No. 14-0219

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

DANIEL ALLAN WEATHERHOLT and
ANITA DENICE WEATHERHOLT, his wife,
Defendants Below,
Petitioners,

v.

JEFFREY NEAL WEATHERHOLT,
Plaintiff Below,
Respondent,

BRIEF OF RESPONDENT

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II. TABLE OF AUTHORITIES

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III. SUMMARY OF ASSIGNMENT OF ERROR

The Petitioner submitted three (3) primary Assignments of Error summarized as follows:

1. That the Trial Court erred by denying a timely request for a jury trial.

2. That the Trial Court erred by awarding a Permanent Injunction against the Petitioner, Defendant below, placing obstructions within a stipulated deeded right of way.

3. That the Trial Court erred in finding that the Respondent, Plaintiff below, has a prescriptive easement for a water line to his home through the property of the Petitioners, Defendants below.

IV. STATEMENT OF CASE

The Judgment Order below fairly and accurately sets forth the facts surrounding the dispute between the Petitioners, Defendants below, and the Respondent, Plaintiff below. The parties and their parents share a common access road from a rural county highway as noted by the Court. The Respondent has a deeded right of way as stipulated by the parties and as noted by the Court, twenty (20) feet in width, with an additional twelve (12) foot utility easement located on the east side of the access right of way, through the property of the Petitioners, through the property of the parents of the parties, and into the real estate owned by the Respondent. Each of the parties maintain homes on their respective tracts of real estate. Again, the findings of fact set forth within the Judgment Order by Judge Carl adequately describe the properties of the various parties, the location of the respective properties and homes, and the situation which exists between the parties. Of significant note, it appears that the parties simply

do not get along. Trial transcript at page 148, lines 17-19; page 169, lines 7-9; page 170; page 196. The original Complaint in this action was filed by the Respondent, Plaintiff below, with the Circuit Clerk of Hardy County, West Virginia, on July 16, 2013, therein claiming a 20 (twenty) foot access right of way from the public road together with a second 12 (twelve) foot right of way for utilities. The Complaint included claims of obstructions across the right of way, including the Defendants having nailed wooden boards into the pavement as purported speed barriers; constructing buildings which have doors that open onto the access right of way; leaving children's toys within the right of way; constructing a garden and rock garden within the right of way; placing wooden barriers and firewood within the right of way; digging holes in the dirt along the edge of the pavement; and parking equipment and vehicles within in the right of way, all of which appear intentionally calculated to interfere with the open access granted to the Plaintiff within his deed. The Plaintiff claimed that he had approached the Defendants on numerous occasions in an effort to have the obstructions and restrictions in the right of way removed, however, the Defendants refused to move the obstructions, and suit was filed. Complaint at paragraph 8. The Defendants responded admitting the existence of the twenty (20) foot access right of way and the twelve (12) foot utility easement access right of way on the east side of the travel easement. Answer, Fifth Defense, paragraph 2. The Defendants also filed a Counter Claim claiming trespass of the Plaintiff by an existing water line through the property of the Defendants from the public road and public water system to the home of the Plaintiff, as well as several other counts within the Counter Claim which are not a part of this Appeal. The Plaintiff replied that the water line was a prescriptive easement, having been located with

knowledge of the predecessors in title of the Defendants and with the knowledge of the Defendants for a period in excess of ten (10) years, without objection, and acquiesced as to the location and existence of the line in excess of ten (10) years.

The Defendants initially demanded a trial by jury, and on December 11, 2013, the Court noted that the Defendants had requested a jury trial, and that they were entitled to a jury trial on the issue of the prescriptive easement claimed through the real estate of the Defendants. On that date, December 11, 2013, and prior to the commencement of the bench trial scheduled for that date, the Defendants waived their right to trial by jury on the road after being given a full opportunity to exercise that right by the Court. Transcript of December 11, 2013, at page 16, lines 14-16.

