. 754 (1888), **pg. 29**
25. Huddleston v. Mariotti, 143 W.Va. 419, 102 S.E.2d 527 (1958), **pg. 29**
26. Humble Oil & Refining Co. v. Lane, supra., **pg. 34**
27. Jessee v. Aycoth, 202 W.Va. 215, 503 S.E.2d 528 (1998), **pg. 28**
28. Johnson v. Welch, 42 W.Va. 18, 24 S.E. 585 (1896), **pg. 29**
29. Kimmell v. Mohler, 102 W.Va. 355, 135 S.E. 175 (1926), **pg. 32**
30. Knotts v. Bartlett, 83 W.Va. 525, 98 S.E. 590 (1887), **pg. 28**
31. Patricia E. Lee v. Charles W. Lee, 228 W.Va.483; 721S.E.2d 53 (W.Va. 2011), **pg. 34**
32. Mays v. Hogue, **pg. 21**
33. McClung Investments, Inc. v. Green Valley Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), **pg. 15, 20, 21**
34. Melbourne Bros. Constr. Co. v. Pioneer Co., 181 W.Va. 816, 384 S.E.2d 857 (1989), **pg. 27**
35. Michie's Jurisprudence, Contracts, §40, book 4A, page 428 (1999), **pg. 27**
36. Michie's Jurisprudence, Contracts, §40, book 4A, page 429 (1999), **pg. 28**
37. Michie's Jurisprudence, Contracts, §41, book 4A, page 429 (1999), **pg. 28**
38. Michie's Jurisprudence, Contracts, §42, book 4A, page 431-432 (1999), **pg. 28**
39. Michie's Jurisprudence, Contracts, §43, book 4A, page 434 (1999), **pg. 28**
40. Michie's Jurisprudence, Contracts, §43, book 4A, page 435 (1999), **pg. 29**
41. Michie's Jurisprudence, Contracts, §43, book 4A, page 437 (1999), **pg. 29**
42. Michie's Jurisprudence, Contracts, §48, book 4A, page 449 (1999), **pg. 29**

43. Michie's Jurisprudence, Estoppel, §14, book 7A, page 486 (1998), **pg. 30**
44. Michie's Jurisprudence, Estoppel, §14, book 7A, page 488 (1998), **pg. 30**
45. Moore v. Chesapeake & O. Ry., 493 F. Supp. 1252 (S.D.W.Va. 1980), 649 F.2d 1004 (4th Cir. 1981), **pg. 27**
46. Norfolk & W.R. Co. v. Perdue, 40 W.Va. 442, 21 S.E. 755 (1895), **pg. 30**
47. O'Dell v. Stegall, 703 S.E.2d 56 (2010), **pg. 21, 22, 23, 25**
48. Peerless Carbon Black Co. v. Gillespie, 87 W.Va. 441, 105 S.E. 517 (1920), **pg. 29**
49. Raleigh Lumber Co. v. Wilson & Son, 69 W.Va. 598, 72 S.E. 651 (1911). **Pg. 28**
50. Restatement (Second) of Contracts § 139, **pg. 30**
51. Roberts v. Consolidation Coal Co., 208 W. Va. 218, 539 S.E.2d 478 (2000), **pg. 18**
52. Ross v. Midelburg, 42 S.E.2d 185 (W.Va. 1947), **pg. 31**
53. Ryan v. Rickman, 213 W.Va. 646, 584 S.E.2d 502, **pg. 30**
54. Stone v. Tyree, 30 W.Va. 687, 5 S.E. 878 (1888), **pg. 30**
55. Taylor v. Taylor, 176 W.Va. 413, 11 S.E.2d 587 (1940), **pg. 28**
56. Heather C. Washington v. Charles D. Washington, 645 S.E.2d 110, 221 W. Va. 224 (2007), **pg. 18**
57. Weaver v. Burr, 31 W.Va. 736, 8 S.E. 743 (1888), **pg. 30**
58. WV Rules of Civil Procedure, Rule 60(b), **pg. 18**
59. Wetterwald v. Woodall, 83 W.Va. 647, 98 S.E. 437 (1919), **pg. 28**
60. Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 90 (4th Cir. 1981), 500 F. Supp. 307 (E.D. Va. 1980), **pg. 29**

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting, by order entered April 24, 2015, Defendants' Motion to Dismiss.

2. The Court erred by denying the Plaintiff her day in Court on key unresolved issues such as prescriptive right and way of necessity.

3. The Circuit Court erred as a matter of law for failing to construe the evidence in the light most favorable to the Plaintiff, the non-moving party, when considering the Defendants' Motion to Dismiss filed on December 29, 2014.

4. The Circuit Court erred by denying the Plaintiff Equal Protection under the 14th Amendment of the US Constitution and Due Process under the 5th and 14th Amendments of the US Constitution.

STATEMENT OF THE FACTS AND CASE

1. This action (14-C-123), and its predecessor (13-C-29), were filed by Pamela J. Hayes against the Defendants, Larry Brady and Dawn Michelle Boone Brady, in order to permit Pamela Hayes to regain access to her land, a 16.5 acre tract situate in Banks District, Upshur County, WV, via the ingress and egress right of way, which had been blocked since approximately 2011 by the Defendants.

2. Pamela Jean Hayes acquired 16.5 acres from Glenn William Samples by deed dated June 21, 1994, of record in the Office of the Clerk of the County Commission of Upshur County, WV in Deed Book 381 at page 32.

3. Below is a chart referencing the chain of title including the quoted language of each right of way conveyed or reservation to the subject 16.5 acres owned by Pamela J. Hayes and the 50 acres owned by Larry and Dawna Brady.

4. The key to the Petitioner's case is the consistent conveyances and reservations, running with the land, of ingress and egress rights of way.

	Date of Deed	Grantor	Grantee	Conveyed
A.	January 20, 1920	L. W. Cutright and W. B. Cutright	Robert Boone	114 ¼ acres (Parent tract to 16.5 acres and 50 acres)
B.	August 3, 1921	Robert Boone and Cora Boone	William E. Boone	½ interest in 114 ¼ acres (Parent tract to 16.5 acres and 50 acres)
C.	November 7, 1924	Robert Boone and Cora Boone	William E. Boone	½ interest in 64 ¼ acres (This tract encompasses Pamela Hayes' tract of 16.5 acres and lies immediately to the east thereof.)
D.	November 7, 1924	William E. Boone and Nancy Boone	Robert Boone and Cora Boone	½ interest in 50 acres (This tract is the tract adjoining Pamela Hayes' 16.5 acres and is owned by the Brady's. It lies immediately to the west of her tract.)
E.	December 16, 1924	W. E. Boone and Nancy Boone	Okey Boone	64 ¼ acres
F.	April 10, 1936	Okey Boone and Georgia Boone	A. M. Samples	64 ¼ acres
G.	May 26, 1977	Robert Boone May Belle Boone	James K. Boone and	50 acres

