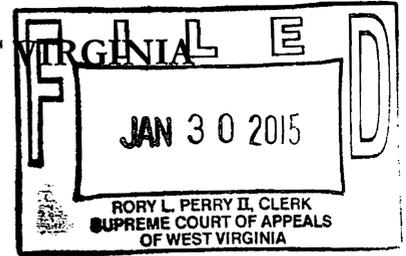


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



HEARTWOOD FORESTLAND FUND IV  
LIMITED PARTNERSHIP, a North Carolina  
limited partnership,

*Petitioner,*

v.

BILLY HOOSIER, JR.,

*Respondent.*

Appeal No. 14-1110

(Wyoming County Civil Action No. 10-C-34)

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**BRIEF OF PETITIONER**

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Arising from a Final "Order Granting Defendant's Motion for Judgment  
as a Matter of Law on Equitable Principles" Entered on  
September 26, 2014, in Civil Action No. 10-C-34 in the  
Circuit Court of Wyoming County, West Virginia

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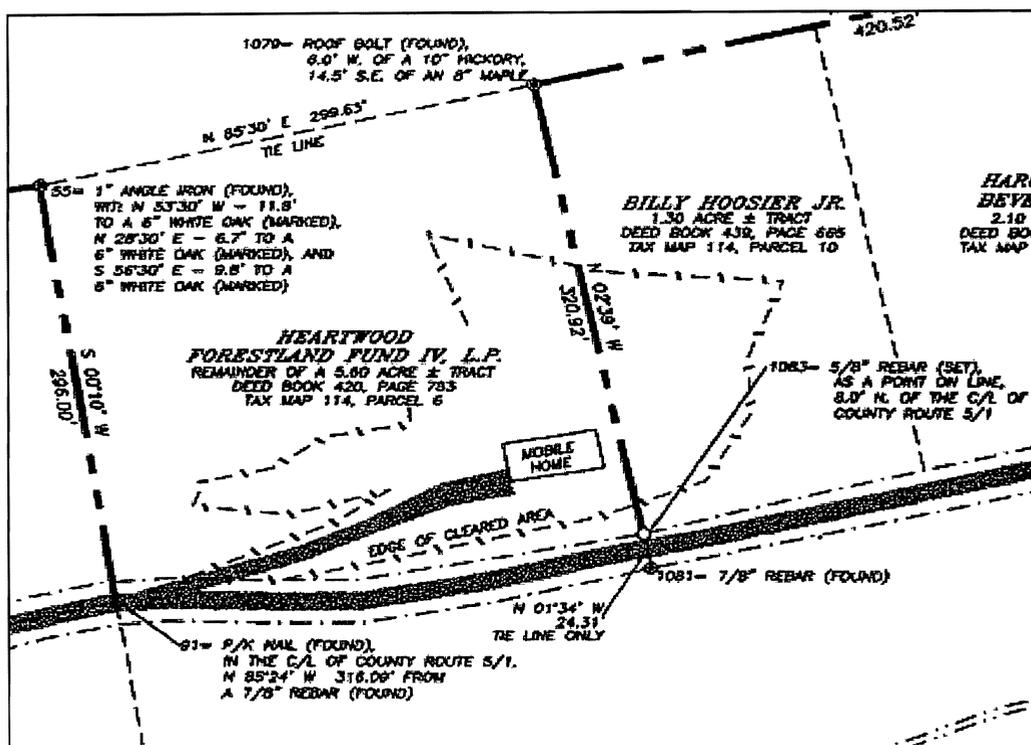
### III. ASSIGNMENTS OF ERROR

- I. The lower court violated the Fifth Amendment to the United States Constitution and Article 9, Section 3, of the Constitution of the State of West Virginia, by ordering Plaintiff-Petitioner Heartwood Forestland Fund IV, LP, to transfer certain of its Wyoming County, West Virginia, property to Defendant-Respondent Billy Hoosier, Jr.
- II. The lower court misapplied this Court's decision in *Somerville v. Jacobs*, 153 W. Va. 613, 170 S.E.2d 805 (1969) when it ordered Plaintiff-Petitioner Heartwood Forestland Fund IV, LP, to transfer certain of its Wyoming County, West Virginia, property to Defendant-Respondent Billy Hoosier, Jr.
- III. The lower court erroneously concluded that this Court has not relied upon Restatement principles with respect to the proper remedy in the context of mistaken improvements to the land of another, and ordered a forced exchange of property that has no basis in West Virginia law or any Restatement principle.
- IV. The lower court's September 26, 2014, "Order Granting Defendant's Motion for Judgment as a Matter of Law on Equitable Principles" relies upon "facts" which have no evidentiary basis in the record.
- V. The lower court abused its discretion in this matter by repeatedly delaying a resolution of this matter, and, ultimately, by failing to adhere to West Virginia Trial Court Rule 24.01 relating to the submission of proposed orders.

