

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

DC CHAPMAN VENTURES, INC.,

A West Virginia Corporation,

Plaintiff-Respondent,

v.

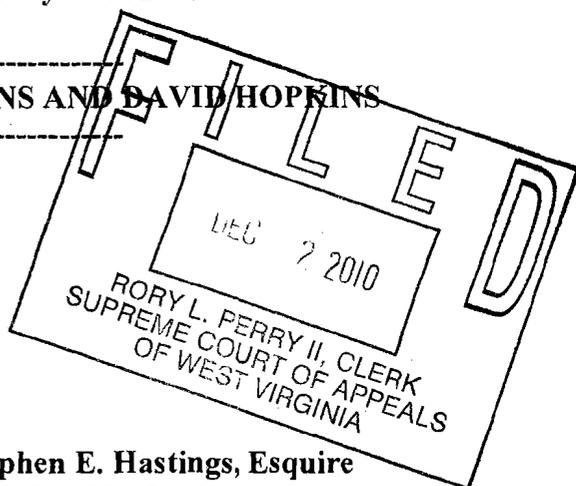
J.D. HOPKINS and DAVID HOPKINS,

Defendants- Petitioners.

Petition for appeal from the Circuit Court of Nicholas County, West Virginia in Civil

Action No. 05-C-195, Judge Gary L. Johnson

BRIEF OF PETITIONERS J.D. HOPKINS AND DAVID HOPKINS



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I. STATEMENT OF THE CASE

The subject civil action arose as a result of a Complaint filed by the Plaintiff to establish a boundary line between its property and the property of the Defendant pursuant to West Virginia Code § 55-4-31. Petitioner/Defendant J.D. Hopkins purchased his 24-acre tract, part of which serves as a motel business, in 1965 (“the Hopkins Tract”). At the time of the filing of the Complaint, Respondent/Plaintiff D.C. Chapman Ventures, Inc. (“Respondent” or “Chapman”) was a lessee of property adjoining the eastern boundaries of the Hopkins Tract owned by Judith Young (“the Chapman Tract”) with a right to purchase which Chapman later exercised. *See* Complaint at 5-6. J.D. Hopkins’ source of title (dating back to 1934) is senior to the grant under which plaintiff Chapman claims title. Chapman and Judith Young filed suit on October 19, 2005 in the Circuit Court of Nicholas County against J.D. Hopkins and David Hopkins alleging the encroachment and trespass by defendants along the eastern boundary of the Hopkins Tract. Judith Young and David Hopkins were dismissed from the case prior to trial. Circuit Judge Gary L. Johnson presided over a five-day trial taking place on September 19-20 and October 10-12, 2007, viewing the disputed property, Duffy Lane, and other relevant landmarks on the first day. On December 5, 2007, Judge Johnson issued an order finding that a survey performed by Craig Dunlap (Plaintiff Chapman’s surveyor) of the junior deed Chapman Tract most accurately represented the disputed boundary line but also that defendant J.D. Hopkins had adversely possessed property bounded by the “Encroachment Tract” shown on the Dunlap Survey (Plaintiff’s Exhibit Number 1), and requiring J.D. Hopkins to obtain a further survey of the “Encroachment Tract.” *See* Order Following Bench Trial Establishing Real Estate Boundaries dated December 5, 2007 (“2007 Trial Order”). On December 17, 2007, J.D. Hopkins filed a Motion For New Trial, Or In The Alternative, Motion To Alter or Amend Judgment Or Make

Additional Findings of Fact (“Motion”). A hearing on the Motion occurred on February 19, 2008 (“February Hearing”) with Judge Johnson re-affirming the 2007 Trial Order and elaborating on the rationale for his findings. On May 19, 2008, Judge Johnson entered an Order explicitly adopting the rationale as stated during the February Hearing, noting the filing of the associated transcript (“Hearing Trans.”), and attaching a partial copy of Plaintiff’s Exhibit No. 1 showing the “Encroachment Tract” as Exhibit A. See Order Denying Defendant’s Motion For New Trial, Or In The Alternative, Motion To Alter or Amend Judgment Or Make Additional Findings of Fact And Order Reflecting Ruling On Other Post Trial Motions (“May 2008 Order”). J.D. Hopkins sought review of Judge Johnson’s Orders by both the West Virginia Supreme Court of Appeals and the U.S. Supreme Court. Both courts declined to grant Mr. Hopkins’ petitions. On December 2, 2009, J.D. Hopkins’ surveyor Kevin Schafer completed the survey of the Encroachment Tract required by the 2007 Trial Order (hereafter, the “Final Survey”). On or about March 31, 2010, Plaintiff filed Plaintiff’s Motion to Compel Defendant to Perform an Accurate Survey (hereafter, “March 2010 Motion”), arguing that the Final Survey identifying the Encroachment Tract designated on the Dunlap Survey as the adversely possessed area “substantially expands the area which the Court found the Defendant was entitled to possess.” See March 2010 Motion at 9. A hearing on the March 2010 Motion occurred on May 3, 2010. By Order dated July 9, 2010 (hereafter, “the 2010 Modified Order”), Judge Johnson *changed* the area adversely possessed by J.D. Hopkins from the area “designated on the Dunlap Survey as the ‘Encroachment Tract’” as stated in the 2007 Trial Order to “an area ten foot (10’) surrounding the building known as the 40’s building and a contiguous second area the outer boundary of which runs from a point ten feet (10’) to the east of the front right corner of the 40’s building, as one faces the 40’s building, to a rebar located 26.19 feet generally in a northwestern direction from

the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W. Mr. Hopkins seeks review of the 2010 Modified Order's blatant changing of the adversely possessed area two years after entry of the 2007 Trial Order clearly identifying the adversely possessed area as the "Encroachment Tract" designated on the Dunlap Survey, and after the appeal process contesting the Encroachment Tract as the adversely possessed area has ended and the Final Survey has been performed.¹

II. STATEMENT OF THE FACTS

A. The 2007 Trial Order Identified The Adversely Possessed Property As the "Encroachment Tract" designated on the Dunlap Survey.

The portion of the 2007 Trial Order pertaining to the subject adverse possession issue states:

2. Based on his clearly and convincingly establishing all the legal requirements of adverse possession, **the defendant shall have title to the land** on which the 40s Building currently sits, **as well as an area around the 40s Building, designated on the Dunlap Survey as the "Encroachment Tract"** and including 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1).

2007 Trial Order at 22 (emphases added). In the body of the 2007 Trial Order, Judge Johnson explained:

[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994. Specifically, the video depicted an area the size of a single lane roadway, or about 10 feet wide, on the east side of the 40s Building leading toward the rear of the building.

