

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Charleston

DEAN LOWE AND MARTHA LOWE,  
individually and as Trustees of the Demar  
Revocable Trust, Counter-Plaintiffs and  
Third-Party Plaintiffs Below,

Petitioners

v.

Docket No. 13-0234

JOSEPH C. RICHARDS and JOYCE A.  
RICHARDS, Third-Party Defendants Below;  
and, HUGH E. HEGYI, Trustee of the Herman  
Hegyí Trust, Plaintiff and Counter-Defendant Below,

Respondents.

**PETITION FOR APPEAL AND NOTE OF ARGUMENT**

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### III. ASSIGNMENTS OF ERROR

a. The Circuit Court erred when it ruled that it lacked subject matter jurisdiction to hear a case between a West Virginia landowner and adjoining Virginia landowners to determine the boundary between their properties which, according to calls in their deeds is the state line between West Virginia and Virginia, where there is no known disagreement or controversy between the States of West Virginia and Virginia as to the location of that state line boundary, and authoritative monumentation of the state line boundary has been found in the field by licensed land surveyors. [App. Pg. 110, ¶19].

b. The Circuit Court erred when it ruled that it lacked subject matter jurisdiction to determine the boundary line between a West Virginia landowner and adjoining Virginia landowners to determine the West Virginia and Virginia state line boundary, which, according to calls in the deeds is their boundary line, when the Circuit Court ruled that subject matter jurisdiction for this civil action is vested exclusively in the United States Supreme Court by virtue of U.S. Const. Art. III, Section 2, clause 2 and 28 U.S.C. Section 1251, even when there is no known controversy or disagreement between the States of West Virginia and Virginia as to the location of that state boundary line. [App. Pg. 110, ¶20].

c. The Circuit Court erred when it ruled that the States of West Virginia and Virginia were indispensable parties to a case between a West Virginia landowner and adjoining Virginia landowners to determine the state line boundary between those properties, which, according to calls in their deeds, is the boundary line, where there is no known disagreement or controversy between those two states as to the location of that state line boundary, and authoritative monumentation of the state line boundary has been found in the field by licensed land surveyors. [App. Pg. 110-112, ¶s 23-30].

d. The Circuit Court erred when it ruled that the issue of where the state line boundary is located between the states of West Virginia and Virginia as between adjoining landowners in those two states which, according to their deeds is the boundary line, is not a legal issue, but a “political issue”, not to be determined by the courts when there is no known controversy or disagreement between those two states as to the location of that state line boundary. [App. Pg. 107-109, ¶s 12-14 and 18].

e. The Circuit Court erred when it ruled that the issue of where the state boundary line is located as between West Virginia and Virginia in a civil action between a West Virginia landowner and adjoining Virginia landowners to determine the location of that state line, when, according to calls in their deeds, the state line boundary is the boundary line, when there is no known controversy or disagreement between those two states as to the location of the state boundary line and authoritative monumentation as to the location of the state line has been found in the field by licensed land surveyors must be referred to the West Virginia Boundary Commission pursuant to §29-23-2(c)(6) of the *West Virginia Code*, and not to the Circuit Court. [App. Pg. 108-109, ¶s 16-18].

f. That the Circuit Court erred in failing to assume subject matter jurisdiction of the boundary lien dispute to Petitioners Lowes’ claims for ejectment, adverse possession and boundary line determination pursuant to §§ 55-4-31 or 55-4-31a of the *West Virginia Code*. [App. Pg. 113-114, ¶s 33-36].

#### IV. STATEMENT OF THE CASE

This civil action was first filed by Respondent, Hegyi Trust (Plaintiff below) in the Circuit Court of Berkeley County, West Virginia, in November, 2011, and the Respondent Hegyi Trust's Complaint was later amended twice, and a third amendment is currently being sought by the Respondent, Hugh Hegyi, Trustee of the Hegyi Trust (hereafter simply "Hegyi Trust"), against Defendants and Petitioners herein, Dean Lowe and Martha Lowe, individually and as Trustees of the Demar Revocable Trust (hereafter collectively referred to as "Petitioners Lowe") and George Sekel to establish a right of way in West Virginia by implication, by prescription, by way of necessity and as an ancient road; for trespass and ejectment; injunctive relief; and, for damages and punitive damages for unlawful obstruction of access in West Virginia to the Respondent Hegyi Trust's tract of real estate in Virginia.