### IV. STATEMENT OF THE CASE

Defendant-Respondent Billy Hoosier, Jr., ("Mr. Hoosier") purchased certain real property located in McGraws, Wyoming County, West Virginia, to use as a site for his manufactured home. [AR 39-42.] During his deposition, Mr. Hoosier identified the deed conveying this property to him, and stated that he never had the property surveyed before moving in and setting up his manufactured home. [AR 45-47, 52-61.] Mr. Hoosier is the sole grantee listed on the deed to this parcel, and is the sole grantor of a deed of trust on this parcel. [AR 52-61.] Despite never engaging anyone to conduct a survey, Mr. Hoosier nevertheless "dozed" and "leveled" a "bench" for his manufactured home, and constructed a road leading to the bench. [AR 44.] The company that installed the manufactured home used the bench that Mr. Hoosier previously leveled and dozed for the site for the manufactured home. [AR 44.]

Plaintiff-Petitioner Heartwood Forestland Fund IV, LP (“Heartwood”), is the record owner of the parcel on which the manufactured home was installed. [AR 62.] Heartwood acquired this smaller parcel on March 31, 2004, as part of a complex, larger land transfer that involved tens of thousands of acres. [Id.] Accordingly, to be sure of its boundary lines, Heartwood engaged the services of a professional surveyor who prepared a plat of the relevant parcels. [AR 63-66.] The following excerpt from the plat unequivocally illustrates the placement of Mr. Hoosier’s manufactured home on Heartwood’s property:



[AR 63.] Mr. Hoosier stipulated that his manufactured home trespasses on Heartwood’s property. [AR 119.]

Once Heartwood became aware that Mr. Hoosier was trespassing on its property, it contacted him and explained that the property was needed for ingress to and egress from its timber operations. [AR 47-49, 176-77.] Heartwood inquired about the feasibility of using another route. [Id.] To date, the lot on which Mr. Hoosier continues to trespass remains the only viable route to Heartwood’s other property, on which it intends to manage and harvest timber. [Id.] Mr. Hoosier’s

trespass devalues Heartwood's other property by prohibiting its business use, and forces Heartwood to pay taxes for property it cannot utilize. [*Id.*] Heartwood has no interest in keeping, and has no need or use for, Mr. Hoosier's manufactured home. [*Id.*] Heartwood offered to assist Mr. Hoosier in moving his manufactured home from its property. [*Id.*] Mr. Hoosier declined this offer, prompting Heartwood to file the underlying lawsuit on March 4, 2010. [AR 1-5.]

Mr. Hoosier's deposition was taken on June 20, 2011. [AR 18.] Mr. Hoosier never served any discovery, noticed or took any depositions, or filed subpoenas upon third parties. On August 26, 2011, Heartwood moved the lower court for summary judgment. [AR 22-66.] Mr. Hoosier did not file a response to the motion for summary judgment. Rather, at the hearing, counsel for Mr. Hoosier made an oral motion for leave to file an amended answer and third party complaint, but in no way challenged Heartwood's motion for summary judgment. [AR 77.] By order dated November 14, 2011, the lower court granted Mr. Hoosier twenty (20) days' leave to file an amended answer and third party complaint, and held the motion for summary judgment in abeyance. [*Id.*]

Mr. Hoosier's time to file an amended answer and third party complaint came and passed without any new pleadings. On December 12, 2011, Heartwood filed and served a new notice of hearing on its motion for summary judgment. [AR 79.] The notice scheduled Heartwood's motion for summary judgment for January 18, 2012.

At the January 18, 2012, hearing, the lower court heard argument from counsel for Heartwood on its motion without any additional filings from Mr. Hoosier. Rather than contest summary judgment, Mr. Hoosier renewed his request for leave to file an amended answer and third party complaint. [AR 96.] The Court again granted Mr. Hoosier's request for leave to file an amended answer and third party complaint, giving him thirty (30) days to file and serve the same. [*Id.*] The next day, the lower court entered its January 19, 2012, "Order Denying Motion for Summary Judgment." [AR 83-85.] Mr. Hoosier never filed an amended answer. Nor did he pursue a third party action.

On April 10, 2012, Heartwood filed a Petition for Writ of Prohibition, captioned *State ex rel. Heartwood Forestland Fund, IV, LP v. McGraw*, No. 12-0445. Therein, Heartwood highlighted its perceived legal and factual flaws in the lower court's denial of summary judgment in favor of Heartwood. This Court ordered respondents to file a response on or before May 1, 2012. [AR 99.] Mr. Hoosier did not file a response. On May 23, 2012, this Court refused Heartwood's requested writ. [AR 100.]

Heartwood noticed a status and scheduling conference for November 7, 2012, before the lower court. [AR 101.] On November 13, 2012, the lower court entered a scheduling order, setting trial and a pre-trial conference for June 12, 2013. [AR 105-106.] On June 10, 2013, Heartwood filed its pre-trial information sheet with the Court, but Mr. Hoosier did not do so. [AR 107.]

