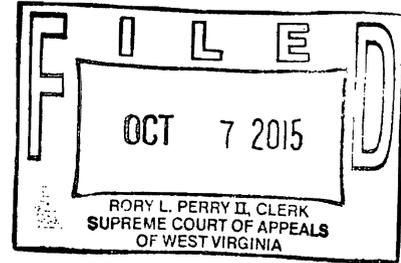


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA JEAN HAYES,
Plaintiff Below, Plaintiff

Case No. 15-0518

LARRY BRADY and
DAWNA MICHELLE BOONE BRADY
Defendants Below, Respondents



RESPONDENT'S BRIEF

Trena Williams
WV State Bar No. 9963
Counsel for Respondents
217 E. 3rd Street
Weston, WV 26452
Phone: 304-517-1460
Fax: 304-517-1461
Email: trena@trenawilliamsllaw.com

TABLE OF CONTENTS

	Page
Table of Authorities.....	3
Assignments of Error.....	4
Statement of the Facts and Case.....	4
Summary of Argument.....	10
Statement Regarding Oral Argument.....	12
Argument.....	13
Petitioner’s 1 st Assignment of Error:.....	13
Petitioner’s 2 nd Assignment of Error:.....	16
Petitioner’s 3 rd Assignment of Error:.....	18
Petitioner’s 4 th Assignment of Error:.....	19
Response to Additional Focuses of Petitioners Brief.....	19
(a) Allegations of Fraud and Dishonesty.....	19
(b) Contract Law.....	23
(c) Equitable Estoppel.....	23
(d) Landlocked Property	25
Conclusion	26
Verification – Dawna Brady.....	27
Verification – Larry Brady.....	28
Certificate of Service	29

TABLE TO AUTHORITIES

5th Amendment of the US Constitution11, 19

14th Amendment of the US Constitution.....11, 19

Blair v. Maynard, 324 S.E.2d 391, 174 W.Va. 247 (W.Va., 1984).....17

Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41, 201 W.Va. 469 (1997).....14, 15

Burgess v. Porterfield, 469 S.E.2d 114, 196 W.Va. 178 (W.Va., 1996).....13

Conley v. Spillers, 171 W.Va. 584, S.E.2d 216 (1983).....15

In re Estate of McIntosh, 144 W.Va. 583, 109 S.E.2d 153 (1959).....15

Sayre's Adm'r v. Harpold [sic], 33 W.Va. 553, 11 S.E. 16 (1890).....15

West Virginia Rules of Civil Procedure, Rule 52(c).....11, 21

ASSIGNMENTS OF ERROR

A total of four assignments of error are delineated under the title “Argument” within the “Petitioner’s Brief”. The first three assignments of error by Ms. Hayes appear to have been lumped together within the Argument section of the brief without clear delineation, or are simply not addressed, as the only assignment of error under a clear heading is assignment of error number four. Notwithstanding the Petitioner’s organization of her brief, the Petitioner’s assignments of error will be addressed in the order with which they are originally set forth in the brief, then a separate section will address additional focuses of the brief which do not appear to fit within the enumerated assignments of error.

STATEMENT OF THE CASE

Robert Boone acquired a 114.5 acre tract from Mary. L. W. Cutright and W.B. Cutright, on January 20, 1920 (DB 68/554). (Supplemental Appendix, 58). There was later a curative deed from Mary. L. W. Cutright and W.B. Cutright to Robert Boone, setting forth certain coal rights, dated August 2, 1921 (DB 71/534). (Supplemental Appendix, 59).

Robert Boone and his wife conveyed a one-half interest in the entirety of the 114.5 acres to W. E. Boone by deed dated August 3, 1921 (DB 72/92). (Supplemental Appendix, 60).

By deed dated November 7, 1924, Robert Boone and wife conveyed by deed 64.5 acres to W. E. Boone (DB 76/ 593). That deed contained the following language: “The said parties of the first part also reserve the right of egress and regress over and through the above described tract of land to and from a tract of land now owned by them and lying west of this tract.” This 64.5 acres was a portion of the 114.5 acre tract. (Supplemental Appendix, 62). It should be noted that this deed was not recorded until February 13, 1925.

By deed dated November 7, 1924, W. E. Boone conveyed (DB 76/594) conveyed to Robert Boone fifty (50 acres). This deed contained the following language: "The said parties of the first part also reserves the right to egress and regress over and through the above described tract of land to and from a tract of land now owned by them lying east of this tract." This 50 acre tract is the balance of the 114.5 acre tract after the conveyance of the 64 ¼ acres mentioned above. (Supplemental Appendix, 63). It should be noted that this deed was not recorded until February 13, 1925.

The following is the history that attaches solely to the 64.5 acre tract, which later is divided into smaller tracts, one of which Ms. Hayes now owns:

W. E. Boone conveyed the entirety of the 64.5 acres to Okey Boone (W. E. Boone's son) on December 16, 1924 (DB 72/592). Such deed contained the following language: "It is also understood and agreed that a certain deed made by W.E. Boone and wife to Robert Boone the right was reserved to travel over and through the land that was conveyed to said Robert Boone and this privilege shall extend to said Okey Boone giving him the full benefit of said right as is set out in said deed mentioned." (Supplemental Appendix, 66). It should be noted that this deed was recorded on December 16, 1924, prior to the time W.E. Boone recorded his deed on February 13, 1925.

