

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Agnieszka Collins and William Collins,
Defendants and Third Party Plaintiffs Below,
Petitioners**

FILED

February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0056 (Mineral County 09-C-155)

**Barbara L. Stewart, Frankie Quesenberry,
Toni H. Quesenberry and Raymond A. Snyder,
Plaintiffs Below, Respondents**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mineral County, wherein the circuit court granted summary judgment for the respondents. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court. Respondents have filed a response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On August 8, 2007, petitioners, husband and wife William and Agnieszka Collins, purchased property from Jemima Twigg and thereafter began building their house on the 30.44 acre tract of land in Mineral County. There is a long, one lane dirt road on the property, but the property does not border any public road. As such, the property enjoys two deeded rights of way as a way of ingress and egress. The road at issue in this matter, Collins Road, begins at either one of the two points of entrance from these rights of way.

The respondents, Barbara L. Stewart, Frankie Quesenberry, Toni H. Quesenberry, and Raymond A. Snyder, all own property near petitioners' land. In order to reach their respective properties, the respondents have to travel through petitioners' property on Collins Road before reaching their own properties. Petitioners claim that they purchased the property without knowledge of any use by others, and thereafter erected a locked gate blocking the road after discovering respondents' use. However, the respondents continued

to use the road, so the petitioners eventually dug a trench across the road and barricaded the rest of the road north of the access to their dwelling.

Respondents filed a civil action seeking a temporary and permanent injunction for egress and ingress, while petitioners countersued for defamation and trespass. Two judges recused themselves before Judge Andrew Frye became presiding judge. The circuit court granted temporary unrestricted use of the petitioners' road, ordered petitioners to provide respondents with a key to the gate, and did not set bond. At a hearing on petitioners' motion to dismiss, Petitioner Mrs. Collins argued that because her land was landlocked, all parties had to travel over other individuals' property and that the matter should be dismissed because those landowners should be joined as necessary parties, since adjudication could not provide complete relief and could cause prejudice to those individuals. That motion was ultimately denied.

Petitioners later requested that the issue of bond for the temporary injunction be addressed, but the circuit court did not require bond in relation to the injunction. A viewing of the property took place, during which Petitioner Mrs. Collins began to question Judge Frye's impartiality. On July 6, 2010, respondents' motion for summary judgment was reintroduced, and in response the petitioners argued that the respondents had permission to use Collins Road and that they had committed fraud by claiming that the road was the only access to their property. On December 6, 2010, the circuit court entered an order granting the respondents' motion for summary judgment. It is from this order that petitioners appeal.

On appeal, petitioners allege the following eleven assignments of error: that the circuit court applied the wrong standard of review when evaluating the existence of a prescriptive easement; that the circuit court failed to define the scope and character of the adverse use; that the circuit court wrongfully ruled on a motion for summary judgment while recognizing that additional discovery could be helpful; that the circuit court failed to address the issue of fraud, a material fact; that the circuit court failed to address the issue of an easement in gross versus an easement appurtenant; that the circuit court wrongfully dismissed petitioners' counterclaim; that the circuit court erred by prematurely prohibiting the petitioners from erecting a gate or doing any excavation work on the road; that the circuit court refused to set bond for the respondents' use of the Collins Road, pursuant to a preliminary injunction; that the circuit court refused to dismiss the action for failure to join necessary parties; that the circuit court failed to rule on petitioners' motion to strike scandalous materials; and, that the presiding judge should have recused himself after discovery of a potential conflict with one of the petitioner's roles as an attorney. The Court will address each assignment of error in turn. Further, this Court has held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. Pt. 1, *Kelley v. City of Williamson*, W.Va., 221 W.Va. 506, 655 S.E.2d 528 (2007).