On June 11, 2013, the lower court, *sua sponte*, generally continued the pre-trial and trial dates established by its prior scheduling order. [AR 116.] After the lower court generally continued the matter without any other direction, Heartwood contacted the lower court's secretary on January 13, 2014, with the intention of getting the matter back on track. [AR 198.] On March 5, 2014, the lower court entered a Scheduling Order, setting a pre-trial conference for May 7, 2014. [AR 117.] On May 7, 2014, counsel for the parties met with the Hon. Warren R. McGraw, Jr., in chambers, and filled out a pre-trial conference order that was later entered by the lower court. [AR 119-121.] At that time, counsel for Mr. Hoosier noted his intention to file a motion, and, on May 14, 2014, Mr. Hoosier filed his "Motion for Judgment as a Matter of Law." [AR 122-26.]

On May 28, 2014, the parties appeared before the lower court for oral argument on Defendant's pending "Motion for Judgment as a Matter of Law." At the end of oral argument, the lower court ordered the parties to provide proposed orders on or before June 20, 2014. [AR 250.] In accordance with those directions, Heartwood provided the lower court with its proposed "Order Denying Defendant's Motion for Judgment and Awarding Summary Judgment in Favor of Plaintiff" on June 20, 2014. [AR 200-212.]

Three (3) months after the date on which the lower court required submission of proposed orders from the parties, on September 19, 2014, Mr. Hoosier provided the lower court with his “Order Granting Defendant’s Motion for Judgment as a Matter of Law on Equitable Principles.” His order was two (2) pages in length, misstated the record, and misapplied a single case. By contrast, Heartwood’s timely proposed order recounted the undisputed facts, and provided sound legal reasoning for the lower court’s review.

Counsel for Heartwood did not receive Mr. Hoosier’s proposed order in their office until September 22, 2014. Thus, under Rule 24.01(c) of the West Virginia Trial Court Rules, Heartwood had five (5) days from “receipt” of the proposed order to file a notice of its objections - by Monday, September 29, 2014. Accordingly, Plaintiff-Petitioner filed its objections with the lower court on September 29, 2014. [AR 215-19.]

Unbeknownst to Heartwood and three (3) days prior to the expiration of the time to note its objections, the lower court improvidently entered Mr. Hoosier’s proposed order, and thereby denied Heartwood the ability to voice its opposition to the proposed order. A review of the Certified Docket from this matter does not even indicate that Mr. Hoosier properly noticed his submission of a proposed order to opposing counsel. [AR 253 at ll. 45-51.]

This appeal followed.

## V. SUMMARY OF ARGUMENT

This could have been a quickly resolved, factually unsophisticated trespass case. Heartwood is an owner of land and timber reserves in Wyoming County, West Virginia. The specific tract of land at issue in this matter serves as the sole means of ingress and egress for certain timber reserves owned by Heartwood in Wyoming County. Mr. Hoosier purchased an adjoining tract of land which he intended to use as a site for a manufactured home. But without having a survey performed, Mr. Hoosier cleared and leveled the site where his manufactured home was installed. Mr. Hoosier’s manufactured home therefore mistakenly rests on land owned by Heartwood.

In the parties' agreed pretrial order, Mr. Hoosier stipulated to his trespass. And critically, the unreasonable nature of Mr. Hoosier's mistake - i.e. the lack of any effort to determine his property line - is undisputable. He testified in his deposition that he did nothing to ascertain the proper boundary lines before clearing the site for his manufactured home. Heartwood has no use for, and does not want, Mr. Hoosier's manufactured home. But it does ask that Mr. Hoosier remove his manufactured home from its property - a remedy achievable in fact and provided for by law.

With years to consider the undisputed facts and apply the law, the lower court ultimately gave Mr. Hoosier title to Heartwood's property. As the United States Supreme Court unequivocally stated, "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477, 125 S. Ct. 2655, 2661, 162 L. Ed. 2d 439 (2005). But that is precisely what the lower court ordered. Had the lower court upheld Heartwood's constitutional property rights, followed this Court's precedent and Restatement principles, that absurd result and this appeal could have been obviated. Worse still, the lower court could have done so at a much earlier time - the facts never changed in the many years Heartwood diligently sought to vindicate its property rights.

## VI. STATEMENT REGARDING ORAL ARGUMENT

This case merits argument per Rule 20 of the West Virginia Rules of Appellate Procedure for at least two (2) reasons.

First, the lower court ordered a private condemnation of property in violation of the United States Constitution and the Constitution of the State of West Virginia. As this Court previously recognized, "The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it." *Cantley v. Morgan*, 51 W. Va. 304, 41 S.E. 201, 203 (1902). Accordingly, under Rule 20(a)(3), the parties should have the

opportunity to advocate proposed syllabus points updating this State's jurisprudence regarding the unconstitutional exercise of judicial power in the context of forced exchanges of private property.

Second, the lower court erroneously concluded that this Court has not previously relied upon Restatement principles in determining the appropriate remedy for mistaken improvements to another's land. In *Realmark Developments, Inc. v. Ranson*, 208 W. Va. 717, 721, 542 S.E.2d 880 (2000), this Court specifically relied upon the Restatement (First) of Restitution in determining the restitutionary interest of an improver who made a mistake of law. While this Court addressed a mistake of fact in *Somerville v. Jacobs*, 153 W. Va. 613, 613, 170 S.E.2d 805 (1969), the parties should have the opportunity to advocate proposed syllabus points updating this State's jurisprudence to conform with the Restatement view on remedies for improvements made on the property of another due to a mistake of fact.

## VII. STANDARD OF REVIEW

This Court reviews a circuit court's decision to grant summary judgment under a *de novo* standard. Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Accordingly, this Court applies the same standards initially applied by the circuit court to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). Summary judgment is mandated when the record, viewed most favorably to the non-moving party, demonstrates no genuine issues of material fact and the moving party's entitlement to judgment as a matter of law. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996). Here, the parties stipulated that Mr. Hoosier's manufactured home trespasses on property owned by Heartwood. Accordingly, this Court's role is to determine the appropriate remedy on an undisputed factual record.

Further, this Court's role includes determining "whether the stated reasons for the granting of summary judgment by the lower court are supported by the record." *Nestor v. Bruce*

*Hardwood Flooring, L.P.*, 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999) (quotations and citation omitted) (emphasis added). Here, there are at least three “facts” the lower court included in its order that have no evidentiary basis. First, the lower court found that Mr. Hoosier’s mistake was done in “good faith.” It was not. Second, the lower court made two factual misstatements when it found that Mr. Hoosier “properly argued that only one resident of the structure allegedly erected upon the land of [Heartwood] in this matter.” Nothing about Mr. Hoosier’s trespass is “alleged,” and Mr. Hoosier is the only record owner his parcel of land and of the manufactured home. And third, the lower court found that there was another avenue of ingress and egress for Heartwood. Again, that has no basis in the record. This Court should review the record to determine whether these factual findings were supported.

### VIII. ARGUMENT

***A. The lower court violated the United States Constitution and the Constitution of the State of West Virginia when it ordered a private condemnation of Heartwood’s property.***

This case concerns an undisputed trespass by Mr. Hoosier on property owned by Heartwood. Any fault for that trespass rests solely with Mr. Hoosier, who admittedly failed to have a survey of his property performed and who dozed and leveled the bench on Heartwood’s property for the site of his manufactured home. Rather than require Mr. Hoosier to remove his manufactured home from Heartwood’s property - which he conceded was possible [AR 246 at ll. 20-23] - the lower court simply ordered Heartwood to convey its property to Mr. Hoosier. No case law supports that result, and, in fact, it is an unconstitutional taking of Heartwood’s property.

In 1902, this Court recognized the very principle illustrating the absurdity of the lower court’s order:

The principle of the case is that where one by mistake puts improvements on another’s land, mistaking it for his own, equity will, in a proper case, compel the latter to sell and convey the land to the former at a price to be fixed by the court, unless he will consent to pay for the improvements. The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to

it is a violation of constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it.

*Cautley v. Morgan*, 51 W. Va. 304, 41 S.E. 201, 203 (1902). This is not a “proper case” for compelling Heartwood to transfer its property. It is undisputed that Heartwood is entirely innocent of any “actual or implied culpability.” Heartwood is not attempting to take Mr. Hoosier’s manufactured home. It has no interest in Mr. Hoosier’s manufactured home, but has every interest in its own property for future business uses. Heartwood played no role in the placement of Mr. Hoosier’s manufactured home on its property. On the other hand, Mr. Hoosier undertook no efforts to ensure that his manufactured home was being placed on his property. And, Mr. Hoosier is capable of moving his manufactured home back onto his property.

Based upon these “equities,” there is simply no law or equitable principle which granted the lower court such unfettered power to take Heartwood’s property and give it to Mr. Hoosier. In fact, it was just this result that Justice Caplan warned of in *Somerville*:

What of the property owner’s right? The solution offered by the majority is designed to favor the plaintiff, the only party who had a duty to determine which lot was the proper one and who made a mistake. The defendants in this case, the owners of the property, had no duty to perform and were not parties to the mistake. Does equity protect only the errant and ignore the faultless? Certainly not.

It is not unusual for a property owner to have long range plans for his property. He should be permitted to feel secure in the ownership of such property by virtue of placing his deed therefor on record. He should be permitted to feel secure in his future plans for such property. However, if the decision expressed in the majority opinion is effectuated then security of ownership in property becomes a fleeting thing. It is very likely that a property owner in the circumstances of the instant case either cannot readily afford the building mistakenly built on his land or that such building does not suit his purpose. Having been entirely without fault, he should not be forced to purchase the building.

In my opinion for the court to permit the plaintiff to force the defendants to sell their property contrary to their wishes is unthinkable and unpardonable. This is nothing less than condemnation of private property by private parties for private use. Condemnation of property (eminent domain) is reserved for government or such entities as may be designated by the legislature. Under no theory of law or equity should an

individual be permitted to acquire property by condemnation. The majority would allow just that.

*Somerville*, 153 W. Va. 613, 613, 170 S.E.2d 805 (1969) (Caplan, J. dissenting). Surely the majority opinion in *Somerville* is distinguishable from this case, and supports Heartwood's position, as will be explained below. But the essence of Justice Caplan's dissent applies directly to this instant matter. Heartwood should feel secure in its ownership of the parcel at issue, and should be entitled to use that property as it desires.

As the Supreme Court of the United States explained with respect to the Fifth Amendment, "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477, 125 S. Ct. 2655, 2661, 162 L. Ed. 2d 439 (2005). And, as this Court explained with respect to Article 9, Section 3, of the Constitution of the State of West Virginia, "Certainly it requires very little citation of authority to say that private property cannot be taken for private use." *State ex rel. McMillion v. Stahl*, 141 W. Va. 233, 241-42, 89 S.E.2d 693, 699 (1955); *see also Varner v. Martin*, 21 W. Va. 534 (1883).

These fundamental state and federal constitutional provisions safeguard property rights among others. The judicial power of the State of West Virginia, as exercised by its courts, should not be so extended as to allow the transfer of property from one party to another - certainly not on the "equities" of this case and without any legal basis. Accordingly, the lower court violated these constitutional safeguards, ignored any sober equitable analysis under *Cautley* or *Somerville*, and gave Mr. Hoosier title to Heartwood's property. This Court should reverse that improper decision.

***B. The lower court misapplied this Court's decision in Somerville by ignoring critical distinguishing factors between it and the matter sub judice.***

The lower court summarized the essential holding of *Somerville*, but then failed to apply it correctly to the facts of this matter. The order summarized as follows: "where an improver of real estate reasonably believed that he owned the land and acted in good faith when he erected a building

which increased the value of the other's land, the owner of the land was required in equity to pay the value of the improvements." [AR 213.] The actual language from the lone syllabus point of *Somerville* reads in part:

An improver of land owned by another, who through a reasonable mistake of fact and in good faith erects a building entirely upon the land of the owner, with reasonable belief that such land was owned by the improver, is entitled ... to purchase the land so improved upon payment to the landowner of the value of the land less the improvements[.]

Syl, *Somerville*. Thus, reasonableness, good faith, and an "improvement" are all critical aspects of the *Somerville* decision which are absent in this case. Here, it is undisputed that Mr. Hoosier never had any survey performed prior to dozing and leveling the bench on which his manufactured home now rests. Mr. Hoosier's mistake was thus unreasonable, and he could not have dozed and leveled the bench in "good faith." And, Heartwood's property has been devalued by placement of the manufactured home because it prevents its only use to Heartwood - a means of ingress to and egress from its timbering business on adjoining properties. The manufactured home is, from the perspective of Heartwood, a roadblock. Accordingly, *Somerville* is simply not on-point with the facts in this case.

Further analysis of the facts in *Somerville* illustrate why the lower court's result in this matter is unmerited. There, W.J. and Hazel Somerville (the "Somervilles") owned three parcels of land in Parkersburg, West Virginia: lots 44, 45, and 46. William and Marjorie Jacobs (the "Jacobs") owned Lot 47, a parcel of land situated near the Somerville plots. Relying on a faulty surveyor's report, the Somervilles built a warehouse on Lot 47. Fred Engle and Jimmy Pappas (collectively, with the Somervilles, the "plaintiffs") purchased the warehouse from the Somervilles and subsequently leased it to the Parkersburg Coca-Cola Bottling Company ("Coca-Cola"). The Jacobs did not discover that their land had been improved with a warehouse until after Coca-Cola began to use the warehouse. Upon discovering the building, the Jacobs claimed ownership of the building and its fixtures under the theory of annexation. The plaintiffs then filed a case in an attempt to receive equitable relief.

Unlike Mr. Hoosier, the plaintiffs in *Somerville* relied upon a third-party's incorrect survey, meaning their mistake was in "good faith" and that they acted upon a "reasonable" belief when erecting the warehouse on the wrong property. Moreover, the Jacobs actually sought to keep the Coca-Cola warehouse for their own. Heartwood has disavowed any interest in the manufactured home and even offered to assist with its removal.

Again, the lower court's decision ignored the glaring distinguishing facts between this case and *Somerville*, and erroneously awarded title of Heartwood's property to Mr. Hoosier. Indeed, the lower court's entire basis for relief was "equity," which is a completely fact-driven analysis. The fact that the lower court avoided any real comparison of the facts and equities in this case is reversible error.

**C. *The Restatement (Third) of Unjust Enrichment and Restitution provides this Court with guidance as to the proper remedy.***

The lower court seemed unpersuaded that it could rely on Restatement principles to the extent there was no West Virginia case specifically identifying the remedy in this matter:

THE COURT:	The restatement; is that the law?
MR. WEBB:	It is the law inasmuch as there really isn't any law in West Virginia on point, Your Honor.
THE COURT:	Where is that the law?
MR. WEBB:	It is a pronouncement of Uniform Law Commissioners ... restating what the law is.
THE COURT:	Is it some legal expert's opinion of what the law is?
MR. WEBB:	It is the Uniform Commission of Law Examiners.... [E]very state participates in developing what the restatement provisions ought to be, and so it is a recitation of the common law or the equitable principles of unjust enrichment and restitution, and to the extent West Virginia has gaps in its common law treatment of restitution and unjust enrichment, or doesn't have cases that address the nuances of the topic, it would be persuasive authority, Your

Honor, and it would give this Court guidance on how to deal with these issues.

