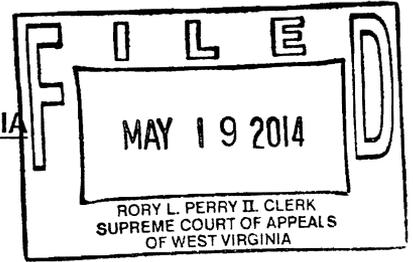


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Daniel Allan Weahterholt, and Anita Denice Weatherholt,  
Defendants Below, Petitioners

Vs.)

Docketing No.: 14-0219  
(Hardy County Civil Action NO: 13-C-52)

Jeffrey Neal Weatherholt, Plaintiff Below,  
Respondent.

PETITIONER'S BRIEF

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#### ASSIGNMENTS OF ERROR

1. The Trial Court erred when it denied the Petitioner's timely request for a Jury Trial.  
Additionally, it should be considered if this Judge should have voluntarily disqualified himself from this matter and if this is plain error;
2. The Trial Court erred when it awarded a permanent injunction as the same was not supported by the facts, there was no obstruction, and no bond was addressed or considered;
3. The Trial Court erred in finding that the Respondent had obtained a prescriptive easement for his water line. Furthermore, the Trial Court erred in the application of real property law to the facts of this case.

## STATEMENT OF CASE

This matter was brought by the Respondent, Plaintiff below, seeking a permanent injunction enjoining Petitioner, Defendant below, from obstructing an express easement for ingress and egress that is twenty (20) feet in width and a utility easement twelve (12) feet in width from Frosty Hollow Road, County Route 10/1, to a 6.806 acre tract where the Respondent resides. The Petitioner is the owner of the Servient Estate for a portion of the easements. (see copy of Complaint and exhibits 1-3 beginning on page 30 of the appendix.) It should be noted that the Respondent was the attorney who prepared the deeds listed as exhibits 1 and 3.

An Ex Parte Order was filed with the Complaint and the same was entered by Senior Status Judge Keadle. (a copy of this Order is included beginning on page 60 of the appendix.) The matter was set for a hearing on the temporary injunction for July 22, 2013. The matter was heard, a temporary restraining order was entered, and the case was set for an evidentiary hearing on August 15, 2013. (a copy of the Temporary Restraining Order is included beginning on page 62 of the appendix and a copy of the transcript from this proceeding is included as Volume 1 of the appendix.) It should be noted that the Petitioners were pro se at this time as no local attorneys would take their case given that the Respondent was the Law Clerk for another Judge in the Circuit. (see final statement of Petitioner, Daniel Weatherholt, at the bottom of page 2 and continuing onto page 3 of the transcript from the July 22, 2013 hearing designated as volume 1 of the appendix.) The Judge suggested that Petitioners get an attorney. (see page 17, line 9 of the transcript designated as volume 1 of the appendix.)

Petitioners then retained the undersigned counsel. An Answer and Counterclaim were timely filed requesting the matter be tried by jury. The Answer admitted the existence of the

twenty and twelve foot right of ways but denied that there was any obstruction that would warrant a permanent injunction as relief. It was clear from the Deeds that the exact location of the easements was never designated by metes and bounds. The paved portion of the travel easement is within the twenty feet but not always in the center. Count I of the Petitioner's Counterclaim pleads trespass and nuisance of the Respondent's water line not being installed within his expressly granted utility easement. Petitioner prayed that the water line be relocated, at Respondents expense, to within the utility easement in which he possesses. (A copy of the Answer and Counterclaim is included beginning on page 65 of the appendix.)

Respondent replied to the Counterclaim and admitted that the water line was not within the utility easement. Respondent further replied that the water line was placed in its location prior to Petitioner acquiring title to the property with the knowledge of the prior owner who did not object and in fact, acquiesced to the location of the water line. Respondent plead the affirmative defense of prescriptive easement as to the location of the water line and further prayed that the Petitioner not be entitled to a jury trial. (a copy of the Reply to Counterclaim is included beginning on page 77 of the appendix.)

A pre-trial hearing was held on September 12, 2013. The hearing was noticed by Respondents order of continuance for purposes of a scheduling order and to hear outstanding motions and the case was transferred to the newly appointed Judge H. Charles Carl, III.. ( A copy of the order of continuance is included on page 76 of the appendix.) At this Hearing Respondent attempted to try the case. (see the transcript from the hearing located on page 4 of volume 2 of the appendix.) At this hearing the Trial Court denied Petitioners' timely request

for a jury trial. (see the transcript from the September 12, 2013 hearing designated as volume 2 of the appendix beginning on page 31 of the transcript following “Mr. Sites” through page 34.)

Respondent’s Counsel drafted a proposed order from the September 12, 2013 hearing and the undersigned took exception to portions of the order and informed Respondent’s Counsel pursuant to the Trial Court Rules. There was no response and the order was entered by the Circuit Judge. (a copy of this pre-trial order is included beginning on page 82 of the appendix.)

A Bench Trial was held on December 11, 2013 before the Honorable H. Charles Carl, III., Circuit Judge. The matter was called to order for purposes of a bench trial (see the transcript from the December 11, 2013 bench trial designated as volume 3 in the appendix on page 4 ), witnesses were sequestered, a sequestration order was entered, corrections were discussed regarding the September 13, 2013 hearing order, and Respondent’s Counsel was directed to prepare and amended order. (a copy of the amended order is included beginning on page 159 of the appendix.)

