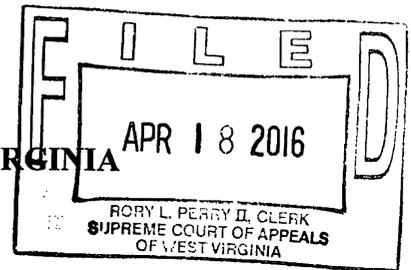


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1205



GARRY THOMAS,

Defendant below, Petitioner,

v.

ARCHIE D. HOUCK,

Plaintiff below, Respondent.

An appeal from the Circuit Court of Berkeley County, West Virginia,
The Honorable Gray Silver, III
Civil action no. 14-C-220

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

A respondent’s brief need not specifically restate the petitioner’s assignments of error. W. Va. R. App. P. 10(d). It is the position of the respondent/plaintiff, Archie D. Houck (“Mr. Houck”), that the circuit court did not err.

Additionally, this Court may affirm the circuit court on any ground appearing in the record, and, indeed, on any adequately supported independently sufficient ground. *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) (“An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support”).

STATEMENT OF THE CASE

Introduction

After hearing three days of testimony, a jury found by clear and convincing evidence that Petitioner Garry Thomas built a fence across Archie Houck’s right of way. The jury found that Thomas closed off the right of way despite knowing that Mr. Houck actively used that right of way as the only access to his family property for decades. In fact, the jury further found that Thomas closed off the right of way with the specific intent to deprive Mr. Houck of access to his property. On these points, the evidence was overwhelming and unimpeached: Mr. Thomas knew exactly what he was doing and he did it with the intent to harm Mr. Houck.

Mr. Thomas now complains before this Court about what he views as procedural errors below. Undoubtedly, Mr. Thomas made a mess of things by proceeding pro se through trial. The circuit court expressly warned him that he should have an attorney to defend himself in this case. However, Mr. Thomas chose to ignore that advice, as he ignored other court orders, and instead filed self-defeating, often incomprehensible documents.

But Mr. Thomas’s pro se difficulties made no difference. The circuit court and the jury reached the correct conclusion based on the clear law and obvious facts before them: Mr. Houck

established his right of way by clear and convincing evidence, and Mr. Thomas intentionally and maliciously sought to close that right of way. As will be seen *infra*, each point of alleged error now raised by Mr. Thomas is amply refuted by the clear, well-documented and legally sound trial court record. Therefore, this Honorable Court should affirm the circuit court's rulings.

Factual Background

During all relevant times, Mr. Houck owned, and continues to own, real property in the Hedgesville District of Berkeley County, West Virginia as depicted on tax map H-8, Parcel 10 and as more fully shown on the various plats appearing in the record. (JA 988-989, 1075). Russell L. Way, who was at one time a defendant in the proceedings below, owns real property immediately adjoining Mr. Houck's property. *Id.* Defendant Thomas owns real property adjoining Mr. Way's property, *id.*, property that he bought in 1997. *Id.* Mr. Thomas critically admitted, and witnesses testified, that Mr. Thomas and his witnesses had no knowledge of the Houck property, or how it was used, prior to that date. (JA 618, 759-60).

For many decades prior to this litigation, Mr. Houck's property has been served by a right of way. The right of way extends from Mr. Houck's property, across a portion of Mr. Way's property and across a portion of Defendant Thomas's property ultimately connecting to West Virginia County Rte 3/2. *Id.* Based on uncontradicted evidence, the jury found that right of way in question is 14 feet wide, more or less, extends for 799 feet, and has a reasonably identifiable starting point at Mr. Houck's property and a reasonably identifiable ending point at the access road West Virginia County Rte 3/2. (JA 688, 728, 1088).

Mr. Houck, and every witness with direct knowledge of the property and its prior use, testified that Mr. Houck used the right of way continuously and without interruption for at least ten

years as the sole means of access to Mr. Houck's property. (JA 511, 515-518, 582, 596-597, 603, 610, 617, 622, 627-28, 662-663, 682, 729). Even Mr. Thomas admitted that the testimony overwhelmingly showed that the right of way was Mr. Houck's only access. (JA 819 "Q And the testimony had been pretty clear here today that there's no other way to get there, hasn't it? A It's been pretty clear, yes, sir").

Because the right of way was the only way to access the Houck property, Mr. Houck and his family have used the right of way for many decades, perhaps as early as 1920 – and certainly many decades before Mr. Thomas moved into the area. (JA 510, 565, 603, 616).

Mr. Houck continued to use the right of way for a ten year period after Thomas moved in. (JA 507-508, 519, 581). Mr. Thomas's witnesses contradicted themselves on this point. For example, Ms. Duvall (Mr. Thomas's wife) stated at trial that she only saw Mr. Houck use the right of way "a few times" after they moved in. (JA 773-74). But under cross examination, she was forced to admit that, in fact, she previously testified that she saw him use it "many times." (JA 775-776)

Similarly, Mr. Thomas contradicted his own prior sworn testimony when stated at trial that Mr. Houck had not used the right of way often since he (Thomas) brought the property. In fact, Mr. Thomas had already stated at his deposition that Mr. Houck used it "many times" since then. (JA 808-810).

Importantly, Mr. Houck has never asked permission to use the right of way either before or after Mr. Thomas moved in (JA 493-498, 583, 598, 604, 610, 617). In fact, Mr. Thomas himself admitted in discovery and again at trial that Mr. Houck never had permission to use the right of way. (JA 820). Mr. Thomas's interest in the property was expressly made subject, by deed, to existing

rights of way such as Mr. Houck's (JA 766).

Nevertheless, in 2013, Mr. Thomas built a fence across Mr. Houck's right of way (JA 809, 1068), forcing Mr. Houck to file suit. Mr. Thomas tried to block the right of way before, but he was told not to do so by persons who knew that Mr. Houck used the right of way as access to his property (JA 628-29). In fact, the person who sold the property to Mr. Thomas told him directly that Mr. Houck used the right of way and that Mr. Thomas could not block the right of way. (JA 32-33, 806)

Mr. Houck produced two expert surveyors. Gregory Yebernetsky qualified as an expert without objection (JA 672). He testified to the dimensions of the road – that it was an average of 14 feet wide (JA 680) and 799 feet long (JA 679). Galjto Geertsema testified that the right of way ran to Mr. Houck's property, and that the right of way existed as early as 1950 (JA 655). Mr. Geertsema testified to the obvious proposition that, just because a right of way does not appear on a tax map, it doesn't mean that the right of way doesn't exist. (JA 657). Geertsema qualified as an expert without objection (JA 650)

Mr. Thomas, proceeding pro se despite cautions from the court (JA 1092), put on no expert testimony or other evidence to impeach Mr. Yebernetsky or Mr. Geertsema.

Unsurprisingly, and based on the overwhelming evidence, the circuit court granted Mr. Houck's motion for partial judgment as a matter of law. The Court found that

“Based on the evidence presented, concessions by the parties and other matters appearing more fully on the record, the Court finds and concludes that the Defendant has been fully heard on the issues related to Plaintiff's claim for prescriptive easement and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue with respect to the following the first three elements related to prescriptive easements set forth in Syl. pt. 1, O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010).

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 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 that any owner of a right of way would use it, as demonstrated by clear and convincing evidence. The Court further notes that Mr. Thomas has conceded this point and that no reasonable juror could find to the contrary. The Court also finds and concludes that, by clear and convincing evidence, that no reasonable juror could find otherwise than 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.

Therefore, the Court GRANTS Plaintiff's Rule 50 motion with respect to those elements. The Motion is DENIED with respect to the final element, relating to the dimensions of the right of way. That issue remains for the jury, and the Court's denial of the motion with respect to that element in no way constitutes a factual finding with respect to that element. The Defendant may not raise the denial of this portion of the motion in any manner in closing argument to the jury or for any other purpose either directly or indirectly.”