The Respondent Hegyi Trust property and that of the Respondents Richards (Third Party Defendants below) both lie in Frederick County, Virginia along the northwestern boundary of the Petitioners Lowe's property in Gerrardstown District of Berkeley County, West Virginia. The Respondent Hegyi Trust seeks a right of way in West Virginia through Petitioners Lowe's property in West Virginia and through George Sekel's property in West Virginia and Virginia to the Respondent Hegyi Trust property in Virginia. A default judgment has been entered in favor of the Respondent Hegyi Trust by the Circuit Court against George Sekel, but no affirmative relief has yet been granted to Respondent Hegyi Trust against Mr. Sekel pending further proceedings before the Circuit Court.

On October 1, 2012, in accordance with the Circuit Court's Scheduling Order, Petitioners Lowe made a Motion for Leave to File a Counterclaim and Third Party Complaint and were granted leave by the Circuit Court to so file [App. Pg. 25-42] against adjoining land owners,

Respondent herein and Plaintiff below, Hegyi Trust and Respondents, Third Party Defendants, Joseph Richards and Joyce Richards, for adverse possession, ejectment and a boundary line determination as to the division line between the Petitioner Lowe's property in West Virginia and that of Respondent Hegyi Trust and Respondent, Third Party Defendants Richards' property in Virginia, as calls in all of the deeds of these parties refer to the state line between Virginia and West Virginia as the boundary between the properties. [App. Pgs. 33, 39, 69, 70 and 72-73]. Found authenticated survey monumentation exists which reflects where the West Virginia and Virginia state boundary is located and two set state line authoritative monuments were located in the field by Petitioners Lowe's expert, licensed land surveyor, Edward L. Johnson, Jr. of Ed Johnson & Associates, who is a licensed land surveyor in both West Virginia and Virginia. [See App. Pg. 64, ¶4].

Petitioners Lowe in their Counterclaim and Third Party Complaint below, sought a judgment from the Circuit Court for adverse possession of Petitioners Lowe's property in the State of West Virginia, partially claimed by Respondent Hegyi Trust and partially claimed by Respondents Richards; for ejectment of the Respondent Hegyi Trust and Respondents Richards from all real estate located within the State of West Virginia pursuant to the property line Petitioners Lowe had established by Petitioners Lowe's surveyor, Edward L. Johnson, Jr.; and, for a boundary line determination between the properties pursuant to Mr. Johnson's survey.

Upon motion of Respondents, Third Party Defendants Richards, joined in by Respondent Hegyi Trust, the Circuit Court dismissed Petitioners Lowe's Counter claim and Third Party Complaint on the grounds that the States of West Virginia and Virginia were both indispensable parties to the civil action; that the controversy was a "political" issue, and not a legal issue; that it was one to be determined between the States of West Virginia and Virginia; that it was an issue

that should have been brought before the West Virginia Boundary Commission [§29-23-2(c)(6) of the *West Virginia Code*]; and, most importantly, that the Circuit Court lacked subject matter jurisdiction to hear this boundary line dispute as only the United States Supreme Court had jurisdiction to hear boundary line disputes between the States of West Virginia and Virginia. [App. Pg. 104-115]. No known controversy or disagreement between the States of West Virginia and Virginia as to the location of the state boundary line between Frederick County, Virginia and Berkeley County, West Virginia was pled by any party nor is believed to exist.

That from the order of the Circuit Court, dated February 15, 2013, dismissing Petitioners Lowe's Counterclaim and Third Party Complaint for lack of subject matter jurisdiction, failure to join indispensable parties and failure to state a claim upon which relief may be granted, Petitioners Lowe hereby appeal to this Honorable High Court.

