No. 28722 -- Grist Lumber Inc., a West Virginia Corporation v. Paul R. Brown, Jr.

FILED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 9, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

I dissent because I believe the evidence in this case establishes a prescriptive easement for removing timber across the appellant's property.

There was clear and convincing evidence presented in this case showing that the roadway in question has been used since at least 1911, and more importantly, that it has been used for timbering purposes. Specifically, the record indicates that a saw mill was located on the appellee's real estate in the 1920s. Moreover, timbering operations were conducted on the appellee's property in the 1980s as evidenced by two documents showing that the subject road was upgraded at that time for that purpose.

The majority claims that these documents granted express permission by the appellant's predecessor in title for the roadway to be used for timbering for a limited period of time. By granting permission for such use, the majority concluded that a prescriptive easement has not been established in accordance with the requirements set forth in *Town of Paden City v. Felton*, 136 W.Va. 127, 66 S.E.2d 280 (1951) (an easement is not created if the use is by permission of the owner). However, the circuit court found that these documents were merely acknowledgments of the existence of the right-of-way that were

used to allow third parties to make improvements upon the road at the expense of the appellee's predecessors in title. This Court has repeatedly held that "'"[t]he finding of a trial court upon facts submitted to it in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such findings." *Daugherty v. Ellis*, Point 6 Syllabus, 142 W.Va. 340, 97 S.E.2d 33.' Syllabus Point 6, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962)." Syllabus Point 2, *Fraley v. Family Dollar Stores of Marlington, West Virginia, Inc.*, 188 W.Va. 35, 422 S.E.2d 512 (1992). In this case, it does not.

Thus, in light of the evidence that the roadway in question was used for several decades for vehicular traffic including the removal of timber, I would have affirmed the final order of the circuit court. Accordingly, I respectfully dissent.