	Date of Deed	Grantor	Grantee	Conveyed
H.	December 11, 1990	Gary Marion Samples As Executor of the Last Will and Testament Of Edna Mae Huffman Deceased	Glenn William Samples	16.5 acres
I.	June 21, 1994	Glenn William Samples	Pamela Jean Hayes	16.5 acres
J.	October 24, 2007	Terry Boone, Ken Boone Kerri Boone, Kristen Boone, now known as Kristen Boone Hedrick, and Kelli Boone, now known as Kelli Boone Bender	Larry G. Brady and Dawna Michelle Brady	50 acres

	Deed Book & Page	Right of Way
A.	68/554	N/A
B.	72/92	N/A
C.	76/593	The said parties of the first part also reserve the right of egress and regress over and through the above described tract of land to and from a tract of land now owned by them and lying west of this tract.
D.	76/594	The said parties of the first part also reserve the right of egress and regress over and through the above described tract of land to and from a tract of land now owned by them lying east of this tract.
E.	76/592	It is also understood and agreed that a certain deed made by W. E. Boone and wife to Robert Boone the right was reserved to travel over and through the land that was conveyed to said Robert Boone and this privilege shall extend to said Okey Boone giving him the full benefit of said right as is set out in said deed mentioned.
F.	93/208	It is also understood and agreed that in a certain deed made by W. E. Boone and wife to Robert Boone the right of way reserved to travel over and through the land that was conveyed to said Robert Boone and this privileges shall extend to A. M. Samples giving him the same rights and benefits of said reserve as the said Okey Boone may have to said rights under his deed,...
G.	263/212	This deed is made subject to the same restrictions, reservations, easements, and requirements as are contained in previous deeds of the property herein conveyed to the extent to which the same are presently applicable, and have not heretofore been released, abandoned, or discharged by operation of law or otherwise.
H.	357/525	For the aforesaid consideration, there is further granted and conveyed unto the said party of the second part a right of way for ingress and egress from the Wilsontown Road to the tract herein conveyed over and across the present roadway, said right of way being heretofore conveyed to A. M. Samples in a deed from Okey Boone, et. ux., dated April 10, 1936, of record in said Clerk's Office in Deed Book No. 93 at page 208. (Note: The Wilsontown Road is one and the same road now known as the Salem Ridge Road.)
I.	381/32	This conveyance is made subject to, and where applicable, the Grantee herein, his successors and assigns, shall have the benefit of the following exceptions, reservations and provisions as contained in the aforesaid deed, viz:

Deed Book & Page

Right of Way

“For the aforesaid consideration, there is further granted and conveyed unto the said party of the second part a right of way for ingress and egress from the Wilsontown Road to the tract herein conveyed over and across the present roadway, said right of way being heretofore conveyed to A. M. Samples in a deed from Okey Boone, et. ux, dated April 10, 1936, of record in said Clerk’s office in Deed Book No. 93 at page 208.

“It is further understood and agreed that this conveyance is made subject to a right of way for ingress and egress from the Wilsontown Road over and across the real estate conveyed to a tract or parcel of real estate containing 16.5 acres this day conveyed to Gary Marion Samples, Executor of the Last Will and Testament of Edna Mae Huffman, deceased, to Cecil Ray Samples.”

This conveyance is subject to all rights of way and easements of record affecting said premises and is further made subject to such other matters as would be disclosed by a view and inspection of the premises.

(Note: The Wilsontown Road is one and the same road now known as the Salem Ridge Road.)

J. 471/258

This conveyance is made subject to all rights of way and easements affecting said premises of record in said Clerk’s Office, if any, and is further made subject to such rights of way, easements and other matters which would be disclosed by a visual inspection of the premises herein conveyed. The property herein conveyed is made subject to any and all exceptions, reservations, conditions and restrictions contained in prior deeds in the chain of title.

5. Ms. Hayes' first suit (13-C-29) was filed by her *pro se*, as a self-represented Plaintiff. She filed her own "Request to Overturn Ruling" on or about March 24, 2014 and "Motion for Reconsideration" on or about April 3, 2014.

6. She retained counsel on or about April 5, 2014. The Motion for Reconsideration was argued on her behalf by her counsel on June 30, 2014.

7. The Honorable Judge Kurt W. Hall denied that motion, but in the "Order Granting Judgment as a Matter of Law", entered September 26, 2014, the Court stated, in pertinent part:

"The Court will note that this ruling does not touch upon the issues of prescriptive easement or easement by necessity. Those issues were not pled or identified in the Plaintiff's Complaint or Amended Complaint and are not properly before the Court at this time."

8. The Court easily could have disposed of these issues in the Brady's favor as Pamela Hayes, being self-represented, had failed to allege them in the alternative as she had no clue what alternative pleading is.

9. Therefore, Judge Hall's order of September 26, 2014 appears intentionally to have left open the issues of prescriptive easement and easement by necessity.

10. Plaintiff contends that she should have been granted the opportunity to present evidence that the initial factual representations of the Defendants were false, that the Salem Ridge Road and the Wilsontown Road are one and the same, that the Salem Ridge Road is the successor name of the road formerly known as the Wilsontown Road, and that the physical route of the right of way for ingress and egress to and from her property exists, and has existed continuously for decades.

11. Dora B. Neely provided a statement, which was received August 6, 2014, that stated,

I, Dora Neely, a resident of Rock Cave, Upshur County, WV, state as follows:

1. I live at 225 Salem Ridge Road, Rock Cave, WV 26234.
2. I live next to the Wilson Chapel.
3. My name is included on the attached Domestic Geographic Name Proposal, which refers to the change of the name of a road known as "Stillman" to Wilsontown Road dated 1966.
4. I have personal knowledge of the location of the road now known as Salem Ridge Road as well as the road formerly known as Wilsontown Road.
5. I confirm that Wilsontown Road and Salem Ridge Road are the same road.
6. I have lived in my home for fifty plus years, since 1959.
7. There was a sign for Wilsontown Road until 911 change, then the sign was replaced with one for Salem Ridge Road

12. Failing that, and in the event that relief is barred based upon "res judicata", Plaintiff should be entitled to present evidence of prescriptive right for a period in excess of ten (10) years, open, hostile, and continuous use under color of title, per the letter opinion of Professor Emeritus and Dean John W. Fisher, II, of June 2, 2014.

13. And, failing that, Plaintiff should be able to present evidence of a "way of necessity", per the letter opinion of John W. Fisher, II.

14. Pamela J. Hayes then filed her "Civil Complaint and Motion for Relief Under Rule 60(b)(1)" civil action no. 14-C-123, against Mr. and Mrs. Brady on November 25, 2014. There were attached to the Civil Complaint and Motion for Relief Under Rule 60(b)(1), affidavits from neighbors or former occupants regarding the right of way to and from the subject property.