2007 Trial Order at 18-19 (emphases added). Furthermore, Judge Johnson, sua sponte, ordered Petitioner Hopkins to obtain further survey to document formally the "Encroachment Tract"

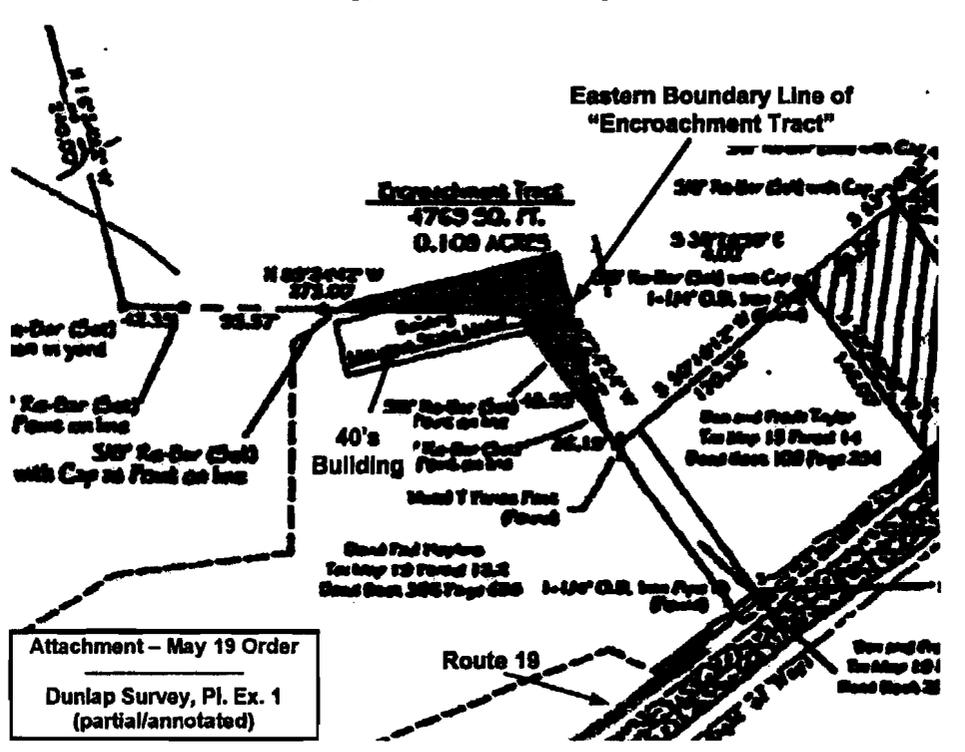
¹ On or about May 20, 2010, J.D. Hopkins re-conveyed the subject property to David Hopkins by Deed dated May 20, 2010, of record in the office of the Clerk of the County Commission of Nicholas County, West Virginia, in deed book 461 at page 583. Accordingly, David Hopkins is again an interested party in the subject case, but J.D. Hopkins remains a party as he was personally ordered to have a survey performed.

boundary line explicitly depicted on the Dunlap survey. 2007 Trial Order at 23.

In the May 2008 Order, the trial court attempted to clarify the Encroachment Tract boundary line by attaching Exhibit A, a partial blowup of the referenced "Dunlap Survey (Plaintiff's Exhibit Number 1)" showing the Encroachment Tract. The May 2008 Order stated in relevant part:

(4) Defendant's Motion for Clarification of Order is GRANTED and, by way of further clarification, the Court FINDS that **the subject boundary line segment is contained within the encroachment area which is generally reflected on the attached partial blowup of Plaintiff's Exhibit 1 which is attached to this Order as Exhibit A and described more specifically in the transcript of the February 19, 2008 proceedings herein, the original of which is contained within the Court file of this matter.**

May 2008 Order at 1. An annotated copy of Exhibit A is reproduced below:



In Exhibit A, the "Encroachment Tract" is designated on the "Dunlap Survey (Plaintiff's Exhibit Number 1)" by shading (i.e., the "brick" area) and area calculation (i.e., 4769 SQ. FT.; 0.109 ACRES). In the annotated reproduction above, a red shading has been added for additional

emphasis. The February 19, 2008 hearing transcript referenced in the May 2008 Order reflects the 2007 Trial Order wording above for the adversely possessed area:

Mr. Hastings: And so, it's ten feet around the building?

The Court: Yes.

Mr. Hastings: If, anywhere in that, the difference between the building and that encroachment tract line is not ten feet, - -

The Court: It's ten feet.

Mr. Hastings: And if the encroachment tract is more than ten feet, we use the encroachment tract line?

The Court: Yeah, right.

February 19, 2008 Transcript at 7.

B. Brief Sections From The Petitions To The West Virginia Supreme Court of Appeals And The US Supreme Court Showing Defendant Raised the Encroachment Tract Issue And Relied On The 2007 Trial Order's Wording During Appeal

1. WV Appeal Petition Sections Raising Issue With The Trial Court's Finding Limiting Adverse Possession To The Encroachment Tract

a. Statement Of The Case

The Statement Of The Case section of the WV Appeal Petition stated in relevant part:

On December 5, 2007, Judge Johnson issued an order finding that a survey performed by Craig Dunlap of the junior deed Chapman Tract most accurately represented the disputed boundary line and that defendant J.D. Hopkins had adversely possessed property bounded by the "Encroachment Tract" shown on the Dunlap survey, and requiring J.D. Hopkins to obtain a further survey of the "Encroachment Tract." See Order Following Bench Trial Establishing Real Estate Boundaries dated December 5, 2007 ("Trial Order").

b. Section IV.E – Defendant's Adverse Possession Is Limited To The Forties Building And The "Encroachment Tract" As Drawn On Dunlap Survey (Pl. Ex. 1). Trial Order at 5, ¶ 2

Section IV.E of the WV Appeal Petition (Disputed Trial Court Findings) identified as a disputed finding the trial court finding limiting the defendant's adverse possession to the Encroachment Tract identified on the Dunlap Survey:

E. Defendant's Adverse Possession Is Limited To The Forties Building And The "Encroachment Tract" As Drawn On Dunlap Survey (Pl. Ex. 1). Trial Order at 5.

In the Trial Order, the trial court explained the rationale for this finding:

[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994

Trial Order at 18-19.

c. Section V – Summary of the Argument

In The West Virginia Appeal Petition, the Summary of the Argument (Section V)

identified the Encroachment Tract as the boundary line determined by the trial court:

Finally, the trial court’s division of the disputed property to the right of the Forties Building per the “Encroachment Tract” is not supported by the trial record. Nothing on the ground limited or impeded the Hopkins’ use of the disputed property to the Encroachment Tract, or even differentiated the Encroachment Tract from the surrounding disputed property. Moreover, the consistent testimony of the three Hopkins family members is that they used and maintained an area to the right of the Forties Building spanning at least 55 feet (and delimited by the natural tree line and a stream running behind the Taylor House) as a customer/parking area for the Hopkins’ motel business for more than twenty years, their testimony supported by pictures, video, and ground evidence. As the trial court found that J.D. Hopkins adversely possessed area to the right of the Forties Building, that holding should not be limited to the oddly shaped Encroachment Tract created by plaintiff’s expert in 2005. Instead, the finding should extend to the entire area used for the Hopkins business since 1985, that property naturally bounded by the stream and tree line as explained by the Hopkins family and supported by the objective evidence.

d. Section XIII – The Trial Court’s Finding Limiting Hopkins’ Adverse Possession To The “Encroachment Tract” Drawn On The Dunlap Survey Is Clearly Erroneous. Trial Order at ¶ 23.

