

No. 30402 - Ralph E. “Gene” Butler v. John E. Price, an individual, and CSX Transportation, Inc., a foreign utility corporation licensed to do business in West Virginia

FILED

October 18, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

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Starcher, Justice, concurring:

I write separately to point out two aspects of the Court’s opinion in this case.

1. We are decidedly *not* affirming the circuit court’s conclusion that Mr. Price (and derivatively, Mr. Butler) as a matter of law did not and could not have a right to cross the CSX right-of-way for commercial purposes. Had we addressed the circuit court’s summary judgment order, I am confident that we would have reversed it, if only because there were simply too many disputed factual issues for this decision to be made as a matter of law. There is, it should be noted, no authority in our law stating that any grantor of a railroad right-of-way is categorically excluded from reasonable non-interfering commercial use of that right-of-way -- unless, of course, specific language to such an effect is included in the grant.

2. It is only Mr. Butler’s failure to appeal his eviction – or to have the eviction case joined with the instant action – that compels the result in the instant case. Had he appealed his eviction, or had it joined with the instant case, we could have ruled on the circuit court’s summary judgment order – and, I believe, we would have reversed it.

With these two understandings, I concur in the Court’s judgment.