15. There were also attached the expert letter opinion of Dean John W. Fisher, II, regarding the law pertaining to the subject right of way, and an affidavit of Letetia J. Hawkins regarding her conversations with Don Rice, mapping officer, of the Upshur County Assessor's Office.

16. The Brady's Motion to Dismiss on the grounds of "res judicata" was filed on December 29, 2014.

17. The Plaintiff responded to that motion by “Plaintiff’s Response to Defendants’ Motion to Dismiss” filed on January 9, 2015.

18. The wrongful actions that gave rise to the litigation brought by Pamela J. Hayes are that Michelle Brady began blocking Pamela Hayes’ entrance to her property in approximately 2011 and persisted continuously to date.

19. Ms. Hayes alleged that Ms. Brady was larger and more aggressive than Ms. Hayes who was unable to obtain relief from the authorities.

20. The Bradys and their predecessors in title, Glenn William Samples and Robert Kessler Boone had permitted continuous access to Pamela Hayes and her husband, via that right of way, from 1994, the date Pamela Hayes bought the property, until 2011, about seventeen (17) years.

21. The terms of the parties’ deed and the continued permitted access are at the heart of Pamela Hayes’ assertion of the doctrine of equitable estoppel.

22. Petitioner can prove, unequivocally, that the same right of way was used continuously to access the property for over sixty (60) years, based upon witness information, and over ninety (90) years per the deeds of record.

23. Ms. Hayes, not having sufficient resources to retain an attorney, (she is disabled and a recipient of SSI), attempted to represent herself. She was held to the same standard as a licensed attorney.

24. Petitioner contends, in this action, 14-C-123, per authority cited below, that the Court was bound to accept as true the factual assertions of Pamela J. Hayes including the assertion, supported fully by statements and/or affidavits, that the road known as the Salem Ridge Road is one and the same as the road previously known as the Wilsontown Road. Assertions otherwise by the Defendants and their counsel constitute either fraud, or constructive fraud resulting from failure to investigate properly.

25. If the Court had done so, all theories of relief would be available to Pamela Hayes, those being:

- a. That she has a right of way of reasonable width, via a clear chain of title, with covenants running with the land, along a visible and identifiable route across the property of Defendants, or, if that were not true;
- b. She is entitled to use that right of way under the equitable doctrine of “prescriptive right”; and, if neither of those theories were true,
- c. She is entitled to an ingress and egress right of way as a “way of necessity”.

26. These theories are fully supported by the letter opinion of former Dean and Professor Emeritus (of the WVU College of Law) John W. Fisher, II dated June 2, 2014 and duly filed with the Civil Complaint and Motion for Relief Under Rule 60(b)(1) on November 25, 2014.

27. Ms. Hayes has now been wholly deprived of any and all use of per property for approximately four (4) years.

SUMMARY OF ARGUMENT

This case sets out, in the starkest form possible, the question of whether a self-represented litigant can obtain justice in the Courts of West Virginia? And, if it should turn out that a self-represented litigant loses because the defense presented false and/or grossly inaccurate evidence and legal theories, or because she did not understand the applicable law or the concept of alternative pleadings, does she have a remedy?

It presents for this Court's consideration the question of whether, when the defense presented by the represented litigants is false and fraudulent, the answer of the West Virginia Courts to the losing party is, "That's tough; you should have hired a lawyer."

Ms. Hayes has even been questioned, "How can you afford a lawyer?", with an implicit assumption, "because you are poor?". Answer, she has borrowed money she could not afford to borrow in an effort not to lose her sixteen and one-half (16 ½) acre tract, where she had already begun to build a house, on which she had planned to live her remaining years on earth. It is her slice of "almost heaven".

The defense raises some appropriate questions and issues. There were written rules of civil procedure, discovery rules, evidentiary rules, statutory law, and West Virginia case law applicable to her case. Once her counsel was able to retain the services of "the foremost authority in this field (real estate contract law) in the State", quotation from McClung Investments, Inc. v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), it became apparent that Defendants' counsel's assertion that the right of way in question did not "run with the land" is unsupported by West Virginia law.

During oral argument on March 10, 2015, Petitioner's counsel proffered, in pertinent part, that he inquired of his client, "Why didn't you subpoena those people?", and she responded to him, "What's a subpoena?".

Walton Chance, a former equitable owner of the 16.5 acres, and Ms. Hayes' former husband stated, in an Affidavit dated June 1, 2014, with an attached drawing, as follows:

I, Walton L. Chance, a resident of Elkview, WV, state as follows:

1. I am the former husband of Pamela J. Hayes. We were divorced in approximately 1994.
2. The property, 16.5 acres, situated on the waters Little Kanawha River, banks District, Upshur County, WV, was acquired while we were separated and is solely in Pamela J. Hayes' name. I do not claim any ownership in the subject property. I knew Glenn William Samples and was involved in discussions and negotiations regarding the

property, as well as the purchase of the subject property and discussions and decisions regarding the land contract.

3. Pamela Hayes and I were told by Mr. Samples there was good access to the property. We observed the existing roadway. In fact, I went onto the property with Glenn William Samples, the owner, and traveled the entire length and observed the existence of a road and right of way across the neighboring tract. The travel area had a small berm. My perception is that the right of way was around twenty feet wide, but certainly no less than twelve feet wide.

4. I heard Mr. Samples expressly assure Ms. Hayes of the existence of the right of way. Mr. Samples explained to us that this property and right of way had been in his family for many years.

5. I observed the gates and inquired about them. There were 3 gates. He assured us that the right of way existed.

6. Ms. Hayes and I relied on Mr. Samples' statements and gestures as to the right of way that we were shown. I believed him and trust that Pamela believed him.

7. I am confident that if Mr. Samples were alive today, he would reaffirm the existence of the right of way in question and its location and width.

8. Only after the land contract was entered into and payments we being made, did I meet James Kessler Boone, owner of the 50 acre tract. Mr. Boone only asked that we go through the "other gates in the barnyard". He explained this was the same route the gas company used and would be more convenient for him. Mr. Boone owned the land now owned by Larry and Michelle Brady.

9. I have no stake or gain in the outcome of this case. I withdrew from the transaction because of marital problems between Ms. Hayes and me, and because I had become disabled.

Mr. Chance's affidavit was filed by Ms. Hayes as an attachment to her "Supplement to Motions and Motion for Reconsideration" filed on June 20, 2014, is her former husband, who had planned to testify that day. Unfortunately, as his affidavit reveals, he became ill and she was unable to present this evidence. She had no attorney or experience in how to deal with this problem which would have caused some difficulty if she had had an attorney as for the best method to present his testimony, which was critical to the disputed issues.