The Trial Court then revisited the issue of a jury trial. The Trial Court maintained that there was no right to a jury trial on the injunction but would entertain a motion for a jury trial on the counterclaim. Petitioners wanted a jury trial on both the claim and counterclaim. Petitioners wanted the matter ended on that day. Because the two issues were so closely related they were resolved to waive their right to a jury trial and proceed in a bench trial on their counterclaim so that it could be tried with the claim. (See page 15 and 16 of the transcript from the December 11, 2013 bench trial designated as volume 3 of the appendix.)

The trial then began without opening statements. The Trial Court then asked if the parties were waiving opening statements to which it was agreed. The Trial Court commented that it did not want to take away any rights even though it had effectively taken away the Petitioners' right to a jury trial. (see page 20 of the transcript from the December 11, 2013 bench trial designated as volume 3 of the appendix.)

Respondent then testified and several exhibits were entered into evidence. (a copy of exhibits are included beginning on page 90 of the appendix.) It was stipulated that the paved portion of the travel easement is within the twenty foot easement. It was also stipulated that there was a twelve foot utility easement along the east side of the travel easement. Although not stipulated, it was admitted in pleadings and testimony that Respondent's water line is not located within the utility easement

The Trial Court was correct in its determination of the contested issues. The contested issues in the matter were, the location of the travel easement, is a "speed bump" an obstruction, and had the Respondent obtained a prescriptive easement for the location of his water line.

The Respondent has maintained the location of the paved portion of the right of way is the center line for his twenty foot easement. Petitioner maintained that the pavement was within the twenty feet but at the beginning the pavement had been installed towards the eastern edge in order to straighten the roadway from the original course that was in existence at the time the Respondent obtained title.

Respondent interjected at the September 12, 2013 that the he had nothing to do with the paving but the road had been there for a very long time. (see page 26, beginning on line 19

of the transcript designated as volume 2 of the appendix.) It is curious that Respondent admits he was there but had nothing to do with the location and yet he wants to hold the Petitioner responsible for the water line location merely because he lived in the county.

Respondent testified at the Bench Trial that the pavement is in the exact location of the old dirt road from the sixties. No deviation from its original course. (see page 52, beginning at line 9 through page 60, line 10 of the transcript designated as volume 3 of the appendix.) (also see photograph #6 located on page 113 of the appendix marked in red ink as the location of the old dirt road.)

Witness, Otis Weatherholt, testified that the pavement is not in the same location that the dirt road in places. He testified that there was a little turn in it out front. This is where the Respondent said it was always straight. (see page 127, line 10 through page 129, line 11 of the transcript designated as volume 3 of the appendix.) (also see page 135, line 8 of the transcript designated as volume 3 of the appendix.) Witness, Bette Weatherholt, testified that the pavement is not exactly where the gravel road was. (see page 182, line 21 through page 183, line 4 of the transcript designated as volume 3 of the appendix.)

Petitioner testified that the pavement is not exclusively where the gravel road used to be. Petitioner illustrated that prior to the pavement the road was further from the trees. (see page 22, beginning on line 22 through page 157, line 13 of the transcript designated as volume 3 of the appendix.) (see also Defendant's exhibits 1 and 2 on page 134 and 135 of the appendix and Plaintiff's exhibit 5, picture 6 on page 113 of the appendix.)

Respondent took the stand as rebuttal and restated that the pavement is in the location of the gravel road. (see page 190, line 11 of the transcript designated as volume three of the appendix.)

The Trial Court ruled that the location of the pavement was not the location of the gravel road out near the rock garden. The Trial Court believed the witnesses other than the Respondent. This issue is not being appeal but is relevant in that the Respondent was not truthful and this should have affected the weight and credibility that the Trial Court placed upon all of his testimony. Respondent felt the need to retake the stand in rebuttal and continue his untruth after hearing his parents and brother speak the truth. Then upon cross-examination Respondent admits to tasteless act of putting pressure upon his own mother to get the speed bumps pulled up. (see page 196, beginning at line 6 through page 197, line 23 of the transcript designated as volume three of the appeal.)

Respondent was also untruthful regarding the outbuildings. Respondent testified that the building had only been there since 2008. (see page 48, beginning at line 8 through page 49, line 7 of the transcript designated as volume 3 of the appendix.) This testimony was controverted by the testimony of the Petitioner. (see page 158, line 21 of the transcript designated as volume 3 of the appendix.) Petitioner's testimony is supported by the photograph introduced illustrating the construction of the outbuilding in 2003. (see Petitioner's trial exhibit #4 located on page 137 of the appendix.)

It was evident that children are playing in their yard in which the road passes. This creates a danger if vehicles are traveling at an excessive speed. Respondent complains of children's toys near the roadway and the pictures admitted into evidence further illustrate this

fact. (see page 64, line 22 of the transcript designated as volume 3 of the appendix and photograph 9 on page 115 of the appendix.)

Witness, Otis Weatherholt, testified that children are playing and cars are driving fast. (see page 131, beginning at line 20 through page 132, line 15 of the transcript designated as volume 3 of the appendix.) In fact, this witness was nearly injured as a result of the speed in which vehicles are traveling on this easement. (see page 129, beginning on line 12 through page 130, line 19 of the transcript designated as volume 3 of the appendix.) He testified that he wished he had the old bumpy road back. (see page 146, line 18 of the transcript designated as volume 3 of the appendix.)

Witness, Bette Weatherholt, testified about her concerns with the speed of traffic and that the speed bumps helped. She is worried about her husband and grandchildren. (see page 181, beginning at line 21 through page 182, line 5 of the transcript designated as volume 3 of the appendix. She testified that she would like the speed bumps installed. (see page 183, line 5 of the transcript designated as volume 3 of the appendix.)

