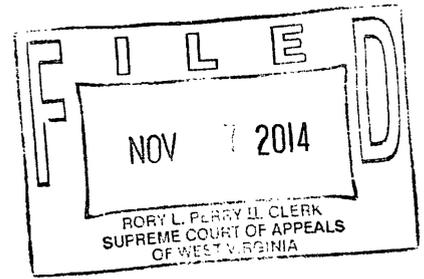


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DONALD E. COTTLE  
PETITIONER

Vs.)            No. 14-0898

MARY DAVIS  
RESPONDENT

Appeal From a final order  
of the Circuit Court of Webster County  
Judge Jack Alsop  
Case #13-P-20

Petitioner's Brief

Donald Cottle   
P.O. Box 1028  
Ceredo, WV 25507  
(304) 617-1042

(1)

## **TABLE OF CONTENTS**

- 1. TABLE OF AUTHORITIES**
- 2. ASSIGNMENT OF ERRORS**
- 3. STATEMENT OF CASE**
- 4. SUMMARY OF ARGUMENT**
- 5. STATEMENT REGARDING ORAL ARGUMENT**
- 6. ARGUMENT**
- 7. CONCLUSION**
- 8. CERTIFICATE OF SERVICE**

## **TABLE OF AUTHORITIES**

### **Cases**

*Allemong*, 178 W. Va. at 606, 363 S.E.2d at 492

*Blair v. Maynard* 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984)

*Dillon v. Egnor* 188 W.Va. 221, 227, 423 S.E.2d 624, 630 (1992)

*Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915)

*Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921).

*Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937).

*Waite v. Civil Servo Comm'n*, 161 W.Va. 154, *Syllabus*  
Pt. 1, 241 S.E.2d 164 (1977).

*Wallace v. St. Clair*, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962)." Syl. pt. 2, *Allemong v. Frenzel*, 178 W. Va. 601, 363 S.E.2d 487 (1987).

*Wilson v. WVU Sch. of Med.*, No. 11-0600, 2011 W. Va. LEXIS 545 (West Virginia Supreme Court, October 21, 2011)

### **Codes**

**1.)WV Code 3-10**

**2.)WV Code 36B-27**

**2.) WV CSR 64-9-4.7**

**3.) WV CSR 64-9-4.10**

**4.) WV CSR 64-9-4.12**

- 5.) **WV CSR 64-9-4.18**
- 6.) **WV CSR 64-9-4.22**
- 7.) **WV CSR 64-9-4.23**
- 8.) **WV CSR 64-9-4.25**
- 9.) **WV CSR 64-9-5.1**
- 10.) **WV CSR 64-9-5.4.1**
- 11.) **WV CSR 64-9-5.4.4**
- 12.) **WV CSR 64-9-10.1**
- 13.) **WV CSR 64-9-10.6**
- 14.) **WV CSR 64-9-10.6.2**
- 15.) **WV CSR 64-9-10.7**
- 16.) **WV CSR 64-9-10.10.1**
- 17.) **RULE 52(a) RULES OF CIVIL PROCEDURE**

**NOTE: CLERICAL ERROR IN THE TRANSCRIPTS NOTES THAT CHARLES AND JUDITH GROSE ARE REFERRED TO AS "GROVES".**

## ASSIGNMENTS OF ERRORS

1. Denied Motion for default. Defense attorney, Dan Hardway, did not respond to complaint according to WV Rules of Civil Procedure in a timely manner and did not follow courts Scheduling Order.
2. Denied Discovery. Defense attorney, Dan Hardway did not follow rules of procedure and Court denied me access to evidence needed for hearing.
3. Court misinterpreted testimony and was misled by Defense. Court granted a Motion for Interim Protection Order for Defendant, Mary Davis, granting her 739 feet of United States Forest Service Property and full control of US Forest Service Gate and this is not specified in her deed.
4. Court's error on right to maintain and care for 125 year old cemetery. Cemetery is located on my Right of Way, which I have maintained for over 25 years, Court denied access to cemetery and even the existence of this cemetery.
5. Court did not follow WV Code of State Regulations WV CSR 64-9. Code sets forth guidelines for sale of any property intended for a dwelling and the Court should have followed these rules and regulations to amend deed.
6. ALL sub-divided property has evolved since their original sale from Charles and Judith Grose, prior to the undeveloped campground, and water and electric becoming available.
7. Court denied Motion to amend judgment or new trial. Re-evaluation of facts based on WV CSR 64-9 and misinterpreted findings.
8. Court denied Motion to Withhold Judgment and Follow Recommendations of Webster County Health Department.
9. Court scheduled Hearing for September 2, 2014, denied all new evidence and witnesses.

## **STATEMENT OF CASE**

This case originated from a dispute over deeded Right of Ways of Donald Cottle across property belonging to Mary Davis of Glade District, Webster County, West Virginia.  
(Appendix Page 3)

Deeds show Right of Ways to be 30 feet wide and Mary Davis and her attorney, Dan Hardway contested these to be only 12 feet wide.  
(Appendix Page 3 and 9)

Also included were disputes of maintenance of 125 plus years cemetery and a prescriptive Right of Way that I had been using for 25 years, also a US Forest Service Right of Way and Gate.  
(Appendix Page 3 and 9)

When filing case, the defendant filed a counter suit regarding a clause in a previous deed stating there shall be no septic system on property I purchased in 1989 from Charles and Judith Grose. This counter-suit was only filed as to force me to drop the original suit against the defendant and the Attorney Dan Hardway knew the restriction was unlawful and unenforceable.  
(Appendix Page 12)

Court of Webster County upheld the deeded Right of Ways of Donald Cottle with an exception of a prescriptive Right of Way. The Court did not agree concerning the cemetery and US Forest Service Right of Way and Gate.  
(Appendix Page 43)

In the counter suit, the Court decided they could not remove the clause from my deed regarding the septic system, even though this restriction to the property was illegally inserted in the document. The Court would not hear any arguments during the trial and Post Trial Motions about Webster County Health Department Rules and Regulations.  
(Appendix Page 43, 65, 66, 69, 72 and 80)

After trial of April 29<sup>th</sup>, 2014, a final order was entered June 11, 2014. Motions were entered to modify this order due to newly found evidence from the Health Department and West Virginia legislature WV CSR 64-9. Court would not allow a new trial or amend judgment and denied these motions. A new final order was made July 9, 2014. (Appendix Page 65, 66, 69, 72 and 80)

I filed several other Motions to try and get Court to set hearing for the evidence to be heard and was given a date of September 2, 2014. (Appendix Page 31, 43, 66, 69 and 74)

On September 2, 2014, The court did not hear any evidence or new testimony from WV CSR 64-9 and/or subpoenaed witnesses,(subpoenaed witnesses never showed for the Plaintiff in the court), and Judge Alsop denied all motions, then stated the Final order of July 9, 2014 was upheld. (Appendix Page 72)

## SUMMARY OF ARGUMENT

Donald Cottle filed a Civil suit against Mary Davis on September 16, 2013, to protect his rights as land/homeowner of deeded Right of Ways for his property located in Webster County, purchased in December of 1989. This action was to ask the Court to enforce his 30 foot Right of Ways protected by his deed because Mary Davis and her attorney, Dan Hardway were interfering with his 30 foot Right of Ways arguing that Right of Way was only 12 feet.

Defendant's Counsel did not follow Rules of Procedure and filed a counter suit more than 20 days later stating that a clause existed in Plaintiff's deed that there would not be a septic system on the property.

Prior to trial, several meetings took place between Plaintiff and Defendant's attorney to try and resolve this matter with nothing agreeable. Pre-trial Motions were entered and were denied rights of some evidence needed for trial.

During trial, the Court found the Right of Ways of 30 feet to be correct. I mostly agree with the Court's findings pertaining to Deeded Right of Ways.

The argument with the Court would be in regards to the counter suit and the restrictive covenant in Plaintiff's Deed. I do not agree with these findings of the lower Court.

I believe that the restrictive covenant in the deed was illegal at time of purchase (December 1989) by WV CSR 64-9, therefore the seller and attorney drafting the deed should not have inserted this illegal restriction. I was not aware of any law in existence that should have prevented this clause in the deed in the first place and the intention of this clause because of construction of a campground never took place.

There is argument of a USFS Gate which the Court deemed not in his jurisdiction but superseded his authority giving all control of gate to Defendant, Mary Davis and furthered issued a permanent injunction concerning the USFS Gate and property.

The rights to maintain the 125 year old Bennett-Williamson Cemetery were denied, stating that even though Plaintiff was allowed to care for cemetery for over 25 years, Court denied access to cemetery even though it is located partially on my Right of Way.

## STATEMENT OF ORAL ARGUMENT

Because the principle issues in the case have been decided in the Webster County Court's decision, Cottle vs. Davis, oral argument is necessary under Rule 19 because;

- (1) involves assignments of error in the application of settled law
- (2) the case involved insufficient evidence and testimony
- (3) other issues arising upon the record should be addressed

All issues should be addressed and we feel that oral argument is necessary.

## ARGUMENT

### 1. DENIED MOTION FOR DEFAULT

Defendant's Counsel, Dan Hardway, did not follow rules of Civil Procedure and filed a counter suit more than 20 days after the original complaint was received. I filed a motion for Default at this time and was denied by the lower Court.

**Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.**

**(a) When presented. — (1) A defendant shall serve an answer within 20 days after the service of the summons.**

### 2. DENIED DISCOVERY

Defense Attorney, Dan Hardway did not follow Rules of Civil Procedure, violated Rule 26 Discovery of Evidence. Motion to Comply was filed on March 4, 2014. Did not file a Pre-trial Memorandum until Pre-trial hearing, ignoring the scheduling order of December 3, 2013.

“A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.” Syllabus point 1, **B.F. Specialty Co. v. Charles M. Sledd Co.**, 197 W. Va. 463, 475 S.E.2d 555 (1996).

### 3. COURT MISINTERPRETED TESTIMONY

Court misinterpreted testimony or was misled by the defense regarding the United States Forest Service Gate location and jurisdiction. Court granted a Motion for Interim Protective Order for defendant, granting her 739 feet of United States Forest Service property and full control of the USFS Gate contrary to Judge Alsop's admission in Court transcript **Page 64**, stating "I don't know what rights the United States Government has in regard to that Forest Service Road, and quite frankly, I don't have jurisdiction to determine what rights the US Government has. It has to be done in the United States District Court." This is also discussed on **Page 53** of Court Order shown in the Appendix. Maps shown in Appendix, **Page 98 and 102**.

Interim Protective Order on **Page 26** of the Appendix shows that Judge Alsop judged and sentenced without the courtesy of human exchange in less than six hours and made the order permanent in his Final Order of July 9, 2014.

### 4. COURT'S ERROR ON RIGHT TO MAINTAIN CEMETERY

Court denied the right to maintain 125 year old Bennett-Williamson Cemetery, **Page 63** of the Appendix. Petitioner has maintained this cemetery for the past 25 years, which is located on his right of way and believes he has done so in accordance with **WV Codes 37-13A-1-6**. As testified by Mr. Lee Bennett on **Page 26** and **Page 83-85** of the transcript.

The court misinterpreted or misconstrued the evidence presented at trial regarding the Bennett-Williamson cemetery, Petitioner and Mr. Bennett, a distant relative of those buried there, had built a fence around the cemetery two years prior with Respondent's permission. Found on **Page 18** of the transcript.

## 5. COURT'S ERROR ON FOLLOWING WV CSR 64-9

Court did not follow **WV Code of State Regulations 64-9**. This code sets forth guidelines for the sell of property intended for a dwelling and the court should have followed these regulations regarding the sub-division of the original plat belonging to Charles and Judith Grose or Charles and Annabelle Grose, **Page 101 and 102** of the Appendix described as Judith A. Grose Tract. **WV CSR 64-9-4.23** states:

The division of land into two or more lots, tracts, parcels, plats, sites, areas, units, interests or other division, any of which are less than two acres in size with an average frontage of less than one hundred fifty feet for the purpose of dwelling or establishment development and including the division of land by deed, metes and bounds description, lease, map, plat or other instrument, or by act of construction.

### **WV CSR 64-9-10.5 states:**

The division of land through public or private auction, sale or through the terms of a will shall constitute a subdivision under the provisions of these regulations. It shall be the responsibility of the owner of such land or executor of the will to meet all requirements of these regulations.

When I purchased my property in December 1989, Charlie Grose stated that his intent for the remaining 50 acres was to develop a campground, shown on Plat Map, **Page 101 and 102** of the Appendix. This covenant was added to my deed because of a spring located 120+ feet from my property line. This spring was to provide water for the proposed campground. No other property or lots sold from this plat had any restrictions on the deeds except for the property I purchased. In April of 1990 the remainder of his approximately 50 acre plat was sold to Frank and Mary Davis, shown on **Page 99** of the Appendix. Due to the sale of this property to Frank and Mary Davis, the campground was never developed. No utilities were available on this secluded/undeveloped property.