To begin, petitioners argue that the circuit court applied the incorrect standard of review to this matter. It is alleged that the circuit court incorrectly applied the standard from *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977), and incorrectly placed the burden of proof of permission on the petitioners. Therefore, petitioners argue the circuit court's ruling on the respondents' motion for summary judgment is incongruent with this Court's recent holding that "[t]o the extent our prior cases suggest that proof of adverse use is not required, or that the continuous and uninterrupted use of another's land for ten years is presumed to be adverse, they are hereby overruled." Syl. Pt. 7, in part, *O'Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561 (2010). Petitioners allege that the respondents offered no evidence of adverse possession upon which the circuit court could rely. However, the Court finds no merit in petitioners' argument because the circuit court's ruling would have been the same regardless of which standard was applied, and because of the timing with which the *O'Dell* decision was issued in relation to the circuit court's grant of summary judgment.

As noted above, the circuit court entered its order granting summary judgment on December 6, 2010. The *O'Dell* decision was issued on November 24, 2010, approximately two weeks prior to the order granting summary judgment. Further, application of the *O'Dell* decision to the instant matter shows that the circuit court's order satisfied each of the factors enumerated therein. In that decision, this Court held 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.

Syl. Pt. 1, *O'Dell*, 226 W.Va. 590, 703 S.E.2d 561 (2010). Review of the circuit court's order in the present case shows that there were sufficient facts to meet these elements. The circuit court held that Respondent Stewart's "use of the roadway was adverse to the rights of the predecessors in title to the [petitioners'] tract of property." It also found that Respondents Quesenberry "utilized the roadway in a manner wholly consistent with its use by their predecessor in title," and that the Quesenberrys' ownership was based upon the exercise of adverse possession by Respondent Stewart as addressed above. Respondent Snyder satisfies this element "inasmuch as his use of the roadway was adverse to the rights of the predecessors in title to the [petitioners'] tract of property." Further, in her pro se answer to petitioners' third-party complaint, Ms. Twigg, the prior owner of petitioners' property, stated that she "never stopped or gave permission to whoever used the road."

As for the second *O'Dell* factor, the circuit court plainly found that all the respondents' adverse use was continuous and uninterrupted for at least ten years, either by the specific individual or through utilization in a manner consistent with the predecessor in title. In fact, the circuit court found that Respondent Stewart had used the right of way for thirty-eight years, well beyond the ten year requirement. As for the third element, the circuit court also found that all the respondents' use was open and notorious, as the use caused an obvious path of travel across the petitioners' land. Lastly, as to the fourth element, there is no dispute nor misunderstanding between the parties as to the starting point, ending point, or any other boundaries of the road. The circuit court described it as "an obvious dirt road bed that exists on the [respondent's] property which extends from Georges Run Road, crosses a ford in Georges Run, passes through the property of the [petitioners] to the property boundary of the [petitioners'] property and continues on through other property bordering on the [petitioners'] land." Additionally, the circuit court made specific findings as to the manner or purpose for which the land was adversely used, which is to access the respondents' respective properties. As such, the Court now finds that the application of the *Somon* standard amounts to harmless error, as the elements set forth in *O'Dell* were satisfied and the same result would have been achieved through its application below.

Petitioner next asserts that the circuit court failed to define the scope and character of the adverse use, and that it improperly found that the respondents had full use of the road for any purpose. In *O'Dell*, we held that:

[a] person claiming a prescriptive easement must prove the reasonably precise location of the starting and ending points of the land that was used adversely, the line that the use followed across the land, and the width of the land that was adversely used. Furthermore, the manner or purpose in which the person adversely used the land must be established. This is because a right of way acquired by a prescriptive easement cannot be broadened, diverted or moved; its purpose and location are determined solely by the adverse use made of the land during the ten-year prescriptive period.

Syl. Pt. 13, *O'Dell, Id.* As noted above, there is no dispute as to the location and boundaries of the road in question. Additionally, the circuit court found that the respondents, and also their direct predecessors in title, has used the road in question for a variety of purposes, including ingress and egress to residential property, transportation of construction materials, timber removal, recreation, and to provide access to the property for utility companies. As such, it appears that the circuit court's order that the respondents shall "have a right of way across the land of the [petitioners] where the roadway presently exists for the purpose of ingress and egress to their properties" is appropriate, as it is in line with the adverse use made of the land during the prescriptive period.