## V. SUMMARY OF ARGUMENT

Petitioners Lowe assert that the Circuit Court erred because there is no pled or known controversy between the States of West Virginia and Virginia as to where the state boundary line is located. It is only an issue between these parties as to where the state line is located in the field based upon the calls in all of their deeds that the state line boundary is their properties' boundary, and is more appropriately an issue for surveyors, and not for the states as a political issue. There is no known disagreement between the States of West Virginia and Virginia as to where the boundary line is located, and this is not a controversy such as there was between Jefferson County, West Virginia and Loudoun County, Virginia, as to where the state line was located, resulting in the two states entering into negotiations and statutes to resolve the boundary line. See §29-23-3 of the *West Virginia Code* [1998].

The Circuit Court's analysis could be more easily accepted if there had been such a disagreement between the States of West Virginia and Virginia as to the state boundary line, but no such controversy is known to exist and was not pled. This is a boundary line issue between adjoining landowners which only coincidentally involves the state line as the boundary between their properties.

Lastly, Petitioners believe that the Circuit Court's decision that the West Virginia Boundary Commission's jurisdiction should be sought to determine this matter is misguided as well. It is clear that the Legislature intended that the jurisdiction of the West Virginia Boundary Commission must be requested by the governor or the Legislature [see §29-23-2(a) of the *Code*]. The Commission's authority only goes so far to establish a boundary line which shall be ***presumed correct unless proven otherwise in a court of law***. [See §29-23-2(c)(1) of the West

Virginia Code]. Petitioners Lowe seek the determination of a court of law by the filing of their Counterclaim and Third Party Complaint which was dismissed by the Circuit Court.

It is clear that Petitioners Lowe should be able to prove in Circuit Court the state boundary line as the boundary between the parties' properties and all parties to the action before the Circuit Court should have their opportunity to be heard as to the location of that boundary line. Nothing contained within §29-23-2(c)(1) of the West Virginia Code preempts Petitioners Lowe's ability to seek a boundary line determination as to the boundary line between the Respondent Hegyi Trust property, the Respondents Richards' property, and Petitioners Lowe's property pursuant to §55-4-31 or §55-4-31a of the West Virginia Code whether it is the state boundary line or any other call or distance.

**VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners Lowe assert that oral argument is necessary pursuant to the criteria set forth in Rule 18(a) of the Rules of Appellate Procedure, and a Rule 20 argument is necessary for the following reasons:

a. This Honorable High Court has decided no cases under the relatively new West Virginia Boundary Commission provisions [§29-23-2 of the West Virginia Code], and the extent of the jurisdiction of the West Virginia Boundary Commission involving the location of state line boundaries, and this should be an issue of first impression for this Honorable High Court.

b. There is a case to decide whether a federal constitutional issue exists as to the boundary line between two states, involving landowners from different states, when the state boundary line is not otherwise contested between those two states, as a “political” issue or a legal issue to be determined by the courts.

c. The Circuit Court’s decision raises a federal constitutional issue as to whether or not a circuit court in West Virginia may decide an issue between landowners, one in West Virginia and the others in Virginia, when there is no controversy between the two states as to location of the state line boundary as it relates to the boundary between those landowners in different states, or whether jurisdiction is reserved exclusively for this controversy in the United States Supreme Court. 28 U.S.C. §1251 and Art. III, §2, clause 2 of the U.S. Constitution.

## VII. ARGUMENT

### A. Standard of review for this appeal is *de novo*.

The standard of review by this Honorable Court for consideration of the appeal from the Circuit Court's granting of a motion to dismiss Petitioners Lowe's counterclaim and third party company is *de novo*. See *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995), syl. pt. 2; *Easterling v. American Optical Corp.*, 207 W.Va. 123, 127, 529 S.E.2d 588, 592 (2000); *Rhododendron Furniture & Design, Inc. v. Marshall*, 214 W.Va. 463, 590 S.E.2d 656 (2003), syl. pt. 1; *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 640 S.E.2d 217 (2006), syl. pt. 1; *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008), syl. pt. 2; *Stuyvesant v. Preston County Com'n*, 223 W.Va. 619, 678 S.E.2d 872 (2009), syl. pt. 1; and, *Mey v. Pepboys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235, 239 (2011).

