No. 24744 -A & M Properties, Inc. v. Norfolk Southern Corporation and Norfolk Southern Railway Company, a subsidiary of Norfolk Southern Corporation

Starcher, Justice, dissenting:

The majority opinion, on behalf of a railroad corporation, obfuscates and overrules West Virginia law without even hinting that it is doing so. The opinion reasons that railroad crossings interfere with the efficient flow of commerce; the majority forgets that farmers, landowners and businesses use railroad crossings for commerce as well. Rather than balancing the interests of farmers, businesses and landowners against railroads, the majority simply tips the scale of justice to favor railroads alone. I therefore dissent.

A.
Overturning Established Law without Saying So

The majority opinion, without saying so, overturns settled West Virginia law that has protected farmers, businesses, and landowners for 85 years.

In *Dulin v. Ohio River R. Co.*, 73 W. Va. 166, 80 S.E. 145 (1913), this Court ruled that a railroad is not a "public highway" for purposes of the law of adverse possession.[1]

We held in Syllabus Point 5 of *Dulin* that: "The doctrine of adversary possession *is* applicable to land acquired by a railroad company for its right of way." (Emphasis added.) In so holding, the *Dulin* majority stated that "the right of a railroad company does not stand on a par with public highways generally . . . ." 73 W. Va. at 171, 80 S.E. at 147.

Coincidentally, it is Syllabus Point 5 of the majority opinion in the instant case that adopts the directly opposite position from *Dulin*; it states in pertinent part: "*. . . neither adverse possession, prescriptive easement, nor equitable estoppel may lie against . . . the trackway of a railroad* . . . so long as the trackway continues to be used for railroad purposes." (Emphasis added.)

The majority opinion in the instant case is simply not being honest in its claim to be "put[ting] an end to any latent ambiguity remaining

[1]The prescriptive easement claimed by A&M Properties in the instant case is the same sort of claim as an adverse possession claim, both being equitable interests in property acquired by use.

as a result of *Dulin . . . .*" ___ W.Va. at ___, ___ S.E.2d at ___. (Slip op. at 7.) Syllabus Point 5 of *Dulin* is not ambiguous, latently or otherwise. As the foregoing quotations demonstrate, Syllabus Point 5 of the majority opinion directly overrules Syllabus Point 5 of *Dulin,* a settled rule of West Virginia property law that has guided our circuit courts and our property owners for 85 years.

Justice Neely, in *Kline v. McCloud*, 174 W.Va. 369, 380, 326 S.E.2d 715, 727 (1984) (Neely, J., dissenting) quoted languge that is appropriately applied to the majority opinion in the instant case:

> "If the Court deems it necessary to disregard precedent, let it boldly overrule a prior decision and not, with passionate intensity, manoeuvre interstitially among the lines of cases written only yesterday. I am reminded of Lord Holt's protest, in 1704: ". . . these scrambling reports . . . will make us appear to posterity for a parcel of blockheads." *Slayter v. May*, 2 Ld.Raym. 1072 [1704]."

Notably, our law requires us to have particularly strong reasons for overturning decisions that are related to established property rights.

We stated in *Hock v. City of Morgantown*, 162 W.Va. 853, 856, 253 S.E.2d 386, 388 (1979):

> Predictability is at the heart of the doctrine of *stare decisis*, and regardless of what we think of the merits of this case, we must be true to a reasonable interpretation of prior law in the area of property where certainty above all else is the preeminent compelling public policy to be served.

The majority opinion, by pretending not to overturn the rule established in *Dulin,* ignores this fundamental principle of law.

B.

Farmers, Businesses and Landowners Lose their Established Rights

Based on *Dulin,* it has been the law in this state for 85 years that a farmer, landowner or business person, like the respondent A&M Properties, who has openly used a railroad crossing for many years -- and who may have even built buildings, paved roads, or made other expensive improvements in reliance on that crossing -- *may* have some rights to the continued use of that crossing.