Petitioner testified as to what he wanted with respect to the speed bumps. He did not want to obstruct the easement just to promote safety. (see page 175, beginning at line 11 through the end of the page of the transcript designated as volume 3 of the appendix.) This has always been the Petitioner's wish even at the first hearing when he was pro se. Petitioner wanted to protect his family, tried a sign and it did not work, so he tried temporary speed bumps to see if that helped before installing permanent speed bumps. (see page 9, beginning at line 6 through page 10, line 11 of the transcript designated as volume 1 of the appendix.)

The Trial Court took the position that this concern for safety is general and that no accidents or injuries have resulted from the use of the right of way. (see page 7, paragraph 20 and 21 on the next page of the Judgment Order in the appendix.) This is the same thought that the Respondent demonstrated according to the statements by the Petitioner in the first hearing. (see page 17, line 18 of the transcript designated as volume 1 of the appendix.) This defies common sense. This ideology is opposite of that expressed by Senior Status Judge Keadle in the temporary injunction hearing when commenting on the statement he said “Well, you don’t want to put them in after they’re hit.” (see page 17, line 21 of the transcript designated as volume 1 of the appendix.)

Respondent testified that he had never been unable to gain access to his property. (see page 113, line 6 of the transcript designated as volume 3 of the appendix.) His vehicle has never been damaged as the result of any alleged obstruction. (see page 114, line 7 of the transcript designated as volume 3 of the appendix.) Contrary to the finding of the Trial Court, Respondent testified that the easement has never been obstructed before the speed bumps other than some kids toys which was not a problem. (see page 115, line 6 of the transcript designated as volume 3 of the appendix.) The travel portion of the easement has always been about twelve feet. (see page 115, line 21 of the transcript designated as volume 3 of the appendix.) Respondent testified that the speed bumps did not render the easement impassable. (see page 121, beginning on line 16 through page 122, line 19 of the transcript designated as volume 3 of the appendix.)

Respondent testified that his grandmother, predecessor in title to the real estate now owned by Petitioner, was aware when the water line was installed where it was installed. (see

page 27, line 16 of volume 3 of the appendix.) Respondent testified that Petitioner was also aware. (see page 28, line 3 of volume 3 of the appendix.) Respondent testified that he asked his grandmother, then corrected himself and stated that he told his grandmother after the water line was installed and she said okay. (see page 28, line 20 of volume 3 of the appendix.) During cross examination Respondent admitted that he felt the need to inform his grandmother regarding the location of the water line and she acquiesced, never objected. (see page 99, line13 through page 101, line 4 of volume 3 of the appendix.)

Witness, Otis Weatherholt, testified that he was involved in the installation of the water line and had no knowledge of the existence or location of any utility easement. (see page 125, line 12 of volume 3 of the appendix.) This witness also testified that Petitioner was not present during the installation of the water line. (see page 126, line3 of volume 3 of the appendix.)

Petitioner, Daniel Weatherholt, testified that he became aware of the existence of the twelve foot utility easement in the fall of 2011. (see page 149, line 7 of volume 3 of the appendix.) He testified that he first became aware of the location of the water line in 2001 after he acquired title to his real estate and began excavating for his home but he has never revoked any permission or consent as to this location until the filing of this counterclaim. (see page150, line12 though page 151, line 4 of volume 3 of the appendix.)

Respondent performed the attorney work for Petitioners' Deed and a Deed to witnesses Otis and Bette Weatherholt. (see trial exhibits number 3 and 4 beginning on page 98 through page 110 of the appendix.) Respondent received compensation for his attorney work from Petitioner and Petition paid value for the real estate he acquired from his grandmother. The fact that the utility easement exists was of record with the County Clerk but the one charged

with the duty of performing the attorney work concealed this fact in the way that the documents were drafted. Nothing in the Deed to Petitioner discloses the existence of the easements; however, in the Deed to Otis and Bette Weatherholt different verbage is utilized that places the grantee on notice that this conveyance is subject to restrictions and exception. (see page 101, line 21 through page 113, line 4 of volume 3 of the appendix.)

Closing arguments were made by both parties and the matter was surrendered to the Trial Court. The Trial Court directed the parties to file proposed findings of fact and conclusions of law. (see Respondent's proposed findings of fact and conclusions of law at page 163 of the appendix.) (see Petitioners' proposed trial order, with changes handwritten by judge, at page 183 of the appendix and proposed final order at page 186 of the appendix.)

The Trial Court had time to review the proposals. The Trial Court, as trier of fact, had to weigh the credibility of the witnesses. There were two non-party witnesses, Otis and Bette Weatherholt, who had to testify in a trial between two of their sons. There was the Respondent, who is an attorney, that it is clear from the transcripts was calculating and avoided some questions. He interjected at prior hearings. He showed no concern for the safety of his nieces and nephew as compared to his convenience. He was clearly untruthful regarding the beginning portion of the easement in an effort to force Petitioner to move his rock garden. He was untruthful in the time in which the buildings were constructed to avoid any possibility of a prescriptive easement defense. He felt the need to take the stand again in rebuttal and say everyone else is lying and then he admitted that he was pressuring his own mother. This should all be considered towards credibility. Lastly, there was the Petitioner whose account was corroborated by the non-party witness's and the photographs. He teared up, evidenced by

the pause in the transcript, when he stated all he wanted was peace and his brother back. (see page 175, line 22 of the transcript designated as volume 3 of the appendix.)

The Trial Court then rendered his own Judgment Order. It is from that order in which Petitioner appeals.