The defense has also raised the point that a self-represented litigant should not get "a second bite at the apple" in light of the fact that the Defendants have already spent their money paying a representative. It is a question that deserves an answer within a system that is designed to produce a just result.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner contends that oral argument in this case is necessary pursuant to the criteria in Rule 18(a) to wit:

1. Petitioner does not waive oral argument;
2. The appeal is not frivolous; and
3. Counsel has a compelling belief that the oral argument will aid the Court and permit the parties' counsel to answer questions raised upon strenuously contested issues.

Petitioner believes that this case can be set for Rule 20 argument because it is a case involving issues of fundamental public importance. It will help define the status of the poor versus the powerful.

Oral argument in this case is essential in light of the entry of an erroneous order of the Circuit Court.

ARGUMENT

- 1. The Circuit Court erred in granting, by order entered April 24, 2015, Defendants' Motion to Dismiss.**
- 2. The Court erred by denying the Plaintiff her day in Court on key unresolved issues such as prescriptive right and way of necessity.**
- 3. The Circuit Court erred as a matter of law for failing to construe the evidence in the light most favorable to the Plaintiff, the non-moving party, when considering the Defendants' Motion to Dismiss filed on December 29, 2014.**
- 4. The Circuit Court erred by denying the Plaintiff Equal Protection under the 14th Amendment of the US Constitution and Due Process under the 5th and 14th Amendments of the US Constitution.**

This case addresses the profoundly serious issue of whether it is possible for a poor person to obtain a just result in the courts of the State of West Virginia. The tragic facts of this case provide this Court an opportunity to explore this and related issues thoroughly.

The fundamental question is, what happens if the Court tries the case, and because of the lack of the skill of a self-represented party, simply gets it wrong? Does the self-represented person lose because of her poverty, or because of her naivety that she simply believed the Court would rule in her favor because she knew she was right?

What if the true facts are contrary to the findings of the Court and the Court's findings can be demonstrated to be false utilizing Rule 60(b)?

And, finally, in the event of adverse rulings on these issues, when it becomes obvious that the Plaintiff now has absolutely no access to her property, may the Court utilize the doctrines of prescriptive right or "way of necessity" under much the same concept as equitable estoppel, to provide a remedy to the formerly self-represented party? Or, will Pamela Hayes be barred because she had no clue what alternative pleading is and no clue how to subpoena witnesses or try her case?

The case of Heather C. Washington v. Charles D. Washington, 645 S.E.2d 110, 221 W. Va. 224 (2007) states, in pertinent part:

...Essentially, a party, especially one represented by counsel versus a *pro se* litigant, should not be permitted to benefit from one[']s own neglect, oversight[,] or error. This equates to invited error and it has been condemned by this Court. *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E.2d 478 (2000)...

...We have clearly recognized that "[u]nder West Virginia Constitution Art. III, §17, the right to self-representation in civil proceedings is a fundamental right which cannot be arbitrarily or unreasonably denied." Syllabus Point 1, *Blair v. Maynard*, 174 W.Va. 247, 324 S.E.2d 391 (1984)...

...We have also advised that "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." *Bego v. Bego*, 177 W.Va. 74, 76, 350 S.E.2d 701, 703-

704 (1986) (citing *Blair v. Maynard*, 174 W.Va. 247, 252-253, 324 S.E.2d 391, 395-396)...

...“trial courts possess a discretionary range of control over parties and proceedings which will allow reasonable accommodations to *pro se* litigants without resultant prejudice to adverse parties. *Pro se* parties, like other litigants, should be provided the opportunity to have their cases ‘fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party.’ *Conservation commission v. Price*, 193 Conn. 414, 479 A.2d 187, 192 n. 4 (1984).” *Blair v. Maynard*, 174 W.Va. 247, 252, 324 S.E.2d 391, 396 (1984)...

In *Maynard*, the Court explained:

...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.** Case should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. **This “reasonable accommodation” is purposed upon protecting the meaningful exercise of a litigant’s constitutional right to access to the courts.** 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984)... (emphasis added)

Petitioner acknowledges that a self-represented person is bound to follow the Court’s rules, and the Court cannot represent her, but when the outcome is patently wrong and the *pro se* person was denied equal protection, the Court should figure a solution that is fair to both and not give a windfall to the represented party.

Plaintiff’s Civil Complaint and Motion for Relief Under Rule 60(b)(1) were filed on November 25, 2014, and were drafted carefully, in full anticipation the Defendants would oppose it based upon the doctrine of *res judicata*. Accordingly, Plaintiff re-alleges, as if set forth herein verbatim as a statement of fact, everything contained in the Civil Complaint and Motion for Relief Under Rule 60(b)(1).

Additionally, she avers that her Rule 60(b)(1) motion was filed timely, that the judgment in question was obtained by a gross misrepresentation of the facts, which facts were readily available to the Defendants and their counsel, and that even if that were not so, the Circuit Court by the Order Granting Judgment as a Matter of Law entered September 26, 2014, which clearly stated, "...The Court will note that this ruling **does not touch upon the issues of prescriptive easement and easement by necessity**. Those issues were not pled or identified in Plaintiff's Complaint or Amended Complaint and are not properly before the Court at this time...(emphasis added)".

The issues of "prescriptive right" and "way of necessity" have not been litigated.

At this stage, all facts alleged in the Civil Complaint and Motion for Relief Under Rule 60(b)(1) must be accepted as true entitling Plaintiff to all reasonable conclusions derived therefrom.

There was a critical mistake in fact, inadvertently presented by proffer and perhaps some evidence, by Defendants' counsel, which counsel for Petitioner has learned is utterly inaccurate.

That "mistake of fact" is the assertion contained in the only full paragraph on page 4 of Defendants' Motion for Summary Judgment wherein counsel states,

...It should be noted that at this point, there appears (sic) to be two different "right of ways" granted, both of which attach to the Wilson town road (sic), which does not touch the lands of Mr. and Mrs. Brady...

As referenced in paragraphs 22 and 23 above, the Plaintiff filed, as an exhibit to her Civil Complaint and Motion for Relief Under Rule 60(b)(1), the written report of former Dean and Professor Emeritus of the West Virginia University College of Law, John W. Fisher, II, "the foremost authority in this field (real estate contract law) in the State", quotation from McClung

W.Va. 490 (1997). Dean Fisher's report states:

You have asked me to advise you as to my opinion as to possible easements or right of ways created by the facts in the above case. It is my understanding that Ms. Hayes, a lay person, appeared pro se in this case and for that reason the facts were not as well-presented to the court as they could have been, nor were they presented with an understanding of the various legal theories that may have been relevant to this case.

