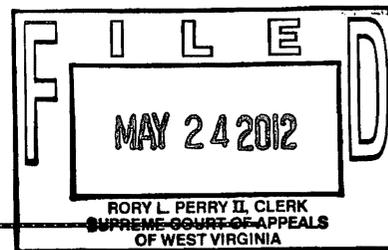


No. 12-0042



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**DOUGLAS W. WILSON, II, and JOELLEN WILSON,
Petitioners Below, Petitioners,**

vs.

**JOHNNY L. STAATS and LORI A. STAATS,
Husband and wife,
Respondents Below, Respondents**

(From the Circuit Court of
Jackson County, West Virginia
Civil Action No. 09-C-5)

RESPONDENT'S BRIEF IN OPPOSITION TO APPEAL

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STATEMENT REGARDING ORAL ARGUMENT

The Respondents agree that the facts and legal arguments are adequately presented in the brief and record on appeal, and the decisional process would not be significantly aided by oral argument.

I. ISSUES PRESENTED

Whether the Circuit Court of Jackson County properly refused to find that the Petitioners herein enjoy a “leasehold easement” across the lands of the Respondents for the maintenance of a gas line running from a producing gas well, across the lands of a non-party neighbor, across the lands of the Respondents, and to the residence of the Petitioners. The Respondents further raise the issue of whether the Petitioners should be permitted to pursue the instant appeal when the Petitioners failed to file proposed findings of fact and conclusions of law as Ordered by the Circuit Court, thereby depriving the Court of any opportunity to consider and rule upon the arguments advanced herein.

II. PROCEEDINGS AND RULINGS BELOW

The Petitioners filed suit by counsel Larry L. Skeen in late 2009 to enjoin the Respondents from removing a gas line installed across the Respondents’ property by the Petitioners in 2000. After Mr. Skeen’s death, attorney Lee F. Benford, Esq. represented the Petitioners in a bench trial held on May 19, 2011. The Circuit Court Ordered the Petitioners to file proposed findings of fact and conclusions of law within 30 days after trial, and Ordered the Respondents to file their responsive proposed findings of fact and conclusions of law within 10 days after Petitioners’ filing. The Petitioners filed no proposed findings of fact, nor did the Petitioners offer any written argument in support of the claims made in the instant Petition for Appeal and Petitioners’ Brief. The Respondents filed their proposed findings of fact and conclusions of law in a timely manner. The Circuit Court issued its Judgment Order, denying the Petitioners’ claim of an easement

across the lands of the Respondents and Ordering the Respondents to remove the said gas line within 60 days of the entry of said Order on September 6, 2011.

The Petitioners filed a timely motion for a new trial and/or to amend judgment, which, along with the Petitioners' oral motion for stay of the September 6, 2011 Order, was denied by Order entered December 9, 2011. To date, the gas line has not been removed.

III. ASSIGNMENTS OF ERROR

A. The Petitioners Waived Their Right to Raise Claims of Alleged "Implied Leasehold Easement" and "Leasehold Easement By Necessity" When They Failed To File Proposed Findings of Fact and Conclusions Of Law As Ordered By The Circuit Court Within 30 Days of the Trial On May 19, 2011.

B. The Lower Court Properly Found That the Petitioners Enjoy No "Leasehold Easement" Of Any Kind Across The Lands Of The Respondents.

IV. ARGUMENT

A. The Petitioners Waived Their Right To Raise Claims Of Alleged "Implied Leasehold Easement" And "Leasehold Easement By Necessity" When They Failed To File Proposed Findings Of Fact And Conclusions Of Law As Ordered By The Circuit Court Within 30 Days Of The Trial On May 19, 2011.

The Petitioners failed to file proposed findings of fact and conclusions of law Ordered by the Circuit Court at the bench trial on May 19, 2011. As such, the arguments and points of law set forth in the instant Appeal were never

presented to the Circuit Court. The failure of a litigant to raise issues before the trial court, while subsequently attempting to raise those issues on appeal, has been addressed by this Court. In Zaleski v. West Virginia Mut. Ins. Co., 687 S.E.2d 123, 224 W.Va. 544 (W.Va., 2009), this court held that the litigant's failure to raise the issue of potential bias by the trial court prohibited that litigant from raising the issue on appeal. In the context of this holding, the Court also articulated a general rule barring new arguments from being raised on appeal.

"Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument as to this record has been waived. The Appellant was required to bring any issue of possible bias before the circuit court so that it could evaluate its actions to determine the credibility of the allegations and respond to them accordingly. This Court has "long held that theories raised for the first time on appeal are not considered. This Court will not consider nonjurisdictional questions that have not been considered by the trial court. The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. [T]here is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." 687 S.E.2d at 129 (internal citations and footnotes omitted)

The Zaleski decision referenced the Supreme Court of Appeals' previous decision in Clint Hurt & Associates, Inc. v. Rare Earth Energy, Inc., 480 S.E.2d 529, 198 W.Va. 320 (W.Va., 1996), in which the Court had previously considered the issue of new matters raised on appeal in a broader context than in Zaleski:

"When a party relies in trial court upon a specific ground for relief or in defense, he is bound thereby, and will ordinarily be refused relief in the appellate court on any position inconsistent therewith . . .

Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.

In this case, we decline to address this new theory of recovery, which was raised for the first time on appeal. [The Appellant] failed to present the theory below and although the facts are not disputed, the circuit court was not given the opportunity to consider the facts relevant to this new theory. Because the theory was not refined, developed or adjudicated by the circuit court, we refuse to proceed to an ultimate resolution in this Court.”

480 S.E.2d 529 at 538, 198 W.Va. 320 at 329 (internal citations omitted)

The transcript of the trial below reflects that the Petitioners raised the arguments set forth in the instant appeal in opening statement, in a manner which can best be described as “cursory”. See Tr., May 19, 2011, opening statements pp. 1-12. On page 10, Petitioner’s counsel expressly acknowledges that memorandums should be submitted after trial with proposed findings of fact and conclusions of law. The Petitioner’s opening statement even included allusions to claims of estoppel, which the Respondents addressed in their proposed findings of fact and conclusions of law, but which are noticeably absent from the instant appeal. Respondents’ counsel expressly noted that the Petitioners’ failure to cite any authority or present any written argument concerning their claim of an easement resulted in the Petitioners requiring “an opportunity to respond to any cases cited by the petitioners, because there has been nothing put in writing thus far”. In response, the trial court noted the absence of any legal authority in the original Complaint, and commented that “it is the duty of the lawyers to research the law and make a determination of whether there is some law . . . which supports your argument”. Tr., pg. 8. Clearly, both parties and the trial court anticipated having Petitioners’ arguments on which to rely or respond.

The Petitioners' failure to file proposed findings of fact and conclusions of law outlining the factual and legal basis for their claim of an easement across the Respondents' property is particularly vexing, given the argument now advanced by the Petitioners. In filing what was technically intended to be a response to the filing due from the Petitioners on or about June 18, 2011, the Respondents were left to guess at the argument to which they should respond. The Respondents *and the Court* were forced to rely solely on the Petitioners' original complaint and on the allusions of Petitioner's counsel at trial as to how the Petitioners intended to frame their argument in support of the requested easement.

The argument presented by the Petitioner on appeal in support of its claim of a gas line "leasehold easement" is acknowledged in the Notice of Appeal as a "case of first impression". Under the circumstances, it was absolutely imperative that the Petitioners present at trial a properly supported, well-articulated written argument which placed the Respondents on notice of the exact nature of their claim to which the Respondents could then respond. The Circuit Court gave the Petitioners every opportunity to raise any and all issues and arguments they chose to present before issuing a final order. It is apparent from the Judgment Order issued by the Circuit Court that the arguments raised on appeal by the Petitioners, i.e., "implied leasehold easement" and "leasehold easement by necessity" arising from various legal theories, were not considered by the Circuit Court in any meaningful fashion. This undesirable circumstance is not the fault of the trial court; rather, the Petitioners' failure to present law and argument in support of its novel position deprived the Respondents of a fair chance to

respond, and deprived the trial court of the opportunity to fully and fairly adjudicate the issues raised by *both* parties.

The Respondents are substantially and unfairly prejudiced by the Petitioners' failure to make argument and cite legal authorities in support of their claim before the Circuit Court. Both parties acknowledge that the claims raised by the Petitioners constitute a "case of first impression". The Respondents' proposed findings of fact and conclusions of law would have been written substantially differently if the Respondents were actually responding to the Petitioners' proposals, rather than attempting to "shotgun" a defense of the issues which the Respondents guessed were likely to be considered by the trial court.

It is patently unfair for the Petitioners to ignore the Circuit Court's Order that they file proposed findings of fact and conclusions of law, to allow the Respondents to spend attorney fees and time filing their argument in accordance with the Order, then for the Petitioners to ask this Court to reverse the Circuit Court's refusal to award an easement based on arguments the Petitioners failed to raise. The Petition for Appeal should be denied and dismissed based on the principles articulated in Zaleski and Clint Hurt cases.