#### SUMMARY OF ARGUMENT

1. The Trial Court erred by denying the Petitioners their right to a trial by jury. The request was timely made. There were issues of fact that warranted a trial as the matter was not disposed of by summary judgment. It is a basic principle in jurisprudence of a litigant's right to a trial by jury. Such a ruling is patently unjust.
2. The Trial Court erred in the award of a permanent injunction. The facts, largely the statements by the Respondent, did not support such a harsh remedy. It is clear that the Respondent was opposed to a speed bump. Speed bumps are not obstructions. There was no balancing test or consideration to the rights of the Petitioner. Bond was not addressed.
3. The Trial Court erred in the Judgment against the Petitioner resulting in the grant to the Respondent of a prescriptive easement for his water line. Respondent now has two utility easements across Petitioner. The law was not accurately applied not did the court adhere to common legal definitions. The end result destroys the public's trust in attorneys.

#### STATEMENT REGARDING ORAL ARGUMENT

Not oral argument is necessary in this matter pursuant to the West Virginia Rules of Appellate Procedure, Rule 18(a)(4).

## ARGUMENT

### I. Denial of Petitioner's Right to Trial by Jury

The Trial Court's ruling that the Petitioner was not entitled to a Jury Trial is subject to *de novo* review. The right to a trial by jury is a fundamental principle afforded by the West Virginia Constitution in Article III, § 10 and 13. It is clear that one cannot be deprived of property without the due process of a judgment of your peers and this right shall be preserved. This right must be asserted in a timely fashion. "If a trial by jury has been demanded in an action involving more than \$20, the impaneling of a jury to try the issue is a jurisdictional requirement, and a judgment rendered without complying with it is void." *Matheny v. Greider*, 115 W.Va. 763, 177 S.E. 769 (1934).

West Virginia Rules of Civil Procedure, Rule 38 provides for the rights to a jury trial. Rule 38(a) states "The right to a trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate." Clearly if one has potential of being deprived of a property right and there are questions of fact such as is something an obstruction then the right to a trial by jury is absolute. Similar to this situation is the West Virginia Uniform Declaratory Judgment Act. West Virginia Code § 55-13-1 *et seq.* charges the courts with the duty to declare rights, status, and other legal relations. This power is unlimited except that if the determination involves questions of fact then the Defendant is afforded the right to a trial by jury. West Virginia Code § 55-13-9; West Virginia Rules of Civil Procedure, Rule 38; and

*Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 2210 W.Va. 536, 558 S.E.2d 336 (2001.) If this is the law for Declaratory Relief then it must likewise be true for Injunctive Relief.

In the present case Petitioners filed an Answer and Counterclaim timely. In this pleading a jury trial was demanded for both the Complaint and Counterclaim. (see page 71 of the appendix.) Respondent filed a Reply to Counterclaim and requested that the Court find and conclude that the Petitioners are not entitled to a jury trial. (see page 82 of the appendix.) At the scheduling hearing on September 12, 2013 the issue of the jury trial was decided. There was no notice that this issue was going to be decided that day, in fact it was a surprise that a jury trial could be denied when one is timely requested. Petitioner was wholly unprepared and unable to adequately respond to such a shocking ruling. (see page 32, beginning on line 10 through page 34 at line 20 of the transcript designated as volume 2 of the appendix.)

It is obvious that the issue of a prescriptive easement will involve questions of fact. It is obvious that whether or not a right of way is obstructed will be a question of fact. How can the timely request for a jury trial be denied? Respondent requested that it be denied without any showing of proof or supporting law. The Trial Court shifted the burden to the Petitioner to prove a fundamental right. This is shocking.

Where does it say that a final injunction cannot be heard by a jury. Yes, a preliminary injunction is heard by the court. West Virginia Rules of Civil Procedure, Rule 65(b). The fact is that Rule 65(a)(2) ends with "This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to a trial by jury." Does this not mean that the trial on the merits can be by jury? An Injunction is an extraordinary remedy to a cause of action. In this matter it should have been plead as an obstruction to an easement being an nuisance and

seeking a permanent injunction as relief. The trial on the merits would be the nuisance of an obstruction to an easement, factual in nature, and clearly would warrant the right to a trial by jury.

The matter then proceeded towards a bench trial on all issues and was scheduled for the same to occur on December 10, 2013. Due to weather the December 10<sup>th</sup> bench trial was cancelled. With the holiday season there was little time to reschedule except for the next day. Petitioners wished this matter to be resolved because of the emotional toll and the parties agreed to conduct the bench trial on the next day.

On December 11, 2013 the Trial Court brought the matter on for a bench trial. (see page 4, line 9 of the transcript designated as volume 3 of the appendix.) The Trial court began the Bench Trial. (see page 5, line 1 of the transcript designated as volume 3 of the appendix.) Witnesses were sworn and sequestered. The Bench Trial had commenced on all issues.

To make a record of an objection Petitioner's Counsel wanted to voice his objection to the order entered from the last hearing. The Trial Court noted some issues from the order and directed Respondents Counsel to prepare an amended order. It is from that ruling on September 12, 2013 denying a right to a jury trial in which Petitioner appeals. The objection to adverse rulings on that day were saved in the amended order.

The Trial Court, *suo sponte*, then reconsidered the issue of the request for a jury trial on the counterclaim. The Court informed Petitioners that they could file a motion for a jury trial on the counterclaim. After the Bench Trial had formally commenced, the Petitioners under the duress and strain from the emotional toll of litigation, waived their right to a jury trial on the counterclaim since they could not have the entire matter heard by a jury of their peers.

Petitioners could not understand how they would have to file a motion to recover a right that had once already been denied. It could not be understood how the matter could be bifurcated when the two issues were so closely related that they would constitute a compulsory counterclaim. It was confusing.