"The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.' Wallace v. St. Clair, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962)." Syl. pt. 2, Allemong v. Frenzel, 178 W. Va. 601, 363 S.E.2d 487 (1987).

The deed was written by an attorney, Donald K. Bischoff of Summersville, WV, I feel he should have been aware of WV Laws, making this restriction unlawful.

2. "In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith." Syl. Pt. 1, *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803

Therefore, I feel this restrictive covenant in my deed, ( party of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on the real estate herein conveyed.) is invalid and unlawful.

## 6. ALL SUBDIVIDED PROPERTY HAS EVOLVED

All sub-divided property has evolved since their original sale from Charles and Judith Grose, prior to the undeveloped campground and water and electric becoming available. This was a secluded family farm a mile away from blacktop road, at the time of Charles and Judith Grose purchasing this property there was no utilities available of any kind. Electric did not become available until the late 1990's.

**W. Va. Code § 36B-27(2005)** Residential purposes, means use for dwelling or recreational uses or both.

" We have "recognized the commonly accepted legal proposition that changes in a neighborhood's character can nullify restrictive covenants affecting property within the neighborhood." Allemong, 178 W. Va. at 606, 363 S.E.2d at 492.

## 7. COURT DENIED MOTION TO AMEND JUDGMENT OR NEW TRIAL

Re-evaluation of facts based on WV CSR 64-9 and misinterpreted findings. Motions were filed in timely manner under WV Rules of Civil Procedure. The misinterpreted facts as noted on **Page 74** of the transcript that Webster County Health representative, George Clutter gave me a list of rules for septic system. Dan Hardway objected, the court sustained, said Mr. Clutter had to testify for the list, I was not allowed to read in court. I then ask if I could call him at that time and was told no.

The trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

State ex rel. Dillon v. Egnor  
188 Wva. 221, 227, 423 S.E.2d 624, 630 (1992)

These legislative rules, Department of Health, 64 CSR, Series 9, Sewage System Rules are displayed on **Page 80** of the Appendix.

Judge Alsop stated that Motions were denied because as such failed to allege any mistake, inadvertence, excusable neglect, unavoidable cause, newly discovered evidence, fraud or any other matter as such relief could be granted, as noted on **Page 31** of Appendix. There were six findings of misinterpreted facts and judgment.

## 8. COURT DENIED MOTION TO WITHHOLD JUDGMENT AND A MOTION TO FOLLOW RECOMMENDATIONS OF WEBSTER COUNTY HEALTH DEPARTMENT.

Motion was filed on August 18, 2014 to withhold judgment, also a Motion to Follow Recommendations of Webster County Health Department was filed on August 22, 2014. The first Motion stated that on June 25, 2014, Webster County Health Department representative, George Clutter, inspected the existing property of Petitioner, in Webster County, WV.

This inspection was for purpose of compliance of the final order. Upon inspection, Mr. Clutter determined there was no approved septic system on the site, Mr. Clutter stated that under **WV Code 64 CSR-9**, this property requires an approved septic disposal system. Under existing code **WV 64 CSR 9** makes section 3 of the the above court order and restriction in the plaintiff's deed illegal.

This property must comply with state and county health laws **Title 64, Series 9, 4.7, 4.10, 4.12, 4.18, 4.22, 4.23, 4.24, 4.25, 5.1, 5.2, 5.4, 5.44, 10, 10.5, 10.6, 10.7, 10.10.1, and 11.**

Reference **Page 66 and Page 69** in the Appendix for Motions and Reference **Page 68**, Health Department Letter.

Motions were denied on September 2, 2014, Reference **Page 72** of the Appendix.

I was issued a Well Permit from the West Virginia Department of Health and Human Resources on April 17, 2007. Permit Number DW-51-07-05, Reference **Page 93** of the Appendix. Further directing the Health Department representative to ask for compliance of **WV CSR 64-9-4.25** Well and **4.24** Wastewater laws, therefore confirming a need for septic system disposal.

The Circuit Court's disregard for the unlawful restriction shows that it violates 5.4.4 of the WV CSR 64. Shall not violate any federal, state or local laws or regulations governing water pollution for sewage disposal.

This Court has long held, and recently affirmed, that any court order that is in contravention of West Virginia law is void and of no consequence. See e.g, *Wilson v. WVU Sch. of Med.*, No. 11-0600, 2011 W. Va. LEXIS 545 (West Virginia Supreme

The Order Impedes, Rather than Furthers, the rights as homeowner or landowner of WV. Also Order Conflicts with Nationwide Obligations in Federal EPA regulations regarding sewage and gray water.

Respondent's objection to Petitioner's septic system was due only to a spring that was supposed to be used for the proposed/non-existent campground previously mentioned in this brief. This spring has never been used and the Webster County Representative, George Clutter, states that this spring has not been in use for over 25 years. Under state regulations **64-9** a proposed septic system has to be **25 feet** from streams. My property line to the spring is over **120 feet**, therefore the proposed septic area looked at by the Health Department would be at least **275 feet** from this spring.

The Circuit Court's decision appears to totally disregard the provisions of **WV CSR 64 Section 9**, Legislative Rules Dept. of Health Sewage Systems Rules, legally adopted under prior acts. This shows the restriction invalid and unlawful based upon Rules and Regulations of dwellings for sub-divided property, which requires the Health Dept. to over see the division of land into two or more lots, tracts, partials, plats, sights, areas, units, interests or other division of which are less than two acres in size. In size with an average frontage of less than 150 feet for the purpose of a dwelling or establishment, development, including the division of land by deed, meets and bounds description, lease map, plat, or any other instrument, or by act of construction.

I feel that this decision the Court has made, affects my property to the point of forcing me to break laws and WV codes and statutes. Therefore, rendering my home and property worthless.

## **9. COURT ORDERED HEARING ON SEPTEMBER 2, 2014**

Court scheduled a hearing on September 2, 2014, which I was under the impression that this was to hear new evidence and/or subpoenaed witnesses, George Clutter, Webster County Health Department and Mr. Richard Rose, Director of 911 Services. Refer to **Page 1** of the Appendix, Docket Sheet, **Lines 54, 55 and 60.**

Subpoenaed witnesses did not show for the Petitioner, but Mr. Clutter did show for the Respondent, stating that he had been subpoenaed there by Mr. Hardway and that he never received mine.

Judge Alsop did not hear or consider new evidence or subpoenaed witnesses and said that the order of July 9, 2014 was upheld and is his final order. **Reference transcript from September 2, 2014.**

**Rule 52(a) [of the West Virginia Rules of Civil Procedure] mandatorily requires the trial court, in all actions tried upon the facts without a jury, to find the facts specially and state separately its conclusions of law thereon before the entry of judgment. The failure to do so constitutes neglect of duty on the part of the trial court, and if it appears on appeal that the rule has not been complied with, the case may be remanded for compliance.**

When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party. Most importantly, the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

**State ex rel. Dillon v. Egnor**  
**188 W.Va. 221, 227, 423 S.E.2D 624, 630 (1992)**

The court must not overlook the rules to the prejudice of any party. The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.

**Blair v. Maynard**  
**174 W.Va. 247, 253, 324 S.E.2D 391, 396 (1984)**

## CONCLUSION

The Circuit Court of Webster County did not properly consider all evidence, therefore made a decision based on incomplete and misinterpreted information which will affect Petitioner's home and property forever. Although I would like the West Virginia Supreme Court to consider all errors described in this brief, which shows the Circuit Court's direction of prejudice, I am most concerned with the Numbers 5, 6, 7, 8 and 9 of the argument in the brief, which concerns the restrictive covenant in my property deed. I feel it has been clearly shown to be an unlawful and an unenforceable covenant.

I ask the Court to reverse the Circuit Court's decision on the restrictive covenant and order the restriction to be removed from my deed by the lower Court by sending a strong message to the Circuit Court that this provision is unenforceable, the Supreme Court can help the process move more quickly, and perhaps at the very least spare the Plaintiff a second trip to the Circuit Court.

Donald E. Cottle



P.O. Box 1028

Ceredo, WV 25507

(304) 617-1042

[duncottle@yanos.com](mailto:duncottle@yanos.com)

## CERTIFICATE OF SERVICE

I, Donald Cottle, do hereby certify that I have sent true and accurate copies of the Petitioner's Perfected Appeal to the West Virginia Supreme Court of Appeals and a copy to Dan Hardway, Counsel for Respondent, at his address of record and by depositing said record in the United States Mail with sufficient postage for delivery on this 5<sup>th</sup> day of November, 2014.

Donald Cottle  
P.O. Box 1028  
Ceredo, WV 25507  
(304) 617-1042  
doncottle@yahoo.com

Donald Cottle 