**B. The Circuit Court erred when it ruled that it lacked subject matter jurisdiction to determine the boundary line between a West Virginia landowner and adjoining Virginia landowners to determine the West Virginia and Virginia state boundary, which, according to calls in their deeds is the boundary line, when the Circuit Court ruled that subject matter jurisdiction for this civil action is vested exclusively in the United States Supreme Court by virtue of U.S. Const. Art. III, Section 2, clause 2 and 28 U.S.C. Section 1251, even when there is no known controversy or disagreement between the States of West Virginia and Virginia as to the location of that state boundary line.**

The Circuit Court, in its rulings, appears to have found a fact which was not alleged in the Respondent Hegyi Trusts' Complaint nor the Petitioners Lowe's Counterclaim and Third Party Complaint that there was some disagreement or controversy between the states of Virginia and West Virginia as to the location of the boundary line between the two states. To the best of Petitioners Lowe's knowledge, the location of state boundary line between Frederick County, Virginia and Berkeley County, West Virginia has been the same for almost one hundred fifty (150) years without disagreement or controversy between the states.

The only cases cited by the Circuit Court in the lower court's ruling to dismiss Petitioners Lowe's pleading involving the boundary lines between states were the cases of: *Ohio v. Kentucky*, 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560 (1973); and, *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L.Ed. 1233 (1838). [App. Pg. 110].

The case of *Ohio v. Kentucky, supra.*, was an original action by the State of Ohio against the Commonwealth of Kentucky to establish the boundary line between the states where they were separated by the Ohio River. Undoubtedly, the two states disagreed as to where in the Ohio River the boundary was located between the two states. There was an actual controversy between the states as to the boundary.

In *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L.Ed. 1233 (1838), the issue was between the two states to settle the boundary between the two as to that part of New England, in America, which lies and extends between a great river there, commonly called Monomack, alias Merrimac, and a certain other river there called the Charles River, being at the bottom of a certain bay, there commonly called Massachusetts Bay; and also singularly those lands and hereditments, whatsoever, lying within the space of three English miles on the south part of said Charles River, etc. Undoubtedly this was a disagreement or controversy between two states, but not private landowners in those two states.

Conspicuously absent in the Circuit Court's ruling is any case in which private landowners who are adjoining, but whose properties are located in different states, have a controversy between themselves as to where the state line boundary was located between their properties which had to be constitutionally heard in the United States Supreme Court.

The circumstances in this particular case, whereby adjoining landowners, albeit in different states, have a controversy as to where their boundary line is located based upon the

calls in their deeds that the boundary is the state line boundary, is entirely different from the last known boundary dispute between the State of West Virginia and the Commonwealth of Virginia, being the disagreement or uncertainty as to where the state line boundary was between the Loudoun County, Virginia and Jefferson County, West Virginia, which led to the enactment by the Legislature of §29-23-3 of the *West Virginia Code* [1998], resolving that issue.

However, the facts in this case are not remotely the same as there is simply no known disagreement between the States of West Virginia and Virginia as to the boundary between Berkeley County, West Virginia and Frederick County, Virginia and the issue in the instant case is between the adjoining landowners and not the states themselves.

For the foregoing reasons, this is not a case in which subject matter jurisdiction should lie in the United States Supreme Court for a determination between two states as to where the boundary line between those states is located, and 28 U.S.C. §1251 and Art. III, §2, clause 2 of the United States Constitution do not apply.

Petitioners Lowe respectfully suggest to this Honorable High Court that the Circuit Court's reliance on the controversy between states as to the state boundary line as the basis for dismissing the Petitioners Lowe's claim in their Counterclaim and Third Party Complaint for adverse possession, ejectment and a boundary line determination between these landowners was misplaced.