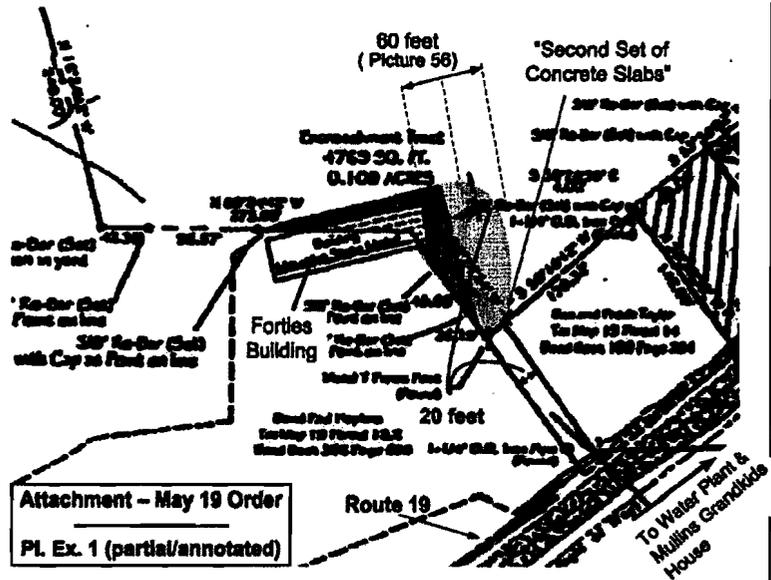
Section XIII of the WV Appeal Petition argued that the trial court finding limiting the adversely possessed area to the Encroachment Tract was clearly erroneous:

The trial judge focused on the 1994 video taken by Martha Hopkins to determine the area adversely possessed by J.D. Hopkins

[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994

Trial Order at 18-19. . . . That the adverse possession finding is clearly erroneous is also readily evident from the fact that it limits the adverse possession to the Encroachment

Tract (red/yellow areas) shown in the annotated attachment to the May 19 Order (Pl. Ex. 1- partial). As shown in Pictures 56 and 76 above, nothing on the ground limits or impedes the Hopkins' use of the disputed property to the Encroachment Tract or even differentiates the Encroachment Tract from the surrounding disputed property. As the trial court found that J.D. Hopkins had adversely possessed area to the right of the Forties Building, that holding should not be limited to the oddly shaped Encroachment Tract created by plaintiff's expert in 2005, but should extend to the entire area used for the Hopkins business since 1985 (at least the red and blue areas), that property naturally bounded by the stream and tree line as explained by the Hopkins family and supported by the objective evidence.



e. Footnote 24 Expressly Addresses The Trial Court's Order Requiring Further Survey

Foot note 24 of the WV Appeal Petition expressly addresses the trial court's order

for further survey:

The court abused its discretion by requiring J.D. Hopkins to obtain further survey to document formally the "Encroachment Tract" boundary line explicitly depicted on the Dunlap survey

C. US Supreme Court Petition Sections Raising Issue With The Trial Court's Finding Limiting Adverse Possession To The Encroachment Tract

1. Question Presented

On page 1 of the U.S. Supreme Court Appeal Petition in the Question Presented, Petitioner Hopkins raised issue with the trial court's finding limiting the adversely possessed area to the Encroachment Tract designated on the Dunlap Survey:

In ruling for Respondent, Judge Johnson (a) limited Petitioner's twenty years of adverse

use to the oddly shaped Encroachment Tract manufactured by Respondent's expert in 2005 for the subject litigation; . . .

2. Section VI– Judge Johnson's Clearly Erroneous Finding Limiting Petitioner's Adverse Possession To The "Encroachment Tract" Originating With And Depicted On The Dunlap Survey Plat. Trial Order at ¶ 23.

Section VI of the US Supreme Court Petition argued that the trial judge's finding limiting the adversely possessed area to the Encroachment Tract is clearly erroneous:

- VI. Judge Johnson's Clearly Erroneous Finding Limiting Petitioner's Adverse Possession To The "Encroachment Tract" Originating With And Depicted On The Dunlap Survey Plat. Trial Order at ¶ 23.

Judge Johnson found that Petitioner Hopkins had adversely possessed "an area around the 40s Building, designated on the Dunlap Survey . . . as the 'Encroachment Tract.'" Judge Johnson focused on the 1994 video taken by Martha Hopkins to determine the area adversely possessed by Petitioner Hopkins. In the Trial Order, Judge Johnson explained:

[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994

App. A, Trial Order at 18-19. . . . That the adverse possession finding is clearly erroneous is also readily evident from the fact that it limits the adverse possession to the Encroachment Tract (red/yellow areas) identified in and originating with the Dunlap Survey. *See* Appendix G ("App. G") (annotated attachment to the May 19 Order (Pl. Ex. 1- partial)). As shown in Pictures 56 and 76 (App. F), nothing on the ground limits or impedes the Hopkins' use of the disputed property to the Encroachment Tract or even differentiates the Encroachment Tract from the surrounding disputed property. As Judge Johnson found that Petitioner Hopkins had adversely possessed area to the right of the Forties Building, that holding should not be limited to the oddly shaped Encroachment Tract created by Respondent's expert in 2005, but should extend to the entire area used for the Hopkins business since 1985 (at least the red and blue areas), that property naturally bounded by the stream and tree line as explained by the Hopkins family and supported by the objective evidence.

3. Footnote 4 Expressly Addresses The Trial Court's Order Requiring Further Survey

Footnote 4 of the US Supreme Court Petition specifically addressed the trial court's order for further survey:

Judge Johnson further abused his discretion by requiring Petitioner Hopkins to obtain further survey to document formally the "Encroachment Tract" boundary line explicitly depicted on the Dunlap survey. Trial Order at 23. Neither party requested this relief and the Trial Order together with the Dunlap survey provide sufficient documentation to reflect the boundary line judgment. This Order should be set aside.

D. Defendant Performed The Survey Required By The Trial Order After The Appeal Process Ended

On December 2, 2009, after the appeal process had ended, Defendant's surveyor Kevin Schafer completed the Final Survey required by the 2007 Trial Order. Pursuant to the language of the 2007 Trial Order, the Final Survey conveyed the "Encroachment Tract" designated on the Dunlap Survey to Defendant, the survey plat explicitly acknowledging that "[i]n the Final Order i[t] states that the defendant shall have title to the land on which the 40's building currently sits, as well as an area around the 40's Building, designated[sic] on the Dunlap Survey as the Encroachment Tract." *See* Final Survey at TAB 1.