While the facts of the case, based upon what I have been able to review, are not fully developed or resolved, the relevant law of easements is well defined. In 2010, The West Virginia Supreme Court of Appeals wrote the seminal decisions in our state involving easements implied by necessity (way of necessity) and easements implied by a prior use (quasi easements) in Cobb v. Daugherty¹ and prescriptive easements in O'Dell v. Stegall². As you are aware, I have written a law review article entitled, "A Survey of the Law of Easements in West Virginia"³. My article was cited with approval in both the Cobb & O'Dell decisions. For your convenience, I have attached a copy of the law review article which I will refer to by page reference in this letter.

I note that the defendants in this case (The Brady's) assert that the easement referred to in the deed in the chain of title is personal or in gross. In my article, I discuss whether an easement is appurtenant or in gross at pages 666 to 670. In particular, the language in Mays v. Hogue (discussed on pages 668-69 and also pages 670-73) is similar to the argument advanced by the Bradys in this case. In my opinion, there is no question that the expressed grant of the easement in the deed in the chain or title would be appurtenant to the dominant estate and "run with the land."

While the Court correctly recognized in its ruling that the language of the "right of way" in the deeds in the chain of title lacked a sufficient description, I do note that in the affidavit of Walton L. Chance he made reference to having "observed the existing road way."⁴ If in fact there was an existing roadway in use at the time of the first grant of the right of way, then the location could be established by such admissible extrinsic evidence.⁵ In addition to an existing roadway, if established by the evidence, being relevant to the expressed right of way in the deed in the chain of title, it would also be relevant to the possibility of the quasi easement or prescriptive easement discussed below.

As noted above, while I am not able to ascertain the access of the subject tracts to public roads, from the materials I have, there appears to be two "severance" of the common tract into smaller parcels which may give rise to an easement implied by the law. Either an easement of "a way of necessity" and implied or quasi arise may be

¹ 693 SE2d 800 W.Va. 2010.

² 703 SE2d 56 (W.Va. 2010).

³ 112 W.Va.Law Rev. 637.

⁴ Also, the deed date June 21, 1994, from Glenn William Samples to Pamela Jeans Hayes (BB 381-32) "granted and conveyed unto the said party of the second part a right of way for ingress and egress from the Wilsontown Road to the tracts here conveyed over and across the present roadway (emphasis added.)

⁵ See article pages 660-666.)

created when there is a necessity or need to prevent a “landlocking” of a parcel following a severance from a common ownership.

The first such severance of a common ownership is the partition of the 114.5 acres between Robert Boon (sic) and W F. Boon (sic) in November of 1924. The second such occurrence is the conveyance of the 16.5 acres of the 49.5 acres by the executor of the Edna Huffman estate to Glenn William Samples in 1990.

The elements of the way of necessity is set forth in Syllabus 4, and for an implied easement or quasi easement in Syllabus 6 of the Cobb v. Daugherty case as follows:

4. To establish an easement implied by necessity (which in West Virginia is called a “way of necessity”), a party must prove four elements: (1) prior common ownership of the dominant and servient estates; (2) severance (that is, a conveyance of the dominant and/or servient estates to another); (3) at the time of the severance, the easement was strictly necessary for the benefit of either the parcel transferred or the parcel retained; and (4) a continuing necessity for an easement.

6. To establish an easement implied by a prior use of the land, a party must prove four elements: (1) prior common ownership of the dominant and servient estates; (2) severance (that is, a conveyance of the dominant and/or servient estates to another); (3) the use giving rise to the asserted easement was in existence at the time of the conveyance dividing the property, and the use has been so long continued and so obvious as to show that the parties to the conveyance intended and meant for the use to be permanent; and (4) the easement was necessary at the time of the severance for the proper and reasonable enjoyment of the dominant estate.

While the Court in the O’Dell case noted that the law does not favor the creation of easements by implied grant or reservation and the burden of proving such easements rests on the party claiming such right by clear and convincing proof, it also expressly stated that when the required elements are met, such easements are established by the application of the law to the facts.

Again, I note that Mr. Chance’s affidavit makes reference to an existing road and a travel area with a small beam. Such reference to the existence of a traveled roadway is relevant under element 3 Syllabus 6, quoted above of an easement implied by prior use or may be relevant if the facts were to establish a prescriptive easement.

The elements for a prescriptive easement are set forth in the O’Dell v. Stegall cases in Syllabus 1 as:

1. a person claiming a prescriptive easement must prove each of the following elements: (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.

Again, the burden of proof is upon the person claiming a prescriptive easement, and the burden of proof is by “clear and convincing evidence.” The Court discusses each of the elements at length and as to the location of the easement, in Syllabus 13 states:

13. 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.

I am aware that you became involved in this case after the trial and, therefore, you were not involved in the presentation of the evidence nor were you present to hear testimony present. However, based upon the materials I have reviewed, I am confident that the expressed easements language in the deeds in the chain of title are appurtenant, and not in gross. If there was a “roadway” or “right of way” sufficient to establish a recognized or obvious way that satisfied the requirement of Syllabus 13 of the O’Dell case, such testimony or evidence would constitute admissible extrinsic evidence to satisfy the descriptive requirement for an expressed easement.

While the West Virginia Supreme Court has stated it does not favor the creation of implied easements, it also does not favor rendering land essentially valueless by permitting it to be landlocked. Therefore, it has expressly recognized “ways of necessities”, implied or quasi easements and prescriptive easements. This willingness to recognize such easements reflects the “laws” reluctance to “landlock” property. If, in fact, Ms. Hayes, has no express right of way from her parcel of land to a public highway, I believe that one of the severance of the larger tract into the lesser parcels would likely give rise to an easement implied by law under one of the above theories.

If you have any questions concerning my opinion expressed herein or the basis of my opinion, please do not hesitate to call.

There are three (3) approaches by which justice can result in this case:

1. By establishing that the factual representations raised by the Defendants in the original case were false. The Brady’s asserted

a.) that there was no visible right of way on the subject grounds, that assertion was not true, and

b.) that the road referenced in prior deeds of record as the Wilsontown Road was separate and unique from the road more recently referred to as the Salem Ridge Road, and that the Salem Ridge Road was actually on the opposite side of the Hayes property, this assertion was egregiously false and known by Defendants to be false or easily ascertained by them to be false.

c.) This gross misrepresentation of fact was the turning point in the first trial although it was also difficult for Ms. Hayes who did not understand how, and therefore, did not present evidence of, the physical existence of the right of way's route.

2. Prescriptive easement; and

3. Way of Necessity.

The case of Cobb v. Daugherty, 693 S.E.2d 800 (WV 2010), Syllabus Points 4 and 6 state,

...4. To establish an easement implied by necessity (which in West Virginia is called a "way of necessity"), a party must prove four elements: (1) prior common ownership of the dominant and servient estates; (2) severance (that is, a conveyance of the dominant and/or servient estates to another); (3) at the time of the severance, the easement was strictly necessary for the benefit of either the parcel transferred or the parcel retained; and (4) a continuing necessity for an easement...