Under *Dulin*, if the railroad takes a notion to tear up and eliminate a crossing, the business, farmer, or landowner has the right to go to court and to try to show that this would be unfair. This right is

fair and reasonable -- it is hardly a big deal. And that is what occurred in the instant case.

But thanks to the majority opinion, A&M Properties -- and all other similarly situated businesses, farmers, and landowners -- are completely and entirely "out of court and out of luck."

Under the majority opinion, regardless of how long the business, farmer or landowner has used a crossing, or what investments they may have made -- and regardless of the past acquiescence of the railroad in the establishment and use of the crossing -- the business, farmer or landowner *has no rights whatsoever*.

This result is unfair and, as demonstrated below, it is not required by law.

C.
Let's Go for a Drive on the N&W

The majority opinion, in stripping farmers, businesses, and landowners of their right to use the courts to protect themselves, relies upon language in Article XI, Section 9 of our *Constitution* that says railroads are "public highways." The majority opinion, *reversing* the *Dulin* court,

sub silentio, decides that railroads are "public highways" for purposes of the law of prescriptive easements, adverse possession, and equitable estoppel.

So, if a railroad is really a "public highway," then can I drive my car on the Norfolk and Western line, just like I do on Corridor G?

If a railroad is really the same as a "public highway," will the West Virginia State Police run radar on the CSX tracks to enforce posted track speed limits, just like they do on I-79?

Most importantly, if a railroad is really a "public highway," then when a railroad decides to sell a piece of its property -- do we, the public, get the money? To all of these questions - and to a dozen others that anyone can think of - the answer is clearly "no."

Obviously, although the majority opinion ignores this principle, railroads are not "public highways" for all purposes. It is up to this Court, or the Legislature, to decide in which cases they are to be treated as "public highways." And there is certainly not a word in our *Constitution,* or in any statute, saying that privately-owned railroad land is a "public highway" for purposes of prescriptive easement law.

In *Dulin,* this Court, recognizing that railroads are not "public highways" for all purposes, used common sense and fairness in developing the common law of adverse possession. We concluded that the same broad protection from claims of adverse possession that we give to true publicly-owned highways need not be given to privately-owned railroad property -- especially when the railroad's interests are in conflict with substantial property interests of other private parties.[2] This was a sound decision.

D.
The World Will Not End If Railroad Rights are Limited

[2]Without pretending to have comprehensively researched the issue, it seems to me that the constitutional statement that railroads are "public highways" is principally in furtherance of railroads' ability to acquire land by eminent domain, and to preserve access to rail transportation for citizens and for competing businesses.

This constitutional language has never been held to mean that railroad property, clearly owned by a private corporation, is to be treated the same as a publicly-owned highway, for purposes of prescriptive easement law.

If there is no written law that dictates the result reached by the majority opinion, what is left? The majority opinion -- with no record to support these speculations -- predicts "dangers to public safety" and an "unnecessar[y] burden [on] the flow of goods and services to [West Virginia] consumers" if a railroad has to be accountable in our courts to citizens who have prescriptive easement claims.

However, the majority opinion inexplicably ignores the examples of the states of New York and Illinois (examples that were cited in the briefs in this case).

New York and Illinois, states that have a tremendous amount of railroad track (much more than West Virginia),[3] allow their citizens to assert prescriptive easement rights against railroads.[4]

Yet I think it is safe to say that New York and Illinois have not suffered an epidemic of carnage at the crossings, or a rash of rampant

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[3]According to the Association of American Railroads, in Illinois 41 railroads operate 7,633 miles of track, and in New York, 37 railroads operate 3,715 miles of track. In West Virginia, three major railroads operate 2,536 miles of track, while five local railroads operate 104 miles of track.

[4]*See Erie R. Co. v. Kaplowitz*, 137 N.Y.S.2d 261 (N.Y.Sup. 1954); *Wehde v. Regional Transp. Authority*, 604 N.E.2d 446 (Ill.App. 1992).

inflation, as a result of their citizens being able to assert prescriptive rights against railroads.