The parties proceeded with a bench trial before the Court on December 11, 2013. The Judgment Order entered by Judge Carl on January 15, 2014, resulted from the evidence taken at that trial.

V. SUMMARY OF ARGUMENT

The original Notice of Appeal in this action filed by the Petitioners stated four (4) Assignments of Error:

1. That the Trial Court denied the Defendants timely request for a jury trial;
2. That the Trial Court was in error in awarding a Permanent Injunction against the Defendants;
3. That the Trial Court was in error in prohibiting the Defendants from installing permanent speed bumps on their property; and
4. That the Trial Court was in error by adjudging that the Plaintiff had a prescriptive easement for his water line.

Within the Petitioners Brief, the Petitioners have stated three (3) Assignments of Error:

1. That the Trial Court erred when it denied the Petitioners' timely requests for a jury trial;
2. That the Trial Court erred when it awarded a Permanent Injunction against the Defendant below as not being supported by the facts, that there was no obstruction, and that there was no bond addressed or considered; and
3. That the Trial Court erred in finding that the Respondent had obtained a prescriptive easement for his water line.

Although the Petitioners discussed issues of "speed bumps" within their Brief, it appears that the Assignment of Error against prohibiting the Defendants below from installing permanent speed bumps has been withdrawn, and is thereby waived. Respondent would also note that the Petitioners, Defendants below, specifically waived their right to a jury trial at page 16 of the trial transcript of December 11, 2013, after considerable discussion between the Court and counsel for the Defendants. Therefore, the demand for jury trial by the Defendants below has been waived, and claimed the error has been waived.

The Defendants below, Petitioners herein, have admitted within their Answer to Plaintiff's Complaint that the Plaintiff is the fee simple owner of a deeded twenty (20) foot access right of way for purposes of ingress and egress through the property of the Defendants, together with a twelve (12) foot utility easement on the east side of that travel easement. Defendants' Answer below at paragraph 2, page 2. The Defendants have stipulated that the twenty (20) foot access easement exists ten (10) feet from

either side of the center line of the existing paved road, for a total of twenty (20) feet except in the area of the location of the rock garden on the Defendants' property and at the entrance of the access right of way from the public road, however, there appears no dispute that the entire paved portion of the access road is within the twenty (20) foot right of way which provides access to the property of the Respondent through the property of the Petitioners, Defendants below. Trial transcript at pages 10-12. There are no limitations in the deeded rights of way, and therefore, the right of way cannot be obstructed. Flaherty v.Fleming, 58 W.Va. 669, 52 S.E. 857 (1906).

The Court was correct in granting a permanent injunction against any obstructions in the access right of way, and the Court was correct in finding a prescriptive easement in favor of the Respondent, Plaintiff below, for his water line.

Premised upon the foregoing, the arguments of the Respondent within this Brief will focus primarily on the two (2) remaining Assignments of Error stated within the Brief of Petitioner/Appellant:

2. That the Trial Court erred when it awarded a Permanent Injunction against the Defendants; and

3. That the Trial Court erred in finding that the Respondent had obtained a prescriptive easement for his water line.

VI. STATEMENT REGARDING ORAL ARGUMENT

1. Oral argument is not waived by the Respondent.

2. This Response is not frivolous.

3. It is unclear to your Respondent whether or not all errors claimed have been decided authoritatively, however, it is necessary to determine.

4. Your Respondent is not able to say that the decisional process would not be significantly aided by oral argument, and your Respondent is unable to state affirmatively that the facts and legal arguments in this matter are adequately presented in Briefs and record on Appeal.

Upon the foregoing, Respondent reserves the right to participate in oral argument if allowed by the Court.

VII. ARGUMENT

1. The Defendants knowingly, intelligently, and with counsel, waived any right to a jury trial upon any issues before the Court and prior to the commencement of the bench trial on December 11, 2013. Trial transcript at page 16, lines 14-16.

