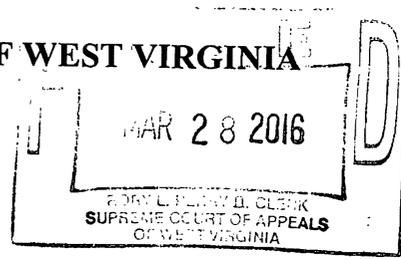


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-00968

IS-1205



GARRY THOMAS,

Defendant - Appellant

vs/

ARCHIE D. HOUCK

Plaintiff - Appellee

APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
WEST VIRGINIA

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

- A. That the Court Erred in Granting the Plaintiff's Motion in Limine.**
- B. That the Court Erred in Granting the Plaintiff's Rule 50 Motion.**
- C. That the Court Erred in Not Granting Defendant's Motion for a New Trial.**
- D. That the Court Erred in Granting Plaintiff Attorneys' Fees.**
- E. That the Court Erred in Not Assisting the Defendant in Securing the Attendance of the Co-Defendant.**

STATEMENT OF THE CASE

In 2013 Garry Thomas closed a road crossing his property. Archie Houck, a neighbor who owned property close to the Thomas' property complained that he had a right of way across the Thomas property. Thomas declined to reopen the road.

Houck filed suit against Thomas and Richard Way (who owned property between Thomas and Houck) and was represented by counsel. Discovery ensued and at the conclusion of the discovery period, the Plaintiff filed a motion for summary judgment. (Joint Appendix 13). That Judgment was denied. (JA 71).

After summary judgment was denied Houck and Way settled in a confidential settlement.

Houck and Thomas after three pre-trial conferences went to trial. At the conclusion of the Plaintiff's case, the Plaintiff moved pursuant to Rule 50 of the West Virginia Rules of Civil Procedure for a judgment as a matter of law. (JA 1085).

At the conclusion of the case the Plaintiff moved the Court pursuant to Rule 50 of the West Virginia Rules of Civil Procedure and the Court partially granted it (JA 1085).

The Court recognizing the principle enunciated in O'Dell v. Stegall, 226 W.Va. 590, 703 S.E.2d 561(2010), concluded that the Plaintiff was entitled to a judgment as a matter of law in three of the four elements and let the jury proceed in the four, the dimensions of the right of way.

The jury deliberated and found in favor of the Plaintiff and awarded general damages in the sum of \$5,331.48 and punitive damages in the sum of \$15,000.00 (JA

1088, 1091).

The Plaintiff moved for attorney fees and after argument the Court allowed the Plaintiff his attorneys' fees in the sum of \$125,240.26 (JA 1135, 1185).

The Defendant then moved to set aside the verdict and for new trial which was denied by the Court (JA 1128, 1131).

It is from that decision the Defendant appeals.

SUMMARY OF ARGUMENT

A. That the Court erred in Granting the Plaintiff's Motion in Limine.

After the pretrial hearing, the Court ruled that the Defendant could not mention that the Plaintiff's use of the alleged prescription right of way was permissive. (JA 224). In O'Dell v. Stegall, the Court found that permissive use of a right of way was any defect a claim of prescriptive use. O'Dell v. Stegall, 226 W.Va. 590, 703 S.E.2d 561 (2010).

B. That the Court Erred in Granting the Plaintiff's Rule 50 Motion.

After all of the evidence was presented, the Court granted the Plaintiff's motion for a verdict as a matter of law on three of the four elements of prescriptive easement set out in O'Dell v. Stegall. The Court failed and refused to recognize that the testimony of the Plaintiff and his wife of no adverse use of the property by the Plaintiff in the thirteen years prior to the suit was wrong.

C. That the Court Erred in Not Granting the Defendant's Motion for a New Trial.

Because of numerous errors pointed out to the Court including but not limited to the errors set forth in this appeal, the Court should have recognized that the Defendant did not get a fair trial.

