

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-00968

15-1205

GARRY THOMAS,

Defendant - Appellant

vs/

ARCHIE D. HOUCK

Plaintiff - Appellee

**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
WEST VIRGINIA**

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

O'Dell v. Stegall 226 W.Va. 590 703 S.E. 2d 561 (2010)

Daye v. Plumley, No. 13-0913, 2014 WL 1345493 (W.Va. Apr. 4, 2014)

STATEMENT OF THE CASE

INTRODUCTION

It is interesting to note that the Respondent's counsel in the first sentence of their response state that "a jury found, by clear and convincing evidence. . ." While technically correct, it defines the gravamen of Petitioner's objection.

ARGUMENT

While the Petitioner stands by arguments in the brief and would adopt and re-allege them here, he believes that the key to this case is the Court's Rule 50 Order proper.

The Respondent correctly states that the controlling case is O'Dell v. Stegall 226 W.Va. 590 703 S.E. 2d 561 (2010). They correctly cite the four elements of the construction easement:

"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 notices the use; and (4) the reasonably identified starting point, ending point, line and width of the land was adversely used, and the manner or purpose for which the land was adversely used."

Stated in another way if Mr. Houck can prove at the time he filed suit, the four elements of O'Dell he wins. It is the second element he has trouble.

The Court ruled that Mr. Houck had clearly established the second element from his adverse use from 1981 to 1997.

If Mr. Houck had brought his suit in 1997 based upon that finding he probably

would have gotten a judicial validation of his adverse act. But he didn't. He waited until 2014. Seventeen years after the Circuit Court found his use met the statutory requirement "that the adverse use was continuous and uninterrupted for at least ten years."

The Plaintiff below in 2014 claimed that he had a prescriptive easement and fulfilled the "O'Dell" elements. The Court's finding in its Rule 50 ruling did not address the "O'Dell" elements as they related to the ten years prior to 2014. They related to 16-17 years before.

What happened in the 16-17 years prior to the suit? The evidence showed (in a light most favorable to the Petitioners) that Houck tried to use the easement but was prohibited by Thomas and was prohibited by Thomas for the ten years prior to the suit being filed.

The Respondent's argument taken in its logical conclusions would be that Daniel Boone used a path through property that now belongs to me in Charles Town and continued to use that path for 16 years. Therefore he established a prescriptive easement that his heirs can claim against me. Another example would be that the neighbors' kids walked across my property for 40 years without permission and well before I bought the property. When they closed the school 20 years ago the kids no longer used the path so according to the Plaintiff's position the prescription easement still exists and what has happened over the last 20 years is unimportant.

TIMELINESS OF APPEAL ISSUE

Respondent contends that the pretrial ruling or non rulings of Judge Silver needed to be appealed within thirty days of the ruling. Further they go on to say that the Rule 50 ruling needed to be appealed within 30 days of the ruling. They quote Rule 5(b) of the West Virginia Rules of Appellate Procedure.

Respondent fails to differentiate between an interlocutory order and a final order. Only final orders can be appealed and evidentiary rulings in this case cannot be appealed.

Using the Respondent's logic every trial court ruling made during the course of the trial needs to be appealed. Since in a multiple day trial the court makes numerous evidentiary rulings then each ruling needs a separate appeal. Using that theory the West Virginia Appeals Court would be overwhelmed with unnecessary paperwork.

The two rulings of the Court complained of are evidentiary rulings made during the course of the proceedings and not final rulings on the ultimate issue. While the loser in such rulings may petition the court for a writ of prohibition, those kinds of proceedings are rarely granted.

RICHARD WAY

The Respondent contends that the Court had not duty to assist Mr. Thomas. He cites Daye v. Plumley, No. 13-0913, 2014 WL 1345493 (W.Va. Apr. 4, 2014) for the proposition that *pro se* litigants proceed wholly at their own risk.

A fair review of the quote give us the opposite meaning. The court is required to

“ensure the litigant receives fair and balanced proceeding. . . “ Supra.

Counsel opines that Mr. Thomas made no representation as to what the witness would say and therefore made no record of why the error was not harmless. A review of the record shows that Way’s counsel filed an opposition to Respondent’s Motion for Summary Judgment. That response was supported by Mr. Way’s affidavit. More importantly Mr. Way’s opposition was successful. The Court rules that there were material issue of fact that precluded a summary judgment.

It was those facts that Thomas wanted and needed to make his case. While there may not be a duty for the trial court judge to be proactive in assisting a *pro se* party, it is critical that once has is made aware of a problem and gives an opinion as to the rightfulness of a position, he should then follow up on this problem. Once the court makes a statement he then sets up an expectation in the *pro se* litigant that the court will follow through.

The Court said that the reported behavior of avoiding process was improper. In doing so the Court with its responsibility to ensure the fairness of the proceeding should have done something to insure that fairness of the proceeding. The Court cannot and should not create an expectation and not follow through.

CONCLUSION

Given the Respondent's written responses there is more reasons to grant a new trial.

Respectfully submitted,
GARRY THOMAS
Appellant

By Counsel.

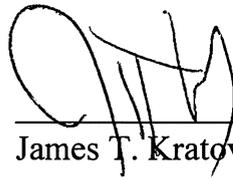


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CERTIFICATE OF SERVICE

I, James T. Kratovil, Esquire, counsel for Defendant, hereby certify that I served the foregoing *Petitioner's Reply Brief* upon counsels for Plaintiffs, by mailing a true copy thereof to the below listed addresses on this the 4th day of May, 2016:

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