E. The Subject Order Dated July 8, 2010 Modifying the Adversely Possessed Area

Two and one-half years after the 2007 Trial Order issued, and after the appeal process had been completed and the ordered Final Survey performed, Plaintiff Chapman filed Plaintiff's Motion to Compel Defendant to Perform an Accurate Survey (hereafter, "March 2010 Motion"), arguing that "Exhibit A [relied upon by Judge Johnson in 2007 and 2008 to identify the adversely possessed area as the 'Encroachment Tract' designated specifically on Exhibit A] does not set forth the distance from the building known as the '40's Building' to the boundary line as set forth on Exhibit A the Plaintiff believes that such area substantially expands the area which the Court found the Defendant was entitled to possess." March 2010 Motion at 9. In response to the March 2010 Motion, Judge Johnson changed the adversely possessed area from that

previously described in the 2007 Trial Order and ordered Petitioner Hopkins to perform a second final survey to document the new description of the adversely possessed area:

On the 3rd day of May, 2010 came the Plaintiff, by counsel, Gregory W. Sproles, along with D. Craig Chapman and came Defendant, J.D. Hopkins in person and by counsel, Stephen Hastings, for a hearing upon the Plaintiff's Motion to Compel Defendant to Perform an Accurate Survey in accordance with the Court's prior Order.

Thereupon, the Court did review its Final Order, all matters of record and did further consider the argument of counsel. At the conclusion of which the Court does hereby find that it was the Court's intent, in its Order Following Bench Trial, to establish the area surrounding the building known as the "40's" building, to which the Defendant is entitled by virtue of adverse possession, to be a perimeter of ten feet (10') surrounding such building and a contiguous second area, the outer boundary of this second area beginning at a point ten feet (10') to the east of the front right corner of the 40's building, as one faces the 40's building, and runs in a straight line to a rebar, the rebar being located 26.19 feet, generally in a northwestern direction, from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W.

It is therefore ORDERED and ADJUDGED that the area to which the Defendant was found to be entitled to use by virtue of adverse possession is an area ten foot (10') surrounding the building known as the 40's building and a contiguous second area the outer boundary of which runs from a point ten feet (10') to the east of the front right corner of the 40's building, as one faces the 40's building, to a rebar located 26.19 feet generally in a northwestern direction from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W. It is further ORDERED that the adversely possessed tract's generally southeastern corner shall be located at said rebar, the rebar being located 26.19 feet generally in a northwestern direction from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W.

It is further ORDERED that the Defendant shall immediately cause a survey to be performed of the tract referred to above and shall provide a copy of such survey to counsel for the Plaintiff. It is further ORDERED that such survey shall be lodged with the Clerk of this Court and shall be recorded in the Office of the Clerk of the County Commission of Nicholas County, West Virginia and indexed in the Orders file of such Clerk, the maps in such Clerk's office and indexed in the Grantor index in said Clerk's office.

In modifying the adversely possessed area, the trial court referenced the same exhibit it had referenced originally to identify the adversely possessed area in the 2007 Trial Order (i.e., the Dunlap survey (Plaintiff's Exhibit Number 1)).

III. SUMMARY OF THE ARGUMENT

In 2010, on motion by Plaintiff Chapman, Judge Johnson blatantly changed his 2007 Trial Order. The 2007 Trial Order was clear on its face that the Encroachment Tract on the Dunlap Survey had been adversely possessed by Petitioner Hopkins, with the body of the 2007 Trial Order explicitly stating that “[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence.” By changing the 2007 Trial Order, Judge Johnson violates the general rule that a court cannot modify its final judgment after the adjournment of the term at which it is rendered by attempting to modify the 2007 Trial Order more than two years after its entry. J.D. Hopkins obtained a vested right in the final judgment in 2007 and relied upon the pertinent wording of the 2007 Trial Order during the expensive and time-consuming process of appeal and in obtaining the ordered Final Survey. Moreover, in order to modify the 2007 Trial Order, Judge Johnson must have jurisdiction pursuant to either Rule 59(e), Rule 60(a), or Rule 60(b) of the West Virginia Rules of Civil Procedure. However, as explained in later sections, the criteria for application of each of these rules are not met. With respect to each Rule, the instigating motion is untimely. Furthermore, the modification of the adversely possessed area is a substantive change outside the purview of Rule 60(a), and given the

detail provided in both the 2007 Trial Order and the 2010 Modified Order, does not reflect mistake or inadvertence by Judge Johnson.² Finally, and significantly, Plaintiff failed to raise issue with the 2007 Trial Order's wording regarding the adversely possessed area during appeal to either the WV Supreme Court of Appeals or the U.S. Supreme Court. Moreover, not once during appeal did Plaintiff refute, or otherwise argue, Defendant's assertion that the 2007 Trial Order limited the adversely possessed area to the Encroachment Tract originating with and designated on the Dunlap Survey. *See* Plaintiff's Responsive WV Appeal Brief.³ In fact, in Section X of Plaintiff's Responsive WV Appeal Brief, Plaintiff agreed with Petitioner that Judge Johnson had limited Petitioner's adverse possession to the 'Encroachment Tract' drawn on the Dunlap Survey. *See* Plaintiff's Responsive WV Appeal Brief at 28, 29. Since Plaintiff acknowledged the same, Plaintiff has waived any argument to the contrary. Judge Johnson abused his discretion by holding otherwise and changing his ruling.

IV. RELEVANT LAW

A. Standard of Review

In reviewing challenges to the findings and conclusions of the circuit court, the Supreme Court applies a two-prong deferential standard of 'review,' reviewing the final order and the ultimate disposition under an abuse of discretion standard and the circuit court's underlying factual findings under a clearly erroneous standard. Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108 (1997). "An abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them."

² Furthermore, the adverse possession claim as to the Encroachment Tract is by color of title based upon The David Hopkins Deed, conveying the entire Encroachment Tract to Petitioners.

³ Plaintiff chose not to file a responsive brief in the U.S. Supreme Court Appeal, and therefore, clearly failed to address Defendant's Encroachment Tract arguments during that appeal.

State v. Calloway, 528 S.E.2d 490 (W.Va. 1999). “A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223 (1996). Conclusions of law are reviewed *de novo*. *Id.*

B. Statutory Bases For Amending Final Judgments

1. Rule 59(e). Amendment of judgments.

Rule 59(e) of the West Virginia Rules of Civil Procedure states:

(e) *Motion to alter or amend a judgment.* — Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

2. Rule 60(a). Relief from judgment or order - Clerical Mistakes.

Rule 60(a) of the West Virginia Rules of Civil Procedure states:

(a) *Clerical mistakes.* — Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

“Rule 60(a) of the West Virginia Rules of Civil Procedure applies to clerical errors made through oversight or omission which are part of record and is not intended to adversely affect rights of the parties or alter the substance of order, judgment, or record beyond what was intended.”