D. That the Court Erred in Awarding the Plaintiff his Attorneys' Fees.

The Court improperly awarded the Plaintiff his attorney fees. The Defendant Thomas relied upon the fact that the Co-Defendant's attorney continued litigation until settlement, that the Court refused to grant the Plaintiff's motion for summary judgment; that the Court refused to grant a Rule 50 at the close of the Plaintiff's case and the

common sense idea that he had the right to block off his property.

E. That the Court Erred in Not Assisting the Defendant in Securing the Attendance of the Former Co-Defendant.

The Defendant, a lay person with no legal training asked the Court to assist him in securing the attendance of Richard Way, a former Co-Defendant and was not given any help.

STATEMENT OF ORAL ARGUMENT

Oral argument is necessary in this case as the dispositive issues have not been decided.

The briefs and records on appeal do not adequately present the facts and legal arguments. Oral argument would significantly aid the decisional process, and a memorandum decision would not be appropriate.

STANDARD OF REVIEW

Conclusions of law made by the trial Court are reviewed *de novo*. Burgess v. Porterfield 196 W.Va. 178, 469 S.E. 2d 114 (1996).

ASSIGNMENT OF ERROR A

A. THAT THE COURT ERRED IN GRANTING THE PLAINTIFF'S MOTION IN LIMINE

In the pretrial conference held July 8, 2015 the Court made a ruling that essentially limited the Defendant's ability to testify as to the "permissive use" issue. (JA. 185-87)

The Court ruled:

If you have evidence, Mr. Thomas, that there was any permissive use, then you can put that on but you need to make sure it's not just you saying it and you don't have any evidence to put on to support what you're saying.

(JA 187). While the Court characterized the ruling as being in favor of the Defendant it clearly shows it did not by the limitation.

Further, the Court later ruled on Motion in Limine No. 8 that the Defendant could not bring up testimony of non use by the Plaintiff of the right of way. (JA 193)

In denying the Plaintiff's motion in limine on the one hand, but limiting the testimony and in denying the Plaintiff the ability to bring up testimony on use, the Court effectively doomed the Defendant's case.

In O'Dell v. Stegall, 226 W.Va. 597 703 S.E.2d 561, the West Virginia Supreme Court of Appeals set forth the standard needed to establish a "prescriptive easement."

The court held in *Syllabus pt. 6*:

In the context of prescriptive easements, a use of another's land that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated.
The court went on to say:

For an adverse use to be "continuous," the person claiming a

prescriptive easement must show that there was no abandonment of the adverse use during the ten-year prescriptive period, or recognition by the person that he or she was using the land with the owner's permission. Additionally, the adverse use need not have been regular, constant or daily to be "continuous," but it must have been more than occasional or sporadic. All that is necessary is that the person prove that the land was used as often as required by the nature of the easement sought, and with enough regularity to give the owner notice that the person was a wrongdoer asserting an easement.

The Court in its granting of motion in limine point 8 referred to Walls v. DeNoone 209 W.Va. 675, 550 S.E. 2d 653 (2001). In that *per curriam* opinion the court stated:

Abandonment of an easement by prescription is a question of intention that may be proved by non use combined with circumstances which evidence an intent to abandon the right. It is the burden of the party asserting the absence of an easement by prescription to prove abandonment by clear and convincing evidence.

In Strahin v. Lantz, 193 W.Va. 285, 456 S.E.2d 12 (1993), the court stated that mere non use alone is insufficient to extinguish a right of way. It requires the challenger to the right to make a clear showing of abandonment.

In this case the Defendant because of the Court's ruling was denied the ability to present testimony of non-use by the Plaintiff and denied the right to present evidence that the Plaintiff's use early on was permissive.

While the Defendant and his wife did testify to a certain extent of the non-use by the Plaintiff and permissive use, the ruling on the two motions in limine prevented them from exploring and using the testimony of others to show those two factors.

ASSIGNMENT OF ERROR B

B. THAT THE COURT ERRED IN GRANTING THE PLAINTIFF'S RULE 50 MOTION.

STANDARD OF REVIEW

The appellant standard of review of granting a motion for judgment as a matter of law in Trial De Novo Modular Bldg. Consultants of West Virginia, Inc. v. Doerio, Inc., 235 W.Va. 474, 774 S.E.2d 555 (2015).