The Judge had a discussion regarding the jury trial requested by the Defendants on page 15 of the trial transcript of December 11, 2013. The Defendants had demanded a jury trial in their Answer and Counter Claim. The Compliant filed on behalf of the Plaintiff in the action below requested a Temporary and Permanent Injunction to Order removal of obstructions placed within the rights of way to the property of the Plaintiff. The issues of Injunctive Relief for a Temporary and Permanent Injunction, whether preventative or mandatory in character rests within the sound discretion of the trial Court, and is not subject to a trial by jury. Timberline Four Seasons Resort Management Co., Inc. v. Herlan, 223 W.Va. 730, 679 S.E. 2d 329 (2009); Camden-Clark Memorial Hosp. Cor. v. Turner, 212 W.Va. 752, 575 S.E. 2d 362 (2002). The Court had considered the Request for Jury Trial by the Defendants in their Counter Claim at the hearing of September 12, 2013, beginning on page 32 of the transcript.

Counsel for the Plaintiff pointed out at page 33 of the trial transcript that the Defendants were not entitled to a jury trial on the issues of the injunction requested to remove obstructions from the rights of way. After some discussion, the Court denied the jury trial demanded by the Defendants in their Counter Claim on the issue of adverse possession of the water line, however, the Court informed counsel for the Defendants that if there was some law the Defendants wished to brief to the Court, the Court would consider those issues. Transcript of September 12, 2013, page 34, lines 4-16.

When the matter came on for trial on December 11, 2013, the Court informed the parties that the Court had reviewed the transcript of September 12, 2013, and that briefs had been requested by the Court, however, there appeared to be some confusion between counsel and the Court regarding the briefs requested by the Court and dispositive motions which the Defendants argued to file. The Court then noted that the Defendants had failed to file any brief or dispositive motions, and that the Plaintiff made no response thereto as directed by the Court since there was no brief or dispositive motion filed by the Defendants. Trial transcript of December 11, 2013, at page 13. The Court further reconsidered the Request for a Jury Trial on the issue of the water line at pages 15-16 of the trial transcript and then informed the Defendants that they were entitled to a jury trial on the issue of the water line raised within their Counter Claim. It was then that the Defendants waived their right to a jury trial, on the record, at page 16 of the trial transcript of December 11, 2013, lines 14-16. This Court has ruled that a jury trial may be withdrawn with consent of the parties or counsel, on the record. Drumheller v. Fillinger, 230 W.Va. 26, 736 S.E. 2d 26 (2012). Proceeding with the

bench trial without raising a further objection thereto, at trial, constitutes a waiver of a right to a jury trial. Id, at page 32.

Upon the foregoing, the Defendants below, Petitioners herein, knowingly and intelligently waived any right to a jury trial, on the record, prior to the commencement of trial on December 11, 2013, which would have been granted by the Court, and which was in fact granted to the Defendants for the issues on the water line right of way even though the Defendants failed to file the brief requested by the Court during the hearing of September 12, 2013.

There is no evidence whatsoever to support the claims of the Petitioners herein that the waiver of jury was as a result of "duress". The Petitioners argue that the issues of the two separate rights of way are "closely related", however, it is clear that the deeded access right of way and deeded utility easement and the obstructions for which the Plaintiff below sought an injunction are not related in any way to the water line easement raised by the Defendants below within their Counter Claim. Therefore, there is no jury trial available on the issue of the Permanent Injunction, nor was there any right of the Defendants below/ Petitioners to have a jury trial on the issue of adverse possession of the water line prior to consideration in a bench trial for injunction directing the Defendants below to remove obstructions on the deeded access right of way. The distinction was made in Camden-Clark Memorial Hosp. Corp., supra.

The Petitioners have mentioned in passing a claim that Judge Carl and/or Judge Keadle should have voluntarily recused themselves from the case below, however, there appears to be little or no argument or citation on this issue, and the matter was not raised prior to or during the trial below. In fact, the matter was never mentioned,

and there was no objection made below. Therefore, the issues is waived and may not be brought before this Court as "plain error" or otherwise.