Savage v. Booth, 468 S.E.2d 318, 321 (W.Va. 1996). “[A] motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make is say something other than what originally was pronounced’ while more substantial errors ‘are to be

corrected by a motion under Rules 59(e) or 60(b).” *Id.* Furthermore, a clerical error is “[an] error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only.” *Id.* at 322.

3. Rule 60(b). Relief from judgment or order - Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.

Rule 60(b) of the West Virginia Rules of Civil Procedure states:

(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. — On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"Courts may not lightly regard their own judgments. When a case, by due procedure, comes to an end in a final judgment, the person in whose favor the judgment is rendered obtains a vested

right in such judgment." *Baker v. Gaskins*, 36 S.E.2d 893, 896 (W.Va. 1946); *Post v. Carr*, 42 W.Va. 72, 24 S.E. 583. "As a general rule, a court cannot modify or vacate its final judgment after the adjournment of the term at which it is rendered." *Baker*, 36 S.E.2d at 896; *Helms v. Greenbrier Valley Cold Storage Co.*, 65 W.Va. 203, 63 S.E. 1089; *Barbour County Court v. O'neal*, 42 W.Va. 295, 26 S.E. 182. "The requirements are not so strict with regard to the vacation or the modification by courts of their final judgments during the term at which they are entered; but even as to those judgments the exercise of the power to modify or vacate must not be arbitrary or capricious. It is limited by judicial discretion which is subject to review." *Baker*, 36 S.E.2d at 896; *Arnold v. Reynolds*, 121 W.Va. 91, 2 S.E.2d 433. "In this jurisdiction the principle is firmly established that a final judgment will not be set aside or altered during the term at which it has been rendered in the absence of a showing of good cause for such action. This Court has held repeatedly that good cause, justifying the vacation by a court of a final judgment during the same term at which it was entered, requires a showing, by the person seeking to vacate such judgment, that fraud, accident, mistake, surprise or some other adventitious circumstance, beyond his control and free from his neglect, occurred which prevented him from making timely defense against the entry of the adverse judgment." *Hill v. Long*, 107 W.Va. 664, 150 S.E. 6; *Sands v. Sands*, 103 W.Va. 701, 138 S.E. 463; *Gainer v. Smith*, 101 W.Va. 701, 138 S.E. 463; *Gainer v. Smith*, 101 W.Va. 314, 132 S.E. 744; *Bell v. Tormey*, 67 W.Va. 1, 67 S.E. 1086; *Wilson v. Kennedy*, 63 W.Va. 1, 59 S.E. 736; *Post v. Carr*, 42 W.Va. 72, 24 S.E. 583; *Baker v. Gaskins*, 36 S.E.2d 893, 896 (W.Va. 1946).

C. Waiver Law

The West Virginia Supreme Court of Appeals recently summarized West Virginia's waiver law in *Perrine v. E.I. Du Pont De Nemours*, 694 S.E.2d 815, 2010 WL 2243936 (2010), explaining that

“There are sound reasons for requiring a party to present all known arguments or claims to an appellate court before its decision is rendered.” *Northern Indiana Commuter Transp. Dist. v. Chicago South-Shore & S. Bend R.R.*, 685 N.E.2d 680, 687 (Ind.1997). “One of the reasons for the rule is to prevent a party from appealing in a piecemeal manner. The rule also keeps a party from shifting its position. The basic purposes are to promote the finality of appellate courts' decisions and to conserve judicial time.” *Kentner v. Gulf Ins. Co.*, 689 P.2d 955, 957 (Or.1984) (citations omitted). *See also OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 747 (Tex.Ct.App.2007). A longstanding legal maxim adhered to by this Court is that “[t]he law aids those who are diligent, not those who sleep upon their rights.” *Dimon v. Mansy*, 198 W. Va. 40, 48, 479 S.E.2d 339, 347 (1996) (internal quotations and citation omitted). “We have explained this principle of law to mean that when attorneys are careless, and [do] not attend to their interests in court ..., they must suffer the consequences of their folly.” *Law v. Monongahela Power Co.*, 210 W. Va. 549, 561, 558 S.E.2d 349, 361 (2001) (Davis, J., dissenting) (internal quotations and citation omitted). *See also Hanlon v. Logan County Bd. Of Educ.*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (“Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur[.]”); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) (“The rule in West Virginia is that parties must speak clearly in ... court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.”).

Perrine, 694 S.E.2d at 932. This Court explained further that

Although the raise or waive rule is usually invoked for errors or irregularities at the trial court level, the rule has equal force and application at the appellate level. As pointed out by the Ninth Circuit Court of Appeals, “[o]rdinarily, arguments not timely presented are deemed waived[, and t]his general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing.” *Narang v. Gonzales*, 138 Fed. App'x 26, 27 (9th Cir.2005) (internal quotations and citation omitted). *See also Noonan v. Staples, Inc.*, 561 F.3d 4, 6 (1st Cir.2009) (“That Staples did not timely raise the issue is also made clear by the fact that it has not, until now [(on a petition for rehearing en banc)], filed the notice required for a challenge to the constitutionality of a state statute. The issue is waived, and the fact that the issue raises constitutional concerns does not save the waiver.”); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n. 35 (9th Cir.2009) (“On petition for rehearing en banc, MBNA raises for the first time an argument that allowing private enforcement of California Civil Code section 1785.25(a) is inconsistent with the purpose of the FCRA and thus is preempted under both FCRA § 1681t(a) and ordinary conflict

preemption provisions. MBNA did not advance this contention before us initially, so the argument is waived.”); *United States v. Pipkins*, 412 F.3d 251, 1253 (11th Cir.2005) (“We have a long-standing rule that we will not consider issues that were argued for the first time in a petition for rehearing, and we adhere to that rule today.”); *Keating v. F.E.R.C.*, 927 F.2d 616, 625-26 (D.C.Cir.1991) (“It was not until the instant petition for rehearing that California raised for the first time a claim that the Corps permit is not a permit ‘with respect to the construction of a[] facility’ within the meaning of the statute. Because California failed to raise this argument until its petition for rehearing, the argument is waived and we decline to reopen the matter now.”).

Id. at 934.