ARGUMENT

When appellate courts review a trial court order granting or denying a renewed motion for judgment as a matter of law after trial, it is not the task of the appellate court to review the facts to determine how it would have ruled on the evidence presented; instead its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Stephens v. Rake, 235 W. Va. 555, 775 S.E.2d 107 (2015).

Rule 50 of the West Virginia Rules of Civil Procedure states as follows:

(a) Judgment as a matter of law:

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

In a ruling on a motion for a judgment as a matter of law, every reasonable and legitimate inference fairly arising from the testimony when considered in its entirety must be indulged in favorably to the non-moving party and the court must assume as true those facts which the jury may properly find under the evidence. Stewart v. Johnson, 209 W.Va. 476, 549 S.E. 2d 670 (2001). The appellate court will sustain the judgment when only one reasonable conclusion as to the verdict can be reached; if reasonable minds can differ as to the importance and sufficiency of the evidence, a circuit court ruling granting a judgment as a matter of law will be reversed. Pipemasters, Inc. v. Putnam County Comm'n., 218 W.Va. 512, 625 S.E.2d 274 (2005).

In determining whether there is sufficient evidence to support a jury verdict, an appellate court does not examine credibility of the witnesses, conflicts in testimony or the weight of evidence. Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149 (1995). Where the directed verdict is for insufficiency of a parties' evidence, proof of that insufficiency must be clear and convincing. Keller v. Landis, 176 W.Va. 540, 346 S.E.2d 58 (1986).

In this case the court ruled:

Specifically, the Court finds and concludes that the evidence is clear and convincing that Mr. Houck's use of the alleged right of way was adverse for at least the period of 1981 to 1997, being more than a 10 year period, and that no reasonable juror could find to the contrary for purposes of accessing his family property.

The court went on to say:

The Court finds and concludes that during that time, if not longer, Mr. Houck's use of the alleged right of way was continuous and uninterrupted, in the manner than any owner of a right of way would use it, as demonstrated by clear and convincing evidence.

The Court then concluded:

The Court also finds and concludes that, by clear and convincing evidence, that no reasonable juror could find otherwise that the owners of the property over which Mr. Houck's alleged right of way travels had actual knowledge of Mr. Houck's adverse use or that a reasonable owner would have noticed the use.

(JA 1085).

The Court's ruling flies in the face of the law in this case. In O'Dell v. Stegall, 226 W.Va. 590, 703 S.E. 2d 561 (2001) the court stated:

A person claiming a prescriptive easement must prove each of the following elements: (1) the adverse of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used.

Further the Court says:

In order to establish a right of way by prescription, all of the elements of prescriptive use, including the fact that the use relied upon is adverse, must appear by clear and convincing proof. *Syllabus Point 2, Beckley Nat. Exchange Bank v. Lilly*, 116 W.Va. 608, 182 S.E. 767 (1935).

A person claiming a prescriptive easement must establish each element of prescriptive use as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim.

In looking at the status of "adverse use" the Court said:

In the context of prescriptive easements, the term "adverse use" does

not imply that the person claiming a prescriptive easement has animosity, personal hostility, or ill will toward the landowner; the un-communicated mental state of the person is irrelevant. Instead, adverse use is measured by the observable actions and statements of the person claiming a prescriptive easement and the owner of the land.

In the context of prescriptive easements, an “adverse use” of land is a wrongful use, made without the express or implied permission of the owner of the land. An “adverse use” of land is a wrongful use, made without the express or implied permission of the owner of the land. An “Adverse use” is one that creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to the law.

Where the use was originally permitted the Court said:

In the context of prescriptive easements, a use of another’s land that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated.

