IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Leonard D. Carr and Gloria J. Carr,
Plaintiffs Below, Petitioners

vs.) No. 19-0216

Lysle T. Veach, Jr., Whitney Sloane Veach,
Sydney Morgan Veach and Bailey A. Veach,
Defendants Below, Respondents.

"PETITIONERS' BRIEF"

Leonard D. Carr (now deceased DOD: 3/8/19)
and Gloria J. Carr
Petitioners - By Counsel

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SYDNEY MORGAN VEACH and BAILEY A. VEACH,
DEFENDANTS BELOW/RESPONDENTS

PETITIONERS' BRIEF

Now comes the above referenced Petitioners by and through their Counsel, Nathan H. Walters, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, for the purpose of filing a Petitioners' brief. Upon a thorough review of the pertinent case law, it is the Petitioner's firm belief that this Honorable Court will ultimately see that the lower Court's decision was flawed and incorrect as it erroneously applied the authoritative guidelines and case law pertaining to a claimant attempting to establish an easement by prescription. Thus, it is the Petitioners' opinion that the lower Court's decision should be overturned.

In support thereof, Petitioners would proffer certain arguments and state as follows:

ASSIGNMENT OF ERROR

1. The lower Court's conclusion of law that the Petitioners failed to meet their burden of proof with respect to an express easement was made in error and said finding was not supported by the evidence presented at Trial. (Appendix Page 161)
2. The lower Court's conclusion of law that the Petitioners failed to meet their burden of proof with respect to a prescriptive easement was made in error and said finding was not supported by the evidence presented at Trial. (Appendix Page 162)

3. The lower Court failed to properly apply the guidelines which must be considered when a party is attempting to establish a claim for an easement by prescription, as set forth by this Honorable Court in *Odell v. Stegall, 226 W. Va. 590 (W. Va., 2010)*.
4. The lower Court's "Amended Judgement," wherein it granted the Petitioners the "ability to travel the disputed right-of-way for and during their natural lifetimes, so long as they are present in a vehicle being driven on the disputed right-of-way" (Appendix Page 193) is an unfounded judgment with no basis upon which to find the same via pertinent West Virginia case law associated with prescriptive easements.

STATEMENT OF THE CASE

M. E. Goldizen, Sr. departed this life testate, and by his Last Will and Testament, he devised an approximate three hundred fifty (350) acre tract of real estate to G. Y. Dolly; with said real estate being located and situate in Grant County, West Virginia. The aforementioned real estate was the parent tract of the real estate which is the subject of this legal matter/Appeal. Pursuant to Mr. Goldizen's Last Will and Testament, a Chancery Suit was initiated in Grant County, West Virginia. B. F. Mitchell, as the Executor of the Estate of M. E. Goldizen, Sr., was the plaintiff and G. Y. Dolly was one of a number of defendants; and the suit resulted in the sale of the parent tract of the real estate at issue in this matter. (Appendix page 99).

The Chancery Court subsequently issued a decree on July 21, 1939 that confirmed the sale and directed a deed for said real estate to be made to G. Y. Dolly by the said B. F. Mitchell, in his capacity as Special Commissioner. (Appendix page 106 and 109). In the multiple Chancery Decrees and Reports, the Chancery Court made reference to the necessity of a right-of-way to be conveyed along with the real estate. Thereafter, a deed was executed on June 27, 1940 by and

between B. F. Mitchell, Special Commissioner, unto G. Y. Dolly and said deed is of record in the Office of the Clerk of the County Commission of Grant County, West Virginia in Deed book 38, at page 391. Within said deed was a metes and bounds description and a reference that "all rights of way are hereby conveyed in this deed." (Appendix page 106 and 109)

Thereafter on September 28, 1943, Lester Rohrbaugh purchased two (2) tracts or parcels of real estate from G.Y. Dolly, with said real estate lying and being situate in Grant District, Grant County, West Virginia. The first tract or parcel of real estate contained 150 acres, more or less; and the second tract or parcel of real estate contained 230 acres, more or less. The aforesaid tracts were conveyed by that certain Deed of record in the office of the Clerk of the County Commission of Grant County, West Virginia in Deed Book 41, at Page 71. (Appendix page 89)