Petitioners next argue that the circuit court wrongfully ruled on the summary judgment motion while recognizing that additional discovery could be helpful. Petitioners' characterization of the circuit court's recognition of the usefulness of such additional discovery is not entirely accurate, however. A review of the record indicates that Mrs. Collins stated on the record that such additional discovery would shed more light on certain issues, though there is nothing in the record to indicate that the circuit court recognized this as a fact. Petitioners further argue that while the additional discovery requests were allowed, the circuit court left no avenue for them to bring such findings before the circuit court. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 2, *Kelley v. City of Williamson, W.Va.*, 221 W.Va. 506, 655 S.E.2d 528 (2007). Additionally, this Court has held that "[i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.' Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995)." Syl. Pt. 3, *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 543 S.E.2d 338 (2000). As outlined above, the respondents were able to satisfy the standard of review applied below, and the record shows that petitioners failed to take any of the three steps enumerated above. As such, petitioners' assertion that additional discovery could have shed more light on these issues does not invalidate the grant of summary judgment.

For the fourth assignment of error, petitioners allege that the circuit court failed to address an issue of alleged fraud, and the same constitutes a material fact. Therefore, petitioners argue that the existence of an issue of fraud precludes the granting of summary judgment, as the determination of fraud must be left to the trier of fact. This argument is, in essence, the same as the prior assignment of error, and we find that the record below illustrates that petitioners provided no evidence in support of the fraud allegations. As such, the circuit court was not precluded from rendering summary judgment in respondents' favor.

Petitioners next argue that the circuit court failed to address the issue of whether the easement was an easement in gross or an easement appurtenant. "The main features of an easement appurtenant are that there must be both a dominant and servient estate; the holder of the easement must own the dominant estate; the benefits of the easement must be realized by the owner of the dominant estate; and these benefits must attach to possession of the dominant estate and inhere to and pass with the transfer of the title to the dominant estate." Syl. Pt. 4, *Newman v. Michel*, 224 W.Va. 735, 688 S.E.2d 610 (2009). Further, this Court

has stated the “[m]any jurisdictions, including this Court, have shown a strong constructional preference for finding easements to be appurtenant rather than in gross. In Syllabus Point 3 of *Post v. Bailey*, 110 W.Va. 504, 159 S.E. 524 (1931), this Court stated: ‘An easement will not be presumed to be in gross where it can fairly be construed to be appurtenant.’” *Newman*, 224 W.Va. at 742, 688 S.E.2d at 617. Based upon our prior holdings and the evidence presented below, it is presumed that the easement in this matter is an easement appurtenant.

As to petitioners’ next assignment of error, they argue that the circuit court wrongfully dismissed their counterclaim, as the circuit court cannot determine the existence or non-existence of a material fact when such facts are not presented to the court. Petitioners assert that no testimony, argument, or evidence was ever presented to the circuit court on their counterclaims. However, petitioners’ counterclaim was based upon alleged trespass to their property by the respondents. By finding that the respondents adversely possessed the right of way, there could therefore be no trespass by the respondents. As such, it was proper for the circuit court to dismiss petitioners’ counterclaims when it granted summary judgment. As for petitioners’ claim of defamation, the Court finds that the same is without merit. This Court has held that, “[a] court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.” Syl. Pt. 6, *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986).” Syl. Pt. 7, *Belcher v. Wal-Mart Stores, Inc.*, 211 W.Va. 712, 568 S.E.2d 19 (2002). Upon review of the allegedly defamatory statements from the record, the Court finds that, as a matter of law, the same are not capable of defamatory meaning.

Petitioners next allege that the circuit court erred in permanently prohibiting them from erecting a gate or doing any excavation work on the road in question. They argue that the circuit court’s order prohibits them from performing maintenance of any kind on the road and leaves it open to virtually anyone to use. However, petitioners misstate the circuit court’s ruling. Specifically, the circuit court stated that the petitioners “may not perform any excavation on the roadway or otherwise disturb the roadway.” Given the petitioner’s prior act of excavating the road so as to be unusable, which action required an order from the circuit court to direct petitioners to remedy, it is clear that this language relates to additional similar excavation that would disturb the roadway and prevent the respondents’ use. As such, the Court declines to find that the circuit court exceeded its authority in prohibiting the petitioners from specific actions, such as locking the respondents off the property.