(JA 1085-1086)

Based on the undisputed testimony, the jury then found the dimensions of the right of way to be 799 feet long and 14 feet wide. (JA 1088). The jury also awarded special damages in the amount of \$5,331.48 and found that Mr. Houck was entitled to his attorneys' fees. *Id.* After the Court made threshold findings for punitive damages (JA843), the jury awarded Mr. Houck \$15,000 for punitive damages. (JA 1091). Thomas had no objection to the form of the verdict. (JA 932).

After trial, Mr. Houck filed a motion for attorneys' fees pursuant to the verdict. The Court heard testimony on the issue and awarded Mr. Houck \$120,513.75 in attorneys' fees and \$4,726.51 in legal costs. (Exhibit A)¹

¹ Although Mr. Thomas gave notice that he was going to include the attorneys' fees order in the appendix (see Notice dated February 22, 2016), the signed order is not listed in the table of context and counsel is unable to locate the order in the appendix itself. Therefore, the order is attached.

SUMMARY OF ARGUMENT

The only credible evidence showed Mr. Houck's use was non-permissive. Therefore, although the trial court allowed Mr. Thomas the opportunity to put forth evidence to the contrary, the court correctly ruled that Mr. Thomas was not allowed to present mere unsupported speculation to the jury.

The court correctly ruled on Mr. Houck's Rule 50 motion during trial. After hearing all of the evidence, no reasonable juror could have found other than that Mr. Houck proved the elements of prescriptive use.

The circuit court correctly denied Mr. Thomas motion for a new trial. Mr. Thomas, neither then nor now, can point to any error in the record below, let alone an error that would justify setting aside the jury's verdict.

The jury correctly found that Mr. Thomas should pay Mr. Houck's legal fees and costs, and the circuit court properly awarded Mr. Houck \$120,513.75 in attorneys' fees and \$4,726.51 in legal costs. Mr. Thomas intentionally and maliciously acted to deprive Mr. Houck of his access to his family home place. Therefore, Mr. Thomas's actions fall within this Court's longstanding exception to the American Rule.

The circuit court had no duty to help Mr. Thomas serve a subpoena. Mr. Thomas knew of the risks of proceeding pro se, but chose to attempt to serve a subpoena himself. There is no indication that Mr. Thomas correctly served the subpoena, or that doing so would have made any difference whatsoever.

For these reasons, as more fully set forth below, the circuit court's August 5, 2015 Order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case. Pursuant to W. Va. R. App. 18(a), Mr. Houck notes that the circuit court, relying on well-established rules of law and equity, correctly decided the dispositive issues. Further, the facts and legal arguments are adequately presented in the briefs and the record on appeal, and oral argument would not aid the decisional process.

Petitioner, Mr. Thomas, argues that “[o]ral argument is necessary in this case as the dispositive issues have not been decided.” Petitioner’s brief, p. 10. But they have been decided. The jury reached a verdict (JA 1088), the circuit court issued a final judgment (JA 1092), and the circuit court ruled on post trial motions (Exhibit B)². There is nothing to be done below, and Mr. Thomas does not suggest, let alone demonstrate, that this case falls within the examples of cases listed in Rules 19 or 20 that may qualify for oral argument.

Therefore, there is no need for oral argument.

ARGUMENT

A. The circuit court did not err with respect to the motion in limine concerning evidence of permissive use.

In his first assignment of error, Mr. Thomas argues that the circuit court erred with respect to a ruling regarding a motion in limine.³ The specific motion was Plaintiff’s motion in limine no. 4 in which Plaintiff asked the Court to exclude argument that Mr. Houck’s prior use was permissive.

² Again, despite suggesting that he would include at least one post trial orders in the appendix, and despite designation of other post trial orders by Mr. Houck, Mr. Thomas did not list them in the table of contents, nor has counsel been able to locate them in the appendix itself.

³“A trial court's ruling on a motion in limine is reviewed on appeal for an abuse of discretion.” Syl. Pt. 1, *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004).

Ultimately, the evidence proved so overwhelming on this point that the Court ruled that no reasonable juror could disagree. (JA 1085-1086).

However, and importantly for purposes of this appeal, the Court actually denied the Plaintiff's motion in limine at the time it was made. (JA 184-187, 224). The Court found that Mr. Thomas could put on evidence of permissive use if he had any. *Id.* Because Mr. Thomas was proceeding pro se, the Court also cautioned Mr. Thomas that his evidence had to be factual and not mere speculation. *Id.*

Despite this clear ruling, Mr. Thomas now argues that “[w]hile the Court characterized the ruling as being in favor of the Defendant it clearly shows it did not by the limitation.” Petitioner’s Brief, p. 12. Presumably Mr. Thomas is referring to the Court’s requirement that Mr. Thomas present factual evidence and not mere speculation. However, the Court’s ruling in that regard was certainly not an error – it simply correctly stated the law preventing speculation from reaching a jury. *Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 642, 520 S.E.2d 418, 430 (1999) (“This Court has consistently rejected permitting counsel to base arguments before the jury upon mere speculation”); syl. pt. 4, *Crane & Equip. Rental Co. v. Park Corp.*, 177 W. Va. 65, 66, 350 S.E.2d 692, 693 (1986) (“A jury will not be permitted to base its findings of fact upon conjecture or speculation”) (citations omitted).

With respect to this assignment of error, Mr. Thomas next argues that “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.” Petitioner’s Brief, p. 12. For this point, Mr. Thomas cites page 193 of the Joint Appendix. *Id.* However, page 193 refers to motion in limine no. 8 as a motion concerning Mr. Thomas’s possible reference to his disabled son. Recognizing the tragic nature of Mr. Thomas’s son’s injury, the Court granted that motion to prevent undue sympathy. (JA 233).

The record discloses no order by the Court prior to the close of evidence which would have prevented Mr. Thomas from arguing “non use” by Mr. Houck to the jury. In fact, Mr. Thomas testified to Mr. Houck’s use at trial. But he actually testified that Mr. Houck did use the right of way. (JA 807, 775-776, 808-810). Not only that, every other witness with knowledge also testified to Mr. Houck’s use. (JA 511, 515-518, 582, 596-597, 603, 610, 617, 622, 627-28, 662-663, 682, 729). The fact is that Mr. Thomas was never prevented from arguing about Mr. Houck’s alleged non-use.⁴

Further, Mr. Thomas’s assignment of error on this point is barred because he didn’t object to the motion in limine at the time and because his appeal with respect to the motion in limine was not timely filed. Mr. Thomas did not object to the motion in limine ruling when the Court made it. (JA 184-187). Of course, Mr. Thomas had no reason to object: he won – the Court denied the Plaintiff’s motion. However, Mr. Thomas’s failure to object means he can’t object now. Syl. pt. 7 of *Wheeling Dollar Savings and Trust v. Leedy*, W.Va., 216 S.E.2d 560 (1975) (“where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered upon appeal”) (citations and internal punctuation omitted); *State v. Carroll*, No. 13-0573, 2013 WL 6152960, at *3 (W. Va. Nov. 22, 2013) (“Time and again, we have reiterated that to preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the

⁴ Mr. Thomas’s assignment of error on this point is puzzling because he ultimately concedes that he “did testify to a certain extent of the non-use by the Plaintiff and permissive use.” Petitioner’s Brief, p. 13. He then seems to modify his assignment of error by stating that the “ruling on the two motions in limine prevented [Thomas] from exploring and using the testimony of others to show these two factors.” *Id.* However, Mr. Thomas still provides no citation to any portion of the record indicating that the Court prevented him from arguing to the jury permissive use or non-use.

claimed defect”) (citations and internal punctuation omitted). To the extent that Mr. Thomas invited error below, he obviously cannot complain about it now. *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 219, 719 S.E.2d 381, 387 (2011) (“It is well-established law in this state that a party cannot invite the court to commit an error, and then complain of it”) (citations and internal punctuation omitted).