Plain Error did nor occur in this case. The issue was not raised below; Counsel knew Plaintiff's current job status, thus; it was waived, and could be asserted that it was trial strategy to get "a second bite at the apple"; Plaintiff's job status did not affect any of the trial court's decisions in this case; a similar argument could be made for any other Circuit Court Judge or even the Justices of this Honorable Court; and this case was correctly decided below, thus, there was not error. The trial court conducted the trial in a fair and impartial manner, and the truth-finding process can not be said to have been substantially impaired. See State v. Miller, 194 W.Va. 3, S.E. 2d 114 (1995).

2. The Court was correct in awarding a Permanent Injunction against the Defendants below thereby enjoining interference of the access right of way "in any way, shape or form... by the Plaintiff or by his family, friends or invitees". This includes within the entire width of the twenty (20) foot access easement, ten (10) feet on either side of the center line of the pavement, with the exception of the area around the rock garden of the Defendants and near the entrance off the public road. Judgment Order of January 15, 2014, pages 23 and 24.

The standard of review in challenging findings and conclusions of a trial court in granting an injunction applies a two-pronged deferential standard of review with final Order and ultimate disposition reviewed under abuse of discretion standard, and the underlying factual findings under a clearly erroneous standard; if the trial Courts findings of fact are not clearly erroneous, and in the event that the correct legal

standard is applied, its ultimate ruling will be affirmed as a matter of law. Weaver v. Ritchie, 197 W.Va, 690, 478 S.E. 2d 363 (1996).

As noted within the Judgment Order of the Court of January 15, 2014, at paragraph 1, page 1, the parties to this action agreed and stipulated, as a matter of law, that a twenty (20) foot right of way was deeded to the Plaintiff from the public Frosty Hollow Road, Hardy County Route 10/1, to the property of the Plaintiff as demonstrated within his deed, through the property currently owned by the Defendants, and crossing real estate of Otis Weatherholt, et ux, the parents of these of parties. The parties also agreed and stipulated that a twelve (12) foot wide utility easement was deeded to the Plaintiff and exists immediately adjacent to the east side of the twenty (20) foot access right of way from the Frosty Hollow Road to the property of the Plaintiff through the real estate of the Defendants and through the property of the parents of the parties hereto. The parties further stipulated and agreed that the twenty (20) foot wide access easement is ten (10) feet on either side of the center line of the existing paved roadway for a total of twenty (20) feet, with the exception of the area of the entrance from the Frosty Hollow Road and the area of the "rock garden" near the home of the Defendants which is also near the entrance of the access road off of Frosty Hollow Road. The testimony at trial by all parties and by the parents of the parties demonstrated that the use of their real estate is residential, and that there are no cattle guards, gates or issues of animal impoundment along or on the right of way for which the Plaintiff below sought a Permanent Injunction demanding removal of all obstructions and a free and open use of the rights of way through the property of the Defendant to his property. Trial transcript at pages 43, 45 and 133. The evidence further demonstrated that the

access roadway though the property of the Defendants was built by the parents of these parties during the 1960's. Trial transcript at pages 42, 143, and 145. Mr. Otis Weatherholt acknowledged that the roadway today exists in the same place that it existed in 1966. Trial transcript at page 145. The access roadway was purposefully redesigned to eliminate the need for cattle guards, and the property of the parties hereto is zoned by the county as residential. Appendix record page 123, Plaintiff's Exhibit 9, and trial transcript at page 133. The Court has correctly determined the dates of ownership interests of the various parties in the real estate which they own subject to the rights of way in question, together with the dates of all transfers, and therefore, those issues are not going to be further developed within this brief.