Okey Boone conveyed to A. M. Samples the entirety of the 64.5 acres on April 10, 1936 (DB 93/208). Within that deed the following language appears: "It is also understood and agreed that in a certain deed made by W.E. Boone and wife to Robert Boone the right was reserved to travel ober (sic) and through the land that was conveyed to said robert (sic) Boone and this privileges shall extend to said A.M. Samples giving him the same rights and benefits of said reserve as the said Okey Boone may have to said rights under his deed, as follows: The land

herein conveyed is the same land conveyed to the said Okey Boone by W.E. Boone as above described.” (Supplemental Appendix, 70)

A. M Samples died testate December 21, 1969 (WB 12/538) leaving all of his estate to his wife, Edna Mae Samples. (Supplemental Appendix, 72). It should be noted that no attempt was made to pass on the “privilege” previously declared to be passed from person to person within the deeds. Edna Mae Samples ‘intermarried with’ Denzil Huffman. Edna Mae Samples Huffman died testate December 12, 1989 and by Will probated January 8, 1990 (WB 26/71), by clause five of the will, she devised a third interest each to her three children the residue of the 64.5 acre tract said to contain 49.5 acres. (Supplemental Appendix, 74). Again, Ms. Samples/Huffman, made no attempt to pass on the “privilege” previously declared to be passed from person to person within the deeds.

Gary Marion Samples, as Executor of the Estate of Edna May Huffman (widow of A. M. Samples remarried) conveyed with covenants of Special Warranty on December 1, 1990, (DB 357/525) Tract A, 16.5 acres, as shown on a plat of survey prepared by Joe L. Beymer, WV LLS #310, to Glenn William Samples, son of Edna Mae Samples Huffman. The deed states, “For the aforesaid consideration, there is further granted and conveyed unto the said party of the second part a right of way for ingress and egress from the Wilsontown Road to the tract herein conveyed over and across the present roadway, said right of way being heretofore conveyed to A. M. Samples in a deed from Okey Boone, et ux, dated April 10, 1936, of record in said Clerk’s Office in Deed Book No. 93 at page 208.” (Supplemental Appendix, 81). It should further be noted that it is at this junction that the wording from the original 1924 language significantly changes, as there was never mention of a road previously or a connection to the Wilsontown Road or the right to ingress.

On June 21, 1994, Glenn William Samples conveyed Tract A (DB 381/32) to Pamela Jean Hayes. The deed contained the following wording, "This conveyance is subject to, and where applicable, the Grantee herein, his successors and assigns, shall have the benefit of the following exceptions, reservations and provisions as contained in the aforesaid deed, viz: 'For the aforesaid consideration, there is further granted and conveyed unto the said party of the second part a right of way for ingress and egress from the Wilsontown road to the tract herein conveyed over and across the present roadway, said right of way being heretofore conveyed to A. M. Samples in a deed from Okey Boone, et ux, date April 10, 1936, of record in said Clerk's Office in Deed Book No. 93 at page 208. It is further understood and agreed that this conveyance is made subject to a right of way for ingress and egress from the Wilsontown Road over and across the real estate conveyed to a tract or parcel of real estate containing 16.5 acres this day conveyed by Gary Marion Samples, Executor of the Last Will and Testament of Edna Mae Huffman, deceased, to Cecil Ray Samples'". (Supplemental Appendix, 85).

The following is the history for the fifty (50) acre tract, which is now the property of Mr. and Mrs. Brady:

After Robert Boone obtained title to the fifty (50) acres from W.E. Boone by deed dated November 7, 1924, (DB 76/594), he held the property until 1977.

On May 26, 1977, the 50 acres was conveyed by Robert Boone, widower, by deed (DB 263/212) to James K. Boone and May Belle Boone. That conveyances reads in part, "This deed is made subject to same restrictions, reservations, easements, and requirements as are contained in previous deeds of the proeprty herein conveyed to the extent to which the same are presently applicable, and have not heretofore been released, abandoned, or discharged by the operation of law or otherwise." (Supplemental Appendix, 89).

May Belle Boone died December 29, 1987 with her right passing by survivorship to her husband the said James K. Boone. James K. Boone died testate on May 10, 2007 and by the terms of his Last Will and Testament (WB 56/466) he devised a 1/3rd interest to Terry Boone, a 1/3rd interest to Michelle Fitzgerald, now known as Dawna Michelle Brady, a 1/12th interest to Ken Boone, 1/12th interest to Kerri Boone, 1/12th interest to Kristen Boone and a 1/12th interest to Kelli Boone. (Supplemental Appendix, 91).

Terry Boone, Ken Boone, Kerri Boone, Kristen Boone (Hedrick), and Kelli Boone (Bender) conveyed, by deed October 24, 2007, (DB 471/258) the 50 acres to Larry Brady and Dawna Michelle Brady. This deed stated “ this conveyance is made subject to all rights of way and easements affecting said premises of record in said Clerk’s Office, if any, and is further made subject to such rights of way, easements or other matters which would be disclosed by a visual inspection of the premises herein conveyed.” (Supplemental Appendix, 99).