In any event, Mr. Thomas’s appeal is untimely. The Court’s ruling on the motion in limine was interlocutory. W. Va. R. Civ. P. 54(b). Therefore, the final Judgment Order would have been the appealable order for purposes of the motions in limine. However, this Court noted that Mr. Thomas appeal was not timely with respect to the September 23, 2015 Judgment Order. Scheduling Order, fn. 1. Rule 5(b) of the Rules of Appellate Procedure states “[w]ithin thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules.” *See also Cronin v. Bartlett*, 196 W. Va. 324, 326, 472 S.E.2d 409, 411 (1996) (appeal dismissed when not filed in time). Therefore, Mr. Thomas’s appeal on this point may not be considered.

Therefore, with respect to Mr. Thomas’s first assignment of error, the circuit court was correct and should be affirmed.

B. The Court’s Rule 50 Order was correct.

Because Mr. Houck was trying to prove a prescriptive easement, the case below was governed by Syl. pt. 1, *O’Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010) which states that

“A person claiming a prescriptive easement must prove each of the following elements: (1) the adverse use 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.”

After the close of all evidence, the Plaintiff moved for judgment as a matter of law with respect to the first three elements. The Court ruled as follows:

“Based on the evidence presented, concessions by the parties and other matters appearing more fully on the record, the Court finds and concludes that the Defendant has been fully heard on the issues related to Plaintiff's claim for prescriptive easement and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue with respect to the following the first three elements related to prescriptive easements set forth in Syl. pt. 1, *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010).

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 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 that any owner of a right of way would use it, as demonstrated by clear and convincing evidence. The Court further notes that Mr. Thomas has conceded this point and that no reasonable juror could find to the contrary. The Court also finds and concludes that, by clear and convincing evidence, that no reasonable juror could find otherwise than 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.

Therefore, the Court GRANTS Plaintiff's Rule 50 motion with respect to those elements. The Motion is DENIED with respect to the final element, relating to the dimensions of the right of way. That issue remains for the jury, and the Court's denial of the motion with respect to that element in no way constitutes a factual finding with respect to that element. The Defendant may not raise the denial of this portion of the motion in any manner in closing argument to the jury or for any other purpose either directly or indirectly.”

(JA 1085-1086). Rule 50(a)(1) of the West Virginia Rules of Civil Procedure states

“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.”

W. Va. R. Civ. P. 50. This Court's review of an order granting a Rule 50 motion is *de novo*. Syl. pt. 9, *Gardner v. CSX Transp., Inc.*, 201 W. Va. 490, 492, 498 S.E.2d 473, 475 (1997). This Court will sustain such an order "when only one reasonable conclusion as to the verdict can be reached . . . if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." *Id.*

However, in cases "[w]here the evidence given on behalf of the defendant is clearly insufficient to support a verdict for him so that such verdict, if returned by a jury, must be set aside, and the evidence of the plaintiff is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for the plaintiff." Syl. Pt. 2, *Cramer v. W. Virginia Dep't of Highways*, 180 W. Va. 97, 97, 375 S.E.2d 568, 568 (1988) (citation omitted).

Each of the Court's findings in its Rule 50 Order was supported by clear and convincing evidence. With respect to adverse use, the only credible evidence was that Mr. Houck used it as any owner would without asking permission of anyone. (JA 493-498, 583, 598, 604, 610, 617). In fact, Mr. Thomas himself admitted on multiple occasions that Mr. Houck never had permission to use the right of way. (JA 820).

Mr. Houck and his witnesses testified without contradiction that Mr. Houck used the right of way continuously and uninterruptedly for far longer than the 10 year period in a manner that any rightful owner of the property would use it (JA 511, 515-518, 582, 596-597, 603, 610, 617, 622, 627-28, 662-663, 682, 729). Mr. Thomas was forced to admit that he had no knowledge of Mr. Houck's long period of use before he (Thomas) moved into the area. (JA 618, 759-60). In fact, Mr. Thomas was forced to concede that he had actual knowledge of Mr. Houck's use of the right of way during the time that Thomas owned the property over which the right of way traveled. (JA 507-508,

519, 581, 775-776, 808-810).

To put the matter beyond any dispute, the jury also found that Mr. Houck proved that he had a right of way by prescription by clear and convincing evidence (JA 1088). The evidence was so clear and convincing that no reasonable juror could have found to the contrary: Mr. Houck established his right of way by prescriptive use. Therefore, the circuit court's Rule 50 order was correct and should be affirmed.

Additionally, as before, Mr. Thomas's assignment of error on this point is barred because his appeal with respect to this point was not timely filed. The Rule 50 Order was entered on September 3, 2015. Even if that order can be considered to be part of the ultimate September 23, 2015 Judgment Order, this Court has already ruled that an appeal from that September 23 Judgment Order is untimely. Scheduling Order, fn. 1. Therefore, Mr. Thomas's appeal on this point is barred. W. Va. R. App. P. 5(b) ("[w]ithin thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules"); *Cronin v. Bartlett*, 196 W. Va. 324, 326, 472 S.E.2d 409, 411 (1996) (appeal dismissed when not filed in time). Therefore, Mr. Thomas's appeal on this point may not be considered.

C. The Circuit Court correctly denied Mr. Thomas's motion for a new trial

In his next assignment of error, Mr. Thomas argues that he is entitled to a new trial because he made mistakes when he litigated this matter pro se.

There is no doubt that Mr. Thomas did not handle the case in the manner that an experienced attorney would have handled it. However, Mr. Thomas was expressly warned by the Circuit Court about the consequences of proceeding without an attorney. (JA 1092) ("The Defendant, Garry

Thomas, having been previously cautioned by the Court, at a prior hearing, about the complexity of the case and the advisability of procuring an attorney, nonetheless chose to proceed pro se”). Mr. Thomas is an intelligent man who knew and understood the risks of proceeding pro se. He made the decision to proceed pro se, and it was his right to do. *State v. Blosser*, 158 W. Va. 164, 167-68, 207 S.E.2d 186, 189 (1974) (“The right of a party to appear in his own behalf and be heard in the courts is fundamental. It is an inalienable right common to all, guaranteed both by the constitution of the state and the Constitution of the United States”) (citations omitted).

Although Mr. Thomas decided to proceed pro se, he does not point to any error by the circuit court—reversible or otherwise—that resulted from his decision. The fact that Mr. Thomas proceeded pro se makes no difference to the undisputed facts adduced at trial. Mr. Thomas intentionally cut off a right of way that Mr. Houck used for decades as his only access to his property. He did it despite knowing that Mr. Houck needed that access and despite being warned not to do it. A lawyer may have advised Mr. Thomas not to risk going to trial with such bad facts, but a lawyer could not have changed them facts themselves.

D. The Circuit Court correctly awarded attorneys’ fees and costs to Mr. Houck.

The jury returned its verdict in this case, specifically answering “YES” to the following question on the verdict form: "Please state whether, pursuant to the instructions of the Court, you find that Defendant Garry Thomas acted either in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons such that you find that Plaintiff Archie Houck is entitled to the reasonable attorneys' fees that he incurred in this case." (JA 1088)

In its post-verdict judgment order, the Court noted that it heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck's use of the right of way as the only

access to Mr. Houck's property, but Thomas closed the right of way anyway. (JA 1093-96). Moreover, as the Court noted: "[t]he jury found that Mr. Thomas' actions were intentional, and that he intended to deprive Mr. Houck of the use of his right-of-way and access to his property. Specifically, the jury answered "YES" to the following two questions on the verdict form:

2. Please state whether you find that Garry Thomas intentionally blocked the right-of-way of Archie Houck to the Houck property.
3. Please state whether you find that Garry Thomas, in blocking that road and in keeping it blocked, did so with the intent of permanently depriving Archie Houck from the use of the right-of-way, recognizing that in so doing he was purposely depriving Archie Houck from the use of the right-of-way in question."