The Plaintiff below testified extensively as to the obstructions which the Defendants below placed within the deeded twenty (20) foot right of way including the twelve (12) foot paved roadway, commencing at page 40 of the trial transcript demonstrating that the Defendants nailed 2x6 boards unto the pavement, trial transcript at page 40-41; the Defendants placed buildings immediately adjacent to the right of way so that doors swing onto the right of way approximately two (2) feet when they opened, Id. at page 47, 50; children's toys, bicycles and skate boards are left in the right of way, Id. at page 51; a "rock garden" was placed within the right of way by the Defendants below sometime between 2005 and 2008, Id. at page 59, 60; the Defendants have placed logs and piles of wood within the right of way as seen on photographs entered into evidence, Exhibit 8, trial transcript at page 63; the Defendants below have plowed up the dirt in the right of way and made a garden adjacent to the pavement as demonstrated in Exhibit 8, trial transcript at page 63, 64, and within Exhibit 9; the

Defendants below leave equipment, in the form of a backhoe, sitting just off the edge of the right of way, Exhibit 10, trial transcript at page 65. All of this information is confirmed and really undisputed by the evidence presented during the hearing of July 22, 2013, from which the Temporary Restraining Order was entered by Judge Thomas H. Keadle, Senior Status, on July 25, 2013. Judge Keadle also found that holes had been dug along the edge of the pavement in order to force the Plaintiff below and persons using the right of way to stay on the paved portion of the roadway and run over the wooden boards which had been nailed onto pavement, and from which nails protruded in the travel portion of the roadway. Temporary Restraining Order entered July 25, 2013.

The location of the access right of way through the property of the Defendants below is demonstrated within their deed from Ruth M. Barr, the grandmother of the parties hereto, dated March 30, 2001. The location of the access right of way is depicted on the Plat of Survey of record in Deed Book 260 at page 69, in the Office of the Clerk of Hardy County Commission, and as attached to the Deed of the Defendants placed into evidence. The Plat of Survey is a depiction made by David W. Jopling, Professional Surveyor No. 984, stamped as such attached to the Deed. There is clearly no bend in the access right of way as contended by the Defendants below "near the rock garden" or at the entrance from the Frosty Hollow Road. The surveyor's depiction shows a straight road from the public road through the three (3) acre tract purchased by the Defendants. The bend in the access road which is demonstrated on the 8.753 acre tract owned by the Defendants is past the rock garden which was

constructed within the access right of way by the Defendants within the past ten (10) years.

An injunction is the proper remedy to prevent the maintenance of a wrongful obstruction in a right of way. Flaherty v.Fleming, 58 W.Va. 669, 52 S.E. 857 (1906). Prior to the change in law, injunction was an action in equity, not subject to a request for a jury trial, and was within the sound discretion of the Circuit Judge, and for purposes of obstruction of private roadways, was the proper action to refrain individuals from obstructing a private road where the obstruction would work a special or peculiar injury to the dominant estate. Bent v. Trimboli, 61 W.Va. 509, 56 S.E. 881 (1907). An injunction is the proper remedy through the Circuit Court in the event that the evidence before the Court supports the finding that the Defendants below interfered with the enjoyment of the Plaintiff's easement by placing debris is the roadway thereby obstructing passage. State Road Commission v. Oakes, 150 W.Va. 709, 149 S.E. 2d 293 (1966). The evidence clearly demonstrates that the purpose of the rights of way from the public Frosty Hollow Road, through the properties of the Defendants below and the parents of the parties to the real estate owned by the Plaintiff below is residential in purpose. It is necessary that the Court look to the scope and purposes of the deed creating the right of way, the situation and use of the property, and the intent of the parties in order to determine how the right of way will be enforced to provide a reasonable, safe and convenient way for the purposes for which the right of way was intended. Palmer v. Newman, 91 W.Va. 13,112 S.E. 194 (1922). Upon the foregoing, the Court correctly determined that the actions by the Defendants below in the interference of the access right of way of the Plaintiff required a Temporary and a