**C. The Circuit Court erred when it ruled that the States of West Virginia and Virginia were indispensable parties to a case between a West Virginia landowner and adjoining Virginia landowners to determine the state line boundary between those properties, which, according to calls in their deeds, is the boundary line, where there is no known disagreement or controversy between those two states as to the location of that state line boundary, and authoritative monumentation of the state line boundary has been found in the field by licensed land surveyors.**

Once again, there is no known disagreement between West Virginia and Virginia as to the location of the boundary between Frederick County, Virginia and Berkeley County, West Virginia. The controversy in this case as to the boundary line is best described by Petitioners Lowe's expert witness, Edward L. Johnson, Jr. of Ed Johnson & Associates, a surveyor licensed in both West Virginia and Virginia, as set forth in the Appendix on pages 67-68. The salient portion of Mr. Johnson's report describing the controversy begins on App. page 68, and states as follows:

There is also a monument shown on the Westerly side of Brannon Ford Road which appears on the USC&GS quad map Whitehall. I made three visits to the location in an attempt to recover it but it is not there and has apparently been destroyed. The USC&GS quad maps shows the State line deflecting North at this point. With the absence of this monument and no means to re-establish its position, I recovered and relied on the same two monuments that Huntley, Nyce & Associates and Yesernetsky [*sic.*, Yebernetsky], Roberts & Stansbury<sup>1</sup> used to establish the State line. The HNA plats and the YRS plat shows [Respondents] Richards (Unger) owning a triangular piece of property in West Virginia. The YRS plat goes as far to show the [Respondent] Hegyi parcel lying partially in West Virginia. In my opinion these surveys are is [*sic.*] in error. If all of the deeds are calling for the State line and in some cases, adjoiners as the boundary, then that is the boundary. I do not see how someone surveying either property can establish the state line and then contradict this location of it by showing the boundary of one parcel running into the other state. There is a found 3/8" rebar that both HNA and YRA held for the Northwesternly corner of the [Respondents] Richards tract. The HNA plat actually references it as an iron pipe found (IPF), on the unrecorded plat that they prepared for the [Petitioners] Lowes, which is in error. I presume that we are talking about the same monument. This rebar, in my opinion does not look professionally set and it shows the [Respondents] Richards parcel extending into West Virginia by approximately 152'. I also feel that with a

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<sup>1</sup> Huntley, Nyce & Associates ("HNA") and Yebernetsky, Roberts & Stansburg ("YRS") are survey firms which made prior surveys of the West Virginia/Virginia state line in the same general vicinity of the parties' properties.

call for the state line, like a call for an adjoiner, cannot create a gap or overlap and the state line would become a monument the highest dignity and would take precedence over an artificial monument of especially of [*sic.*] unknown origin.

The instant controversy as to the boundary line between these parties surrounds the use of a prior United States Geological Survey monument which “disappeared” at Brannon Ford Road, to determine the state line boundary, when the original set state line authoritative monuments were actually found in the field by Mr. Johnson as the established state line monumentation as shown on his plat [App. 66]. Mr. Johnson employed GPS instruments to strike the boundary line between West Virginia and Virginia as N. 50°16’ 09” W. [see App. Pg. 64-65, paragraphs 3-8].

The state boundary line controversy between these parties is between the surveyors who apparently disagree over the use of the USGS Brannon Ford monument state line which has disappeared, as opposed to the other two authoritative state line monuments which Mr. Johnson found in the field, and by the use of GPS instruments, struck the state line between Virginia and West Virginia between those two found authoritative state line monuments. This controversy between adjoining landowners does not seem to be the type of case or controversy over which the States of West Virginia and Virginia need be parties...

**D. The Circuit Court erred when it ruled that the issue of where the state line boundary is located between the states of West Virginia and Virginia as between adjoining landowners in those two states, which, according to their deeds, is the boundary line, is not a legal issue, but a “political issue”, not to be determined by the courts when there is no known controversy or disagreement between those two states as to the location of that state line boundary.**

Without belaboring the point, this is not a case or controversy to determine who is the sovereign over the alleged property of the Respondents Hegyi Trust and Richards which they claim is in the State of West Virginia. This is a legal matter for the Circuit Court of Berkeley County to resolve the claims for ejectment, adverse possession and a boundary line

determination of where the state line is between the parties based upon legal principles as to the issue of the location of the state boundary.