On June 19, 1984, John G. Vanmeter, Trustee, did convey Lester Rohrbaugh and Marie Rohrbaugh the same two (2) tracts or parcels of real estate by that certain Deed of record in the Office of the Clerk of the County Commission of Grant County, West Virginia in Deed Book 140, at page 122. (Appendix Page 149) Said Deed notes that this is the same real estate conveyed unto Lester Rohrbaugh by the above referenced Deed from G. Y. Dolly; and after a careful review of the aforesaid Deed, it is unclear as to the nature of John G. Vanmeter's role as a Trustee within the aforesaid document. However, it appears to be a straw deed that essentially re-conveys the same tracts of real estate unto Lester and Marie Rohrbaugh, as joint tenants with rights of survivorship, of which Lester Rohrbaugh obtained in the Deed referenced above on September 28, 1943. This aspect was confirmed by James Paul Geary, II, the closing attorney involved in the purchase of the real estate at issue.

That up to and until the death of Lester Rohrbaugh on March 17, 1985 and Marie Rohrbaugh's subsequent death on December 3, 1997, the Rohrbaughs utilized the disputed right

of way in this matter, identified as "Copper Head Canyon," as a general right-of-way access for purposes of ingress and egress to the above referenced two (2) tracts or parcels of real estate purchased in 1943 and upon which they resided. Pauline B. Reel, who testified during the lower court proceedings, is the daughter of Lester and Marie Rohrbaugh and did begin residing on the subject property in the fall of 1943, as a freshman in high school in Grant County, West Virginia.

Prior to her death, Marie Rohrbaugh actually deeded her daughter, Pauline B. Reel and Mrs. Reel's son, Mark G. Reel, an eighty (80) acre tract or parcel of real estate. Said Deed is dated April 3, 1989 and is of record in the aforesaid Clerk's Office in Deed Book 161, at page 476. (Appendix Page 92) This tract of real estate was a portion of the real estate conveyed unto Lester Rohrbaugh by that certain Deed dated September 28, 1943 and that certain deed dated June 19, 1984, also referenced above.

It should be noted that Pauline B. Reel did not move away from the Grant County, West Virginia area and she has continued to access the real estate conveyed to her and her siblings by her parents as a co-tenant, along with the said aforementioned eighty (80) acres conveyed to her by her mother, Marie Rohrbaugh. Pauline B. Reel did so until 2013, when she and her siblings joined in a conveyance to convey approximately 204.95 acres unto Leonard D. Carr and Gloria J. Carr on December 3, 2013, with said Deed of record in the office of the Clerk of the County Commission of Grant County, West Virginia, in Deed Book 266, at Page 345. (Appendix Page 81) This tract or parcel of real estate purchased by the Carrs was the residue of real estate obtained by Lester Rohrbaugh from G.Y. Dolly on September 28, 1943.

The Deed from Marie Rohrbaugh unto Pauline B. Reel and her son, Mark G. Reel, referenced above, contained the following language pertaining to the right-of-way conveyed to them:

"There is further granted and conveyed a twenty (20) foot general purpose right-of-way leading from the existing Knobley Road to Lester Rohrbaugh's home, thence in a westerly direction and on the north side of the Middle Fork of Patterson Creek to said 80.00 acres approximately 120 feet southwest of corner "A" at a 5/8" X 30" steel rod at base of thirty (30") yellow poplar tree, as shown on the attached plat." *(Appendix Page 92)*.

Prior to the closing of the real estate conveyed to the Carrs' James P. Geary, II, a real estate attorney who has practiced law in the Grant County, West Virginia area for the last three (3) to four (4) decades, inquired of each and every seller with regard to the access and/or right-of-way aspects to the real estate being purchased by the Carrs. Subsequent thereto, Mr. Geary certified clear title to the real estate for the Carrs, along with the below referenced right-of-way for them to utilize, for purposes of accessing the subject real estate. Mr. Geary noted that the right-of-way clause referenced in the deed from Marie Rohrbaugh to Pauline B. Reel and her son, Mark G. Reel, reinforced his opinion that the Carr's real estate had a valid right-of-way.