Permanent Injunction, and the Court was thereby correct in granting a Permanent Injunction enjoining the Defendants below from placing any further obstructions within the access right of way within the definition of items which interfered with the reasonable, safe and convenient use of the right of way. This includes preventing boards from being nailed on the pavement; holes from being dug along the edge of the pavement; gardening within the right of way; wood piled within the right of way; children's toys laying throughout the area of the right of way on the property of the Defendants below; doors opening out into the right of way; and vehicles and equipment being parked within the right of way or from which parts extend into the right of way. The actions by the Defendants were clearly intentional and calculated to interfere with the reasonable, safe and convenient use of the right of way by the Plaintiff below, his family, friends and invitees. Contrary to the contentions of the Petitioners, there is no requirement that the passage to the Plaintiff's property be terminated or completely blocked in order to obtain a Permanent Injunction against interference with the right of way. The interference had been habitual. Trial transcript 171-172, and photos on Appendix Record pages 112 and 114 with grass growing around the items.

Your Respondent has previously demonstrated that the Petitioners have failed to renew the Assignment of Error specifically prohibiting the Defendants from installing permanent speed bumps on their property within the access right of way. The boards or "speed bumps" sought by the Defendants to be placed in the access right of way were properly precluded and enjoined permanently by the Circuit Court below. There was no demonstration by any evidence presented to the Court that speed bumps or "rumble strips" would have been reasonable on this private right of way through family

property nor was there any evidence presented to demonstrate speed as a factor of safety on the property of the Defendants from travel on the access roadway deeded to the Plaintiff. Therefore, there is no further argument herein regarding the prohibition against speed bumps.

The Court correctly found that the twelve (12) foot wide utility easement should be surveyed and calculated twelve (12) feet from the eastern boundary of the final determined location of the Plaintiff's twenty (20) foot wide access easement, and both easements are appurtenant to the fee simple ownership of the Plaintiff's real estate. Final Order of January 15, 2014, page 11.

3. The Court was correct in finding from the evidence that the Respondent had obtained a prescriptive easement for the water line through the property of the Defendants.

Testimony at trial demonstrated that the Petitioners herein constructed their home in 2001 to 2002, and that they became aware of the water line through the property which they had purchased when excavating their house in 2001. Trial transcript at pages 27-29, and 150. There was no consent and there was no permission. Id. at pages 99-101. The Defendants further acknowledge that they had never objected to the location of the water line since 2001. Trial transcript at pages150 and 177-178.

A private right of way by prescription may be acquired over another's land by visible, continuous, and uninterrupted use thereof for ten (10) years, under a bona fide claim of right, with the acquiescence of the owner. Walton v. Knight, 62 W.Va. 223, 58

S.E. 1025 (1907), overruled on other ground by O'dell v. Stegall, 226 W.Va. 590, 703 S.E., 561 (2010). See also O'dell, supra. The primary change in the law is that if permission is alleged by the landowner the dominant estate must prove otherwise. The Court below found "No permission". Judgment Order, page 22, paragraphs 63,64 and 65.

The Circuit Court further correctly found from the evidence, upon the uncontroverted testimony of the Plaintiff, that there was no permission obtained from the Grantor, Ruth M. Barr, prior to constructing the water line outside the confines of the twelve (12) foot wide utility easement; that the father of the parties assisted in the construction of the water line in 1998 or 1999, in its current location; that the Grantor of both, the property of the Plaintiff and the property of the Defendants, did not object or take any subsequent action as long as she owned the property to have the Plaintiff remove or relocate the water line; that the grandmother of these parties, Ruth M. Barr subsequently sold real estate to the Defendants by Deed dated March 30, 2001, and the Defendant, Daniel Weatherholt, confirmed within his testimony during trial that he was aware of the location of the water line and the location it crossed through his real estate during the construction of his home in 2001 to 2002. Therefore, the Court was correct in finding that Otis Weatherholt and the Defendant, Daniel Weatherholt, had actual knowledge of the exact location of the water line as it crossed through the real estate then owned by Ruth M. Barr. Premised thereon, the Plaintiff below proved an adverse and prescriptive easement for the water line through the property of the Defendants. The Defendants took no action and made no objection to the Plaintiff as to the location of the water line from the fall of 2001 until the Counter Claim was filed on

August 5, 2013. The Defendants therefore acquiesced in the location of the water line for a period exceeding ten (10) years as found by the Court at page 13 of the Final Order.