D. Adverse Possession

To obtain title to a tract of land by adverse possession, one must prove that he has held the tract adversely or hostilely, and that the possession has been actual, open and notorious, exclusive, continuous, and under claim of title or color of title. *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 90 (1977). The office of claim of title or color of title is to define the area which can be claimed by adverse possession. *Id.* “Generally, where one asserts adverse possession under a claim of title, the extent of his possession is limited by the area over which he has exercised actual dominion. Under color of title, the limit is determined by the description contained in the title paper, as long as the disseisor has exercised some dominion over a portion thereof and the other elements are satisfied.” *Id.* That is, “claim of title or color of title limits the adversely possessed area either to that actually possessed or to the description in the title paper, respectively.” *Id.*; *Core v. Faupel*, 24 W.Va. 238 (1884). “While the courts have not been entirely consistent in observing the distinction between the concept of claim of right and color of title, there is a generally recognized difference. See 3 Am.Jur.2d Adverse Possession ss 100, 105; 2 C.J.S. Adverse Possession ss 60, 67. A claim of title has generally been held to mean nothing more than that the disseisor enters upon the land with the intent to claim it as his own.” *Somon*, 160 W.Va. at 92; *Heavner v. Morgan*, 41 W.Va. 428, 23 S.E. 874. “Whereas,

'color of title' imports there is an instrument giving the appearance of title, but which instrument in point of law does not. In other words, the title paper is found to be defective in conveying the legal title." *Somon*, 160 W.Va. at 92; *Stover v. Stover*, 60 W.Va. 285, 54 S.E. 350 (1906).

V. JUDGE JOHNSON ABUSED HIS DISCRETION BY MODIFYING THE WORDING OF THE TRIAL ORDER AT ISSUE ON APPEAL AFTER THE APPEAL PROCESS ENDED.

A. Plaintiff Waived Any Argument That The Trial Order Does Not Limit The Adversely Possessed Area To the Encroachment Tract Designated On The Dunlap Survey

1. Petitioner Argued On Appeal To Both The West Virginia Supreme Court of Appeals And The U.S. Supreme Court That The Adversely Possessed Area Should Not Be Limited To The Encroachment Tract Designated On The Dunlap Survey As Ordered By The Trial Court

In his petitions to both the West Virginia Supreme Court of Appeals and the U.S. Supreme Court, Petitioner Hopkins argued that "as the trial court found that J.D. Hopkins adversely possessed area to the right of the Forties Building, that holding should not be limited to the oddly shaped Encroachment Tract created by plaintiff's expert in 2005. Instead, the finding should extend to the entire area used for the Hopkins business since 1985, that property naturally bounded by the stream and tree line as explained by the Hopkins family and supported by the objective evidence." *See* Sections II.B.1.d and II.C.2, *infra*.

2. Defendant Argued On Appeal To Both The West Virginia Supreme Court of Appeals And The U.S. Supreme Court That The Subject Survey Was Not Warranted Because The Trial Court's Order Identifying The Adversely Possessed Area As The Encroachment Tract Designated On The Dunlap Survey In Conjunction With The Dunlap Survey Itself Sufficed To Identify The Relevant Boundary Line.

During appeal to both the West Virginia Supreme Court of Appeals and the U.S. Supreme Court, Petitioner Hopkins argued that "Judge Johnson further abused his discretion by requiring Petitioner Hopkins to obtain further survey to document formally the 'Encroachment Tract' boundary line explicitly depicted on the Dunlap survey. . . [as neither] . . . party requested

this relief and the Trial Order together with the Dunlap survey provide sufficient documentation to reflect the boundary line judgment." See Sections II.B.1.e and II.C.3, *infra*.

3. Plaintiff Did Not Refute Defendant's Interpretation Of The Adversely Possessed Area As The Encroachment Tract Designated On The Dunlap Survey During The Appeal Process And Therefore Waived Such Argument.

Plaintiff did not raise issue with the 2007 Trial Order's wording regarding the adversely possessed area during appeal to either the WV Supreme Court of Appeals or the U.S. Supreme Court. Moreover, not once during appeal did Plaintiff refute, or otherwise argue, Defendant's assertion that the 2007 Trial Order limited the adversely possessed area to the Encroachment Tract originating with and designated on the Dunlap Survey. See Plaintiff's Responsive WV Appeal Brief.⁴ In fact, in Section X of Plaintiff's Responsive WV Appeal Brief, Plaintiff agreed with Petitioner that Judge Johnson had limited Petitioner's adverse possession to the 'Encroachment Tract' drawn on the Dunlap Survey. See Plaintiff's Responsive WV Appeal Brief at 28 ("the Court's finding limiting Hopkins' adverse possession claim to the 'Encroachment Tract' drawn on the Dunlap Survey is not clearly erroneous"); *id.* at 29 ("The Court correctly found that [the evidence presented by Hopkins] did not clearly and convincingly establish title by adverse possession to the area in question beyond the Encroachment Tract."). Since Plaintiff acknowledged the same, Plaintiff has waived any argument to the contrary. As this Court recently noted in *Perrine*,

"[t]here are sound reasons for requiring a party to present all known arguments or claims to an appellate court before its decision is rendered." *Northern Indiana Commuter Transp. Dist. v. Chicago South-Shore & S. Bend R.R.*, 685 N.E.2d 680, 687 (Ind.1997). "One of the reasons for the rule is to prevent a party from appealing in a piecemeal manner. The rule also keeps a party from shifting its position. The basic purposes are to

⁴ Plaintiff chose not to file a responsive brief in the U.S. Supreme Court Appeal, and therefore, clearly failed to address Defendant's Encroachment Tract arguments during that appeal.

promote the finality of appellate courts' decisions and to conserve judicial time.” *Kentner v. Gulf Ins. Co.*, 689 P.2d 955, 957 (Or.1984) (citations omitted). *See also OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 747 (Tex.Ct.App.2007).

694 S.E.2d at 932. Moreover, this Court has explained that

[a] longstanding legal maxim adhered to by this Court is that “[t]he law aids those who are diligent, not those who sleep upon their rights.” *Dimon v. Mansy*, 198 W. Va. 40, 48, 479 S.E.2d 339, 347 (1996) (internal quotations and citation omitted). “We have explained this principle of law to mean that when attorneys are careless, and [do] not attend to their interests in court ..., they must suffer the consequences of their folly.” *Law v. Monongahela Power Co.*, 210 W. Va. 549, 561, 558 S.E.2d 349, 361 (2001) (Davis, J., dissenting) (internal quotations and citation omitted). *See also Hanlon v. Logan County Bd. Of Educ.*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (“Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur[.]”); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) (“The rule in West Virginia is that parties must speak clearly in ... court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.”).

Id. Judge Johnson abused his discretion by ignoring Plaintiff’s waiver of the Encroachment Tract issue.

B. Judge Johnson Lacks Jurisdiction In 2010 To Alter the 2007 Trial Order.

“It is well-settled law that for a court “to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” *Blankenship v. Estep* (496 S.E.2d 211, 213 (W.Va. 1997). In order to modify the Trial Order, Judge Johnson must have jurisdiction pursuant to one of the rules Rule 59(e), Rule 60(a), or Rule 60(b) of the West Virginia Rules of Civil Procedure. However, as explained below, the criteria for application of each of these rules are not met.