It is fundamental to the judicial system that the public have faith in the judiciary. This case is a difficult one to maintain that trust and faith. Petitioners had difficulty finding counsel because of the occupation of the Respondent. When the right to a jury trial was denied in September it was difficult for the Petitioners to have faith that they would receive a fair and impartial trial. This begs the question of should the Trial Judge have voluntarily disqualified himself. The fact pattern of the Law Clerk for the other Judge in a Circuit being the litigant is novel. It does not fit any category that would support a motion by the Petitioners for a Recusal. It does cause the appearance of impropriety in the subjective eyes of some of the citizenry and should be addressed by this Honorable Court to provide guidance should this issue present again. Perhaps Senior Status Judge Keadle should have remained on as the presiding judicial officer in this matter to avoid this appearance. This appearance of impropriety would only warrant a new trial if the denial of the right to a jury trial or the improper weight given to the credibility of the Respondent is obvious error. In this case it is obvious.

In this matter the denial of a timely request for a Jury Trial by the Petitioner is error. There was not a freely and voluntarily given waiver of jury trial after the bench trial had commenced. It was a waiver under duress and without any consideration as there was no notice that this issue would be addressed. A Bench Trial was ordered and a Bench Trial commenced. The Complaint and Counterclaim were so closely joined that it was a compulsory

counterclaim and would not be efficient or practical to hear the evidence twice by two different trier of facts. A Judge should not be able to correct a mistake in this manner, without notice or opportunity to consult with counsel, to remedy an incorrect ruling. Notwithstanding, the waiver obtained under duress at trial was illusory in that the request for a jury trial on the complaint was still going to be denied. This denial of a fundamental, well known right provided by the constitution is damaging to jurisprudence. The appearance of impropriety of the other Judge in the Circuit making such a ruling when the Respondent is a law clerk in the circuit is damaging. The end result is a lack of faith in the community that the judicial system is fair and impartial as it is intended to be. This issue gave a black eye to justice in a small rural community.

## II. GRANTING OF PERMANENT INJUNCTION TO REMEDY OBSTRUCTION

The Trial Court's award of a permanent injunction is subject to a three-pronged deferential standard of review: it reviews the ultimate disposition under an abuse of discretion standard, it reviews the circuit court's underlying factual findings under a clearly erroneous standard, and it reviews questions of law de novo. *State ex rel. E.I. Dupont De Nemours and Co. v. Hill*, 214 W.Va. 760, 591 SE2d 318 (2003). Injunctive relief is mandatory in nature, a harsh remedial process, used only in cases of great necessity and not looked upon with favor by the courts. *State ex rel. Bronaugh v. City of Parkersburg*, 148 W.Va. 568, 136 S.E.2d 783 (1964).

Pursuant to West Virginia Code § 53-5-1 and injunction "may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property." Again, this matter should have been pled as a nuisance action regarding the alleged obstructions to an easement. If Respondent would have

prevailed in such action then the Circuit Judge could award a permanent injunction as the appropriate remedy if the damage or injury would be in the form of the sale, removal, or concealment of the easement.

To award the permanent injunction the Circuit Court would need to determine the degree of harm and balance the rights of the parties. Finally, the Circuit Judge would need to set a bond or recite for good cause no bond is required. *Hall v. McLuckey*, 134 WVa. 595, 60 SE2d 280 (1950). The injunction does not have effect until the bond is posted or the issuing judge has made findings to dispense with the requirement. *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1998).

In the present case the Trial Court was clearly erroneous in the findings that would support a permanent injunction. The Trial Court found that the children's toys and the doors of the wooden buildings when opened have been habitual in occurrence and nature. (see page 7 at paragraph 19 of the judgment order located on page 7 of the appendix.) The testimony from the Respondent does not support this finding. Respondent testifies in direct that some children's toys are in the easement and the building doors swing into the easement but never states that this is habitual. (see page 46 through 48 of the transcript designated as volume 3 of the appendix.) The fact is that the Respondent testified that this was not a problem and there was no problem until the speed bumps were installed which is the opposite of the findings of the Trial Court. (see page 115, line 6 of the transcript designated as volume 3 of the appendix.)

The Trial Court found these obstructions to be within the easement. At the time these items were there the exact location of the easement was not established. The Trial Court found these toys to be inconvenient and unsafe because they are within the easement. They are not

within the travel portion of twelve feet and in fact the picture show they are by the buildings were it is unlikely that vehicles will travel anyway. Petitioner's photographs show that many of the allegations plead are in fact not within the easement and are over four feet from the pavement. Not to be confused some of the photographs do depict flowers and brush within the four feet but this is not on real estate owned by the Petitioners but on that of the witnesses, Otis and Bette Weatherholt. (see Petitioner's photographs beginning on page 134 of the appendix.) Respondent said the toys have not been a problem. This is clearly evidence that there is no irreparable harm.

The Trial Court was clearly erroneous in finding that a speed bump constructed out of a permanent medium such as asphalt or concrete would constitute an obstruction. It was conceded that the temporary speed bumps installed with nails would not work. It was to test the waters after signs did not alleviate the speeding problem.

An obstruction under Black's Legal Dictionary is to render impassable. Respondent testified that he has never been able to gain access to his property. (see page 113, line 8 of the transcript designated as volume 3 of the appendix.) As Injunction applies to easements, West Virginia Code § 53-5-1 mentions cross references in the annotations. § 17-16-1 is referenced with respect to obstructions to roads. This section defines obstructions for public roads, declares them a public nuisance, and provides that injunctions is the appropriate remedy. Speed bumps are not specifically listed in this section as an obstruction. It could be argued that they fall within the catch-all definitions that states "or any other thing which will prevent the easy, safe, and convenient use of such public road." West Virginia Code § 17-16-1. It does not state easy, safe or convenient use. Clearly speed bumps don't fit into this definition as they

promote safe use. Respondent testified that he has not suffered any damage to his vehicle because of an alleged obstruction. (see page 114, line 9 of the transcript designated as volume 3 of the appendix.)