The evidence shows that said acquiescence was not because of permission. The uncontroverted testimony showed that Plaintiff below placed the water line on his Grandmother's property without permission, that he did not ask for permission, and that she had knowledge of the placement of the water line after it was installed. The uncontroverted testimony demonstrates that Defendant Daniel Weatherholt took no action to move the water line. See, December 11,2013, trial transcript pages 29 and 100 ; and trial Order findings 34, 35, 36,39 and 40. Therefore, the water line placement has always been adverse pursuant to O'dell v. Stegall, 226 W.Va. 590, 703 S.E. 2d 561 (2010).

VIII. CONCLUSION

The Court was correct in its conclusions of law that the Plaintiff owns and possesses a twenty (20) foot wide right of way and access road from Frosty Hollow Road through and over the real estate owned by the Defendants, as a deeded right of way for ingress and egress, and that the parties have stipulated and agreed to the deeded twenty (20) foot access ease easement and the twelve (12) foot utility easement immediately on the east side of the access right of away and further that the rights of way are appurtenant to the Plaintiff's real estate. The parties have stipulated and agreed to the location of the twenty (20) foot wide access road, ten (10) feet on either side of the centerline of the paved portion of the roadway for a total of twenty (20)

feet, with the exception of the area at the entrance from Frosty Hollow Road and around the area of the rock garden near the Defendants home. The location of the rights of way were not yet surveyed although the access right of way is demonstrated on the deed of the Defendants below which was submitted into evidence. There appears to be no objection or appeal from the Defendants below within their Petition to the survey as directed by the Court, and therefore, there is no argument necessary regarding the survey of the rights of way.

The Court was correct in granting injunctive relief to the Plaintiff below, thereby prohibiting the Defendants from placing any impediment or obstruction within the twenty (20) foot wide access easement deeded to the Plaintiff and prohibiting interference with the currently unused utility easement. The Court was further correct in determining from the evidence that the obstructions placed within the access right of way by the Defendants were habitual in nature and had caused the use of the right of way to be unsafe and inconvenient for both, the Plaintiff and the Defendants. Therefore, the Court was correct in concluding that the Defendants violated the rights of the Plaintiff to an open twenty (20) foot wide right of way for purposes of ingress and egress to his residential property. There are various issues ordered by the Court in addition to the injunction which have not been objected to or noticed as error by the Petitioners herein. Premised thereon, any Order of the Court or conclusion of law not specifically objected to or raised as an issue within the Petitioners' Petition for Appeal is waived.

The Plaintiff below, Respondent herein, has proved a prescriptive easement for the water line, and therefore, the prescriptive easement found by the Court for the use

and maintenance of the water line is correct given the law cited by the Court.

The Plaintiff thereby requests the Court to deny the relief demanded by the Petitioners within their Petition for Appeal, and that no error be found in the rulings of the Court within the Final Order of January 15, 2014.

Jeffrey Neal Weatherholt
Respondent, Plaintiff below
By Counsel

JUDY & JUDY
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CERTIFICATE OF SERVICE

I, J. David Judy, III, counsel for Respondent, Plaintiff below, does hereby certify that I have served the foregoing, *BRIEF OF RESPONDENT,* upon Jason R. Sites, counsel for Defendants by mailing a true copy thereof, at his address of Sites Law Firm, PLLC, P.O. Box 848, Keyser, West Virginia, 26726, by U.S. Mail, postage prepaid, this the 27 day of June, 2014.

_____
J. David Judy, III