1. Modification Of The 2007 Trial Order In The Year 2010 Violates The General Rule That A Court Cannot Modify Or Vacate Its Final Judgment After The Adjournment Of The Term At Which It Is Rendered

"As a general rule . . . a court cannot modify or vacate its final judgment after the adjournment of the term at which it is rendered." *Helms v. Greenbrier Valley Cold Storage Co.*, 65 W.Va. 203, 63 S.E. 1089 (1909); *Barbour County Court v. O'neal*, 42 W.Va. 295, 26 S.E. 182 . This Court has explained that "[c]ourts may not lightly regard their own judgments. When a case, by due procedure, comes to an end in a final judgment, the person in whose favor the judgment is rendered obtains a vested right in such judgment." *Post v. Carr*, 42 W.Va. 72, 24 S.E. 583 (1896). "Even as to those judgments the exercise of the power to modify or vacate must not be arbitrary or capricious. It is limited by judicial discretion which is subject to review." *Arnold v. Reynolds*, 121 W.Va. 91, 2 S.E.2d 433 (1939).

In the present case, Judge Johnson violates the general rule that a court cannot modify its final judgment after the adjournment of the term at which it rendered by attempting to modify the 2007 Trial Order more than two years after its entry.⁵ J.D. Hopkins obtained a vested right in the final judgment in 2007. Moreover, Mr. Hopkins relied upon the pertinent wording of the 2007 Trial Order during the expensive and time-consuming process of appeal and in obtaining the ordered Final Survey. Judge Johnson abused his discretion by modifying in July 2010 the

⁵ Even as to vacation or modification within the same term, in this jurisdiction the principle is firmly established that a final judgment will not be set aside or altered in the absence of a showing of good cause for such action. "This Court has held repeatedly that good cause, justifying the vacation [or modification] by a court of a final judgment during the same term at which it was entered, requires a showing, by the person seeking to vacate such judgment, *that fraud, accident, mistake, surprise or some other adventitious circumstance, beyond his control and free from his neglect, occurred which prevented him from making timely defense* against the entry of the adverse judgment." *Hill v. Long*, 107 W.Va. 664, 150 S.E. 6 (*emphasis added*); *Sands v. Snads*, 103 W.Va. 701, 138 S.E. 463; *Gainer v. Smith*, 101 W.Va. 701, 138 S.E. 463; *Gainer v. Smith*, 101 W.Va. 314, 132 S.E. 744; *Bell v. Tormey*, 67 W.Va. 1, 67 S.E. 1086; *Wilson v. Kennedy*, 63 W.Va. 1, 59 S.E. 736; *Post v. Carr*, 42 W.Va. 72, 24 S.E. 583." *Baker v. Gaskins*, 36 S.E.2d 893, 896 (W.Va. 1946). In the present case, nothing prevented Plaintiff from timely objecting to the description of the adversely possessed area in the Trial Order, such description repeatedly relied upon by Defendant to contest the adversely possessed area finding during the appeal process.

description of the adversely possessed property in the 2007 Trial Order. His abuse is especially egregious given Mr. Hopkins' reliance on the 2007 Trial Order wording during appeal and the funds expended by Mr. Hopkins to obtain the Final Survey.

2. March 2010 Motion Resulting In Amendment of 2007 Trial Order Is Untimely Under Rule 59(e) Requiring That A Motion To Alter Or Amend Final Judgment Be Filed Not Later Than 10 Days After Entry Of The Judgment.

Rule 59(e) of the West Virginia Rules of Civil Procedure states:

(e) Motion to alter or amend a judgment. — Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

Clearly, Judge Johnson cannot modify the 2007 Trial Order in 2010, more than two years after the Trial Order's entry, using Rule 59(e) requiring filing of the instigating motion 10 days after entry of the 2007 Trial Order.

3. 2007 Trial Order Cannot Be Modified Under Rule 60(a) Because (1) The Subject Modification Is Not A Clerical Error As It Substantively Changes The Boundary Line At Issue And (2) The Associated Motion Is Untimely
 - a. Modification Does Not Correct A Clerical Error Permitted By Rule 60(a) But Instead Is A Substantive Change That Alters The Boundary Line Identified By The Trial Order Such That Less Property Is Conveyed To J.D. Hopkins Under Adverse Possession

Rule 60(a) of the West Virginia Rules of Civil Procedure states

(a) Clerical mistakes. — Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

“Rule 60(a) of the West Virginia Rules of Civil Procedure applies to clerical errors made through oversight or omission which are part of record and is not intended to adversely affect rights of the parties or alter the substance of order, judgment, or record beyond what was intended.”

Savage v. Booth, 468 S.E.2d 318, 321 (W.Va. 1996). “[A] motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make is say something other than what originally was pronounced’ while more substantial errors ‘are to be corrected by a motion under Rules 59(e) or 60(b).’” *Id.* Furthermore, a clerical error is “[an] error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only.” *Id.* at 322.

Given the level of detail provided by the two orders, it is difficult to imagine that either the Plaintiff or Judge Johnson is arguing that substituting the language in the 2010 Modified Order:

It is therefore ORDERED and ADJUDGED that the area to which the Defendant was found to be entitled to use by virtue of adverse possession is an area ten foot (10') surrounding the building known as the 40's building and a contiguous second area the outer boundary of which runs from a point ten feet (10') to the east of the front right corner of the 40's building, as one faces the 40's building, to a rebar located 26.19 feet generally in a northwestern direction from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W.

for the 2007 Trial Order language:

2. Based on his clearly and convincingly establishing all the legal requirements of adverse possession, **the defendant shall have title to the land** on which the 40s Building currently sits, **as well as an area around the 40s Building, designated on the Dunlap Survey as the "Encroachment Tract"** and including 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1).

corrects a clerical error. Rather, he changed the findings. Moreover, as evidenced by reference to the Dunlap Survey, modifying the adversely possessed area from the Encroachment Tract to the indicated rebar in the 2010 Modified Order alters the adjudged boundary line and reduces the amount of property conveyed to J.D. Hopkins, and therefore is a substantive change falling outside the purview of Rule 60(a).

- b. Rule 60(a), Permitting Modification of The Trial Order *Prior To Docketing Of Appeal At Trial Court's Discretion And While Appeal Is Pending With Leave Of The Appellate Court*, Does Not Permit Modification After The Appeal Process Has Ended.

Rule 60(a) on its face appears to prohibit modification of any error, even a clerical error, after the appeal process has ended. While the first sentence of Rule 60(a) states that "[c]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court *at any time* of its own initiative or on the motion of any party and after such notice, if any, as the court orders," the second sentence limits modification at the court's discretion to the time period before docketing with the appellate court, requiring leave of the appellate court to make such corrections while the appeal is pending. Specifically, the second sentence of Rule 60(a) states:

During the pendency of an appeal, such mistakes may be so corrected **before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.**

Rule 60(a) (emphasis added). Accordingly, Rule 60(a) provides no authority to modify even a clerical error, let alone the substantive error at issue, after the appeal process has ended.

Therefore, Judge Johnson had no jurisdiction under Rule 60(a) to modify the 2007 Trial Order in the year 2010 after the appeal process had ended.