**E. The Circuit Court erred when it ruled that the issue of where the state boundary line is located between West Virginia and Virginia in a civil action between a West Virginia landowner and adjoining Virginia landowners to determine the location of that state line, when, according to calls in their deeds, the state line boundary is the boundary line, when there is no known controversy or disagreement between those two states as to the location of the state boundary line and authoritative monumentation as to the location of the state line has been found in the field by licensed land surveyors must be referred to the West Virginia Boundary Commission pursuant to §29-23-2(c)(6) of the West Virginia Code, and not to the Circuit Court.**

The Circuit Court's reliance upon the necessity of having the instant controversy between these parties referred to the West Virginia Boundary Commission for a recommendation as to the location of the state line is particularly troubling. Petitioners Lowe have found no case in which this Honorable Court has discussed the jurisdiction of the West Virginia Boundary Commission pursuant to §29-23-2 of the West Virginia Code [1987], which appears to be one of first impression for this Honorable Court.

It seems eminently clear that jurisdiction of the West Virginia Boundary Commission may be invoked when there are boundary line disputes between states *when requested to do so by the governor or Legislature*. See §29-23-2(a) of the Code. Obviously, respecting the case and controversy before this Honorable High Court in the instant case, there has been no request for the governor or the Legislature to have the West Virginia Boundary Commission entertain the matter to determine a recommendation of the boundary between the Petitioners Lowe and Respondents' parcels of real estate in West Virginia and Virginia, respectively.

Nonetheless, it seems clear that the jurisdiction of the West Virginia Boundary Commission is only advisory, and not conclusive. Section §29-23-2(c)(6) of the *Code* which states that the Boundary Commission has authority to **recommend** to the Legislature where an agreement can be obtained with another contiguous state as to the actual location of any portion of this state's boundary line; or §29-23-2(c)(7) to recommend legislation to direct that the Attorney General proceed under the Constitution of the United States for litigation to adjudicate the exact and true location of any boundary line in dispute or whose location is not ascertainable if there is no agreement with the contiguous state.

Secondly, it has been noted in VII.C. *supra.*, that the state boundary line may be ascertained, and it has been ascertained by the Petitioners Lowe's expert, Mr. Edward L. Johnson, Jr., that the state line between the Petitioners Lowe's and Respondents' real estate is N. 50° 16" 09' W. determined by the use of GPS survey instruments and two (2) found authoritative state line monuments.

Lastly, the Legislature places a limit upon the West Virginia Boundary Commission's jurisdiction in §29-23-2(c)(1) which states as follows: "Establish a boundary line which shall be presumed correct **unless proven otherwise in a court of law**". [Emphasis added]. Petitioners Lowe suggest the West Virginia Boundary Commission's jurisdiction may be preempted by judicial determination by the Circuit Court of Berkeley County, West Virginia for the state boundary line determination between the Petitioners Lowe's and Respondents' property as N. 50° 16" 09' W. Therefore, a West Virginia Boundary Commission's recommended determination of the state boundary will not preempt the Circuit Court's jurisdiction to determine the state boundary line dispute between adjoining landowners pursuant to the provisions of §55-4-31 or §55-4-31a of the West Virginia *Code*.

The Circuit Court's reliance upon the West Virginia Boundary Commission to determine the boundary between the two states is misplaced.

**F. The Circuit Court erred in failing to assume subject matter jurisdiction of the boundary line dispute under Petitioners Lowe's claims for ejectment, adverse possession and boundary line determination pursuant to §§ 55-4-31 or 55-4-31a of the West Virginia Code.**

As Mr. Johnson's report clarifies [App. Pg. 68], the Respondents are asserting that they own certain real estate which Petitioners Lowe assert in their Counterclaim and Third Party Complaint is in Berkeley County, West Virginia and is owned by Petitioners Lowe. Furthermore, Petitioners Lowe claim that same real estate by adverse possession in their Counterclaim and Third Party Complaint. If these claims cannot be adjudicated in the Circuit Court of Berkeley County, West Virginia, then where?