...6. To establish an easement implied by a prior use of the land, a party must prove four elements: (1) prior common ownership of the dominant and servient estates; (2) severance (that is, a conveyance of the dominant and/or servient estates to another); (3) the use giving rise to the asserted easement was in existence at the time of the conveyance dividing the property, and the use has been so long continued and so obvious as to show that the parties to the conveyance intended and meant for the use to be permanent; and (4) the easement was necessary at the time of the severance for the proper and reasonable enjoyment of the dominant estate...

Syllabus Points 1 and 13 in the case of O'Dell v. Stegall, 703 S.E.2d 561 (WV 2010),

state:

...1. A person claiming a prescriptive easement must prove each of the following elements: (1) the adverse use of another' 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...

...13. 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 and 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 solely by the adverse use made of the land during the ten-year prescriptive period...

The trail of documents of record, and available witnesses and facts, easily confirmed, as Dean Fisher noted above, that Pamela Hayes has a clear chain of title commencing on July 28, 1994, during which time there existed an actual road right of way for ingress and egress to her property. The Honorable Kurt Hall, Judge of the Circuit Court of Upshur County and the 26th Judicial Circuit, took full judicial notice of all recorded documents. The Court, therefore, was bound by those records and was obligated, especially in light of the limitations of the Petitioner, as was Defendants' counsel, to understand and comply with those records. See the chart contained herein on pages 7 through 10.

Ms. Hayes had no knowledge of the "Rules of Evidence", laying an appropriate foundation, cross-examination of witnesses, or of subpoenas.

Ms. Hayes knew nothing of alternative pleading, nor was she trained in the law of real estate.

She simply knew that she had paid for the real estate in question and for the ingress and egress right of way and that she and Walton Chance had used it continuously for approximately seventeen (17) years.

Of course, Ms. Hayes lost her case, based largely on proffers, and interpretations of recorded documents, by the Defendants counsel, Trena M. Williams, who assured the Court that no physical right of way existed, which it in fact did, and who inaccurately asserted the claim there was no clear record title, contrary to the written opinion of Dean Fisher. (Letter opinion dated June 2, 2014)

She retained counsel on or about April 5, 2014. Counsel filed Motions on April 8, 2014 and April 15, 2014, and the Plaintiff's Objection to Order on May 2, 2014, which were denied.

However, Judge Hall's Order Granting Judgment as a Matter of Law stated, in pertinent part:

...In the case *sub judice*, the original, attempted reservation in the deed from W.E. Boone and his wife to Robert Boone indicated that W.E>Boone and his wife "reserve the right of egress and regress over and through the above described tract of land to and from a tract of land now owned by them lying east of this tract." (DB 76/594). There is no mention in said deed of a Wilsontown Road or any presently existing road over the 50-acre plot conveyed to Robert Boone. Indeed, there was no mention of any other roads or even a beginning point or ending point of the right-of-way. This reservation was devoid of any mention of the dimensions, distance, length, or width of the right-of-way. The reservation contained no reference to any physical markers, such as trees, fences, gates, ponds, farmhouses, or the like, which could be used to determine or locate the placement of the easement. The deed makes no reference to any extrinsic documents or evidence, such as a map, that could be consulted to reasonably identify where the easement existed. Given the utterly vague and ambiguous description contained within the deed, there is simply no indication of where the contemplated right-of-way once existed or if it is the same right-of-way now sought by the Plaintiff...

...The Court will note that this ruling does not touch upon the issues of prescriptive easement or easement by necessity. Those issues were not pled or identified in the Plaintiff's Complaint or Amended Complaint and are not properly before the Court at this time...

Since Pamela Hayes considered it to be inconceivable that her neighbor could simply take her property and since she knew nothing of the doctrine of the way of necessity or the concept of alternative pleading, she did not allege it.

Ms. Hayes annexed statements of witnesses and the written opinion of Dean Fisher to her second complaint. The road known as the Salem Ridge Road is one and the same as the road formerly known as the Wilsontown Road contrary to the inaccurate representations of counsel and the Defendants. However, even if the roads were separate, the right of way in question was used by Ms. Hayes continuously, openly, and under “color of title” since her purchase of the property on June 21, 1994 until such time as she was “locked out” of the property, a period of approximately seventeen (17) years, and if neither of those are the case, Ms. Hayes is totally landlocked. She has not set foot in her property for approximately the (4) years. She is entitled to a right of way “by necessity”.

The case of Moore v. Chesapeake & O. Ry., 493 F.Supp. 1252 (S.D.W.Va. 1980), aff'd, 649 F.2d 1004 (4th Cir. 1981), states, in pertinent part,

A contract's (in this case, deed) language must be accorded its plain meaning and, where plain, the language must be given full effect.

The case of Melbourne Bros. Constr. Co. v. Pioneer Co., 181 W.Va. 816, 384 S.E.2d 857 (1989) states, in pertinent part,

A valid written instrument which expresses the intent of the party in plain unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.

Michie's Jurisprudence, Contracts, §40, book 4A, page 428, (1999), states,

It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain. Griffin v. Coal Co., 59 W.Va. 480, 53 S.E. 24 (1905);

Michie's Jurisprudence, Contracts, §40, book 4A, page 429, (1999), states,

The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court. Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968); Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996); Jessee v. Aycoth, 202 W. Va. 215, 503 S.E.2d 528 (1998)

Michie's Jurisprudence, Contracts, §41, book 4A, page 429, (1999), states,

Where it is necessary to determine the meaning of words not of certain and definite import, consideration will be given to the situation of the parties, the subject matter of the contract, the acts of the parties thereunder, the purpose sought to be accomplished thereby, and the general circumstances attending its execution. Wetterwald v. Woodall, 83 W.Va. 647, 98 S.E. 890 (1919); Butler v. Carlyle, 84 W.Va. 753, 100 S.E. 736 (1919), Garrett v. Patton, 81 W.Va. 771, 95 S.E. 437 (1918); Raleigh Lumber Co. v. Wilson & Son, 69 W.Va. 598, 72 S.E. 651 (1911); Knotts v. Bartlett, 83 W.Va. 525, 98 S.E. 590 (1887); Bragg v. Peytona Lumber Co., 102 W.Va. 587, 135 S.E. 841 (1926)

Michie's Jurisprudence, Contracts, §42, book 4A, page 431-432, (1999), states,

Every contract ought to be construed so as to give effect according to the real intent of the parties, to be collected from all the terms of the agreement; and when the expressions are equivocal, such intent gathered from the while of the instrument must determine the meaning of such expressions. If the terms conflict or are so inconsistent that the intent of the parties cannot be ascertained the contract may be nugatory by reason of such uncertainty, which is a consequence to be avoided, if possible. The parties must have intended something by their agreement, and they are presumed to have intended that which renders their agreement valid and capable of performance, not that which renders it void and impossible of execution. Taylor v. Taylor, 176 Va. 413, 11 S.E.2d 587 (1940); Bell v. Hagmann, 200 Va. 626, 107 S.E.2d 426 (1959)