Speed bumps and rumble strips are used on many public roads in this State to promote safe travel. Inconvenient, maybe, but the safety outweighs the inconvenience. If placed as harassment then the test may fail but it was clear from the initial hearing through the trial that these were placed to protect children and the elderly. (see page 17 of the transcript designated as volume 1 of the appendix and see page 175, line 15 of the transcript designated as volume 3 of the appendix.) This is a legitimate purpose. Otis and Bette Weatherholt have to cross the speed bumps and suffer any inconvenience but they accept and desire this for the greater good. (see page 183, line 5 of the transcript designated as volume 3 of the appendix.)

In the award of an injunction the Court must balance the hardships as part of the test. The Trial Court made no findings or conclusions that any balancing of the interest of the parties was considered. The Trial Court references the inconvenience to the Respondent and speculates that opening the doors to the building could be dangerous. The Trial Court failed to consider the testimony and photographs of children playing and elderly being present, a category that might not be paying as close attention or at least should be afforded more protection. The Trial Court only considered that there was no evidence that they had been injured. This cannot be construed as a logical balancing test. The only logical conclusion is that any inconvenience to the Respondent is clearly outweighed by the safety concerns for the elderly and children.

The Trial Court ignored the property rights of the Petitioner. Does the Petitioner not possess the right to the use and enjoyment of his land as well as the right to protect his property and family? A landowner has the right to erect cattle guards and install gates so long as they permit the dominant estate passage and there is nothing to the contrary in the grant of the easement. Michies Jurisprudence, Easements § 24 citing *Palmer v. Newman*, 91 W.Va. 13 (1914). A gate is much more inconvenient than a speed bump. This land has an agricultural history, a property line crosses the easement, and a gate might need to be constructed. Respondent has a gate on his property line across this road. (see page 98, line 7 of the transcript designated as volume 3 of the appendix.)

An easement is not ownership of the property. An easement is the right to commit a trespass or nuisance on the property in which one does not own the surface. The dominant estate only possesses the right to use the surface for the purpose in which the easement was granted and must do so without unnecessary injury to the servient estate. *Michies Jurisprudence*, Easements § 24 citing *McKell v. Collins Colliery Co.*, 46 W.Va. 625, (1899). The servient estate also has rights and can utilize their property so long as it does not unreasonably interfere with the dominant estate. The installation of two very low speed bumps is not an unreasonable interference.

Finally, the public interest must be considered in the award of an injunction. Is it not clear that the public interest is the protection of children and elderly?

In this matter the Trial Court erred in the award of a permanent injunction. Nuisance was not plead. Respondent failed to prove by a preponderance of the evidence that his easement was obstructed. He admitted he never was unable to gain access or suffered any

damage. The Trial Court erred in stating that the building doors and children's toys were habitual in nature and unsafe. Respondent testified this was never a problem. The problem is the inconvenience of a speed bump. The Trial Court found that the nails protruding from the temporary speed bump was hazardous but did not consider a permanent speed bump from a different medium. The Trial Court found that the safety concerns for the children were general in nature but had no problem deciding that all speed bumps are an obstruction to an easement even though they are located on public roads throughout this state. Does a private landowner possess less rights and have a greater duty to guests and invites than the State has to the public? It would seem to reason that the converse is true as far as rights. Although, if the State can install speed control surface structures like speed bumps and rumble strips to promote safety of other vehicles and largely pedestrians can a landowner not do the same for the same intended purpose?

The award of the permanent injunction was in error. Respondent failed to demonstrate irreparable harm. There was not balancing test. There was no consideration of public interest. Procedurally, no bond was set or considered. Injunctions are not favored by the Court as it is a harsh remedy. As this order stands a father can be jailed if his eight year old doesn't pick up his toys when a rain storm hits. It probably wouldn't happen, but it could and the Petitioner is aware of this possible result and must live with it. It may sound petty but the Respondent introduce pictures, that he took the time to measure, to demonstrate that blowing leaves to the side of the pavement is an obstruction. (see pages 120 and 121 of the appendix.) Is that the use and enjoyment of his land?

This award of a permanent injunction is not supported by the evidence. The necessary underlying cause of action was not plead or proven. The need for the harsh remedy was not proven by clear appearance. Procedurally, the requisite findings are not present nor appear to be considered, and bond was not addressed. It is from the Judgment Order entered January 15, 2014, finding that Petitioner had obstructed the easement and the award of a permanent injunction in which Petitioner appeals. At the conclusion of that order all objections and exceptions to adverse rulings were saved.

### III. JUDGMENT OF PRESCRIPTIVE EASEMENT FOR WATER LINE

The Judgment of a Trial Court following a bench trial is subject to a two-pronged deferential standard of review; (1) the final order and ultimate disposition are reviewed under an abuse of discretion standard, and (2) the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *McConaha v. Rust*, 219 W.Va. 112, 632 S.E.2d 52 (2006.) This Court offered a wonderful opinion in 2010 that provides excellent guidance in what was a "tangled mess of weeds" that should result in an improvement as to how this issue is litigated.

The Judgment of the Trial Court that the Respondent has obtained an appurtenant prescriptive easement in the current location of his water line with five feet on each side for maintenance or repair is in error. The Respondent had to prove by clear and convincing evidence each of the following (1) the adverse use of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending

point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used.” Syllabus Point 1, *O’dell v. Stegall*, 703 S.E.2d 561, (2010). Each element must be proven independently or the claim is fatal. Syllabus Point 3. *O’dell*.

This case turns on was the use adverse. Adverse use is a wrongful use made without the express or implied permission of the owner of the land. Syllabus Point 5. *O’Dell*. If the use began as permissive, it will not become adverse unless the license is repudiated. Syllabus Point 6, *O’Dell*.