As to petitioners’ next assignment of error, they allege that the circuit court erred when it refused to set bond for the respondents’ use of the road pursuant to a preliminary injunction, as is required by Rule 65(c) of the West Virginia Rules of Civil Procedure. This Court has held that “[d]espite the strict statutory requirement of an injunctive bond, for all intents and purposes the final determination of whether an injunction bond will be required

of a certain party in a specific case is dependent upon the prerogative of the enjoining court. Our judicial interpretation of that standard recognizes that there will occasionally be cases in which the facts and circumstances simply do not compel the posting of an injunctive bond, *i.e.*, where ‘good cause’ has been shown.” *Kessel v. Leavitt*, 204 W.Va. 95, 160, 511 S.E.2d 720, 785 (1998). Because the circuit court found that no bond was necessary for the injunction below, the Court declines to disturb the circuit court’s discretion on appeal.

Petitioners next allege that the circuit court erred when it refused to dismiss for failure to join a necessary party. They argue that, because their land is landlocked, all parties have to travel over several landowners’ properties to reach theirs. As a matter of law, if respondents were able to obtain a favorable outcome, the other landowners would be prejudiced. Further, by limiting their lawsuit to petitioners only, the respondents would not be able to obtain complete relief, as they would only be entitled to a right of way over a property that was landlocked and did not border their own properties. Therefore, petitioners argue that pursuant to Rules 19 and 12(b)(7) of the West Virginia Rules of Civil Procedure, the matter should have been dismissed. However, this Court has held that “[i]n a suit to enjoin and remove obstructions in a right of way by one of the servient owners, other servient owners through whose lands the road runs and against whom no complaints are made or relied sought, are not necessary or proper parties to the suit.” Syl. Pt. 1, *McNeil v. Kennedy*, 88 W.Va. 524, 107 S.E. 203 (1921). Neither the petitioners nor the respondents have made a claim that any person other than the petitioners claims an interest in the petitioners’ real property, and only the petitioners’ land is at issue. Therefore, the circuit court properly denied petitioners’ motion.

Petitioners next argue that the respondents, in their complaint, alleged issues against them that were untrue, scandalous, and irrelevant. The petitioners argue that they moved to strike this material and the circuit court heard arguments on the motion, but failed to rule on the same which amounted to a ruling denying the motion. However, if the circuit court had denied the motion, the same could have been appealed; instead petitioners were precluded from doing so. Based upon the record below, it appears that the petitioners failed to present evidence or testimony on the motion to strike at the appointed hearing, and that the circuit court granted the petitioners the opportunity to revisit the same. That the petitioners failed to ever take the matter up before the circuit court again is not for this Court to address, and we decline to find that the circuit court erred by not ruling on the same.

Lastly, petitioners allege that the presiding judge should have recused himself because of a statement made during a property inspection which petitioners believed showed bias against them. Petitioners also assert that the judge should have recused himself because Petitioner Mrs. Collins was appointed to represent a client in a criminal matter, and that Judge Frye had previously presided over either part of that matter or a civil matter arising from the same incident and facts. Petitioner Mrs. Collins filed a motion to dismiss the

criminal matter, and petitioners now allege that Judge Frye responded by contacting the prosecuting attorney to urge opposition to the motion. The matter was subsequently dismissed but the client filed a civil suit against Judge Frye and others; petitioners allege that this suit was filed after the hearing on the motion for summary judgment in the instant matter, but before Judge Frye ruled on the same. Petitioners allege that, because Judge Frye was personally sued by Mrs. Collins' client over the matter in which she represented him, Judge Frye should have recused himself. This Court has held as follows: “(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.’ Canon 3(C)(1) of the *Judicial Code of Ethics*.” Syl. Pt. 2, *Templeton v. Templeton*, 179 W.Va. 597, 371 S.E.2d 175 (1988). The Court finds that this scenario is not one requiring recusal under the Judicial Code of Ethics, nor does it evidence a bias on the part of the presiding judge. Further, the Court declines to find that the circuit court's decisions below in favor of respondents constitute bias against petitioners.

For the foregoing reasons, we find no error in the decision of the circuit court and the order granting summary judgment for respondents is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh