

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

PETITIONER,

v.

**APPEAL NO 14-1110
(Wyoming County No. 10-C-34)**

BILLY HOOSIER, JR.

RESPONDENT.

RESPONDENT'S BRIEF

SUBMITTED BY:

**RESPONDENT'S COUNSEL
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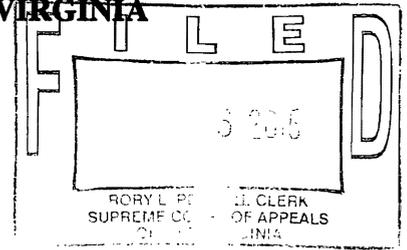


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TABLE OF AUTHORITIES

Somerville v. Jacobs, 153 W.Va. 613, 170 S.E. 2d 150 (1969)

Pages 2, 3, 4, 5

STATEMENT OF FACT

Respondent takes issue with two essential “facts” claimed in Petitioner’s Brief and argument. They are as follows: (1) Petitioner asserts that Billy Hoosier, Jr., did not act in “good faith” in the erroneous placement of his mobile home, (2) Petitioner asserts that Brittany Hoosier, Respondent’s wife, has no interest (they did not sue her for trespass or ejection - in fact, they did not sue her at all).

(1) Billy Hoosier did act in good faith. He bought land for the sole purpose of putting his family home upon it. **App, 159**. He gave a deposition and testified that he dozed a driveway and bench for the home to be placed. **App, 164** Good faith is proven by the following question and answer:

Q: When you cut the bench in, did you think you were putting it on your property?

A: Yes, I did.

See, App at 165, lines 9-11

That is all that is required for “good faith”. There is no allegation that Respondent intentionally trespassed. In fact, he relied to his great potential detriment on the belief that he was on his own property by dozing, preparing the site, and ultimately placing his home and having a permanent foundation placed under it. **See, App at 166 (permanent foundation)**. Lastly, when confronted with the survey, he admitted the accidental encroachment. **App at 156**.

(2) As the Respondent argued to the Circuit Court, Brittany Hoosier, whom the Petitioner did not sue and who the Petitioner seeks merely to ignore, is “. . . the elephant hanging in the room.” **App at 248, line 5.** Respondent concluded with a question for the Petitioner, “What do you do with Brittany Hoosier, who owns this home every but as much as Billy Hoosier?”¹ **App at 248, line 6-7.** Petitioner offered nothing in response to that question. **App at 248.**

SUMMARY OF ARGUMENT

The lower court properly applied Somerville v. Jacobs, 153W.Va 613, 170 S.E. 2d 150 (1969). The Petitioner relies almost exclusively on the dissent in that case. The law, however, in West Virginia, is the majority decision. The Court properly relied on it. In response to the same argument Petitioner urges in this appeal that the Restatement should control West Virginia jurisprudence, the Circuit Court correctly ruled that Somerville is the law in West Virginia. Applying that law, the Circuit Court’s decision was correct. And, the Court correctly found that Respondent’s error was in good faith.

Further, the Court correctly found that there are other persons residing on the encroachment, who have property rights to the home, but who were not made parties to this action. **App at 214.**

STATEMENT CONCERNING ORAL ARGUMENT

The law applying to this case is 35 years old. There is no need for oral argument, and this matter is appropriate for memorandum decision.

¹ The Hoosiers bought the house and are paying for it during their marriage. It is marital property.

ARGUMENT

“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 recover the value of the improvements from the landowner and to a lien upon such property which may be sold to enforce the payment of such lien, or, in the alternative, to purchase the land so improved upon payment to the landowner of the value of the land less the improvements . . .” *Syllabus, Somerville vs. Jacobs*, 153 W.Va 613, 170 S.E.2d 805 (1969) (emphasis added).

The Respondent’s home was accidentally affixed, by permanent foundation, to Petitioner’s real property. The Circuit Court was guided in its determination of this issue by the case of Somerville v. Jacobs, in which a warehouse of accidently constructed on an adjoining property owner’s lot. In this case, the Respondent accidently placed his modular home on permanent foundation on the Petitioner’s property, doing so in the good faith belief that he was placing his home on his own lot, purchased for that sole purpose. **App at 165.**

The Circuit Court’s reliance was on the majority opinion issued in Somerville, unlike the Petitioner herein who relies only on the dissent. The Circuit Court, when urged by Petitioner to abandon the holding in Somerville and rely instead on the Restatement, heard this argument from Respondent, which was evidently compelling to the Court.

“In this particular case, there aren’t any cases in West Virginia that have addressed Illustration 11² (Restatement of Restitution). If there were, we would have been cited to

² An argument made by Petitioner that the Restatement of Restitution was better authority than the decisions of the Supreme Court, in particular, Somerville.

those cases. **The law in the State of West Virginia is as it have been for these past 35 years expressed in Somerville versus Jacobs, which actually goes into some length to address various equitable issues that it saw in other courts. So it wasn't just in a vacuum. The Supreme Court at that time made a survey of the law, which is contained in that opinion."**

App at 247-9. (Parenthetical Supplied) (Bold Type added for emphasis).

The Petitioner urges that Somerville does not apply, but it does. And this Respondent argues that the equities are far more troublesome here than in the simple case of a warehouse. This case involves a house in which people live that has a permanent foundation.

Lastly, the lower court was correct that Petitioner filed maps of survey showing that the Respondent's actual lot is contiguous to the real estate which Petitioner seeks to access. See, App at 214. Petitioner's Brief in this Appeal shows that map as well, and it is apparent from that map that the Respondent owns property contiguous not only to the lot at issue herein, but also to the Petitioner's other real estate upon which Petitioner intends to manage and harvest trees. Respondent has offered to exchange properties, thereby allowing access to the timber land. Recall also that this matter has not been tried on facts. Respondent will assert, if a trial on facts is ordered, that there are other access points to Petitioner's timber which already exist. (This is admittedly not developed in the record).

CONCLUSION

In West Virginia, the law of the land is Somerville v. Jacobs, in which the various equitable issues which may arise from an accidental construction on another's real property are

well surveyed and analyzed. The remedy ordered by the lower court derives directly from the syllabus of the Somerville decision.

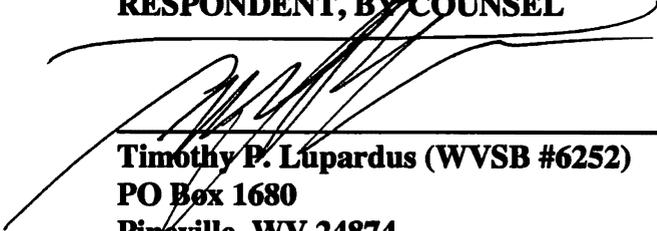
The Court's ruling is proper, based upon the Somerville decisions.

Ejectment is no remedy where the Petitioner did not even sue all the proper parties, and their joinder was mandatory on these facts.

The Petitioner's assertion that this is a private condemnation is incorrect. It is simply an equitable work through of a condition which occurred by accident.

This Court should not reverse or remand.

**RESPECTFULLY SUBMITTED
RESPONDENT, BY COUNSEL**



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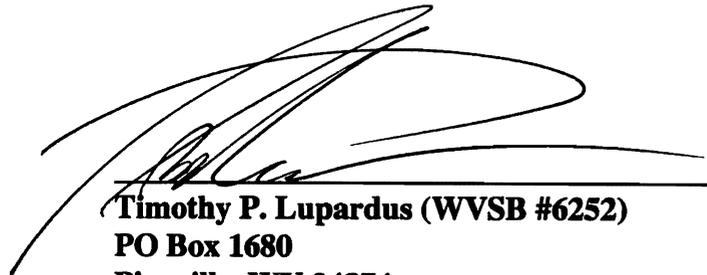
RESPONDENT.

CERTIFICATE OF SERVICE

I, Timothy P. Lupardus, hereby certify that the foregoing **RESPONDENT'S BRIEF** was served upon the Petitioner by placing a true copy thereof into the United States mail, postage prepaid, addressed to counsel of record as follows:

Kenneth E. Webb, Esq.
Bowles Rice LLP
PO Box 1386
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on this the 6th day of April 2015.



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