Michie's Jurisprudence, Contracts, §43, book 4A, page 434, (1999), states,

A contract not clear and free from ambiguity must receive a reasonable construction found as a matter of intent in the nature and condition of the subject, the situation of the parties and the purposes they had in view, subject to the limitation of consistency with the terms used. Conklyn v. Shenandoah Milling Co., 68 W.Va. 567, 70 S.E. 274 (1911)

Michie's Jurisprudence, Contracts, §43, book 4A, page 435, (1999), states,

A contract will not be construed so as to inflict unreasonable hardship, unless its terms clearly impose it. Carper v. United Fuel Gas Co., 78 W.Va. 433, 89 S.E. 12 (1884)

The case of Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981), aff'g 500 F.Supp. 307 (E.D. Va. 1980), states,

While it is true that ambiguities are resolved against the party preparing the contract, where a document is clear and unambiguous, the doctrine does not apply.

Michie's Jurisprudence, Contracts, §43, book 4A, page 437, (1999), states,

It is said that uncertainties should be resolved against the party who prepares an intricate and involved contract. Charleton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (19234); Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (N.D.W.Va. 1970)

Michie's Jurisprudence, Contracts, §43, book 4A, page 437, (1999), states,

Provisions of a contract effecting a forfeiture or exacting a penalty are strictly construed **against** the party for whose benefit they were incorporated in the instrument. Peerless Carbon Black Co. v. Gillespie, 87 W.Va. 441, 105 S.E. 517 (1920) (emphasis added)

Michie's Jurisprudence, Contracts, §48, book 4A, page 449, (1999), states,

When a contract is to be construed, a well-settled rule based on common sense is that the whole contract should be considered in determining the meaning of any or all its parts. Heatherly v. Farmers' Bank, 31 W.Va. 70, 5. S.E. 754 (1888); Johnson v. Welch, 42 W.Va. 18, 24 S.E. 585 (1896); Huddleston v. Mariotti, 143 W.Va. 419, 102 S.E.2d 527 (1958)

There is also an equitable estoppel issue in this case. The gentleman that sold the property to Ms. Hayes let her have access to the property. He did require her to go through a modified right of way through a particular gate based upon the right of way used by an oil and gas company. He conveyed the property to her by general warranty and having purported to convey to her everything owned by the prior owner, which include an ingress and egress right of way, he and his successors should be estopped to deny access to the purchaser. The basic components of estoppel exist in having her relying to her detriment, the general warranty deed, and acquiesce or agreement for her to use the property in question for a period of approximately seventeen (17)

years before she was “locked out” and unable to set foot on her property, and therefore would not be estopped to deny her access to the property under the doctrine of promissory estoppel.

The "hornbook law" on promissory estoppel in this regard may be found in Restatement (Second) of Contracts § 139 where the text provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

Michie's Jurisprudence, Estoppel, §14, book 7A, page 486, (1998), states,

The general rule of equitable estoppels, or, as it is frequently called, *estoppels in pais*, is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another who has a right to rely upon those statements, or the like, and who does rely upon them in good faith to believe in the existence of the state of facts with which they are compatible and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter had so far changed his position that he would be injured thereby. Stone v. Tyree, 30 W.Va. 687, 5 S.E. 878 (1888); Weaver v. Burr, 31 W.Va. 736, 8 S.E. 743 (1888); Hanly v. Watterson, 39 W.Va. 214, 19 S.E. 536 (1894)

Michie's Jurisprudence, Estoppel, §14, book 7A, page 488, (1998), states,

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy. Norfolk & W.R. Co. v. Perdue, 40 W.Va. 442, 21 S.E. 755 (1895)

The WV Supreme Court in Ryan v. Rickman, 213 W.Va. 646; 584 S.E.2d 502 stated,

3. “The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel in pais there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; that party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the

intention that it should be acted on; and the other to whom it was made must have relied on or acted on it to his prejudice.”

The WV Supreme Court in Ross v. Midelburg, 42 S.E.2d 185 (W. Va. 1947), stated,

...It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am.Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See Browne on Statute of Frauds, § 457a...

Four examples are illustrative, the last three of which are cases which the Petitioner's counsel successfully appealed to the West Virginia Supreme Court of Appeals:

a. The classic law school example is the confused neighbor who miscalculates his boundary line and commences to build a barn on his neighbor's land while his neighbor and the neighbor's wife sit on the porch, smirking and sipping tea. The barn is finished. The landowners stroll down to the construction site and thank the neighbor for their new barn....NOT, at least in WV. (Counsel could not find citation to this case which he learned in law school in 1969, and must, therefore, cite Professor Londo Brown!)

b. Everett v. Brown, 174 W.Va. 35, 321 S.E.2d 685 (W.Va. 1984): In this case, Mr. Everett, a Buckhannon real estate agent, had a signed listing agreement for the sale of Mr. and Mrs. Brown's home. The listing was for 90 days, and it expired. Of course, a few days after the expiration, potential buyers appeared seeking a home which fit nearly exactly the Browns'. Mr. Everett called Mr. Brown, reminded him of the listing had expired, and sought permission to show the house, in spite of the fact that West Virginia

has a "statute of frauds" specifically addressing listings and requiring that they be in writing. Mr. Brown readily agreed to Mr. Everett's showing the property.

The potential buyers appeared to be enamored with the property, but several weeks passed, and the buyers advised they were no longer interested. Mr. Everett later learned that the buyers purchased the property from the Browns. The West Virginia Supreme Court of Appeals, stated,

...In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor...

... There is no question in this case that Griffin Real Estate was the "efficient or procuring cause of the sale of the property," *Kimmell v. Mohler*, 102 W.Va. 355, 135 S.E. 175 (1926). We conclude that: (1) an oral agreement to extend the prior written contract existed; (2) the defendants, by their conduct, are stopped to assert the statute of frauds; and, (3) the plaintiffs performed each and every obligation that they had under the oral agreement. Plaintiffs' damages, then, are measured by the amount of their lost profits, which in this case is their 5% commission.

The award to the plaintiffs of their broker's commission is in accord with the general rule that a broker is entitled to his commission when he procures a personable, ready and willing to purchase the property on the specified terms. His commission is not denied him because the seller refuses to complete the transaction, *Dotson v. Milliken*, 209 U.S. 237, 28 S.Ct. 489, 53 L.Ed. 768 (1908)...

c. **Cunningham v. Riley, 180 W.Va. 146, 375 S.E.2d 778 (W.Va. 1988):**

Mr. Cunningham was driving, and Mrs. Cunningham was his front seat passenger, on the Elkins Road, in Buckhannon, when Ms. Riley drove through a stop sign, striking the Cunningham vehicle, and crushing Ms. Cunningham's foot. When they returned home, to

Ohio, they hired a lawyer. When the lawyer could not settle the case, he associated with a Buckhannon attorney, just three months before the running of the statute of limitations. Efforts were made to obtain an examination by a Weston orthopedic surgeon, but two appointments were canceled by the doctor at the last minute. Cunningham's attorney called to explain to the adjuster there would be a delay in submitting the claim, temporarily unaware of the eminent running of the statute. The adjuster replied, "okay".