The Court went on to define continuous and uninterrupted:

For an adverse use to be “continuous,” the person claiming a prescriptive easement must show that there was no abandonment of the adverse use during the ten-year prescriptive period, or recognition by the person that he or she was using the land with the owner’s permission. Additionally, the adverse use need not have been regular, constant or daily to be “continuous,” but it must have been more than occasional or sporadic. All that is necessary is that the person prove that the land was used as often as required by the nature of the easement sought, and with enough regularity to give the owner notice that the person was a wrongdoer asserting an easement.

For an adverse use to be “uninterrupted,” the person claiming a prescriptive easement must show that the owner of the land did not overtly assert ownership of the land during the ten-year prescriptive period. More unheeded requests, protests, objections, or threats of prosecution or litigation by the landowner that the person stop are insufficient to interrupt an adverse usage. If any act by the landowner succeeded in causing the person to discontinue the adverse use, no matter how brief the discontinuance, then

the adverse use was interrupted.

To be “open and notorious: the Court said:

The “open and notorious” or “actually known” requirement is designed to give the owner of the land ample opportunity to protect against another person’s actions to establish a prescriptive easement. To establish that an adverse use was “open and notorious,” the person claiming a prescriptive easement must show that the wrongful use was visible and apparent, was not made stealthily or in secret, and was so conspicuous and obvious that a reasonable, prudent owner of the land had actual knowledge of the adverse use, the person claiming a prescriptive easement need not show that the use was open and notorious.

To all of the above standards we must apply the testimony of witnesses with regard to the three standards that the trial court judge said the Plaintiff met.

In his testimony Garry Thomas said he bought the land in question in 1997 (JA 807). He said two weeks after he purchased the house, he saw Mr. Houck on the roadway, they had a conversation where they agreed to share the driveway (JA 795).

Later he had a falling out with Mr. Houck and said “Well, look, you know, so use your own damn driveway, pretty much” (JA 795). He stated that from then on each time he saw Houck try to use the driveway he would run him off (JA 796). The testimony Thomas would say “Hey, off the driveway. Go use your own driveway. So he would turn around, he would back down and whatever and he would go to his own driveway.” (JA 796).

On cross-examination, Thomas said that he never heard from Mr. Green (the person he purchased the land from) that Houck had a right of way. (JA 804-818).

Thomas testified that after a year and a half or two he had a disagreement with

Houck and ended Mr. Houck's use of the right of way. He said "I didn't try to stop him, I stopped him" (JA 807). Simple math would reveal that if the property was purchased in 1997 Mr. Thomas ended Houck's use in 1999 or 2000. (JA 808).

Thomas agrees with counsel that since 2000 Houck continued to use the road and Thomas confronted him. (JA 810). He said that he saw Houck on his property after 2000, but Houck didn't use the Thomas driveway (JA 816).

Mrs. Vialeria Duvall Thomas testified that she was the wife of Garry Thomas and they had indeed purchased the property in 1997 (JA 748). She testified that she never spoke with Mr. Green the prior owner (JA 750-752). She said that after a confrontation with Houck she and her husband allowed Houck to use the road which continued for about two years (JA 754). She said she saw Houck on his property, but he never used the road on their property (JA 755).

On cross-examination she testified that they let Mr. Houck use the road at first after they bought the property (JA 761).

Ms. Duvall Thomas was insistent that the initial use of the road by Houck after they bought it was permissive. (JA 772). That once they told him he couldn't use it after the first year and a half, she "never saw him use it again." (JA 777). He tried a few times but then he backed down. (JA 774). In a heated discussion with defense counsel, Ms. Duvall Thomas insisted Houck did not use the road. (JA 776-777).

The statutory time period for a prescriptive easement stems from *West Virginia Code §55-2-1* which states:

No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims.

Essentially this is a statute of limitations. Somon v. Murphy Fabrication & Creations Co., 160 W.Va. 84, 232 S.E. 2d 524 (1977). It looks backward from the statutory period and if the claimer or contestor of the right sits on that right for ten years or more then they forfeit their right to file a claim. The statute contemplates a continuous period of time and should be calculated ten years backward from the date the action complained of arises.