Pamela Hayes initially brought suit against Larry Brady and Dawna Michelle Boone Brady, in the Upshur County Circuit Court in case number 13-C-29, which was filed on March 6, 2013. (Supplemental Appendix, 1). Ms. Hayes later moved to amend her complaint, her request was granted and she amended her initial complaint on July 11, 2013. (Supplemental Appendix, 6-12). Mr. and Mrs. Brady filed a pro se “Answer of the Defendants Larry Brady and Michelle Boone Brady” to the initial Complaint and through counsel filed an “Answer and Defenses to ‘Amendment’”. (Supplemental Appendix, 3 and 13, respectfully). The matter was set for trial initially on January 22, 2014, but was continued due to weather and was rescheduled for February 24, 2014, but was continued as Ms. Hayes reported she was ill. (Supplemental Appendix, 26 and 28, respectfully). At that time, the trial was rescheduled for March 20, 2014.

Prior to the March 20, 2014 trial, a “Motion for Summary Judgment” was filed by Mr. and Mrs. Brady. (Supplemental Appendix, 29). The “Motion for Summary Judgment” was heard by the Court on March 13, 2014, but was not granted and it was ordered that the matter would proceed to trial on March 20, 2014. Ms. Hayes also filed a “Motion for Summary Judgment”. (Supplemental Appendix, 104).

The matter ultimately proceeded to trial on March 20, 2014, slightly over one year after the initial complaint was filed. Prior to the start of trial, the Court cautioned Ms. Hayes regarding the challenges of navigating a trial as a pro se litigant and Ms. Hayes elected to proceed without counsel. At the trial, Ms. Hayes, as the Petitioner, called seven (7) witnesses, testified on her own behalf and presented her evidence as she deemed appropriate. After Ms. Hayes rested her case, Respondents, via counsel, moved the court to dismiss the action, and that motion was granted. Following the trial, Ms. Hayes filed multiple post trial motions and/or objections, which resulted in a hearing on June 30, 2014. The Court entered its “Order Granting Judgment as a Matter of Law”, on September 26, 2014. (Petitioner’s Appendix, 1) The final order in 13-C-29, was never been appealed, more than thirty days have elapsed and that order has now cured.

On November 26, 2014, Pamela Hayes again filed a “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” against Larry Brady and Dawna Michelle Boone Brady, in the Upshur County Circuit Court in case number 14-C-123. (Petitioner’s Appendix, 15) The “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” in 14-C-123, either alleges the same issues that were presented in Civil Action 13-C-29, either within the pleadings or the presentation of evidence, or are issues that could have been resolved, had they been presented, within the prior action.

On December 30, 2014, Mr. and Mrs. Brady filed a “Motion to Dismiss” in 14-C-123, upon the grounds of *res judicata* and collateral estoppel. (Petitioner’s Appendix, 61) A hearing was had upon the motion on March 10, 2015, at which time, the Upshur County Circuit Court granted the motion. The Court entered its “Order Granting Motion to Dismiss” on April 24, 2015. (Petitioner’s Appendix, 75)

The appeal brought by Ms. Hayes must be based upon the “Order Granting Motion to Dismiss”, entered April 24, 2015, in 14-C-123, as the timeframe to appeal the “Order Granting Judgment as a Matter of Law”, entered on September 26, 2014, in 13-C-29 has long since elapsed.

SUMMARY OF ARGUMENT

The Circuit Court of Upshur County did not error by granting the “Motion to Dismiss” on the basis of *res judicata*, as the parties in 14-C-123 and 13-C-29 are exactly the same, a final order had been entered in 13-C-29 and the time frame to appeal the final order had passed, and all issues involved in Civil Action 14-C-123 are either the same issues that were presented in Civil Action 13-C-29, either within the pleadings or the presentation of evidence, or are issues that could have been resolved, had they been presented, within the prior action.

The Circuit Court of Upshur County did not deny Ms. Hayes her day in court to address issues of “prescriptive right” and “way of necessity”. On March 20, 2014, there was a trial held in Case Number 13-C-29, upon Ms. Hayes “Complaint” and “Ammendment” (sic) wherein she was given a full and fair opportunity to present her case, including any and all theories of her case. All litigants whether represented by counsel or not, are required to present all theories or defenses that may exist in the case, and failure to present a theory or defense, results in waiver of

the theory or defense as future attempts to present the theory or defense within a new action, will be barred pursuant to *res judicata* or collateral estoppel.

Petitioner offered no argument, authority, reasoning or explanation to support the contention that the court must construe the evidence in the light most favorable to the non-moving party, when a party files a “Motion to Dismiss” on the grounds of *res judicata*.

Petitioner offered no argument, reasoning or explanation to support the contention that Ms. Hayes was denied equal protection under the 14th Amendment of the US Constitution and due process under the 5th and 14th Amendments of the US Constitution.

Petitioners brief spends extensive time personally attacking Mr. and Mrs. Brady and their counsel, with repeated claims that false, fraudulent, constructively fraudulent, grossly inaccurate evidence, proffer and/or legal theories were offered at the trial, and that as a direct result, Ms. Hayes was unsuccessful at trial. The “Order Granting Judgment as a Matter of Law” was based upon Rule 52(c) of the West Virginia Rules of Civil Procedure and as such, no evidence was presented by Mr. and Mrs. Brady during the trial, as the Court ruled at the close of the Ms. Hayes case in chief. Ms. Hayes’ contentions within the appeal as to the reason why the Circuit Court of Upshur County ruled against her in Case Number 13-C-29, are not supported by what actually occurred during the March 20, 2014 trial or the “Order Granting Judgment as a Matter of Law”.