B. The Lower Court Properly Found That the Petitioners Enjoy No "Leasehold Easement" Of Any Kind Across The Lands Of The Respondents.¹

¹ The Respondent's argument in opposition to the two separate assignments of error raised by the Petitioner are likely to be so redundant that to separate them within this brief would unnecessarily duplicate the Respondent's argument. Section "B" of the Respondent's argument should be considered the Respondent's consolidated response to both of the Petitioner's assignments of error, and not a waiver of any response under Rule 10(d) of the Rules of Appellate Procedure.

The Petitioners have, by their conduct, at all times acknowledged the authority of the Respondents to deny the Petitioners a gas line across the Respondents' property in 2000. The evidence established unequivocally that the Petitioners sought and received the Respondents' permission to lay the subject gas line under conditions which clearly placed the Petitioners on notice that the line was subject to removal. The Petitioners now disingenuously claim that they can force the line to remain in place, allowing them to enhance the value of their property at the expense of the Respondents.

The Petitioners are attempting to establish a "leasehold easement" alternatively by necessity or by implication. Notably, a "leasehold easement" has never been recognized as any interest in real estate in either statutory or common law in West Virginia, nor do the Petitioners cite authority from any other state or of the federal government. It appears to be a phrase the Petitioners coined in order give substance to their unsupported arguments.

The facts of the instant case, as determined by the Circuit Court, can be summarized as follows: The Petitioners requested the Respondents' permission to lay a gas line across the Respondents' property. Prior to giving their permission, the Respondents required the Petitioners to sign and have notarized a document entitled "AGREEMENT BETWEEN JOHNNY L. & LORI A. STAATS AND DOUGLAS AND JOELLEN WILSON, II", admitted at trial as Joint Exhibit I (hereafter "the Agreement"). The Agreement, executed on or about June 27, 2000, acknowledged that any gas line laid across the Respondents' property was installed with the Respondents' permission and that the Petitioners

enjoyed no “binding Right of Way” through the Respondents’ property. The parties agreed that the Respondents flatly refused to allow the Petitioners to lay said line until the Agreement was signed by all four parties. The Petitioners acknowledged that at no time was their gas line situate on the Respondents’ property over the Respondents’ objection and that no prescriptive rights had arisen to the Respondents’ property in favor of the Petitioners. The Petitioners paid nothing for their permissive use of the Respondents’ property.

Nothing in these facts as determined by the Court in any way supports an “easement of necessity” as the same is defined under modern law. “The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof”. Cobb vs. Daugherty, 693 S.E.2d 800, 215 W.Va. 435 (2010), Syl. Pt. 2. “The law does not favor the creation of easements by implied grant or reservation.” Id., Syl. Pt. 1. Even the Miller case cited by the Petitioners acknowledges that rule “not to be limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience.” 79 W.Va. 645 (1917), Syl Pt. 4. Cobb vs. Daugherty represents the standard applicable to the establishment of easements: “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.” Id., Syl. Pt.

4. (emphasis added)

There is no evidence to suggest that, at the time of the severance, the easement now sought was strictly (or even marginally) necessary for the benefit of either the parcel transferred or the parcel retained. Absent such proof, both elements (3) and (4) must fail.

Miller vs. Skaggs, the 1917 case upon which the Petitioners rely in the argument for a “leasehold easement of necessity”, is factually so remarkably different from the instant case as to make it irrelevant. Prior to the partition of the Miller tract into separate lots, a sanitary and storm sewer drain was installed to service two residences. After the partition of the properties, the owner of the servient tract deliberately dug out and stopped up the portion of the sewer line located on his property and servicing the other residence. The Court ruled that the owner of the servient tract took the subject property with all the benefits and burdens which appeared at the time of the sale. Although the Plaintiff correctly quotes the Miller court’s ruling, the ruling in no way relates to the Petitioner’s claims herein. The Petitioners have a fully operational residence which may, at any time, be re-converted to use all electric appliances.

Likewise, nothing in the facts as established by the Court supports the Petitioners’ claim of an implied leasehold easement by virtue of the gas leases, unitization agreement and other relevant documents. Joint Exhibits A, B, C, D and E set forth only those agreements and covenants entered into between a) the named Lessors (being the owners of oil and gas interests in and to the

properties which are the subject of this action), their heirs and assigns and b) the named Lessee and its successors in interest. The lower court correctly found that no exhibit admitted at trial purported to grant any Lessor any interest in and to the lands of the Lessor's neighbors, and for good reason: the gas company lessees of the mineral rights possess only the right to transport the gas they produce incident to their operations under the well, not the authority to bestow the same right of transmission upon adjoining landowners not a party to the Respondents' lease.