4. 2007 Trial Order Cannot Be Modified Under Rule 60(b) Because (1) The Instigating Motion Based On Mistake Or Inadvertence Is Untimely And (2) No Mistake Or Inadvertence Occurred.

Rule 60(b) of the West Virginia Rules of Civil Procedure states

(b) *Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.* — On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: **(1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause;** (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.** A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

WVRCP 60(b) (*bold emphasis added*). From the wording "it was the Court's intent" in the 2010 Modified Order, Judge Johnson appears to rely on "mistake" or "inadvertence" of Rule 60(b)(1) as the means by which he has the authority to modify the 2007 Trial Order:

At the conclusion of which the Court does hereby find that **it was the Court's intent, in its Order Following Bench Trial**, to establish the area surrounding the building known as the "40's" building, to which the Defendant is entitled by virtue of adverse possession, to be a perimeter of ten feet (10') surrounding such building and a contiguous second area, the outer boundary of this second area beginning at a point ten feet (10') to the east of the front right corner of the 40's building, as one faces the 40's building, and runs in a straight line to a rebar, the rebar being located 26.19 feet, generally in a northwestern direction, from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W

2010 Modified Order. However, Rule 60(b) specifically states that a motion under Rule 60(b) "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Accordingly, a motion resulting in the modification of the 2007 Trial Order pursuant to Rule 60(b)(1) had to have been filed

within one year of the entry of the Order, that is, in 2008. Accordingly, Plaintiff's March 2010 Motion was not timely filed and Judge Johnson had no jurisdiction under Rule 60(b)(1) to modify the 2007 Trial Order.⁶

Furthermore, although it appears that both the Plaintiff and Judge Johnson assert that Judge Johnson mistakenly inserted the 2007 Trial Order language

2. Based on his clearly and convincingly establishing all the legal requirements of adverse possession, **the defendant shall have title to the land on which the 40s Building currently sits, as well as an area around the 40s Building, designated on the Dunlap Survey as the "Encroachment Tract"** and including 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1).

when he intended the language in the 2010 Modified Order

It is therefore ORDERED and ADJUDGED that the area to which **the Defendant was found to be entitled to use by virtue of adverse possession is an area ten foot (10') surrounding the building known as the 40's building and a contiguous second area the outer boundary of which runs from a point ten feet (10') to the east of the front right corner of the 40's building, as one faces the 40's building, to a rebar located 26.19 feet generally in a northwestern direction from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff's Exhibit Number 1) and on the line depicted on the Dunlap Survey (Plaintiff's Exhibit Number 1) with a bearing of N 36° 24' 24"W.,**

it is difficult to believe the assertion given the level of detail in both orders. The 2007 Trial Order clearly identifies the Encroachment Tract as the adversely possessed area stating explicitly that "the defendant shall have title to the land on which the 40s Building currently sits, as well as an area around the 40s Building, *designated on the Dunlap Survey as the 'Encroachment Tract'* and further ensures that the adversely possessed area "includ[es] 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building *and 2) the land west of the*

⁶ Nothing in Plaintiff's March 2010 Motion nor in the Modified Order appears to invoke any provision under Rule 60(b) other than Rule 60(b)(1).

Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1).” Moreover, the body of the 2007 Trial Order is replete with references to the Encroachment Tract as adversely possessed area to include Judge Johnson specifically stating that “[t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence,” that “the Court finds that the evidence strongly supports the defendant’s adverse possession of the 40s Building and the Encroachment Tract,” and that “the defendant failed to clearly and convincingly demonstrate that his use of any area other than that of the 40s Building and the Encroachment Tract was sufficiently, exclusive, open and notorious to establish title by adverse possession.” 2007 Trial Order at 18-19; *see* Trial Order 20-22 generally. Finally, the “Dunlap Survey (Plaintiff’s Exhibit Number 1)” clearly designates the “Encroachment Tract” by shading (i.e., the “brick” area) and area calculation (i.e., 4769 SQ. FT.; 0.109 ACRES). The very phrase “the Encroachment Tract” originated with the Dunlap Survey. 2007 Trial Order at 18-19. The 2007 Trial Order clearly established the Encroachment Tract on the Dunlap Survey as the adversely possessed area. The 2010 Modified Order, however, fails to even reference the Encroachment Tract, focusing instead on a rebar *not even identified in the 2007 Trial Order* (i.e., “to a rebar located 26.19 feet generally in a northwestern direction from the corner of the tract owned by Ben and Freda Taylor as depicted on the Dunlap survey (Plaintiff’s Exhibit Number 1).”) In sum, Judge Johnson simply and blatantly changed his 2007 Trial Order, and in doing so, abused his discretion.⁷

⁷ The Encroachment Tract originated due to the overlapping of two deeds to J.D. Hopkins and David Hopkins respectively. *See* Plaintiff’s Exhibit No. 33 (Interrogatory #4); Trial Transcript, October 11, 2007 AM (Martha Hopkins - Cross); May 3, 2010 Hearing Transcript 5: 23- 6:2. The Encroachment Tract boundary line on the Dunlap Survey follows the boundary line of the deed to David Hopkins (hereafter, “The David Hopkins Deed”). *Id.* As this Court knows, to obtain title to a tract of land by adverse possession, one must prove that he has held the tract adversely or hostilely, and that the possession has been actual, open and notorious,

VI. CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court grant this petition.

Respectfully submitted,

**J.D. Hopkins and David Hopkins
By Counsel**



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exclusive, continuous, *and under claim of title or color of title*. *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 90 (1977) (emphasis added). Claim of title or color of title limits the adversely possessed area either to that actually possessed or to the description in the title paper, respectively. *Somon, supra*; *Core v. Faupel*, 24 W.Va. 238 (1884). While Petitioners have argued, and believe that the record reflects, that Petitioners have actually possessed an area greater than that of the Encroachment Tract, Petitioners' adverse possession claim to the Encroachment Tract is governed by color of title pursuant to The David Hopkins Deed. "Under color of title, the limit [of the adverse possession] is determined by the description contained in the title paper, as long as the disseisor has exercised some dominion over a portion thereof and the other elements are satisfied." *Id.* As the trial court has ruled that some area of the Encroachment Tract has been adversely possessed by petitioners, the entire Encroachment Tract described in and bounded by The David Hopkins Deed conveys the entire Encroachment Tract to petitioners under color of title theory of adverse possession.

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

DC CHAPMAN VENTURES, INC.,

A West Virginia Corporation,

Plaintiff-Respondent,

v.

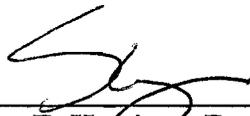
J.D. HOPKINS and DAVID HOPKINS,

Defendants- Petitioners.

CERTIFICATE OF SERVICE

I, Stephen E. Hastings, counsel for Defendants-Petitioners, do hereby certify that on this 9th day of November 2010, I served the foregoing **“Docketing Statement”** by hand-delivering a true and exact copy thereof upon the following counsel of record:

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