Petitioner spends extensive time quoting Michie’s Jurisprudence on the subject of ambiguity in contracts and how that ambiguity will be resolved; however, there is no contract of any sort or written document executed directly between Ms. Hayes and Mr. and Mrs. Brady. Mr. and Mrs. Brady did not draft Ms. Hayes’ deed, Ms. Hayes did not draft the Brady deed, and neither party drafted any of the deeds in either chain of title. Further, neither party sold any

property to the other party and neither party is a predecessor or successor in title to the other party's real estate.

Further, petitioner spends extensive time discussing how estoppel should apply to the gentleman who sold her the property and his successors from denying the existence of a right of way. Mr. and Mrs. Brady are not predecessors or successors in title to the real estate owned by Ms. Hayes. As such, Petitioners argument that the gentleman who sold her the property and "his successors" should be estopped from denying the existence of a right-of-way, does not relate to Mr. and Mrs. Brady as they are not the gentleman who sold the property or his successors. Mr. and Mrs. Brady cannot be estopped from denying the existence of a right of way based upon what somebody else allegedly expressed or promised to Ms. Hayes.

Ms. Hayes is not landlocked by Mr. and Mrs. Brady in that they do not own all of the property surrounding Ms. Hayes real estate. Ms. Hayes property is one of three tracts of real estate created when the land from which her property was created was divided in 1990. The other two pieces of land created when the land was divided lay between her and the main road, on the opposite side of her property from where her property borders the Brady land.

STATEMENT REGARDING ORAL ARGUMENT

Respondents contend that oral argument is not necessary as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

When determining the propriety of a circuit court's ruling, circuit court's final order and ultimate disposition are reviewed under an abuse of discretion standard. Challenges to findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. Burgess v. Porterfield, 469 S.E.2d 114, 196 W.Va. 178 (W.Va., 1996).

Respondents object to any and all quotations and references contained within the Petitioner's Brief that are from Walton L. Chance, Dora B. Neely, and John W. Fisher, II, also referred to as Dean Fisher and Respondents object to any and all quotations and references from persons who did not testify at trial, but who are mentioned within Petitioners "Civil Complaint and Motion for Relief Under Rule 60(b)(1)" which was incorporated by reference into Petitioners Brief, as none of those individuals testified at trial, all statements were obtained after the trial, and the letter obtained from John W. Fisher, II, also referred to as Dean Fisher, was obtained after the trial and has never been admitted into evidence.

Petitioner's 1st Assignment of Error: The Circuit Court erred in granting, by order entered April 14, 2015, Defendant's Motion to Dismiss.

No direct argument or explanation was presented as to why the Petitioner contends that the "Order Granting Motion to Dismiss" entered April 24, 2015, which granted Defendant's Motion to Dismiss on the basis of *res judicata*, was entered in error. The only mention of *res judicata* within the Argument section of "Petitioners Brief" appears on Page 19, and provides as follows: "Plaintiff's Civil Complaint and Motion for Relief Under Rule 60(b)(1) were filed on November 25, 2014, and were drafted carefully, in full anticipation the Defendant's would oppose it based upon the doctrine of *res judicata*. Accordingly, Plaintiff re-alleges, as if set forth

herein verbatim as a statement of fact, everything contained in the Civil Complaint and Motion for Relief Under Rule 60(b)(1).”

The Upshur County Circuit Court was correct in ruling that the “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” filed in Civil Action Number 14-C-123 should be dismissed pursuant to the doctrine of *res judicata*, also referred to as claim preclusion, in its “Order Granting Motion to Dismiss”.

Suits are barred pursuant to *res judicata* when three elements are satisfied. This three-pronged standard was articulated in syllabus point four of Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41, 201 W.Va. 469 (1997), as follows:

“ . . . before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.”

The parties to Civil Action 14-C-123, being Pamela Jean Hayes, the Plaintiff, and Larry Brady and Dawna Michelle Boone Brady, the Defendants, are the exact same Plaintiff and Defendants that existed in Civil Action 13-C-29.

In Civil Action 13-C-29, the “Order Granting Judgment as a Matter of Law” was entered after a bench trial in the matter and post trial motions. The “Order Granting Judgment as a Matter of Law” was never appealed and the time frame for appeal has now passed.

All issues involved in Civil Action 14-C-123 are either the same issues that were presented in Civil Action 13-C-29, either within the pleadings or the presentation of evidence, or are issues that could have been resolved, had they been presented, within the prior action.

Ms. Hayes contends within her “Civil Complaint and Motion for Relief Under Rule 60(b)(1)”, that the language on page twelve of the “Order Granting Judgment as a Matter of Law”, which provides that the ruling is not based upon issues of prescriptive easement or easement by necessity, allows for the “possibility of additional litigation”. (Petitioner’s Appendix, 21). The Court is not signaling the “possibility of additional litigation” as is argued.

In regard to theories that are left not plead or presented, the West Virginia Supreme Court has explained,

“More explicitly, the requirements of the doctrine of *res judicata* contemplate:

”[a]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.’ Point 1, Syllabus, *Sayre’s Adm’r v. Harpold* [sic], 33 W.Va. 553[, 11 S.E. 16 (1890)].” Syllabus Point 1, *In re Estate of McIntosh*, 144 W.Va. 583, 109 S.E.2d 153 (1959).

Syl. pt. 1, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (emphasis in original). Thus, *res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.”

Blake v. Charleston Area Medical Center, Inc. 498 S.E.2d 41, 201 W.Va. 469 (1997).