The exhibits are silent as to how each Lessor, his heirs or assigns, may transport "free gas" from the well head (the location of which was likely unknown at the time the Leases were executed) to the Lessor's dwelling. The exhibits grant the Lessee the right to produce and distribute gas to various individuals, and in no way grant the Petitioners surface rights in the Respondents' property. The Petitioners had no right to enter upon the Respondents' property for any reason; as a result, the Petitioners correctly sought and obtained *permission* from the Respondents to lay a gas line across the Respondents' property in 2000. The Petitioners cannot now deny the Respondents' authority to determine the fate of their real property.

The lower court correctly found that the facts of the instant case establish the parties' creation of a revocable license. "Though the distinction between an easement and a license may, in a particular instance, be difficult to determine and has given rise to many conflicting decisions involving that question, the essential characteristics of the two are materially different. An easement creates

an interest in land; a license does not, but is a mere permission or personal and revocable privilege which does not give the licensee any estate in the land.” Cottrell v. Nurnberger, 47 S.E.2d 454 at 456 (W.Va. 1948), quoting *1 Thompson on Real Estate, Permanent Edition, Section 318; Washburn on Easements and Servitudes*, 5. “A license differs very materially from an easement in that it constitutes no interest in land whatever, and is not real estate, but is a *mere authority*, usually revocable at pleasure and not transferable, to do a certain act or series of acts, for example, to hunt, upon the lands of another, without conferring any interest in the land itself. On the other hand, an easement is the very opposite of this, being an *interest in land*, which is usually *irrevocable* and *freely transferable* in connection with the dominant tenement, as other interests in land are, subject to the same limitations.” Id. at 456 quoting *1 Minor on Real Property, Second Edition, Section 92*. (emphasis original)

The gas line laid across the Respondents’ property by the Petitioners, with the Respondents’ express permission, with no consideration paid by the Petitioners and with no writing granting the Petitioners any interest in the Respondents’ lands, constitutes a license, not an easement, and may be revoked by the Respondents. The evidence establishes that the Respondents took great pains to make abundantly clear to the Petitioners the fact that they would, by laying a gas line from PKE 752 to the Petitioners’ home, establish no easement or permanent rights in the Respondents’ land. The Respondents cry foul and claim “irreparable harm” when, for a period of eleven (11) years, they received free gas to their residence via the use of the Respondents’ property at

no cost through no means other than the Respondents' munificence. The Respondents do not dispute that the Petitioners converted their home from wood heat and electric appliances to gas-powered heat and appliances at the cost set forth in the Petitioner's evidence. However, the Respondents' generosity for over a decade does not obligate them to accommodate the Petitioners' desire (as distinguished from need) for free household gas indefinitely. The Circuit Court made specific findings as to the financial benefit enjoyed by the Petitioners from 2001 and continuing to the present in violation of the Circuit Court's order.

The Petitioners' claims would, if sustained, create a permanent right in the Respondents' property which would burden it indefinitely. Such a result is untenable under the facts as established by the evidence at trial. The Petitioners knew or should have known in 2000 that they expended funds at their own risk and, in fact, the Petitioners have received a very substantial benefit from their expenditure, that being nearly ten years of free gas use for their residence.

The Petitioners' claim of "necessity" is no such thing - the Petitioners simply want to forcibly encumber the Respondents' property for the Petitioner's financial comfort and convenience, over the Respondents' objection and with no compensation. Further, the Petitioners' claim of an implied leasehold easement flies squarely in the face of every step they took to acquire the Respondents' permission to lay the gas line in 2000.

V. CONCLUSION

The Petitioners waived their right to pursue the arguments claimed herein when they failed to file proposed findings of fact and conclusions of law. The claims advanced herein should be denied, first, on the basis of this waiver. Alternatively, the Petitioners' claims of the novel interest in real estate referred to as a "leasehold easement" should be found to be unsupported and the Judgment Order of the Circuit Court of Jackson County upheld in its entirety.

Respectfully submitted,
Johnny L. Staats and Lori A. Staats,
Respondents,
By counsel



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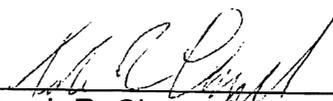
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Husband and wife,
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(From the Circuit Court of
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Civil Action No. 09-C-5)

CERTIFICATE OF SERVICE

The undersigned counsel for the Respondent hereby certifies that she did serve a true copy of the attached Respondents' Brief in Opposition to Appeal, Supplemental Appendix and Respondents' Motion for Leave to File Supplemental Appendix on this the 24th day of May, 2011 by hand delivery to the following address:

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