The terms and provisions of §55-4-31 of the *Code* appear to be the most appropriate remedy to resolve the boundary issues between Petitioners Lowe and Respondents.

This Honorable Court has considered whether §55-4-31 of the *Code* is constitutional, and found it to be constitutional in *Sypolt v. Shaffer*, 130 W.Va. 310, 315-316, 43 S.E.2d 235, 238 (1947).

The Circuit Court has jurisdiction to determine land titles, and if the Respondents claim some portion of Petitioners Lowe's property in West Virginia, adjoining or part of what Petitioners Lowe claim is their property in Berkeley County, West Virginia, certainly the Circuit Court of Berkeley County, West Virginia may decide a boundary line dispute as well as adverse possession and ejectment claims as to that particular property claimed to be within Berkeley County, West Virginia. Subject matter jurisdiction undoubtedly lies in the Circuit Court of Berkeley County, West Virginia to determine those claims raised in Petitioners Lowe's

Counterclaim and Third Party Complaint dismissed by the Circuit Court for lack of subject matter jurisdiction.

## VIII. CONCLUSION

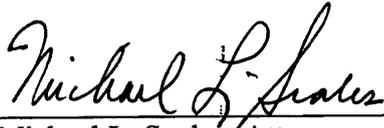
What was filed by Petitioners Lowe as a Counterclaim and Third Party Complaint to determine issues of ejectment, adverse possession and a boundary line determination has been turned into a statutory and constitutional morass by the Circuit Court's decision below. In the lower court's decision to dismiss the Counterclaim and Third Party Complaint on the grounds of lack of subject matter jurisdiction, failure to join indispensable parties and failure to state a claim, the lower court has erroneously found a necessity of joining the States of West Virginia and Virginia as indispensable parties; the issue is one of "political question", and not a legal issue; and, that exclusive jurisdiction for the determination of the state line boundary is in the United States Supreme Court.

The instant civil action claims are nothing more than the usual claims for adverse possession, ejectment and a boundary line determination. What may make this case unique is that the deeds of all the parties have calls which make the boundary between their properties the state line boundary between West Virginia and Virginia, but that fact in and of itself does not give to jurisdictional and federal constitutional issues if there is no disagreement between the states of West Virginia and Virginia as to the location of that state boundary. It is only a factual issue between the parties (and their expert surveyors) to determine where the two (2) states have agreed that the state boundary line is located.

The Circuit Court's ruling must be reversed as when the facts pled in Petitioners Lowe's Counterclaim and Third Party Complaint are viewed in the light most favorable to Petitioners Lowe, they allege colorable claims for ejectment, adverse possession and for a boundary line determination under §55-4-31 or 31a of the *Code*.

The Circuit Court's ruling must be reversed and remanded that the Circuit Court of Berkeley County, West Virginia has subject matter jurisdiction to hear Petitioners Lowe's claims.

Dean Lowe and Martha Lowe, individually  
and as Trustees of the Demar Revocable  
Trust, Counter-Plaintiffs and Third-Party  
Plaintiffs Below, Petitioners  
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DEAN LOWE AND MARTHA LOWE,  
individually and as Trustees of the Demar  
Revocable Trust, Counter-Plaintiffs and  
Third-Party Plaintiffs Below,

Petitioners

v.

Docket No. 13-0234

JOSEPH C. RICHARDS and JOYCE A.  
RICHARDS, Third-Party Defendants Below;  
and, HUGH E. HEGYI, Trustee of the Herman  
Hegy Trust, Counter-Defendant Below,

Respondents.

**CERTIFICATE OF SERVICE**

I, Michael L. Scales, Attorney for Petitioners, Dean Lowe and Martha Lowe, individually and as Trustees of the Demar Revocable Trust, do hereby certify that I have served a true copy of the foregoing PETITION FOR APPEAL AND NOTE OF ARGUMENT upon the following counsel:

Braun A. Hamstead, Esquire  
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each by United States Postal Service Mails, postage prepaid and securely affixed, this 10<sup>th</sup>  
day of June, 2013.

  
\_\_\_\_\_  
Michael L. Scales, Attorney at Law