The doctrine unjustly rewards trespass, is akin to theft, and discourages neighbors from being peaceful. *O’Dell* at page 563. *O’Dell* opined that there is nothing more vicious than a fight over land between neighbors. It may be more vicious if the neighbors are also brothers. *O’dell* opined that this doctrine is not favored by the courts because it rewards a trespass and takes property rights without compensation. It is more offensive when the individual benefitting is the attorney whom performed the legal work relating to the acquisition of the real estate and was charged with the duty of loyalty to his client. This is not a factual pattern for estoppel but does wreak of unjust enrichment.

It is understood that the rationale for prescriptive easements or adverse possession was to get use out of the land. If one uses it as his own and the true owner does not stop the use then the land is at least being utilized and the person so doing has acquired the right to use it. In the present case the opposite effect occurs. To permit the water line to remain in the Petitioners’ back yard prevents them from being able to use their land as they desire. (see page 151, line 8 of the transcript designated as volume 3 of the appendix.) Petitioner is already limited in his use of the twelve foot utility easement and now he lost ten more feet for a water

line easement. The Judgment Order specifically prohibits Petitioners from doing anything that would interfere with the current location of the water line and limits the use of the utility easement. (see page 26, paragraph L. and page 27, paragraph M. of the appendix.) This means that by agreement and at their own expense they cannot relocate the water line without court approval. If neighbors try to agree and be civil, must they obtain court approval?

Two questions must be answered to determine if this situation meets the burden of clear and convincing proof that the use was adverse. The questions are (1) was there an implied permission or consent from Ruth Barr, then landowner of Petitioner's real estate, to allow the water line to remain outside of the utility easement and (2) did the respondent disregard Ruth Barr's claim to ownership entirely as if he owned it himself. *Odell*, at 572.

In Respondent's Reply to Counter-claim, Respondent avers that the water line is not within the utility easement but he has acquired an easement by prescription for the current location. This pleading specifically states "Plaintiff denies any form of trespass or that the Defendants have suffered any form of loss or damage to their property which was purchased subject to the prescriptive use and the location of the water line as acquiesced by the grandmother of these parties" (see page 79, paragraph 8 in the appendix.) Respondent testified that his grandmother acquiesced to the location of the water line, she never objected. (see page 99 beginning at line 16 through page 101 at line 4 of the transcript designated as volume 3 of the appendix.)

Black's legal dictionary defines "acquiesce" as "to give an implied consent." Under *O'dell* to be adverse there must be no permission or use must be without consent. The permission or consent can be express or implied. *O'dell* at page 572. Thus, if the use began

with implied consent then adverse does not present until the permission is repudiated.

Syllabus point 6 of *O'dell*.

Petitioner testified that he has never revoked the permission from his grandmother. (see page 150, line 24 of the transcript designated as volume 3 of the appendix.) Petitioner did testify that he discussed moving the water line about five years ago with Respondent and Respondent said it could be moved but he wasn't paying to do it. It should be noted that this was before Petitioner was aware that Respondent had a lawful place to locate his water line that being the utility easement. Now everyone knows there is a place where the water line should be. The Trial Court called the utility easement the "water line easement." (see page 76, line 17 of the transcript designated as volume 3 of the appendix.) Respondent and his Counsel referred to the utility easement as the "water line easement." (see page 80, line 3 of the appendix.)

The answer to question one is that the water line remains in its current location with the implied consent from the original landowner and the consent had not been revoked until the filing of the counterclaim. This is a significant determination that is admitted by Respondent.

Respondent testified that he "asked his grandmother", saw the reaction from his Attorney, then corrected himself and said he didn't ask her regarding the installation of the water line. (see page 28, line 20 of the transcript designated as volume 3 of the appendix.) In cross-examination Respondent testified that he felt the need to inform his grandmother that he had not placed the water line within the utility easement. (see page 99, line 13 of the transcript designated as volume 3 of the appendix.) This act begs the question of would one need to inform the lawful true owner if he was using the land as if he owned it with disregard to the

true owner? This answer is clearly “No.” Respondent did not use the land as if he was the owner, he did not disregard the true owner’s rights, he felt the need to go tell the owner and receive her blessing and permission. This fact pattern is the opposite of “adverse.” *O’dell* defines “adverse use” generally means the “use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one.” *O’dell* at page 572 borrowing from cases in Washington and Maine.

The answer to question two is that the water line in its current location was never adverse because Respondent did not act as if he was the owner of the land. He did not disregard the lawful owner and sought her permission. This is a significant determination that is offered only by admission of Respondent.

After reviewing both significant question regarding was this installation of the water line adverse it is clear that it is not. It does not appear adverse by a preponderance of the evidence and definitely not by clear and convincing evidence. If this element of prescription is not proven by independent fact then the claim is fatal.

The Trial Court found that the Petitioner learned of the existence of the water line in 2001. (see page 13, paragraph 39 of the appendix.) This was after he acquired title so there was not actual knowledge at the time of conveyance but later when he began construction for his residence. The Trial Court found that the Petitioner took no adverse action or made no objection to the location of the water line until the filing of the Counter Claim. The Petitioner acquiesced to the location for over ten years. (see page 13, paragraph 40 of the appendix.) This is a finding that the original consent had not been revoked. This is a finding that the consent continued by the Petitioner.

It is relevant that the Petitioner did not learn of the existence of the utility easement until 2011. Is it not logical for one to believe that a water line is placed in an unauthorized location? Petitioner was unaware that there was another location, the utility easement where the water line should be located. It only stands to reason that this is when a person would begin to realize that a trespass is occurring. It is true that Petitioner did not assert any rights from 2011 until he filed his compulsory counter claim in this matter.