(JA 1097-98). The Court also noted that the jury "further found that the Defendant's actions met the standard set forth in the Court's instruction such that the Defendant should pay the Plaintiff's attorneys' fees." (JA 1098). The Court then concluded that "[i]n light of the Court's instructions and the jury's findings with respect to attorneys' fees, the Court finds and concludes that Defendant acted in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons." *Id.*

To determine the amount of fees, Mr. Houck filed a supplemental motion with the circuit court. The court held a hearing, and considered evidence, including the testimony of Mr. Houck's lead counsel, Wm. Richard McCune, Jr. Specifically, the Court made the following findings of fact and conclusions of law with respect to the elements set forth in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986).

With respect to the first element, the evidence demonstrated the time and labor required, which was set forth on the fee and cost statement provided to the Court as modified by Mr. McCune's testimony. Up to the date of the hearing on November 18, 2015, Mr. Houck's counsel's office billed a total of 695 hours for a total amount of \$120,513.75. Senior partner, Mr. McCune, billed his time at \$240/hr. Mr. Tsiatsos's time as junior partner was billed at \$180/hr. Para-professional time was billed at \$75/hr. The Court finds that proof of time spent is well-documented, and

that the time spent and the rates are reasonable and customary given the circumstances.

Additionally, Mr. McCune's unopposed and uncontradicted testimony established an additional \$4,726.51 in costs. Evidence demonstrated that Mr. Houck's counsel attempted to avoid certain expert and other costs. Given the length and nature of this case, such costs are also reasonable.

With respect to the second Pitrolo element, the novelty and difficulty of the questions, the Court finds and concludes that while right of way disputes are not novel, litigating such disputes on behalf of plaintiffs is difficult in light of recent case law requiring plaintiffs to prove such rights of way by clear and convincing evidence. *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010). The evidence showed that this case involved interviewing dozens of witnesses regarding prior use, numerous visits to the property, consulting on many occasions with surveyors and researching various issues related to easement law. The fact that the defendant decided to proceed pro se also added to the difficulty. The Defendant often did not file appropriate and timely documents, and with respect to documents actually filed, Mr. Houck's counsel often received documents that required objection or other actions that would have been unnecessary had the documents been filed by counsel. The Court expressly cautioned Mr. Thomas about the importance of having his own counsel. Mr. Thomas, as was his right, chose to proceed without counsel. Had Mr. Thomas obtained counsel, it is likely that his counsel would have impressed upon Mr. Thomas the need to remove his fence and to settle the case.

With respect to the third element, the skill requisite to perform the legal service properly, the Court finds and concludes that the attorneys had the requisite skill to perform this work. Mr. McCune has been a skilled and successful litigator, often litigating land disputes, for more than 40 years. Mr. Tsiatsos has practiced for 8 years and has demonstrated his skills before local judges. Mr. Thomas's counsel conceded this point.

With respect to the fourth element, the preclusion of other employment by the attorney due to acceptance of the case, the uncontradicted evidence showed, and the Court finds and concludes, that Mr. Houck's counsel's office currently has several dozen active litigation files, including several large-scale billable hour cases that counsel could have worked on had they not litigated this matter to trial.

With respect to the fifth element, the customary fee, the Court finds and concludes that the hourly rates (set forth above as \$240/hr. for Mr. McCune's time, \$180/hr. for Mr. Tsiatsos's time and \$75/hr. for paraprofessional time) are customary. Those were the rates charged to all billable hour fixed rate cases by Mr. Houck's counsel at the time this case began in 2013.

With respect to the sixth element, whether the fee is fixed or contingent, the Court finds and concludes that the fee in this case was fixed at the rates stated above. However, due to his limited resources, Mr. Houck was unable to stay current with his payments. Therefore, as a practical matter, counsel would have been unlikely to have been compensated had Mr. Houck not prevailed in this matter.

With respect to the seventh element, time limitations imposed by the client or the circumstances, the Court is familiar with the time burdens and deadlines involved in a jury trial, and how those limitations require the complete focus of counsel to the exclusion of all other matters, professional and personal. The evidence showed that Mr. Houck's counsel's firm is a two-attorney firm and that both attorneys were forced to stop all other work to get ready for trial. The Court finds and concludes that this element, too, weighs in favor of the requested compensation.

With respect to the eighth element, the amount involved and the results obtained, the Court finds and concludes that the focus of the case was equitable relief - reopening the right of way and fee shifting as a result of the Defendants' intentional actions. Two years of litigation resulted in \$120,513.75 in fees and \$4,726.51 in legal costs. The Court finds and concludes that the results were excellent. Not only did counsel establish by clear and convincing evidence that the right of way should be reopened, but, on counsel's motion, the Court granted Rule 50 relief on 3 out of 4 of the prescriptive easement elements. Counsel also obtained the rare results of fee shifting and punitive damages against a pro se party in a right of way case.

With respect to the ninth element, the experience, reputation, and ability of the attorneys, the Court finds and concludes that counsel have sound reputations within the legal community and that they had the experience and ability to obtain a desirable result for their client.

With respect to the tenth element, the undesirability of the case, the evidence shows, and the Court finds and concludes, that this was an undesirable case due to the difficult prescriptive easement standards and due to the fact that the client would ultimately be unable to fully compensate counsel for the time spent in this case. Right of way disputes are often difficult and contentious, and the prospects of fee shifting and punitive damages seemed remote initially.

With respect to the eleventh element, the nature and length of the professional relationship with the client, although there was no professional relationship prior to this case, the relationship between Mr. Houck and counsel has now lasted for over two years, the duration of this litigation. Mr. McCune testified that Mr. Houck has expressed his satisfaction concerning the results obtained.

With respect to the twelfth and final element, awards in similar cases, reports of fee shifting in prescriptive easement cases appear to be uncommon. However, in other

context, fees have been awarded in much greater amounts and at higher rates. *See, e.g., Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 328, 737 S.E.2d 640, 662 (2012) (awarding \$495,956.25 and expenses in the amount of \$100,243.64, for a total of \$596,199.89 in consumer credit action); *CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, at *23 (W. Va. May 30, 2014) (finding \$350.00 hourly rate reasonable) cert. denied sub nom. *CashCall, Inc. v. Morrissey*, 135 S. Ct. 2050, 191 L. Ed. 2d 956 (2015)).

After making these findings under *Pitrolo*, the Court ruled that Mr. Houck was entitled to \$120,513.75 in attorneys' fees and \$4,726.51 in legal costs. Exhibit A.

Mr. Thomas does not challenge Mr. Houck's right to attorneys' fees generally.⁵ He argues that under the American Rule (by which parties generally pay their own attorneys' fees) ordinarily attorneys' fees are not recoverable in the absence of a statutory or contractual provision. Petitioner's Brief, p. 24. He also argues that there are three general classes of other exceptions to the American Rule: common fund, common benefit and bad faith. *Id.* He argues that, in this case, only the bad faith exception is relevant. *Id.*

However, the relevant West Virginia authority is, as the Circuit Court found, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d 246, 247 (1986) which states, at syllabus point 3, that: "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Therefore, in addition to his bad faith actions, Mr. Thomas's vexatious, wanton or oppressive actions would have justified an award of attorneys' fees against him.

⁵ In fact, it is now too late for Mr. Thomas to challenge Mr. Houck's general right to attorneys' fees. That right was decided by the jury in its verdict of September 3, 2015, and adjudged by the Court in its Judgement Order Following Jury Verdict of September 23, 2015. (JA 1098-1100). As this Court has already noted, any appeal with respect to the September 23 Order is untimely.

As the Court instructed the jury, “[t]he law considers a party’s actions to be ‘vexatious’ if they are troublesome or annoying and lack sufficient ground. A party’s actions are ‘wanton’ if they were done intentionally. A party’s actions are ‘oppressive’ if they are unjust, burdensome, harsh and wrongful. A party’s actions are ‘in bad faith’ if they are dishonest in belief or purpose.” (JA 1096); *See Newcome v. Turner*, 179 W. Va. 309, 312, 367 S.E.2d 778, 781, fn. 5 (1988) (defining “vexatious” with respect to legal actions in fee shifting context); 22 C.J.S. Criminal Law § 52 (“The words ‘wanton,’ ‘wantonly,’ and ‘wantonness’ mean the doing of an act intentionally”); Black’s Law Dictionary (Deluxe 7th ed. 1999), p. 1121 (defining “oppression” as “the act of an instance of unjustly exercising authority or power”); *Masinter v. WEBCO Co.*, 164 W. Va. 241, 251, 262 S.E.2d 433, 440 (1980) (defining oppressive conduct by corporations as conduct which is “burdensome, harsh and wrongful conduct”) (citations omitted); Black’s Law Dictionary (Deluxe 7th ed. 1999), p. 134 (defining “bad faith” as “Dishonest of belief or purpose”).

As stated *supra*, there was ample evidence of such conduct by Mr. Thomas. The Court heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck’s use of the right of way as the only access to Mr. Houck’s property, but Thomas closed the right of way anyway. (JA 1093-1096). Moreover, the Court and the jury found that Mr. Thomas’ actions were intentional, and that he intended to deprive Mr. Houck of the use of his right-of-way and access to his property. (JA 1097-1098).

Mr. Thomas’s appeal does not address these findings and conclusions by the jury or the *Pitrolo* factors discussed by the Circuit Court. Instead, Mr. Thomas argues that he raised good faith arguments below Petitioner’s Brief, p. 26. But whether or not Mr. Thomas raised good faith

arguments below (and he did not) is not the issue. Under *Sally-Mike*, Mr. Thomas's unquestionably intentional bad acts were sufficient to justify fee shifting.

Mr. Thomas finally claims that the amount of fees is unreasonable, *id.* at 27, but he does not identify any deficiency in the Circuit Court's reasoning, nor does he claim that the Circuit Court's *Pitrolo* analysis was faulty in anyway. Even now, Mr. Thomas does challenge any specific charge in Mr. Houck's counsel's fee statement. (JA 1141-1178). Judge Silver carefully reviewed the evidence and his order carefully set forth the grounds justifying the fee award.

Despite knowing he was wrong, Mr. Thomas forced Mr. Houck to try the case to a jury for three days. The jury trial, and the eighteen months of litigation before it, were costly to Mr. Houck. Mr. Houck and his attorneys had to track down and interview witnesses who lived as far away as Tennessee; they had to visit the property with experts on numerous occasions; they had to take additional time to attempt to decipher and address Mr. Thomas's pro se pleadings and other filings; they had to address procedural irregularities caused by Mr. Thomas's decision to proceed pro se; and, they had to do the things necessary to prepare for trial such as draft and respond to discovery, research, draft and file motions and pre-trial filings, and other such matters. This case took a lot of time because of Mr. Thomas's behavior. Therefore, the jury and the Court correctly found that the fees and costs attributable to Mr. Thomas's behavior should be Mr. Thomas's responsibility.

E. The Circuit Court had no duty to assist Mr. Thomas in subpoenaing a witness.

Mr. Thomas's final assignment of alleged error involves his unsuccessful attempt to subpoena a witness, Russell Way, to testify at trial.

Mr. Thomas represented to the trial judge that he (Thomas) in fact subpoenaed Mr. Way, but Mr. Thomas has not included a copy of the subpoena as part of the record, nor has he included proof

of service. The Circuit Court reviewed a letter from Mr. Way's counsel (which may have outlined some of the deficiencies in the subpoena), but that letter, too, is not part of the record. There is no indication that Mr. Thomas properly served Mr. Way with a legally sufficient subpoena.

As before, Mr. Thomas has no one to blame but himself. He has hired counsel to handle his appeal, and he could have hired counsel for trial. But he chose to proceed pro se and, as a result, he apparently did not properly serve a subpoena. Mr. Thomas now seeks to blame the Circuit Court for his own errors, but the Circuit Court in fact invited Mr. Thomas to prove service, and said that, upon proof of such service, the Court would compel Mr. Way's attendance (JA 342). Despite this invitation, Mr. Thomas did not provide proof of service.

This Court has recently held that:

“When faced with a pro se litigant a trial court bears the responsibility to ensure the litigant receives fair and balanced proceedings. Our Court has consistently recognized that cases should be decided on the merits, which may require ‘reasonable accommodation’ of litigants, whether represented by counsel or not. . . . ‘Reasonable accommodation’ does not, however, require a court to cross the fine line between accommodating a litigant and advocating for the litigant. Nor does it require the Court to give legal counsel. Ultimately, the pro se litigant bears the responsibility and the consequences of his mistakes and errors.”

Daye v. Plumley, No. 13-0913, 2014 WL 1345493, at *10 (W. Va. Apr. 4, 2014), cert. denied, 135 S. Ct. 117, 190 L. Ed. 2d 89 (2014) (citations omitted).

Moreover, any error (even if it was Mr. Thomas's) in failing to procure Mr. Way's attendance at trial was harmless. Mr. Thomas made no proffer of what Mr. Way might have said, but Mr. Way himself admitted that he did not move into the area until 2012 (JA 38), long after Mr. Houck had acquired his prescriptive rights. Therefore, Mr. Way could not have impeached the voluminous testimony and other evidence establishing Mr. Houck's right to use the right of way by prescription. Accordingly, even had there been any error with respect to Mr. Way, such error was harmless. W.

Va. R. Civ. P. 61 (“No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties”).

CONCLUSION

For the reasons stated above, Respondent Archie D. Houck asks this Honorable Court to affirm the rulings of the Circuit Court below and to deny Petitioner Garry Thomas any relief on appeal.

Respondent, Archie D. Houck,
by counsel:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1205

GARRY THOMAS,

Defendant below, Petitioner,

v.

ARCHIE D. HOUCK,

Plaintiff below, Respondent.

An appeal from the Circuit Court of Berkeley County, West Virginia,
Civil action no. 14-C-220

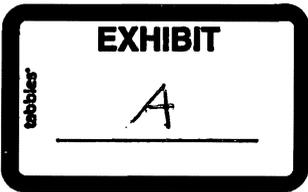
CERTIFICATE OF SERVICE

I, undersigned counsel for Respondent the Estate of Charles A. Rocheleau in the above-styled matter, hereby certify that I served a true and accurate copy of the foregoing *Respondent's Brief* on the following by first class United States mail, postage pre-paid, on this 15th day of April, 2016:

James T. Kratovil, Esq.
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Alex A. Tsiatsos, Esq. (WVSB #10543)



IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

Plaintiff,

v.

Civil Action No. 14-C-220
Judge Gray Silver, III

GARRY THOMAS,

Defendant.

2015 DEC 10 AM 10:43

**ORDER GRANTING PLAINTIFF'S POST-TRIAL MOTION REGARDING
ATTORNEYS' FEES**

This matter came before the Court on motion by Plaintiff Archie Houck, by counsel, asking the Court to award him attorneys' fees and legal costs following the September 3, 2015 jury verdict in this matter establishing Mr. Houck's entitlement to such fees and costs. The Court has considered the opposition to this motion filed by Defendant Gary Thomas, by counsel. The Court further held a hearing on this matter on November 17, 2015. For the reasons stated below, after considering the affidavits, submissions, arguments and evidence of the parties, and for good cause shown, the Court GRANTS the motion. The Court finds and concludes as follows.

I. Factual Background

The plaintiff filed this case claiming that the defendant intentionally and wrongfully ~~had~~ blocked the plaintiff's right of way, a right of way which the plaintiff claimed that he ~~had~~ ^{and} his family have used for over ninety years.