Mr. Geary was designated as an expert witness by the Court at the Trial of this matter and further indicated that the more recent deeds in the chain of title did not specifically identify the existence of a right-of-way. This aspect was also confirmed by the Defendant's expert witness, Pat A. Nicholas. Moreover, the deeds to Mr. Veach and his predecessor(s) in title did not contain a specific reference to or a reservation of a road or right-of-way and based upon the same, Mr. Geary deemed it necessary to inquire further as to the existence of the right-of-way.

In that vein, Mr. Geary testified that he personally spoke to each and every seller with regard to the existence of a right-of-way to the property and had each seller execute, under oath, an Owner's affidavit. In each Owner's affidavit Mr. Geary prepared, a provision which was

included to confirm each seller's understanding of the existence of the right-of-way to the property. With each seller confirming the existence of a right-of-way to be conveyed with the real estate the Carr's purchased, Mr. Geary felt comfortable including the below referenced right-of-way in the deed unto the Carrs.

In addition to Mr. Geary's title certification and belief that a general purpose right-of-way was associated with the real estate, he also reviewed the Grant County Assessor's Office records, which showed the existence of this particular right-of-way from Knobley Road across Mr. Veach's property, which Mr. Geary believed to be the same road utilized by Mr. Veach, as well as G. Y. Dolly, Lester and Marie Rohrbaugh, Pauline B. Reel and then the Carrs. As evidenced by his testimony at the Trial of this matter, Mr. Geary held a firm belief that the use of the disputed right-of-way also more than satisfied the elements necessary for an easement, in addition to the right-of-way conveyed in prior deeds in chain of title.

The deed dated December 3, 2013, from Pauline B. Reel and her siblings, unto the Carrs contained the following language:

> "The Grantors do further grant and convey unto the Grantees as aforesaid, a general purpose right of way over courses and distances now in existence from Knobley Road to the real estate herein described and conveyed. Said right of way shall not be exclusive, but shall be used jointly and in common with others having the right to use same." (Appendix Page 81).

To access the disputed right-of-way described as "Copper Head Canyon" off of Knobley Road (identified as County Route 3) there were two (2) separate gates. Both gates are located on the property of Lysle T. Veach, Jr. The original gate was/is a manual farm gate that needed to be opened by an individual exiting his or her vehicle and opening the same and the second or alternate

gate was electric, so that an individual could access the gate and right-of-way with an "electric clicker," similar to a garage door opener.

At some point in time after the Carrs had purchased the real estate in 2013 and constructed a modern dwelling house thereon, the Carrs approached Mr. Veach to request the ability to utilize the electric gate, which had been installed by Lysle T. Veach, Jr., in addition to the manual gate the Carrs' predecessors in title had always used for ingress and egress up and through "Copper Head Canyon." The Carrs paid Mr. Veach the costs associated with the "electric clickers." The primary reason the Carrs approached Mr. Veach to utilize his electrically powered gate was the severe health ailments to which Leonard D. Carr suffered from and his inability to get out of his vehicle to utilize the manual gate. This was of particular significance to Leonard D. Carr by virtue of his multiple medical conditions, which he ultimately succumbed to and did depart this life on or about Friday, March 8, 2019, the same day your undersigned Counsel mailed out the *Notice of Intent to Appeal* to this Honorable Court.

The Carrs continued to use the disputed right-of-way known as "Copper Head Canyon," without issue until several years later in late 2015 and early 2016, when Mr. Veach began personally obstructing the right-of-way access for the Carrs. Around that time, Mr. Veach insisted, by and through his attorney, Jason R. Sites, that the Carrs now had to access their real estate and residence constructed thereon, through a completely different right-of-way access, from a completely different direction.

It was at that point in time that Mr. Veach, by and through his aforesaid Counsel, took the position that the Carrs only had permission and not a legal right to access said disputed right-of-way to their real estate purchased in December of 2013.