The Upshur County Circuit Court was correct in ruling that the “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” filed in Civil Action Number 14-C-123 should be dismissed pursuant to the doctrine of *res judicata*.

Petitioner's 2nd Assignment of Error: The Court erred in denying the Plaintiff her day in Court on key unresolved issues such as prescriptive right and way of necessity.

Ms. Hayes was not denied her day in court to address issues of “prescriptive right” and “way of necessity”. Although the “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” provides that Ms. Hayes “attempt to represent herself in the prior action was, in short a disaster.” and that her “efforts to represent herself at trial wholly failed”, she was provided with her day in court on March 20, 2014. (A.R 18)

On March 20, 2014, there was a trial held in Case Number 13-C-29, upon Ms. Hayes “Complaint” and “Ammendment” (sic) wherein she was given a full and fair opportunity to present her case, including any and all theories of her case. Although Ms. Hayes argues repeatedly that she was a *pro se* litigant and didn't know what she was doing, and didn't know to present alternative theories in this matter, her “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” admits that Ms. Hayes “mistakenly pursued the theory of “prescriptive right” attempting to show open, notorious, and continuous use for 10 years.” (Petitioner's Appendix,18). Further, attached to the back of Ms. Hayes “Motion for Summary Judgment” is documentation, which has certain paragraphs circled, which discusses prescriptive easements and adverse possession. (Supplemental Appendix, 155). She also attached to the back of her “Motion for Summary Judgment”, legal research performed on land disputes between neighbors. (Supplemental Appendix, 147). Ms. Hayes fully participated, not only in the trial process by testifying on her own behalf and calling seven (7) witnesses to the stand, she also fully participated in the pretrial process, as is demonstrated by her multiple filings, which include a motion to amend her original complaint, an amended complaint, an original witness list, two amended witness lists, and a motion for summary judgment, together with the fact that she

appeared for all pretrial proceedings and even continued the trial once for personal illness. (Supplemental Appendix, 6, 10, 18, 22, 24, 104, and 28 respectfully).

Ms. Hayes was given ample time to prepare her case, consult with counsel or retain counsel, as more than one year lapsed between the time Ms. Hayes began litigation in Case Number 13-C-29 and the day of trial. Further, as Ms. Hayes initiated the litigation, she could have consulted with counsel before beginning the litigation. Ms. Hayes acquired counsel on April 8, 2014, and an expert witness within a matter of days after the March 20, 2015 trial, giving rise to the presumption that it could have been possible for her to obtain counsel if desired to do so before the trial. Ms. Hayes assessment of her situation and determination to proceed without counsel was her choice.

All litigants whether represented by counsel or not, are required to present all theories or defenses that may exist in the case, and failure to present a theory or defense, results in waiver of the theory or defense as future attempts to present the theory or defense within a new action, will be barred pursuant to *res judicata* or collateral estoppel. There has been no allegation that the Court said or did anything to Ms. Hayes that prevented her from obtaining a full and fair trial upon her Complaint and “Ammendment” (sic), or from presenting the legal theory or theories that she wanted to present, or that the Court said or did anything that limited Ms. Hayes right to proceed on a *pro se* basis.

The issue of risk associated with self-representation, has been addressed by the Court previously, at which time the court declared that “. . . ultimately, the pro se litigant must bear the responsibility and accept the consequences of any mistakes and errors.” Blair v. Maynard, 324 S.E.2d 391, 174 W.Va. 247 (W.Va., 1984). Ms. Hayes assessment of her situation and determination to proceed without counsel was her choice and she must bear the consequences of

any mistakes or errors that have resulted therefrom, including the consequence of having a future claimed barred on the basis of *res judicata*.

3rd Assignment of Error: The Circuit Court erred as a matter of law for failing to construe the evidence in the light most favorable to the Plaintiff, the non-moving party, when considering the Defendant's Motion to Dismiss filed on December 29, 2014.

Direct reference regarding Petitioner's contention that the Circuit Court erred as a matter of law for failing to construe the evidence in the light most favorable to the Plaintiff, the non-moving party, when considering the "Defendant's Motion to Dismiss" filed on December 29, 2014, is found in two places within the Petitioners Brief, as follows:

"Petitioner contends, in this action, 14-C-123, per authority cited below, that the Court was bound to accept as true and factual assertions of Pamela J. Hayes including the assertion, supported fully by statements and/or affidavits, that the road known as Salem Ridge Road is one and the same as the road previously known as the Wilsonstown Road. Assertions otherwise by the Defendants and their counsel constitute either fraud, or constructive fraud resulting from failure to investigate properly." (Petitioners Brief, page 14). Despite the indication that authority would be cited for this proposition, not authority could be located within Petitioner's Brief.

"At this stage, all facts alleged in the Civil Complaint and Motion for Relief Under Rule 60(b)(1) must be accepted as true entitling Plaintiff to all reasonable conclusions derived therefrom." (Petitioners Brief, Page 20).

Although this accusation was made twice, no argument, authority, reasoning or explanation has been located within the Petitioner's Brief to support the contention that the court

must construe the evidence in the light most favorable to the non-moving party when considering a Motion to Dismiss or to explain and set forth the assignment of error. Further, Petitioner has offered no fact(s), that would change the outcome delineated by the three prong test set forth above, that were allegedly not viewed in the light most favorable to the non-moving party.

The Upshur County Circuit Court correctly applied the three prong test set forth above and correctly determined that that the “Civil Complaint and Motion for Relief Under Rule 60(b)(1)” should be barred by the doctrine of *res judicata*.

4th. The Circuit Court erred in denying the Plaintiff Equal Protection under the 14th Amendment of the US Constitution and Due Process under the 5th and 14th Amendments of the US Constitution.

No explanation was provided within the section of Ms. Hayes brief as to how she was denied equal protection under the 14th Amendment of the US Constitution and due process under the 5th and 14th Amendments of the US Constitution, as this section merely provides a quotation of the 5th and 14th Amendments. Ms. Hayes has suffered no denial of equal protection under the 14th Amendment of the US Constitution or due process under the 5th and 14th Amendments of the US Constitution.

Response to Additional Focuses of Petitioner’s Brief:

(a). Allegations of Fraud and Dishonesty

Petitioners brief spends extensive time personally attacking Mr. and Mrs. Brady and their counsel, with repeated claims that false, fraudulent, constructively fraudulent, grossly inaccurate

evidence, proffer and/or legal theories were offered at the trial¹, and that as a direct result, Ms. Hayes was unsuccessful at trial.

One of the most direct statements of Ms. Hayes theory is as follows:

“There are “three (3) approaches by which justice can result in this case:

1. By establishing that *the factual representations raised by the Defendants in the original case were false*. The Brady’s asserted

a) that there was no visible right of way on the subject grounds, *that assertion was not true*, and

b) that the road referenced in the prior deeds of record as Wilsontown Road was separate and unique from the road more recently referred to as the Salem Ridge Road, and that the Salem Ridge Road was actually on the opposite side of the Hayes property, that *assertion was egregiously false and known by Defendants to be false* or easily ascertained by them to be false.

c.) This *gross misrepresentation of fact was the turning point* in the first trial although it was also difficult for Ms. Hayes who did not understand how, and therefore, did not present evidence of, the physical existence of the right of way’s route.” Emphasis added. (Petitioner’s Brief, pages 23-24).

In direct regard to the allegations regarding the roads, the “Order Granting Judgment as a Matter of Law”, which was entered after the trial on March 20, 2014, after the various motions for reconsideration and after the hearing on those motions on June 30, 2014, provides that “No

¹ (1) Ms. Hayes refers to any assertion that is contrary to her own belief regarding road names is “*fraud, or constructive fraud resulting from failure to investigate properly*.” (Petitioner’s Brief, page 14).

(2) She questions “. . . if it should turn out that a self-represented litigant loses because the *defense presented false and/or grossly inaccurate evidence and legal theories* . . . does she have a remedy?” (Petitioner’s Brief, page 14).

(3) She questions “. . . when *the defense presented by the represented litigants is false and fraudulent*, the answer of the West Virginia Courts to the losing party is, “That’s tough; you should have hired a lawyer.” (Petitioner’s Brief, page 15).

(4) She asserts “. . . that the judgment in question was obtained by a *gross misrepresentation of the facts*, which facts were readily available to the Defendants and their counsel . . .” (Petitioner’s Brief, page 20).

(5) “There was a critical mistake in fact, inadvertently presented by proffer and perhaps some evidence, by Defendant’s counsel, which counsel for Petitioner has learned is utterly inaccurate.” (Petitioner’s Brief, page 20).

(6) Ms. Hayes argues that “The road known as Salem Ridge Road is one and the same as the road formerly known as the Wilsontown Road contrary to the *inaccurate representations of counsel and the Defendants*.” (Petitioner’s Brief, page 27). Emphasis added to all quotes.

evidence is before the Court indicating what roads, if any, existed at the time of the 1924 reservation of right of egress and regress between W.E. Boone and Robert Boone.”

(Petitioner’s Appendix, 6) As such, Ms. Hayes allegation that Mr. and Mrs. Brady and/or their counsel provided false information to the court regarding the roads is completely without merit as the court has explained that no evidence was presented on the issue. The “Order Granting Motion to Dismiss” states that: “The Plaintiff asserts that counsel for the Defendant falsely represented to the Court that the Wilsonstown Road is a separate road from Salem ridge Road. The Plaintiff alleges that, absent the allegedly false representation, the case would have turned in the Plaintiff’s favor. The Plaintiff also avers that the two roads purportedly being one in the same constitutes newly discovered evidence warranting relief from the judgment. However, the Plaintiff’s argument loses sight of the forest for the trees. Whether the Wilsonstown Road and the Salem Ridge Road are one and the same had no impact on the Court’s finding that the original attempted reservation in the deed from W.E. Boone and his wife to Robert Boone (DB 76/594) was insufficient as a matter of law.” (Petitioner’s Appendix, 81).