Based on depositions taken, including the depositions of individuals who testified that the defendant knew of the plaintiff's need to use the right of way but blocked it anyway, the court

allowed the jury to be instructed on the standard for fee shifting based on a party's intentional acts. Specifically, the Court instructed the jury that:

“in some cases, one party may have to pay another party's attorneys' fees. Specifically, if one party acts either in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons, then that party may have to pay the other party's attorney's fees. The law considers a party's actions to be “vexatious if they are troublesome or annoying and lack sufficient ground. A party's actions are “wanton” if they were done intentionally. A party's actions are “oppressive” if they are unjust, burdensome, harsh and wrongful. A party's actions are “in bad faith” if they are dishonest in belief or purpose. If you find that Defendant Thomas acted in bad faith, vexatiously, wantonly or for oppressive reasons, then you may order him to pay Mr. Houck's attorneys' fees.”

Jury Charge. *See, e.g.*, Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d 246, 247 (1986) (“[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as “costs,” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons”); *Newcome v. Turner*, 179 W. Va. 309, 312, 367 S.E.2d 778, 781, fn. 5 (1988) (defining “vexatious” with respect to legal actions in fee shifting context); 22 C.J.S. Criminal Law § 52 (“The words ‘wanton,’ ‘wantonly,’ and ‘wantonness’ mean the doing of an act intentionally”); Black's Law Dictionary (Deluxe 7th ed. 1999), p. 1121 (defining “oppression” as “the act of an instance of unjustly exercising authority or power”); *Masinter v. WEBCO Co.*, 164 W. Va. 241, 251, 262 S.E.2d 433, 440 (1980) (defining oppressive conduct by corporations as conduct which is “burdensome, harsh and wrongful conduct”) (citations omitted); Black's Law Dictionary (Deluxe 7th ed. 1999), p. 134 (defining “bad faith” as “Dishonest of belief or purpose”).

On September 3, 2015, the jury returned its verdict in this case, specifically answering “YES” to the following question on the verdict form: “Please state whether, pursuant to the instructions of the Court, you find that Defendant Garry Thomas acted either in bad faith or

vexatiously or wantonly or intentionally or for oppressive reasons such that you find that Plaintiff Archie Houck is entitled to the reasonable attorneys' fees that he incurred in this case."

In its post-verdict judgment order, the Court noted that it heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck's use of the right of way as the only access to Mr. Houck's property, but Thomas closed the right of way anyway. See Judgment Order, pp. 2-4. Moreover, as the Court noted: "[t]he jury found that Mr. Thomas' actions were intentional, and that he intended to deprive Mr. Houck of the use of his right-of-way and access to his property. Specifically, the jury answered "YES" to the following two questions on the verdict form:

2. Please state whether you find that Garry Thomas intentionally blocked the right-of-way of Archie Houck to the Houck property.

3. Please state whether you find that Garry Thomas, in blocking that road and in keeping it blocked, did so with the intent of permanently depriving Archie Houck from the use of the right-of-way, recognizing that in so doing he was purposely depriving Archie Houck from the use of the right-of-way in question."

Judgment Order, pp. 6-7. The Court also noted that the jury "further found that the Defendant's actions met the standard set forth in the Court's instruction such that the Defendant should pay the Plaintiff's attorneys' fees." *Id.* at 7. The Court then concluded that "[i]n light of the Court's instructions and the jury's findings with respect to attorneys' fees, the Court finds and concludes that Defendant acted in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons." *Id.*

The Judgment Order was entered September 23, 2015. Following the verdict, however, on September 11, 2015, Mr. Houck filed a post-trial motion for the attorneys' fees, providing a detailed breakdown of billing entries and asking for a specific amount of fees pursuant to the jury's general award. Mr. Houck's motion, which included supporting affidavits, discussed the

relevant factors under Syl. pt. 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986) (“Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases”).

Mr. Thomas did not challenge the attorney fee award until he filed his response to the plaintiff's motion for a specific fee amount on October 8, 2015. Utilizing the counting rules under W. Va. R. Civ. P. 6, the response was filed 11 days after the Judgment Order,

II. Discussion of Law

For the reasons found by the jury and set forth in the Court's Judgment Order, the Court finds that there is no genuine dispute that Mr. Houck is entitled to an award of attorneys' fees. The record demonstrating the intentional nature of Mr. Thomas's actions is ample. The Court heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck's use of the right of way as the only access to Mr. Houck's property, but Thomas closed the right of way anyway. As set forth in the Court's Judgment Order, under the circumstances, controlling West Virginia law authorizes awards of attorneys' fees in such cases as an exception to the American Rule. Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d

246, 247 (1986) (“[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as “costs,” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons”).

Mr. Thomas’s Response does not address these findings and conclusions by the jury and the Court. Instead, he states that because Mr. Houck’s earlier summary judgment motion was denied, “the suit is not frivolous.” Mr. Thomas argues that attorneys’ fees should not have been awarded against him because his defense survived summary judgment. But whether or not a court grants summary judgment is not the standard for fee shifting. As stated above, Mr. Thomas’s intentional actions – overwhelmingly proven by the evidence – justified the award of attorneys’ fees against him under the applicable case law. Therefore, under *Sally-Mike Properties v. Yokum* the Court’s judgment that attorneys’ fees should be awarded against Mr. Thomas was correct as a matter of law.

Moreover, it is now too late for Mr. Thomas to challenge Mr. Houck’s general right to attorneys’ fees. That right was decided by the jury in its verdict of September 3, 2015, and adjudged by the Court in its Judgment Order Following Jury Verdict of September 23, 2015. While Mr. Thomas now suggests that the jury verdict may only be “advisory” (Response, p. 1), the Court’s findings and conclusions in its Judgment Order were not advisory. They represent the Court’s reasoned and final judgment. Although it was not always easy to decipher Mr. Thomas’s previous pro se filings (some of which were not served on counsel), it appears Mr. Thomas did not ask the Court to alter or amend that judgment with respect to Mr. Houck’s entitlement to attorneys’ fees within the 10 day period provided by Rule 59 of the West Virginia Rules of Civil Procedure. Therefore, any challenge to Mr. Houck’s right to attorneys’ fees must now fall under Rule 60. *See Savage v. Booth*, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996)

("If a motion is filed within ten days of judgment, the motion is treated as a motion to alter or amend judgment under Rule 59(e). Alternatively, if it is filed more than ten days after entry of judgment, we look to Rule 60(b) to provide the basis for analysis of the review").

Although he is making his arguments in a response rather than a motion, Mr. Thomas is effectively seeking relief from the judgment (entitling Mr. Houck to an award of attorneys' fees) more than 10 days from the date of the judgment – thus he is making a Rule 60 argument. However, Mr. Thomas has not articulated the Rule 60 standard, nor has he attempted to make any arguments under the Rule. Accordingly, Mr. Thomas's challenge to the judgment must be denied. *See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 706, 474 S.E.2d 872, 886 (1996) ("A circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it. In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled").

Mr. Thomas next argues that the amount of attorneys' fees sought by Mr. Houck is too high because some of the charges relate to work necessitated by Thomas's former co-defendant, Russell Way, and those charges should not be Mr. Thomas's responsibility. Although Mr. Thomas has not challenged any specific billing item, Mr. Houck's counsel has voluntarily removed charges identified as being for work performed solely with respect to Mr. Way in the amount of \$2,940, and another \$18.75 that was erroneously included on the billing statement.

At the hearing in this case, the Court heard testimony from Richard McCune, who is Mr. Houck's lead attorney, concerning the remaining charges. Mr. McCune testified the litigation work before the Way settlement would have been the same regardless of the number of defendants. According to Mr. McCune's testimony, that work was necessary to marshal the facts

and the law to prove Mr. Houck's right of way whether there was only one defendant or a dozen defendants. The evidence further showed that following the settlement, Mr. Houck incurred the bulk of the charges and those charges are attributable in large part to the continuing actions of Mr. Thomas who refused to take down the fence despite being provided with overwhelming evidence that it should be taken down.¹

Mr. McCune then provided testimony with respect to the elements set forth in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986).