It was then that Clyde M. See, Jr., prior Counsel for the Carrs, filed a Civil Action and corresponding *Motion for Injunctive Relief* with the Grant County Circuit Court in order to allow the Carrs to continue to utilize the right-of-way identified as "Copper Head Canyon." The Injunctive Relief was granted by the Honorable Lynn A. Nelson, Grant County Circuit Court Judge. The purpose of said Civil Action filed by Mr. See on behalf of the Carrs, was to solidify the Carrs notion of an easement through the Veach real estate to the real estate the Carrs purchased from Reel et. als. (Appendix Page 1)

Clyde M. See, Jr. departed this life on April 7, 2017 and the Carrs subsequently obtained your undersigned Counsel, Nathan H. Walters, to aid them in pursuing the aforesaid Civil Action. The Grant County Circuit Court, with the Honorable Lynn A. Nelson presiding, did thereafter conduct a Bench Trial on Thursday, September 7, 2017 and Friday, September 8, 2017 in the Circuit Court of Grant County and at the conclusion thereof issued a written opinion, filed with the Grant County Circuit Court Clerk on September 22, 2017, essentially ruling for the Defendants, Lysle T. Veach, Jr. et als., that the Carrs did not have a valid easement over and through land owned by Mr. Veach and his daughters, off of Knobley Road and through "Copper Head Canyon" to access their real estate and modern dwelling house constructed thereupon. (Appendix Page 155)

During the Bench Trial held in this matter, the Defendants and their Counsel set forth the theory that the Carrs could utilize another means of access to their real estate through the "backside" of their property. The testimony elicited at said Trial evidenced the fact that this means of travel could be described as a "pig path", only to be utilized with a four-wheel drive vehicle and most likely not utilized at all during the winter months of the year.

It was also a theory of the Defendants at the Trial of this matter that the recently constructed Corridor-H highway and a corresponding Deed, dated September 3, 2009 and of record in the

Grant County Clerk's Office in Deed Book 249, at page 307 somehow extinguished the aforesaid general purpose right-of-way because it altered the disputed right-of-way. This theory was contradicted by several Plaintiff witnesses whom had resided in this particular area of Grant County, West Virginia; and had personally known Lester and Marie Rohrbaugh and had utilized the disputed right-of-way from time to time for several decades. Said witnesses testified that the recently constructed Corridor-H highway did slightly modify the disputed general purpose right-of-way, but did not impact its general direction nor how it was utilized to access the real estate the Carrs purchased.

Additionally and in conjunction with the foregoing, this other means of access that can be accurately described as a "pig path," traverses through three (3) separate tracts or parcels of real estate with three (3) separate owners and was only rudimentarily used during the construction of the Corridor H through that part of Grant County, West Virginia.

Subsequent to the aforementioned Bench Trial, Counsel for the Carrs filed a *Motion for New Trial, Motion to Alter or Amend Judgment*, and a *Motion to Stay* on September 28, 2017. The Court subsequently entered an *Order Granting Stay* on September 28, 2017 and a hearing was thereafter conducted in the Circuit Court of Grant County, West Virginia on December 17, 2017 on said motions. The Court, with the Honorable Lynn A. Nelson presiding, did subsequently enter an *Order Altering or Amending Judgement*, with said *Order* dated December 18, 2017 and entered by the Court on January 23, 2018, whereby the Court did alter and/or amend its judgement pursuant to the requisite post-trial motions filed by Mr. Walters on behalf of the Carrs and did thereafter allow the Carrs " to utilize the disputed right-of-way for and during their natural lifetimes, so long as the Plaintiffs are traveling in a vehicle on the aforesaid disputed roadway." The Court also afforded the Carrs "the ability to allow for normal ingress and egress on the disputed right of way

for normal, daily living purposes. (ex. Fuel, propane oil delivery and other necessities of habitability and life)." (Appendix Page 193).

Leonard D. Carr departed this life on Friday, March 8, 2019, and once Mrs. Carr departs this life, pursuant to the ruling by the Grant County Circuit Court, the Carrs' real estate, totaling 204.95 acres, more or less, along with the modern dwelling house constructed thereon, will be rendered useless, as it will have no lawful right-of-way access, thus the necessity of filing this Appeal to the Honorable West Virginia Supreme Court of Appeals.

STATEMENT OF THE ARGUMENT

In *O'dell v. Robert*, a 2010 West Virginia Supreme Court Case, this Honorable Court described the necessary elements which must be met for a person to claim an easement by prescription. Therein, the O'dell Court did state that for one to establish a prescriptive easement, they must prove:

> "**(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." O'dell v. Robert 226 W.Va. 590, 703 S.E.2d 56, at Syllabus Pt. 1. (W. Va., 2010)

The O'dell Court went on to state that, when attempting to establish a claim of a prescriptive easement, the claimant "must establish each element of prescriptive use as a necessary

and independent fact by clear and convincing[1] evidence, and the failure to establish any one element is fatal to the claim." *Id.* at Syllabus Pt. 2.

At the Trial in this matter, which occurred in the Circuit Court of Grant County, West Virginia on or about September 7th and 8th of 2017, the Petitioners did present evidence to show that they had an express easement to traverse certain tracts of real estate owned by the Respondents. Thereafter the Petitioners further presented more than ample evidence and testimony to meet the stringent level of clear and convincing proof to show that if no express easement did exist, then they had adversely utilized a gravel road, located and situate upon the Respondents' land, for the purpose of accessing real estate owned by the Petitioners, with the general location of said road not being in question. Further, the Petitioners presented evidence that sufficiently demonstrated that said road had been utilized in a continuous manner, via the theory of tacking, by the Petitioners and prior owners in the chain of title for more than seventy (70) years, with same being done openly and in clear view the Respondents and their predecessors in the chain of title.

In consideration of the elements required to establish a claim to an easement by prescription coupled with the evidence and testimony presented at trial, it is clear that the lower Court did err in deciding that the Petitioners had failed to meet their burden of proof with respect to a prescriptive easement. The Court did commit further error by limiting the Petitioners' right to utilize said right-of-way to the extent where they only had the "ability to travel the disputed right-of-way for and during their natural lifetimes, so long as they are present in a vehicle being driven on the disputed right-of-way" (Appendix Page 193)

[1] Clear and convincing evidence' or 'clear, cogent and convincing evidence' is the highest possible standard of civil proof [.] ... It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." Id. at Page 580; citing Cramer v. West Virginia Dept. of Highways, 180 W.Va. 97, 99 n. 1, 375 S.E.2d 568, 570 n. 1 (1988) (per curiam).

On behalf of the Petitioners and in accordance with Rule 10 of the West Virginia Rules of Appellate Procedure, Counsel would state that the aforementioned issues along with the following arguments being presented to this Honorable Court are not ones of first impression, and Counsel would state that oral arguments are not necessary, unless this Honorable Court would deem so otherwise. If this Honorable Court does decide said oral arguments are necessary, then same would be ordered under Rule 19 of the West Virginia Rules of Appellate Procedure, as this is a case "involving assignments of error in application of settled law." WV App. Proc. Rule 19 Oral Argument (West Virginia Rules of Appellate Procedure (2010))

ARGUMENT

First and foremost, the Petitioner would state that the matter upon appeal is an issue which would require a *de novo* standard of review. In Grist Lumber, Inc. v. Brown, this Honorable Court stated "[w]e review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo..." Grist Lumber, Inc. v. Brown, 550 S.E.2d 66, at Page 70 (W.Va., 2001); citing Burgess v. Porterfield, 469 S.E.2d 114, Syl. Pt. 4 (W.Va. 1996). In Grist Lumber, Inc., the Court stated that "we accept the lower court's findings of fact, based upon essentially undisputed facts, and detect no basis for reversal of such findings of fact. In our examination of the lower Court's conclusions of law based upon those facts, however, we employ a *de novo* standard of review." Id. The aforementioned application of a *de novo* standard of review is most applicable to the matter at hand, as the Petitioners' Appeal is not based upon any certain finding of fact, but is more entrenched in the theory that the lower Court failed to properly apply the applicable findings of law to the facts presented.

EXPRESS EASEMENT

As stated in the Petitioners Assignments of Error and Statement of the Argument, the crux of the legal theory and conclusions of law, for which this appeal is based upon, is whether the Petitioner has established a legal easement by prescription. However, prior to delving into a more in-depth discussion of an easement by prescription, the Petitioners would be remiss if they did not point out the fact that there was ample and sufficient evidence presented, coupled with expert testimony given during the lower Court bench trial, wherein the Petitioners did establish they had an express[2] legal easement by prior Court Order.[3]

During the lower Court bench trial, Petitioners' expert witness, James Paul Geary, II, the attorney who certified title pertaining to the real estate now owned by the Petitioners, which the easement in question does connect, did testify at length as to why, in the Deed he drafted for the Petitioners, he included the following language:

> "The Grantors do further grant and convey unto the Grantees as aforesaid, a general purpose right of-way over courses and distances now in existence from Knobley Road to the real estate herein described and conveyed. Said right of way shall not be exclusive but shall be used jointly and in common with others having the right to use same." (Appendix Page 83)

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[2] An express easement (right of way) is defined as "An express easement is created by a deed or by a will. Thus, it must be in writing." https://realestate.findlaw.com/land-use-laws/express-and-implied-easements.html (Copyright 2019); "Express easements are created by a written agreement between landowners granting or reserving an easement. Express easements must be signed by both parties and are typically recorded with the deeds to each property." https://www.justia.com/real-estate/docs/easements (Copyright 2019)

[3] During the bench trial in the Grant County, Circuit Court, the Petitioners did present multiple arguments pertaining to their belief they had an express right of way via documentation in the chain of title. The lower Court; however, did state in its Trial Order that there "was no proof offered that the lawful owners of the real estate now owned by the Defendants Granted an express easement to any of the owners in the chain of title of the Plaintiffs. There was insufficient proof offered that the Grantors to the Plaintiffs possessed a right of an easement and thus could not grant an easement unto the Plaintiffs in 2013. The Court does hereby Grant Judgment in favor of the Defendants with respect to the Count for Express Easement." (Appendix Page 161)

It was Mr. Geary's professional opinion that the Grantors in the Deed unto Leonard Carr and Gloria Carr, Grantees therein and Petitioners, with said Grantors being Pauline B. Reel; Reva G. Reel; Amy V.E. Shafer, Trustee under the Shafer Living Trust, dated September 12, 2012; Freeda R. Curtis, Trustee under the Jerry L. Curtis and Freeda R. Curtis Revocable Trust U/D December 12, 2003; David M. Perry and Hilda K. Perry, Trustees under the Perry Revocable Living Trust, dated December 18, 2009, did have an express legal easement across the Respondents real estate with said easement being located upon a gravel road, traversing the Respondents real estate and connecting the Petitioners property to Knobley Road (a public road located and situate in Grant County, West Virginia).

During Mr. Geary's testimony, he stated that he had performed a thorough title review pertaining to the property now owned by the Petitioners. In particular, Mr. Geary did trace and/or research said title back to a chancery suit held in the Circuit Court of Grant County, West Virginia during the winter and spring of 1939; wherein certain real estate was to be divided and sold for purposes of paying certain debts. Ultimately said property, the remainder of which is now owned by the Petitioners, was purchased by a gentleman named G.Y. Dolly. In consideration of same, Mr. Geary did also review multiple documents from said chancery suit, which were then presented unto the lower Court. The first document was a "Decree April Term 1939" from the chancery suit (Appendix Page 99), wherein it was stated generally that the "commissioners to go upon said land and make an equal division of said real estate in two parts, taking into consideration the value of the buildings ... thereon, and they are also directed, if necessary, to provide a right of way for the use of either of said one half undivided interests for the benefit of either of said tracts when laid off" (Appendix Page 99) It was Mr. Geary's position that the chancery court was at that point noting the importance and necessity of an easement. (Appendix Page 282). Thereafter, Mr. Geary

did also review a "Commissioners Report," dated May 23, 1939 (Appendix Page 102), wherein the commissioners did state their intentions to allow for a "right of way over the remainder through G.Y. Dolly's part, and right of way to be the same as now used road, and to be operated as gateway." (Appendix Page 102), which lead Mr. Geary to further believe that the easement in question already existed and had been utilized since 1939. (Appendix Pages 283 and 284).