[AR 235.] Despite the lower court's skepticism, this Court has previously relied upon principles embodied in the Restatement, and can do so again in this matter. And, in fact, the Restatement view comports with prior decisions of this Court, and delineates the proper remedy.<sup>1</sup>

West Virginia law recognizes that, in the context of mistaken improvements to the property of another, the hardship for such mistake falls on the party who failed in his or her duty to avoid the mistake:

[In] cases where there was no intentional fault on the part of either, but by the improper action, though unintentional, of one of the parties a mistake was made, whereby one party or the other must suffer a hardship. This being the case, it is held that that party upon whom a duty devolves and by whom the mistake was made should suffer the hardship, rather than he who had no duty to perform, and was no party to the mistake.

*Cautley*, 51 W. Va. 304, 41 S.E. 201, 204. After recognizing that the “hardship” for the mistake should fall on the party with the duty to perform (i.e., Mr. Hoosier), this Court later qualified that position in *Somerville* by limiting the mistaken improver's ability to recover to situations in which he or she acted reasonably.

*Somerville* and *Cautley* therefore contemplate relief for a mistaken improver of another's land, but that relief is not absolute. It is tempered with the principle that equity does not ignore the innocent party and simply favor the errant party, just as Justice Caplan observed: “The defendants in this case, the owners of the property, had no duty to perform and were not parties to the mistake. Does equity protect only the errant and ignore the faultless? Certainly not.” *Somerville*, 153 W. Va. at 635, 170 S.E.2d at 816 (Caplan, J. dissenting). Indeed, *Somerville* expressly requires “reasonableness” and “good faith” on the part of the mistaken improver as a precursor to relief.

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<sup>1</sup> As a threshold matter, it should be noted that Mr. Hoosier never filed a counterclaim of any kind - despite many opportunities to do so.

Like *Cautley* and *Somerville*, the Restatement (Third) of Restitution and Unjust Enrichment (2011) limits the liability of the innocent landowner in Section 2(4) as follows: “Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse.” (Emphasis added). Comment a to Section 10 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) explains when and how the improver’s restitutionary interest is limited where the owner of the affected property is an innocent recipient of the mistaken improvement:

Even where a remedy imposes a forced exchange on the property owner, the extent of the resulting hardship is largely a function of the owner’s reasonable expectations regarding the property. **A judgment requiring the owner either to pay for an improvement or to sell the property at its unimproved value would probably be unacceptably harsh in the case of property occupied by the owner, or property as to which the owner had formed definite expectations of future use.**

(Emphasis added). Notably, that is precisely the situation at hand - Heartwood has definite plans for the use of its property as a means of ingress to and egress from its timbering business. It was thus “unacceptably harsh” in terms of the Restatement, or even “unconstitutional” per *Cautley*, to require Heartwood to transfer its property to Mr. Hoosier.

Further, comment e to Section 10 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) explains the importance of the reasonableness of the mistake and the exercise of due care by the mistaken improver:

Finally, the concepts of good faith, notice, and negligence all appear to combine in decisions that deny relief because of *constructive notice* on the part of a mistaken improver. The same combination of ideas underlies decisions that require that the improver have made a ‘reasonable mistake,’ or that the improver’s claim of title have been ‘honest and reasonable.’ Whatever the form of words, the legal objective is to deny relief to a party who neglected a reasonable opportunity to avoid the nonconsensual transfer that is the basis of the restitution claim.

(Emphasis added). Like *Somerville*, the Restatement view notes that a party who acts unreasonably should be denied relief - not given a windfall result as in this case. Surely it would turn property law on

its head to allow individuals to put their heads in the sand as Mr. Hoosier did, and blindly install a manufactured home on another's property, only then to claim ownership of the innocent landowner's property.

To the extent that Mr. Hoosier's manufactured home is deemed immovable - which it isn't - the Restatement is again instructive. Section 50(2) of the Restatement (Third) of Restitution and Unjust Enrichment (2011) identifies the measure of the restitutionary interest where an innocent recipient receives an unrequested, nonreturnable benefit:

If nonreturnable benefits would be susceptible of different valuations by the standards identified in § 49(3), the liability of an innocent recipient is determined as follows:

(a) Unjust enrichment from unrequested benefits is measured by the standard that yields the smallest liability in restitution.

(b) Unjust enrichment from requested benefits is measured by their reasonable value to the recipient. Reasonable value is normally the lesser of market value and a price the recipient has expressed a willingness to pay.

(c) Reasonable value may be measured by a more restrictive standard if the validity of the recipient's assent is in question (§ 49(3)(d) ); if the claimant has not performed as requested (§ 36); or if prevailing prices include an element of profit that the court decides to withhold from the claimant.

(3) The liability in restitution of an innocent recipient of unrequested benefits may not leave the recipient worse off (apart from the costs of litigation) than if the transaction giving rise to the liability had not occurred.

(4) The liability in restitution of an innocent recipient of unrequested benefits may not exceed the cost to the claimant of conferring the benefits in question, supplemented when appropriate by the rules of § 53.

(5) An innocent recipient may be liable in an appropriate case for use value or proceeds, but not for consequential gains (§ 53).