With respect to the first element, the evidence demonstrated the time and labor required, which was set forth on the fee and cost statement provided to the Court as modified by Mr. McCune's testimony. Up to the date of the hearing on November 18, 2015, Mr. Houck's counsel's office billed a total of 695 hours for a total amount of \$120,513.75. Senior partner, Mr. McCune, billed his time at \$240/hr. Mr. Tsiatsos's time as junior partner was billed at \$180/hr. Para-professional time was billed at \$75/hr. The Court finds that proof of time spent is well-documented, and that the time spent and the rates are reasonable and customary given the circumstances.²

Additionally, Mr. McCune's unopposed and uncontradicted testimony established an additional \$4,726.51 in costs. Evidence demonstrated that Mr. Houck's counsel attempted to avoid certain expert and other costs. Given the length and nature of this case, such costs are also reasonable.

With respect to the second *Pitrolo* element, the novelty and difficulty of the questions, the Court finds and concludes that while right of way disputes are not novel, litigating such

¹ The Court notes that the evidence also showed that Mr. Thomas himself relied on Mr. Way's efforts in this case. Even in this briefing, Mr. Thomas relies on Mr. Way's defense at summary judgment to argue that his own defense was not frivolous.

² The difficulties caused by Mr. Thomas, necessitating the amount of hours, are discussed below.

disputes on behalf of plaintiffs is difficult in light of recent case law requiring plaintiffs to prove such rights of way by clear and convincing evidence. *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010). The evidence showed that this case involved interviewing dozens of witnesses regarding prior use, numerous visits to the property, consulting on many occasions with surveyors and researching various issues related to easement law. The fact that the *defendant* decided to proceed pro se also added to the difficulty. The Defendant often did not file appropriate and timely documents, and with respect to documents actually filed, Mr. Houck's counsel often received documents that required objection or other actions that would have been unnecessary had the documents been filed by counsel. The Court expressly cautioned Mr. Thomas about the importance of having his own counsel. Mr. Thomas, as was his right, chose to proceed without counsel. Had Mr. Thomas obtained counsel, it is likely that his counsel would have impressed upon Mr. Thomas the need to remove his fence and to settle the case.

With respect to the third element, the skill requisite to perform the legal service properly, the Court finds and concludes that the attorneys had the requisite skill to perform this work. Mr. McCune has been a skilled and successful litigator, often litigating land disputes, for more than 40 years. Mr. Tsiatsos has practiced for 8 years and has demonstrated his skills before local judges. Mr. Thomas's counsel conceded this point.

With respect to the fourth element, the preclusion of other employment by the attorney due to acceptance of the case, the uncontradicted evidence showed, and the Court finds and concludes, that Mr. Houck's counsel's office currently has several dozen active litigation files, including several large-scale billable hour cases that counsel could have worked on had they not litigated this matter to trial.

With respect to the fifth element, the customary fee, the Court finds and concludes that the hourly rates (set forth above as \$240/hr. for Mr. McCune's time, \$180/hr. for Mr. Tsiatsos's time and \$75/hr. for paraprofessional time) are customary. Those were the rates charged to all billable hour fixed rate cases by Mr. Houck's counsel at the time this case began in 2013.

With respect to the sixth element, whether the fee is fixed or contingent, the Court finds and concludes that the fee in this case was fixed at the rates stated above. However, due to his limited resources, Mr. Houck was unable to stay current with his payments. Therefore, as a practical matter, counsel would have been unlikely to have been compensated had Mr. Houck not prevailed in this matter.

With respect to the seventh element, time limitations imposed by the client or the circumstances, the Court is familiar with the time burdens and deadlines involved in a jury trial, and how those limitations require the complete focus of counsel to the exclusion of all other matters, professional and personal. The evidence showed that Mr. Houck's counsel's firm is a two-attorney firm and that both attorneys were forced to stop all other work to get ready for trial. The Court finds and concludes that this element, too, weighs in favor of the requested compensation.

With respect to the eighth element, the amount involved and the results obtained, the Court finds and concludes that the focus of the case was equitable relief – reopening the right of way and fee shifting as a result of the Defendants' intentional actions. Two years of litigation resulted in \$120,513.75 in fees and \$4,726.51 in legal costs. The Court finds and concludes that the results were excellent. Not only did counsel establish by clear and convincing evidence that *the* right of way should be reopened, but, on counsel's motion, the Court *grated* Rule 50 relief on

3 out of 4 of the prescriptive easement elements. Counsel also obtained the rare results of fee shifting and punitive damages against a pro se party in a right of way case.

With respect to the ninth element, the experience, reputation, and ability of the attorneys, the Court finds and concludes that counsel have sound reputations within the legal community and that they had the experience and ability to obtain a desirable result for their client.

With respect to the tenth element, the undesirability of the case, the evidence shows, and the Court finds and concludes, that this was an undesirable case due to the difficult prescriptive easement standards and due to the fact that the client would ultimately be unable to fully compensate counsel for the time spent in this case. Right of way disputes are often difficult and contentious, and the prospects of fee shifting and punitive damages seemed remote initially.

With respect to the eleventh element, the nature and length of the professional relationship with the client, although there was no professional relationship prior to this case, the relationship between Mr. Houck and counsel has now lasted for over two years, the duration of this litigation. Mr. McCune testified that Mr. Houck has expressed his satisfaction concerning the results obtained.

With respect to the twelfth and final element, awards in similar cases, reports of fee shifting in prescriptive easement cases appear to be uncommon. However, in other context, fees have been awarded in much greater amounts and at higher rates. *See, e.g., Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 328, 737 S.E.2d 640, 662 (2012) (awarding \$495,956.25 and expenses in the amount of \$100,243.64, for a total of \$596,199.89 in consumer credit action); *CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, at *23 (W. Va. May 30, 2014) (finding \$350.00 hourly rate reasonable) cert. denied sub nom. *CashCall, Inc. v. Morrissey*, 135 S. Ct. 2050, 191 L. Ed. 2d 956 (2015)).

III. Conclusion

Based on the foregoing findings of fact and conclusions of law, the Court concludes that Mr. Houck is entitled to be reimbursed for the attorneys' fees and costs he incurred. Mr. Houck has established his right to attorneys' fees and costs, and he has met the required elements *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986) for proving that the fees and costs which were put into evidence before the Court are appropriate and reasonable.

The Court therefore ORDERS that the Defendant Garry Thomas, shall pay the amount of \$120,513.75 in attorneys' fees and \$4,726.51 in legal costs to the Plaintiff Archie Houck. Interest on these amounts shall run at the legal rate from the date of this Order.

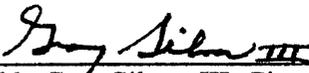
With respect to attorneys' fees and costs incurred in this matter by Mr. Houck following the date of the last fees and costs submitted to the Court, Mr. Houck may petition the Court for supplemental fee applications.

The Court notes for the record the objection of the parties to all adverse rulings contained herein.

The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

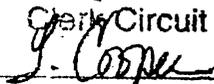
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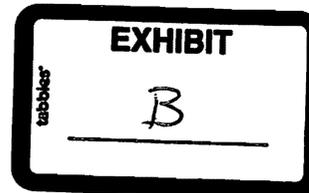
The Clerk shall retire this matter from the active docket and place it among cases ended.



The Honorable Gray Silver, III, Circuit Judge

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ATTEST

Virginia M. Sino
Clerk Circuit Court
By: 
Deputy Clerk



IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

Plaintiff,

v.

Civil Action No. 14-C-220
Judge Gray Silver, III

GARRY THOMAS,

Defendant.

7/20/20 11:10:43

**ORDER DENYING DEFENDANT'S REQUEST FOR MISTRIAL OR RETRIAL AND
OBJECTION TO RULE 50 JUDGMENT**

This matter came before the Court on this 17th day of November, 2015 on the "Request for mistrial or retrial and Objection [to] Rule 50 judgment" filed by Defendant Thomas and the response thereto filed by the Plaintiff. For the reasons stated below, and for good cause shown, the Court DENIES the motion. The Court finds and concludes as follows.