The facts of the Cunningham Case are as follows:

...On appeal the appellants' claim that the record indicates that the Appellee, State Farm Mutual Automobile Insurance Company, was guilty of inequitable conduct which induced them to refrain from filing their complaint within the time period specified by the statute of limitations and that State Farm should be deemed estopped from asserting the limitations defense.

...According to the Appellants, after they had retained attorneys in the case, State Farm acted in such a way as to lead them, or their attorneys, to believe that State Farm would settle the case.

...In their memorandum and response the appellants indicates that State Farm had made assurances that the Appellants' claim would be paid once proof of special damages was received, that State Farm had virtually admitted liability, that the insurance company had made requests for delay, that there had been mutual agreement that final negotiation of a settlement would occur after certain doctors' reports were obtained, that State Farm had been silent when it became apparent that final proof could not be submitted until after the statute had run, that State Farm's adjuster had agreed that the statute would not be a problem in the case, and that the procedures which State Farm and the appellants' attorney had agreed to had the effect of extending the period of the statute of limitations. ...

Subsequent litigation revealed internal memoranda of the adjuster and his supervisor wherein the adjuster recognized the attorney might overlook the statute and was instructed, "Say nothing." The case was salvaged when a concurrent memoranda of

the conversation with the adjuster was found on the attorney's carbon copy. The Supreme Court ruled:

In view of the fact that a State Farm representative specifically stated on December 23, 1985, that "we will settle with you as soon as possible", and in view of the other representations, this Court believes that the record strongly suggests that State Farm was involved in conduct of a type sufficient to suggest estoppel under the guidelines set forth in Humble Oil & Refining Co. v. Lane, supra. Under the circumstances, this Court believes that, at very least, additional inquiry into the facts is desirable for application of the law and that summary judgment was improper under the rule set forth in Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, supra.

The judgment of the Circuit Court of Upshur County is, therefore, reversed and this case is remanded for further development.

d. In the case of Patricia E. Lee v. Charles W. Lee, 228 W.Va.483; 721S.E.2d 53 (W.Va. 2011), Mr. Lee imposed a prenuptial agreement upon his wife just days prior to the parties' scheduled wedding. The dresses were purchased and room and plane reservations made. The wife reluctantly signed the agreement, drafted by the husband, in order to go forward with the parties' marriage. Mr. Lee later had an affair and tried to bar enforcement of the prenuptial agreement that he prepared based upon a technicality. The WV Supreme Court ruled in favor of Mrs. Lee, and Mr. Lee was not granted a windfall and was bound to the terms of the agreement. The ambiguity was construed in favor of the wife.

Each of these cases has two things in common:

a. The persons at risk above was in the wrong by (a) building a barn on the wrong property, (b) failing to get the listing in writing, (c) missing the statute of limitations, and (d) Ms. Lee relied on an ambiguous agreement but was granted the benefit of her bargain;

b. In each instance, the person at risk relied on the actions or forbearance of the other party to his/her own detriment, and the person(s) with the advantage tried to get a windfall.

c. The property owner could have prevented the building of the barn at the first instance. The Browns could have prohibited Mr. Griffin from showing the property. And, the insurance adjuster did not have to say "okay" when the attorney proposed a delay, past the statute, of three weeks.

All were later barred from denying the effect of their actions, as the Brady's should be.

The Circuit Court erred by denying the Plaintiff Equal Protection under the 14th Amendment of the US Constitution and due process under the 5th and 14th Amendments of the US Constitution.

1. The 5th Amendment of the US Constitution, states,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.** (emphasis added)

2. The 14th Amendment of the US Constitution, states,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** (emphasis added)

CONCLUSION

In light of the foregoing, Petitioner believes that this matter should be remanded to the Circuit Court of Upshur County, West Virginia for full factual development on all issues, or such issues as this Court may designate.

Pamela J. Hayes also moves for leave to seek attorneys' fees and such sanctions as this Court deems appropriate.

Respectfully Submitted,
Pamela J. Hayes, Petitioner
By Counsel

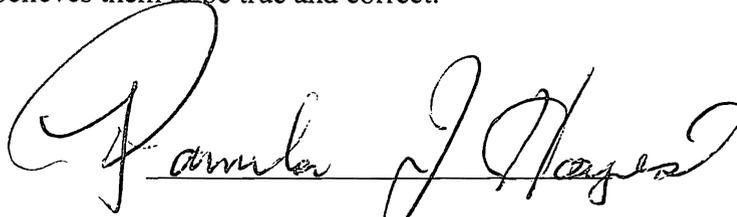


J. Burton Hunter, III
Counsel for Petitioner
J. Burton Hunter, III & Associates, P.L.L.C.
One West Main Street
Buckhannon, West Virginia 26201
(304) 472-7477
WV State Bar ID: 1827

STATE OF WEST VIRGINIA,

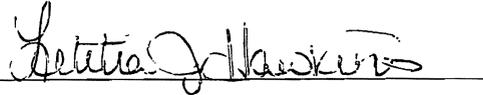
COUNTY OF UPSHUR, TO-WIT:

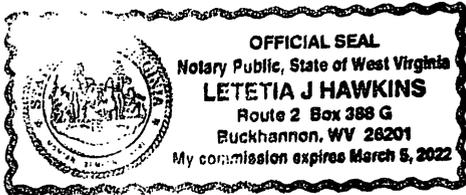
I, Pamela J. Hayes, being first duly sworn, says that the facts and allegations set forth in said **Petitioner's Brief** are true and correct, except insofar as they are therein stated to be upon information and belief, he believes them to be true and correct.


Pamela J. Hayes

Taken, sworn to and subscribed before me this 20th day of August, 2015 by Pamela J. Hayes.

My commission expires: March 5, 2022





Notary Public

CERTIFICATE OF SERVICE

I, J. Burton Hunter, III, attorney for Pamela J. Hayes, do hereby certify that I served the foregoing *Petitioner's Brief* upon the following counsel by depositing a true copy thereof in the United States Mail, with postage prepaid in envelopes addressed as follows:

Trena Williams
217 East 3rd Street
Weston, WV 26452

Dated this 20th day of August, 2015.



J. Burton Hunter, III
One West Main Street
Buckhannon, WV 26201
(304) 472-7477
WV State Bar ID: 1827