(Emphasis added). Indeed, under comment c to Section 50, the drafters of the Restatement make clear that an improver has the least restitutionary interest as against an innocent recipient of an unrequested, nonreturnable benefit as follows:

*c. Unrequested benefits.* The sharpest contrasts between competing measures of enrichment appear in cases of unrequested, nonreturnable benefits, such as services conferred by mistake. A benefit that is costly to confer, with a substantial market value, may be of no value at all in advancing the purposes of the recipient. See § 49, Comment *d*. In such cases the unjust enrichment of an innocent recipient is ordinarily calculated by whichever of the available measures—as identified in § 49(3)—yields the smallest liability in restitution (§ 50(2)(a)). Because “value to the recipient” is usually the most restrictive measure of enrichment, it is the customary measure of the restitutionary liability of an innocent recipient of unrequested, nonreturnable benefits; though in particular contexts the rule of § 50(2)(a) yields the formula “cost or value, whichever is less.”

Accordingly, Mr. Hoosier in this case would effectively be entitled to the smallest amount of restitution possible - the value of the manufactured home to Heartwood, which is effectively nil.

However, to the extent Mr. Hoosier’s manufactured home is movable - which he has conceded is possible - comment a to Section 10 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) indicates the presumptive availability of “specific restitution,” i.e. return of the benefit to the improver’s own lot: “Where specific restitution is feasible without harm to the defendant’s property, restitution is presumptively available.” There is nothing in the record that could vitiate Heartwood’s entitlement to a presumption that Mr. Hoosier’s manufactured home is movable - especially where he has conceded the same.

Thus, the lower court should have found instructive the aforementioned Restatement views on restitutionary relief. Again, there is no question that Heartwood is an innocent recipient of an unrequested benefit. To the extent that Mr. Hoosier suggests that his manufactured home is nonreturnable, i.e. immovable, his restitutionary interest would be the least possible - to protect the innocent landowner who did nothing wrong. Accordingly, Mr. Hoosier would be required to sell his manufactured home to Heartwood for nothing. This is so because the value of the improvement is

measured from the viewpoint of the innocent landowner, and, here, there simply is no value for Heartwood in retaining Mr. Hoosier's manufactured home.

But everyone knows that is not Heartwood's requested result, or even the right result. Double-wide manufactured homes are routinely moved. Per the Restatement, this Court should reverse the lower court's decision and order specific restitution, i.e. the removal of Mr. Hoosier's manufactured home from Heartwood's property - at his own expense, after having declined Heartwood's prior offer of assistance.

***D. The lower court's order relied on facts which have no basis in the record.***

As this Court is aware, its role as a reviewing Court "is to determine whether the stated reasons for the granting of summary judgment by the lower court are supported by the record." *Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999) (quotations and citation omitted) (emphasis added). Here, there are at least three "facts" that the lower court simply conjured without any basis in the record.

First, the lower court suggests that Mr. Hoosier's mistake was made in "good faith." Again, nothing in the record that suggests that Mr. Hoosier acted in "good faith" when he dozed and leveled the bench for his manufactured home - without ever having a survey performed.

Second, the lower court found that Mr. Hoosier "properly argued that only one resident of the structure allegedly erected upon the land of Plaintiff was sued in this matter." [AR 213.] This quote actually contains two misstatements of the record. First, and most egregiously, the lower court stated that Mr. Hoosier's trespass is "alleged." This is not true. The parties stipulated to Mr. Hoosier's trespass. Moreover, it may be true that only one "resident" was sued in this matter, but Mr. Hoosier is the sole owner of the lot on which he should have erected his manufactured home and the sole owner of the manufactured home itself.

And third, the tract on which Mr. Hoosier's manufactured home continues to trespass serves as the sole method of ingress and egress for Plaintiff-Petitioner's timbering business. In fact, the

genesis of the parties' lawsuit is that the manufactured home - now, for a period of nearly five (5) years - has prevented Heartwood from engaging in its business operations. Despite a record which unequivocally states otherwise, the lower court found that "exhibits submitted (a map), clearly show access to the same tract only a few hundred feet away located off the same public road which services the area." The testimony of Heartwood's representative, Mr. Craig Kaderavek, clearly indicated that Heartwood reviewed and found no other possible means of ingress and egress. [AR 176-78.]

Accordingly, this Court should reverse the lower court's decision as it relied upon facts which have no basis in the record.

***E. This lower court abused its discretion in failing to bring this matter to a timely resolution and in entering a proposed order before Heartwood had an opportunity to note its objections under Rule 24.01 of the West Virginia Trial Court Rules.***

As this Court is aware, "judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission." Syl. pt. 1, in part, *State ex rel. Patterson v. Aldredge*, 173 W. Va. 446, 317 S.E.2d 805 (1984). Numerous sources of authority illustrate this affirmative duty.