In his Motion, Defendant Thomas first asks for a retrial or mistrial apparently on the grounds that he wished he could have had a negotiated settlement with Mr. Houck. As the Court ruled in its pre-trial orders, however, settlement negotiations are not admissible. W. Va. R. Evid. 408(a) ("Prohibited Uses. Evidence of the following is not admissible--on behalf of any party-- either to prove or disprove the validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim"). In any event, Mr. Thomas cites no authority and provides no reasoning whatsoever for the proposition that his failure to

settle the case justifies a mistrial or a retrial, as he puts it. Nothing prevented Mr. Thomas from making a settlement offer at any time. He can still make an offer now.

Next, Mr. Thomas seems to try to reargue some of the testimony concerning Mr. Houck's access to his property. But those issues were decided by a jury. The West Virginia Constitution, in Article III, section 13 states "[n]o fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law." Mr. Thomas has not cited or articulated any cognizable standard for post-trial relief with respect to the factual issues in question.¹ Although he appears to ask for reconsideration of the jury's finding (which would suggest a motion pursuant to Rule 59), the Supreme Court of Appeals has repeatedly held that, after a jury verdict, Rule 50 is the proper procedural vehicle. See *Williams v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797, fn. 3 (2003). Under the Rule 50 standard, however, a court must consider "the evidence in the light most favorable to the nonmovant party . . . every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence." Syl. pts. 1 and 2, *Akers v. Cabell Huntington Hosp., Inc.*, 215 W. Va. 346, 348-49, 599 S.E.2d 769, 771-72 (2004). If reasonable minds can differ about the evidence, a Rule 50 motion should not be granted. *Id.*

Mr. Thomas does not allege (much less prove) any of those possible grounds for reconsideration of the jury's finding. There has been no change in the controlling law. No new evidence not previously available has come to light. In fact, Thomas repeats some of the same arguments he made to the jury about Mr. Houck's access. There is no error of law, clear or

¹ Mr. Thomas's request for a "mistrial" is procedurally impossible at this stage. *Vilar v. Fenton*, 181 W. Va. 299, 299, 382 S.E.2d 352, 352 (1989) ("Prior to the entry of the verdict by a jury, a mistrial is procedurally possible; however, declaring a mistrial after the jury verdict is rendered is improper").

otherwise, and there is no injustice. The jury simply chose to believe Mr. Houck and his witnesses and not Mr. Thomas.

Moreover, by failing to make a Rule 50 motion during trial, Mr. Thomas has waived the right to present it now because, pursuant to rule, there is no motion to renew. See Rule 50(a) (2) (“Motions for judgment as a matter of law may be made at any time before submission of the case to the jury”) and (b) (discussion *renewed* Rule 50 motion after verdict).

Mr. Thomas next repeats some of the same arguments he made concerning surveyor evidence admitted on behalf of the Plaintiff during trial. Again, he seems to argue that certain plats were not approved for recording purposes by the planning commission and that the contractor who testified on behalf of Mr. Houck did not have proper licensing and insurance. From this, he seems to infer that the exhibits and testimony should not have been admitted and, astonishingly, that a new trial should be ordered. That argument is without merit. As the Court knows, the Rules of Evidence govern questions of admissibility and evidence. Syl. pt. 3, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907, 908 (2013). (“The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts”) (citation omitted)). Mr. Thomas has provided no explanation of why standards for recording plats or insurance or licensing requirements for a contractor have anything to do with either the weight or admissibility of the evidence under the West Virginia Rules of Evidence.

Finally, Mr. Thomas objects again because witnesses did not attend trial after he tried to serve them with subpoenas. Mr. Thomas does not provide the subpoenas or the responses thereto as part of his motion, but accepted the risk of such problems when he decided, despite the Court’s warnings, to proceed pro se.

Therefore, and for the reasons stated above, the Court DENIES Defendant Thomas's motion.

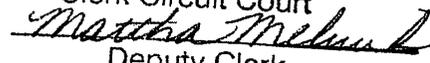
The Court notes for the record the objection of the parties to all adverse rulings contained herein. The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

Entered: 11/17/15



The Honorable Gray Silver, III, Circuit Judge

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Virginia M. Sine
Clerk Circuit Court
By: 
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

Plaintiff,

v.

Civil Action No. 14-C-220
Judge Gray Silver, III

GARRY THOMAS,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RETRIAL

This matter came before the Court on this 17th day of March, ²⁰¹⁵ upon Motion by Defendant Garry Thomas for what he terms a "Retrial" and the response thereto by Plaintiff Archie Houck.¹ For the reasons stated below, and for good cause shown, the Court DENIES the motion. The Court finds and concludes as follows.

In his Motion, Defendant Thomas asks for "retrial" based on allegations concerning the admissibility of certain surveying documents produced at trial. The Court finds that the Yebernetsky plat was included in the Plaintiff's exhibit binder and the Geertsema Plat was subsequently admitted.

The Court finds and concludes that Mr. Thomas made no objection to the exhibits along the lines he now proposes, namely the relationship between Plaintiff's counsel and the surveyors. Had Mr. Thomas wanted to raise such issues, he was obligated to raise them at the time. He could have asked either surveyor about his relationship with Plaintiff's counsel. He could have tried to impeach their testimony. He could have objected to the surveys on any permissible ground. He did none of those things.

¹ Mr. Thomas is cautioned to make sure that he provides copies of all his filings to opposing counsel.

Had Mr. Thomas not intentionally blocked off Mr. Houck's right of way, trial would have been unnecessary. However, having forced Mr. Houck to trial, Mr. Thomas was obligated to put on a defense. The Court expressly and clearly warned Mr. Thomas about the dangers of proceeding *pro se*, but Mr. Thomas nevertheless assumed the risk of representing himself. "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996) (citation omitted)). By failing to object to the evidence at the time, Mr. Thomas has waived any challenge to the evidence now. W. Va. R. Evid 103 (a)(1)(B) (requiring a timely objection to preserve a claim of error with respect to an evidentiary ruling). *Coleman v. Sopher*, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997) ("an objection to evidence must be timely and specific in order to give the trial court an opportunity to address the issue at a time when corrective action may be taken"); *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 316, 496 S.E.2d 447, 458 (1997) ("A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date") (citations omitted);

Mr. Thomas does not cite any standard governing motions for new trials, nor does he allege any of the grounds that would justify a new trial. He has identified no error, prejudicial or otherwise, that has entered the record because he waived any assignment of error when he failed to object to the Plaintiff's exhibits. Mr. Thomas did not raise at trial any of the evidentiary challenges he attempts to raise now. After a three day jury trial, it is simply too late.

His arguments now, besides being waived, must fail on their merits. For example, he seems to argue that exhibits do not comply with certain surveyor standards and are thus "illegal." From this, he seems to infer that the exhibits should not have been admitted and that a new trial

should be ordered. However, the Rules of Evidence govern questions of admissibility and evidence. Syl. pt. 3, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907, 908 (2013). (“The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts”) (citation omitted)). Mr. Thomas has provided no explanation of why surveyor standards have anything to do with either the weight or admissibility of the evidence under the West Virginia Rules of Evidence. The Court found at trial that the documents were admissible and Mr. Thomas (in addition to having waived objections at the time) has provided no argument that would cause the Court to reconsider its earlier rulings.

New trials are not favored under the law. *State ex rel. Meadows v. Stephens*, 207 W. Va. 341, 345, 532 S.E.2d 59, 63 (2000) (“We have often stated that a trial judge should rarely grant a new trial”). This Court will not undo an amply supported jury verdict on the basis of untimely evidentiary objections that would have failed even had they been raised in a timely manner. The Court therefore DENIES Mr. Thomas’s Motion.

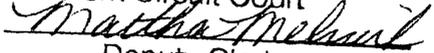
The Court notes for the record the objections of the parties to all adverse rulings herein. The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

Entered: 11/17/15



The Honorable Gray Silver, III Circuit Judge

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Virginia M. Sine
Clerk Circuit Court
By: 
Deputy Clerk