In this case the Defendant erected his fence in 2013 that the Plaintiff complained of. The claimer, here the plaintiff must show "continuous use and it must be for the statutory period Somon v. Murphy, supra. In the law of adverse possession "continuous possession" means possession which has not been abandoned by him who claims such possession and "uninterrupted possession" means possession which has not been effectively broken by possession of another State v. Davis 140 W.Va. 153, 83 S.E. 2d 114 (1954).

The court's finding that the Plaintiff had established a right of way "for at least the period 1981 to 1997" (JA 1085) was not dispositive of the issue of "continuous use." The alleged blocking of the easement took place in 2013 some 16 years after the court's ruling that the right was created. The actions of the Plaintiff from the period from 1997 to 2013 are critical. If the Plaintiff abandoned the use during the statutory period then the right

would be lost.

It is abundantly clear that the testimony of the use made by Mr. Houck of the road across the Thomas property was hotly contested. Houck said he used it because he always used it. Thomas said he used it from 1997 to 2000 with permission and did not use it after 2000. There is a 13 years period that the Defendant claim Mr. Houck used other means to access his property.

What's the truth? That's why there was a jury trial. But the judge did not allow the jury to answer this fundamental question. Instead, he issued a Rule 50 order.

If the jury believed the Thomases, then even if a prescription right had been created from 1981 to 1997, it would have been extinguished during the 13 years of non use.

ASSIGNMENT OF ERROR C

C. THAT THE COURT ERRED IN NOT GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL

STANDARD OF REVIEW

A trial judge's decision to award a new trial is not subject to appellant review unless the trial judge abuses his or her "discretion." Neely v. Belk Inc. 222 W.Va. 560, 668 S.E.2d 189 (2008).

ARGUMENT

Trial judges have the authority to vacate a jury verdict and award a new trial. In re State Public Bldg. Asbelson Litigation 193 W.Va. 119, 454 S.E.2d 413 (1994) cert. denied 515 U.S. 1160. In this case the errors set forth in the other section of the brief taken as a whole would justify a new trial.

The Defendant in determining if he should defend himself and continue on with the case relied upon the opinion of Mr. Way's lawyer who filed an answer he relied upon the judge who ruled in his favor in the motion for summary judgment.

The problem here was the Defendant is not a lawyer. When the judge made his pretrial ruling he did not understand the importance of getting live testimony to verify what he knew to be the truth. He believed that the system would treat him fairly. He thought that the court would help him present his case.

The Defendant as a lay person did a fair job of presenting the evidence as he saw it. He and his wife testified that the Plaintiff had never established a prescriptive right

and if they did the right had been abandoned by permission and non-use. Now Mr. Thomas has a lawyer and deserves a new trial.

ASSIGNMENT OF ERROR D

D. THAT THE COURT ERRED IN GRANTING PLAINTIFF ATTORNEYS FEES

STANDARD OF REVIEW

The applicable standard of review would appear to be “de novo”. Sally-Mike Properties v. Yokum 179 W. Va. 48 365 S.E. 2d 246 (1980).

In this case the Plaintiff asked the jury for an interrogatory determining if the Plaintiff was entitled to have its attorney's fees granted as a result of the actions of the Defendant.

Defendant contends that the requirement of the jury making a finding is merely advisory and the actual award of attorney's fees must be made by the court after it makes certain its findings.

Ordinarily in the absence of a statutory or contractual provision to the contrary, attorney's fees are not recoverable by the prevailing litigant. Branson v. Wilkes, 216 W.Va. 293, 607 S.E. 2d 399 (2004) (per curiam).

There are several exceptions to the “American Rule.” They generally fall into three classes. First “common fund”, second “common benefit”, and third “bad faith.”. Sally-Mike Properties v. Yokum, *supra*. In this case only the “bad faith’ exception has any relevance.

The “bad faith” exception may only be asserted where the unsuccessful party

caused the prevailing party to suffer fees and costs as a result of his or her “vexation, wanton or oppressed assertion and a claim or defense that cannot be supported by a good faith argument for the application, extensions, modification or reversal of existing law.” Shafer v. Kings Tire Serv., 215 W.Va. 169, 597 S.E. 2d 302 (2004); Downing v. Ashley, 193 W. Va. 77, 454 S.E.2d 371(1994).