Ms. Hayes further contends that “Of course, Ms. Hayes lost her case, based largely on proffers, and interpretation of recorded documents, by the Defendants counsel, Trena M. Williams, who assured the Court that no physical right of way existed, which it in fact did, and who inaccurately asserted the claim that there was no clear record title . . .” (Petitioner’s Brief, page 26).²

Simply put, during the trial, no fraudulent testimony was provided to the court by Mr. and Mrs. Brady, or their counsel. The “Order Granting Judgment as a Matter of Law” was based upon Rule 52(c) of the West Virginia Rules of Civil Procedure and as such, no evidence was

² Any and all allegations of inappropriate and dishonest statements to the tribunal, together with all allegations of failure to properly investigate this matter are denied.

presented by Mr. and Mrs. Brady during the trial, as the Court ruled at the close of the Ms. Hayes case in chief. (Petitioner's Appendix, 1) It appears that Petitioner's position that false information was presented to the court is based largely, if not solely, on his belief that if Dean Fisher assesses the situation in a particular manner, than anyone who considers the situation different is being dishonest.³

Ms. Hayes' contentions within the appeal as to the reason why the Circuit Court of Upshur County ruled against her in Case Number 13-C-29, as are set forth above, are not supported by what actually occurred during the March 20, 2014 trial or the "Order Granting Judgment as a Matter of Law". The Circuit Court ruled against Ms. Hayes in Case Number 13-C-29, after she fully presented her case in chief, not because of any of the reasons set forth in her brief, but because (1) the original right-of-way granted between W.E. Boone and Robert Boone when the property was initially divided into two tracts, fails at being sufficient in its description as a matter of law and (2) as the chain of title to Ms. Hayes property was created over the years, the description of the right-of-way changed without any further conveyance from the owners of the property which leads directly to the fundamental tenet of property law that one may not give away that which one does not have. (Petitioner's Appendix, 10-11)

³ Ms. Hayes argument as to why the statements within the Motion for Summary Judgment are false, fraudulent or a gross misrepresentation, are based on the opinion of Dean Fisher, who was not involved in the original litigation and who only issued an opinion letter after the trial was completely over. Dean Fisher has never testified at any proceeding in this matter and his report has not been admitted as evidence. Further Dean Fisher bases his report in part upon "Affidavits" from individuals who never testified at trial and which are either unsigned, not notarized, or merely hearsay that has been obtained by Mr. Hunter's staff.

(b). Contract Law

Ms. Hayes spends from page 27 to page 29 of Petitioners Brief merely quoting Michie’s Jurisprudence on the subject of contract law, with the majority of the quotations dealing with contract ambiguity and the fact that items that are uncertain within a contract should be resolved against the party who drafted the contract, but no argument, statement or reasoning appears outside of the quotations. No explanation is given as to why contract law is being discussed, no reference is made as to how contract law applies to this situation, and no statement of error was located.

There is no contract of any sort or written document executed directly between Ms. Hayes and Mr. and Mrs. Brady. Mr. and Mrs. Brady did not draft Ms. Hayes’ deed, nor any of the deeds in either chain of title. Further, Mr. and Mrs. Brady have never owned the land now owned by Ms. Hayes and Ms. Hayes never owned the land now owned by Mr. and Mrs. Brady.

(c) Equitable Estoppel

Ms. Hayes spends from page 29 to page 35 of the Petitioners Brief discussing “equitable estoppel” She argues that the theory of “equitable estoppel” prevents any claim that a right-of-way does not exist based upon her factual conclusion that the “gentleman that sold the property to Ms. Hayes let her have access to the property. He did require her to go through a modified right of way through a particular gate based upon the right of way used by an oil and gas company. He conveyed the property to her by general warranty and having purported to convey to her everything he owned by the prior owner, which include (sic) an ingress and egress right of

way, he and his successors should be estopped to deny access to the purchaser.”⁴ (Petitioner’s Brief, page 29).

The gentleman that sold the property to Ms. Hayes is Glenn William Samples, who obtained the property from Gary Marion Samples, as Executor of the Estate of Edna May Samples Huffman. Mr. and Mrs. Brady did not sell the real estate to Ms. Hayes. Mr. and Mrs. Brady never owned the real estate now owned by Ms. Hayes.

Ms. Hayes erroneously references Glenn William Samples, on Page 13 of the Petitioners Brief, as being a predecessor in title of the real estate owned by Mr. and Mrs. Brady. Glenn William Samples was never a prior owner of the real estate now owned by Mr. and Mrs. Brady.

Further, reference was made to Robert Kessler Boone, on Page 13 of the Petitioners Brief, as being a predecessor in title of the real estate of Mr. and Mrs. Brady and a claim is made that he allowed Ms. Hayes access to the property. The only Robert Boone in the chain of title regarding either property, is the Robert Boone, no middle name provided, who owned all of the real estate in 1920 until 1927, then a portion of the real estate that is now Mr. and Mrs. Brady’s real estate from 1927 until 1977. Ms. Hayes did not obtain her real estate until 1994, long after Robert Boone deeded away all of his interest in 1977, so how he allegedly allowed her access is unclear.

Mr. and Mrs. Brady are not predecessors or successors in title to the real estate owned by Ms. Hayes. As such, Ms. Hayes argument that the gentleman who sold her the property and “his successors” should be estopped from denying the existence of a right-of-way, does not relate to Mr. and Mrs. Brady as they are not the gentleman who sold the property or his successors. Mr.

⁴ While the deed to Ms. Hayes does declare to be a general warranty deed, it should be noted that it was also prepared without title examination.

and Mrs. Brady cannot be estopped from denying the existence of a right of way based upon what somebody else allegedly expressed or promised to Ms. Hayes.

(d) Landlocked Property

Ms. Hayes is not landlocked by Mr. and Mrs. Brady. Mr. and Mrs. Brady only own the real estate on one side of Ms. Hayes.

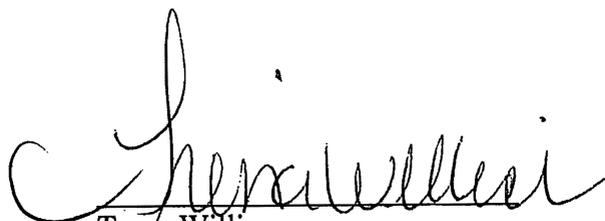
During the hearing on March 10, 2015, counsel for Ms. Hayes, stated as follows in regard to whether or not Ms. Hayes is landlocked by Mr. and Mrs. Brady: “. . . I made a very specific decision not to include the Boones and other surrounding property owners. I don’t even see it as a practical route to get in and out from anywhere except the existing right-of-way, which has been here for 80 years. So I am not at this stage going to do that and I would resist the motion if she files a motion that I failed to join essential parties, I will resist that, because I just don’t think that those people should get dragged into a lawsuit.” (page 28 of the transcript). Further, in regard to suing the other property owners, “I could sue every neighbor and have everybody in that county down there mad at this lady. I am prepared to present this case against these Defendants for now and try to spare the others –” (Petitioner’s Appendix, 117-118).

The property owned by Ms. Hayes is not surrounded by property owned by Mr. and Mrs. Brady. Ms. Hayes property is one of three tracts of real estate created when the land was divided in 1990. The other two tracts of land created when the land was divided lay between Ms. Hayes and the main road, which is on the opposite side of her property from where her property borders the Brady land.

CONCLUSION

The Upshur County Circuit Court did not error in granting the “Motion to Dismiss” on the basis of res judicata, Ms. Hayes was not denied an opportunity to present her case and all theories of her case to the Upshur County Circuit Court during the trial, the court did not error when considering the evidence presented in determining the issue of res judicata, and Ms. Hayes constitutional rights were not violated.

Wherefore, Respondents move this honorable court affirm the “Order Granting Motion to Dismiss”, award Mr. and Mrs. Brady their attorney fees and costs, and deny all requests of Petitioner for attorney fees and sanctions.



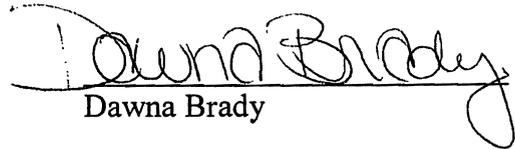
Trena Williams
WV State Bar No. 9963
Law Office of Trena Williams, PLLC
217 E. 3rd Street
Weston, WV 26452
Phone: 304-517-1460
Fax: 304-517-1461
trena@trenawilliamslaw.com

Respectfully submitted,
Mr. and Mrs. Brady
By counsel

VERIFICATION

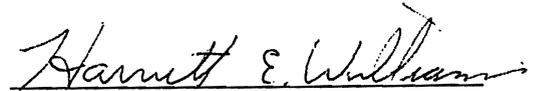
STATE OF WEST VIRGINIA,
COUNTY OF LEWIS, TO-WIT:

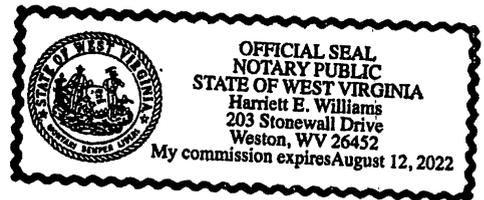
I, Dawna Brady, named in the foregoing "Respondent's Brief", being duly sworn says that the facts and allegations as contained therein are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information, I, Larry Brady, believe them to be true and correct.


Dawna Brady

Taken, subscribed and sworn to before me this 3rd day of October 2015.

My commission expires: August 12, 2022


NOTARY PUBLIC



VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF LEWIS, TO-WIT:

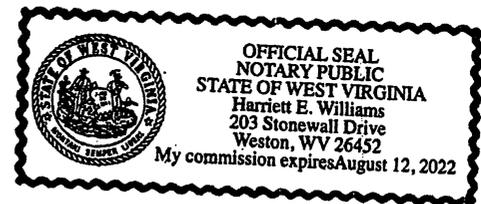
I, Larry Brady, named in the foregoing "Respondent's Brief", being duly sworn says that the facts and allegations as contained therein are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information, I, Larry Brady, believe them to be true and correct.

Larry Brady
Larry Brady

Taken, subscribed and sworn to before me this 3rd day of October 2015.

My commission expires: August 12, 2022

Harriett E. Williams
NOTARY PUBLIC



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA JEAN HAYES, Plaintiff Below,
Plaintiff

v.

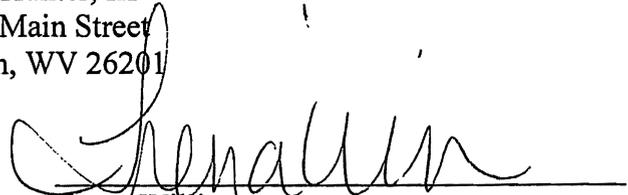
Case No. 15-0518

LARRY BRADY and
DAWNA MICHELLE BOONE BRADY
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Trena Williams, hereby certify that on the 6th day of October 2015, I served the foregoing **Respondent's Brief** upon J. Burton Hunter, III, by placing a true copy of same in the U.S. Mail, first-class, postage prepaid and as addressed as follows.

J. Burton Hunter, III
One West Main Street
Buckhannon, WV 26201



Trena Williams
WV State Bar No. 9963
The Law Office of Trena Williams, PLLC
217 E. 3rd Street
Weston, WV 26452
Phone: 304-517-1460
Fax: 304-517-1461
trena@trenawilliamsllaw.com