The Trial Court found that Petitioner was on constructive notice of the utility easement. (see page 28, paragraph 38 of the appendix.) Any Prescriptive easement was not on record at the time Petitioner acquired title. Most importantly to the argument of constructive notice is the unique fact pattern of this case. It is conceded that a purchaser is on constructive notice of those matter of record in the office of the Clerk of the County Commission. This is why people pay attorneys to perform a title search or choose to proceed at their own peril without the benefit of an exam. It is not common for one to pay an attorney for real estate work and then go themselves to perform a title search. The fact pattern of this matter begins to come close to fraud.

Respondent admitted to performing a title search on the real estate at issue. (see page 92 beginning on line 23 through page 93, line 13.) Respondent admitted to preparing Petitioners' Deed. This was a secured transaction so a title exam was probably conducted although the Deed says without title exam. Respondent avoided answering the question that this is nothing in Petitioners' Deed that puts them on notice of the twenty foot travel easement and twelve foot utility easement. (see page 103 through page 104 of the transcript designated as volume 3 in the appendix.) (see Petitioners' Deed, page 98 of the appendix.)

Respondent admitted to preparing the deed for his parents. This Deed uses different language that puts the grantee on notice that this conveyance is subject to a right of way. (see page 105, line 2 through page 106, line 23 of the transcript designated as volume 3 of the appendix.) (see deed, page 105 of the appendix.)

Deeds are often boilerplate documents. Why put one grantee on notice that the property is subject to an easement and not another? The only answer is to conceal the fact that there is a utility easement that is not utilized and you do not want to be forced to use it until you have acquired the ten year period for prescription. This was not argued at the Bench Trial but if true this would negate the element of open and notorious thus being fatal to the claim. To be open and notorious is cannot be stealthily or in secret. *O'dell* at page 577.

The Trial Court found that the Deed to Petitioners contained notice of the easements. (see page 12, paragraph 37 of the appendix.) (see page 98 of the appendix.) This is not an accurate interpretation of the law. The Trial Court first references the granting clause in the first paragraph and then the Ad Habendum Clause at the end of the deed. The purpose of these clauses is to catch that which is not specifically listed in the description to satisfy the intent of the parties to past total ownership with all rights. The Habendum Clause can limit that which is being conveyed if the grantor does not possess all of the property in the granting clause or description. These clauses do not and are not intended to catch exceptions or reservations and place the grantee on notice of all exceptions or reservations. These must be specifically listed as fee title is passed unless limitations are present.

The fact is that Petitioners hired Respondent to perform legal work in conjunction with the acquisition of his real estate. Respondent said he would take care of it. (see page 176, line

5 through line 23 of the transcript designated as volume 3 in the appendix.) Petitioner had faith and trust in his brother and relied upon him as his attorney. Respondent/Attorney was aware that the water line was not within the utility easement and did not disclose this fact to his client. The end result is that the Respondent will benefit from his unclean hands. The legal term is an unjust enrichment.

The Judgment of the Trial Court that the Respondent has acquired a prescriptive easement in the current location of his water line with five feet on each side for maintenance and repairs is in error. The facts do not support the ruling that the Respondent proved his case by clear and convincing evidence. The law was not properly applied. There was implied consent. The Respondent seeking his grandmother's blessing and permission is not how a true owner would behave. This is not "adverse." This attorney/client relationship really muddies the waters. This is not how attorneys should conduct their practice to anyone, let alone family. This appears as stealthily and secret thus not open and notorious. Yes, Petitioner may have had actual knowledge of the location of the water line but he did not know of the utility easements existence as an alternative, lawful location for the line. If the burden is not met on either element the claim is fatal. Just as the denial of a jury trial gives a black eye to justice, to permit an attorney to personally benefit from stealthy legal work gives a bloody nose to the profession.

It is from the Judgment Order entered January 15, 2014, finding that Petitioner had acquired a prescriptive easement for his water line in which Petitioner appeals. At the conclusion of that order all objections and exceptions to adverse rulings were saved.

## CONCLUSION

Petitioners request this Honorable Court review this matter in total and afford the following relief;

1. Hold that a concrete or asphalt speed bump installed for the legitimate purpose of promoting safety when signs have not worked is not an obstruction to a private easement. Such a speed bump does not render the easement impassible or unsafe and does not meet the definition of an obstruction;
2. That the Trial Court was clearly erroneous in finding that the other obstructions complained of habitual and unsafe based upon the testimony of the Respondent that they were not a problem;
3. That the Trial Court erred and abused its discretion in the award of the harsh remedy of a permanent injunction;
4. That the Trial Court was clearly erroneous in its finding regarding the prescriptive easement;
5. That the Trial Court erred and abused its discretion in applying the law of real property and prescriptive easements to the facts of this case in the judgment for the Respondent resulting in the acquisition of a prescriptive easement;
6. Reverse the decision of the Trial Court and remand back with directions that and order be entered denying the injunction, permitting the installation of speed bumps, and entering a judgment in favor of the Petitioner with respect to count I of the counterclaim with the relief they prayed for;

*In Arguendo*

7. That the Trial Court erred in the denial of the constitutional right of the Petitioners to a jury trial and remand the matter back for the purpose of a jury trial on the merits.

Respectfully Submitted,

  
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Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Jason R. Sites, hereby certify that I served a true copy of the foregoing Petitioner's Brief and attached Appendix upon J. David Judy, III, Esq., Counsel for Respondent, at his address of PO Box 636, Moorefield, West Virginia 26836, by US Mail, first class, postage prepaid, on this the 19 day of May, 2014.

  
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