For example, Article III, Section 17 of the West Virginia Constitution provides, "justice shall be administered without sale, denial or delay." Rule 1 of the West Virginia Rules of Civil Procedure provides that they "shall be construed to secure the just, speedy, and inexpensive determination of every action." Canon 3B(8) of the Code of Judicial Conduct provides, "A judge shall dispose of all judicial matters promptly, efficiently, and fairly." Section 2.50 of the American Bar Association Standards Relating to Court Delay Reduction, provides that "the court, not the lawyers or litigants, should control the pace of litigation." And, Rule 16.01 of the West Virginia Trial Court Rules sets forth the duty of judges to issue timely decisions:

[T]he Supreme Court of Appeals has determined that the expeditious processing and timely disposition of cases by circuit courts are essential to the proper administration of justice. Accordingly, it directs circuit courts and their officers to comply with these rules, which provide time standards for the processing of all cases except for those governed by

statute or in which the circuit court finds, on the record, that extraordinary circumstances exist for exemption from these standards.

Five (5) years from the filing of this suit, Heartwood continues to seek vindication of its rights - twice now before our State's highest Court. To the extent that Heartwood had any procedural due process rights for an expedient result in this matter under Article III, Section 17 of the West Virginia Constitution or elsewhere, the same have been violated by repeated delays in this simple, undisputed trespass matter. A review of the procedural history in this case paints a striking portrait of Heartwood being denied multiple opportunities for bringing this matter to a close, while giving Mr. Hoosier multiple chances to take actions he never took.

Further, the lower court's entry of Mr. Hoosier's proposed order disregarded procedural mechanisms governing the submission and entry of proposed orders under Rule 24 of the West Virginia Trial Court Rules. On May 28, 2014, the parties appeared before the lower court for oral argument on Mr. Hoosier's pending "Motion for Judgment as a Matter of Law." At the end of oral argument, the lower court ordered the parties to supply the Court with proposed orders on or before June 20, 2014. In accordance with the lower court's directions, Heartwood provided its "Order Denying Defendant's Motion for Judgment and Awarding Summary Judgment in Favor of Plaintiff" on June 20, 2014. Under Rule 24.01(c), Mr. Hoosier had five (5) days to file objections, but he did not do so. Nothing in the record indicates that the lower court considered Heartwood's uncontested proposed order at that time, despite a mandate to do so under Rule 24.

Three (3) months after the date the Court required submission of proposed orders from the parties, on September 19, 2014, Mr. Hoosier provided the lower court with his "Order Granting Defendant's Motion for Judgment as a Matter of Law on Equitable Principles." Counsel for Heartwood did not receive this proposed order in their office until September 22, 2014. Thus, under Rule 24.01(c), Heartwood had five (5) days from "receipt" of the proposed order to file a notice of its

objections - by Monday, September 29, 2014. Accordingly, Heartwood filed its objections with the Court on September 29, 2014.

Three (3) days prior to the expiration of Heartwood's time to note its objections to the proposed order, the lower court improvidently entered Mr. Hoosier's proposed order, and thereby denied Heartwood the ability to voice its opposition.

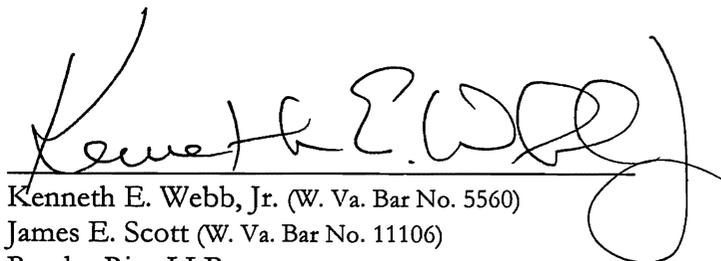
This Court specifically opined on why Rule 24.01 was adopted: "This rule, like the Rules of Civil Procedure, was designed to help secure just, speedy, and inexpensive determinations in every case. Hopefully, by adopting this rule, delays like the one in the case *sub judice* will no longer occur." *Kiser v. Caudill*, 210 W. Va. 191, 198, 557 S.E.2d 245, 252 (2001). Nothing in this matter indicates that the lower court's ultimate entry of Mr. Hoosier's proposed order - after nearly five (5) years - was just, speedy, or inexpensive.

## IX. CONCLUSION

Litigants in the State of West Virginia should feel as secure in their property holdings as they should in the swift administration of justice. This Court should reverse the decision of the Circuit Court of Wyoming County, and order that Defendant-Respondent, Mr. Billy Hoosier, finally remove his manufactured home from property owned by Plaintiff-Petitioner, Heartwood Forestland Fund IV, LP.

Respectfully submitted.

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By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEARTWOOD FORESTLAND FUND IV  
LIMITED PARTNERSHIP, a North Carolina  
limited partnership,

*Petitioner,*

v.

BILLY HOOSIER, JR.,

*Respondent.*

Appeal No. 14-1110

(Wyoming County Civil Action No. 10-C-34)

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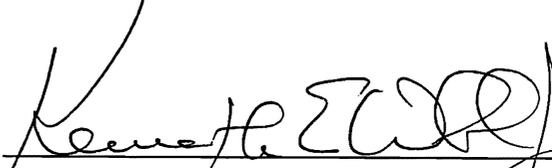
CERTIFICATE OF SERVICE

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I, Kenneth E. Webb, Jr., counsel for Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing *Brief of Petitioner* by U.S. Mail upon:

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