Marmaduke Dent, the eminent and humane West Virginia jurist who served on this Court from 1893 to 1904, once commented that a decision exonerating a railroad for negligently killing cattle, after first attracting them to the tracks with salt, was "repugnant to the sense and justice of every reasonable man not learned in the intricacies of railroad jurisprudence." *Kirk v. Norfolk & W.R.Co.*, 41 W.Va. 722, 732, 24 S.E. 639, 643 (1896) (Dent, J., dissenting).

The majority opinion has the same characteristics that Judge Dent[5] identified over 100 years ago. The majority opinion worries about the "inconvenience" to railroads of having to maintain crossings. What about the inconvenience to businesses, farmers and landowners who have to drive dozens of miles because a railroad unilaterally tears up a crossing that has been used for decades? Or the unnecessary burden on businesses, consumers or employees who are caught on the wrong side of the tracks, and

[5]At the turn of the century when Marmaduke Dent served on our State's highest court, the Court was composed of four jurists with the title of "Judge."

who must drive many miles out of their way to cross those tracks to conduct business?[6]

Stripped of its legal veneer, the majority opinion's unsupported (and in my view, ridiculous) contention that there will be an impairment of our general economic well-being, if railroads have to be accountable in court, is eerily reminiscent of a time I had thought to be past, when courts too often tilted the balance in favor of large industrial corporations and moneyed interests--and against farmers, landowners, wage laborers and small businesses--all in the name of business efficiency.[7] Such an

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[6]This case has absolutely nothing to do with people going out under cover of darkness and establishing clandestine railroad crossings that will forever burden a railroad. Prescriptive easements and similar property rights are only established by longstanding, notorious, permissive or hostile uses of property.

[7]For an inspiring, educational and entertaining discussion of Judge Dent and his role in the legal effort to treat railroads as responsible citizens (that is, like everyone else), *see* Ronald L. Lewis, *Transforming the Appalachian Countryside*, Ch.4, "Making Capital Secure: Law and the Industrial Transformation of West Virginia," University of North Carolina Press 1998. *See also* John Reid, "Henry Brannon and Marmaduke Dent: The Shapers of West Virginia Law," 65 W.Va. L.Rev. 19-37, 99-128 (1962-63); John Reid, *An American Judge--Marmaduke Dent of West Virginia,* New York University Press, 1968.

anachronistic, unnecessarily harsh, "tough luck" approach to jurisprudence is troubling.

E.
A Fair and Balanced Rule

In contrast to the majority opinion's approach -- denying any and all rights whatsoever to farmers, business people and landowners, when these average citizens' interests are in a legitimate conflict with the interests of railroads -- I would advocate a more balanced, fair, and even-handed approach.

I would craft a particular rule for prescriptive easement claims against railroads, recognizing the railroads' unique public-carrier, semi-monopoly character -- and requiring a stricter showing of equity and necessity on the part of those seeking prescriptive rights against a railroad than in an ordinary easement case.

Such a rule would be fair to railroads and landowners, and would protect the public interest. Crafting such a rule is entirely within this Court's proper powers and role in evolving the common law of prescriptive easements.

However, instead of taking such a balanced approach, the majority opinion unnecessarily entirely strips farmers, businesses and property owners of rights they have enjoyed for over 85 years. The author of the majority opinion has, in effect, "stood *stare decisis* on its ear."[8]

F.
Correcting the Mistake

Because a majority of this Court has failed to protect important and longstanding property rights, I hope that the Legislature -- exercising its power to modify the common law -- will promptly restore the rights that the majority opinion has extinguished.

For the foregoing reasons, I repectfully dissent.

[8]*See* McCuskey concurrence in *Tiernan v. Charleston Area Medical Center, Inc.*, ___ W.Va. ___, ___, ___ S.E.2d ___, ___ (No. 24434, May 21, 1998) (McCuskey, J. concurred), in which Justice McCuskey accused Justice Starcher of "stand[ing] the West Virginia Constitution on its ear" in Starcher's dissent.