No. 26840 ***Audrey C. Robertson, Charles D. Robertson, and William B Robertson v. B A Mullican Lumber & Manufacturing Company, L.P.***

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McGraw, J., concurring in part, and dissenting in part:

I agree with the majority that the circuit court did not err in finding that an easement for ordinary purposes was created by implication in 1991; however, there is no factual or legal basis whatsoever supporting the lower court's determination that timbering operations were within the scope of that easement.

Importantly, we work from the premise that "the law does not favor the creation of easements by implied grant or reservation," *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 638, 92 S.E.2d 891, 898 (1956), and therefore "the use of land under an implied easement must be apparent when the severance of ownership occurs," 141 W. Va. at 640, 92 S.E.2d at 899. Generally, "[t]he extent of an easement created by implication is *determine by the circumstances which existed at the time of conveyance* and gave rise to the implication," although consideration may also be given "to such uses as the facts and circumstances show were within the reasonable contemplation of the parties" at the time of severance. 25 Am. Jur. 2d *Easements and Licenses* § 91, at 663-64 (1996) (emphasis added). Here, there is no evidence that timbering was ongoing at the time of severance in 1991, or that the parties anticipated future logging; thus, the fact that timbering took place in the 1950s is irrelevant.

Consequently, I do not join the majority in concluding that there is a support in the record supporting the circuit court determination that timbering operations were within the scope of the implied easement created in this case.