. Ideally the Court must find that the Defendant had no good faith argument for the application of law adverse possession with regard to his case.

Here, several factors render it impossible for the Court to make a finding of fact that the Defendant did not have a good faith argument for his position. First, the Plaintiff on at least on occasion, and maybe more, moved the Court for summary judgment. After extensive evidence being presented, the Court ruled that summary judgment was not appropriate.

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Jochum v. Waste Mgmt. of W. Va., Inc., 224 W.Va. 44 680 S.E.2d 59 (2009). The function of a summary judgment is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether a trial is actually required. Chafin v. Gibson, 213 W.Va. 167, 578 S.E. 2d 361 (2003)

As a correlation to the above, where the Court finds that there are genuine issues of fact and summary judgment is not appropriate, it finds that the trial is necessary to resolve disputed facts and the Court denies summary judgment, by that decision it rules that the suit is not frivolous.

It is critical to note that while the co-defendant was a part of this action, his attorney easily showed that there were legitimate facts in dispute that needed a trier of fact to determine contested issues.

When the Court hamstrung the Defendant in the presentation of his evidence in the motion in limine, the Plaintiff still was unable to have the Court determine there were not material issues. In the Court's Rule 50 decision, it allowed the jury to determine the issue of the dimensions of the right of way. (JA 1085). By allowing that issue to go to the jury, the Court concluded that the Defendant had legitimately asserted a material defense to the Plaintiff's assertion of a prescriptive easement.

It would be impossible for the Court to make a finding that the Defendant asserted no good faith argument for the application of his perspective on the nature of the prescriptive easement when the Court ruled on at least two occasions that there was a legitimate controversy in this case. (JA 169).

The court in its Rule 50 determination (which the Defendant also appealed) concluded that there was not sufficient information to a complete judgment for the Plaintiff. (JA 1085). Both at the conclusion of the Plaintiff's case and after all of the evidence was in, the court could not say that there were no material facts in controversy.

It is the desire of the Plaintiff to punish the non-settling Defendant with the Plaintiff's attorney's fees because he put the Plaintiff to the requirement that he prove his case. Is it ever wrong for a Defendant to issue a general denial and to require the Plaintiff to prove their case? I think no. Adverse possession cases are purely fact specific and no facts can be determined true unless subject to cross-examination and the evaluation by an unbiased finder of fact.

The fact that the defense by a non lawyer, not allowed to present what he believed to be relevant evidence because of the motion in limine, is able to withstand a Rule 50 attack is sufficient to show that his defense was not frivolous and therefore not subject to the sanction of paying the opponent's attorney's fees.

The fact that the two skilled trial lawyers were able to convince a jury of non-experts to make the recommendation that attorney's fees should be awarded is nothing more than an advertisement for the principle that no persons should go to trial without the assistance of counsel. Is the victory of a skilled fencer over an unarmed man a sign of anything more than force?

The jury in this case awarded the Plaintiff actual damages in the amount of \$5,331.48. The Plaintiff asked for \$125,000.00 as attorney's fees. Is that reasonable? Could and should this case be settled at an early stage? If the Plaintiff opines that it should not have settled early then that supports the theory he over evaluation his case while the Defendant's is under evaluated. In an event there was a legitimate difference of opinion which needed to be resolved by the jury.

So the Defendant relied on the analysis of Co-Defendant's lawyer that the case had merit. He relied on the Circuit Court in its ruling on the motion for summary judgment that the case had merit. He relied on the Court's first Rule 50 Motion and the Court's second Rule 50 Motion to go forward. He did not continue litigation in "bad faith."

ASSIGNMENT OF ERROR E

E. THAT THE COURT ERRED IN NOT ASSISTING THE DEFENDANT IN SECURING THE ATTENDANCE OF THE CO-DEFENDANT

STANDARD OF REVIEW

Findings and actions of a court are reviewed using an abuse of discretion standard.

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

ARGUMENT

At the August 19, 2015 pretrial conference, Mr. Thomas told the judge that the testimony of Russell Way was necessary for his case. (JA 266).

A long discussion ensued with the court with regard to the factual nature of Mr. Way's information. The court cautioned that the terms of Mr. Way's settlement was "off limits." (JA 266-268).

On the 1st day of trial Plaintiff's counsel indicated to the Court that Mr. Russell Way would be a witness for the defense. (JA 335). Later that morning the Court and the Defendant had a discussion about Mr. Way. In explaining his difficulty Mr. Thomas showed the Court a copy of a letter from Mr. Way's lawyer trying to avoid service. (JA 336-337). When informed by Mr. Thomas that he had a proper subpoena for Mr. Way the Court stated: "If he's been served and he doesn't show up, I will send the sheriff out to him." (JA 342).

On the second day of trial the Defendant again brought up the Russell Way problem. The following discussion was had:

THE COURT: You know, that's another point that I didn't put on the record, but Mr. Way who we're saying he should be here and I agree it would be helpful to have him here, he's avoiding service of the subpoena on him apparently. And his counsel has told him to do so, try not to come to trial. I think we saw something in writing to that effect, did we not?

MR. THOMAS: Yes, sir.

THE COURT: I think there was a letter I saw. And so that makes – Mr. Thomas, the record should reflect, has done everything he could to get this witness here and he's avoiding service of process of the subpoena at his attorney's directions. Why, I don't know what his attorney is directing him to do so.

But that doesn't pass the small test, I can't give you the legal reasons for it, but it just doesn't pass the small test that an attorney is instructing his client to avoid service of process.

(JA 555-556).

At the conclusion of the defense's case prior to testifying himself the Defendant had the following exchange:

Mr. MCCUNE: May I make inquiry, sir? Mr. Thomas indicated at the beginning of this case that Ms. Duvall will be his last witness. Is she, are we at the conclusion of your case?

MR. THOMAS: Well, she is now because Mr. Way apparently could not be deposed or given that subpoena, so aside from him I guess so. I've got nobody else.

(JA 781). After he testified the defense rested.

West Virginia Trial Court Rules of Procedure govern the trial in West Virginia.

Essentially the trial court rules say that the trial court runs the case. Chapter 2 is directed to Civil Trial and basically states that the court use sound discretion in determining how

to try the case.

Rule 406 talks about bias and prejudice. The salient sentence in rule says:

“Judicial officers must ensure that appropriate action is taken to preserve a neutral trial and fair forum for all persons.”

The first sentence in the Rule sees to the philosophy of the court.

The West Virginia Supreme Court of Appeals aspires to achieve absolute fairness in the determination of cases and matters before all court of this State and expects the highest standards of professionalism, human decency, and considerate behavior toward others from its judicial officers, lawyers, and court personnel, as well as from all witnesses, litigants, and other person who come before the court.

Once the court recognized the activity of a lawyer formerly associated with the case's activity did not pass the “sniff test” the court should have made further inquiry. A phone call to that lawyer to confirm or deny the activity would have been the minimum action of the court.

Pro se litigants take on a serious uphill battle to know of and conform their behavior to the rules. Some time lawyers improperly compare the trial process to a game and use tricks to win cases and make points.

In this case, the court had a duty to protect the Defendant from his own legal shortcomings.

CONCLUSION

Based upon the foregoing the Court should grant Mr. Thomas a new trial.

Respectfully submitted,

GARRY THOMAS
Appellant

By Counsel.

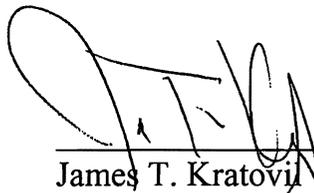


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CERTIFICATE OF SERVICE

I, James T. Kratovil, Esquire, counsel for Defendant, hereby certify that I served the foregoing *Petitioner's Brief* upon counsels for Plaintiffs, by mailing a true copy thereof to the below listed addresses on this the 28th day of March, 2016:

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