A "Decree May Term 1939" (Appendix Page 106) was also presented by the Petitioners, which stated in part that the real estate should be advertised and sold as "the parcel of real estate laid off to be sold for the debts of the said M.E. Goldizen, Sr., consists of 230 acres, more or less, and a right of way from said 230 acres over the remainder of said real estate owned by the G.Y. Dolly under said Will, over road now used, and same to be operated as a gate way to the public road leading from Maysville to Falls. (Appendix Page 106). The aforementioned 230 acres is the same 230 acre tract referenced in the Deed unto the Petitioner's (Appendix Page 81). Therefore, upon completing his review of the chancery suit, it was Mr. Geary's understanding and belief that "it was very evident to me that there was a road; that it existed; and that it was going to be conveyed as part of this transaction," (Appendix Page 284). Mr. Geary, upon having discussed said easement with the Grantors contained in the Deed unto the Petitioners, having reviewed the chancery court proceedings and having reviewed the Grant County Assessor's Office records, which by his testimony did show a road existed across the Respondents' real estate and connected to the Petitioners' real estate (Appendix Page 285); then opined there was more than enough documentation to evidence the "existence of this right-of-way." (Appendix Page 286). Thereby, Mr. Geary did generally end his initial testimony by stating "...I am of the opinion this is not even close. That this right-of-way has existed for many years; it was clear to me that it was intended to be granted and conveyed to the Carrs' predecessors in title, and it was, and that not only was it

granted and conveyed, but it has been used openly and notoriously for a period of time exceeding ten years." (Appendix Page 291)

The Respondents' cross examination of Mr. Geary initially focused on the actual location and existence of the easement in question, as said easement was originally mentioned as mere general language in the Deed from B.F. Mitchell, Spl Commr, unto G.Y. Dolly, dated June 27, 1940 (Appendix Page 97), wherein it stated "[a]nd all rights of way are hereby conveyed." Further, the Respondents did attempt to question and elude to the theory that the easement referenced in the chancery suit only pertained to an easement for crossing real estate which at that time was already owned by G.Y. Dolly and did not pertain to crossing any other real estate, which was necessary to access the public road (Knobley Road).(Appendix Page 297-307). To expound upon this argument, the Respondents' expert, Pat A. Nichol's, later testified that it was his theory that once G.Y. Dolly purchased the real estate, via the chancery suit, then any said easement may have been extinguished via the doctrine of merger (Appendix Page 352), as said right of way was not directly referenced in that certain Deed from G.Y. Dolly unto Lester Rohrbaugh (Appendix Page 89). However, Mr. Geary, during his cross examination, had sternly stated he was comfortable with the location and existence of the easement in question as it was "the same road that's been identified to me by others. It's the same road that's been indicated by the family. It's the same road that everybody has told me exists since the 1930s. It's the only road that I know of in my course of investigation that goes to the Knobley Road" (Appendix Page 297). Prior to that particular statement, Mr. Geary's testimony did also reference a fact that is subtle in nature, but very telling with respect to the big picture, which is that the Respondents' property, upon which the easement in question does lie, was at one time owned by Roy Babb. In particular, Mr. Babb, at the time of the chancery action, did own the Respondents' property, which is one of the tracts of land upon

which the easement in question is located. Mr. Babb was not made a party to the original chancery suit, but was actually one of the appointed commissioners in said suit and therefore was "one of the very persons that recommended that this right-of-way be granted and conveyed over and across his very own property to the Knobley Road." (Appendix Page 296 and 297). In consideration of the aforementioned statements by Mr. Geary, which were based upon what was obviously a very thorough title examination, coupled with the multiple exhibits presented unto the lower Court by the Petitioners, the Petitioners do respectfully believe more than ample evidence was presented at Trial to illustrate they had an express easement to cross the Respondents property so as to access the public road (Knobley Road).

PRESCRIPTIVE EASEMENT

In the alternative to having an express easement, the Petitioners did also argue, in the lower Court Proceedings, that they had a prescriptive easement to cross the property of the Respondent for purposes of ingress and egress to access the public road from their respective real estate. Via multiple witness and personal testimony, the Petitioners arguably proved that they and their predecessors in chain of title had utilized a gravel road located on the Respondents' property, which traversed from the public road (Knobley Road) to the Petitioners' respective real estate, for almost seventy-six (76) years; and that said usage was done openly, continuously, under the claim of title and without granted consent or permission.

This Honorable Court has obviously had the opportunity, on many occasions, to consider the legal theories pertaining to an easement by prescription. However, it appears that said Court in O'dell v. Stegall, (a/k/a O'dell v. Robert) a 2010 West Virginia Supreme Court case, did take great efforts and go to great lengths to expound upon the elements and legal guidelines for which one

must establish to claim an easement by prescription. For an understanding of the importance of this case, one has to look no farther than Justice Ketchum's statement that:

> "[a]fter careful consideration of our morass of case law, we now take this opportunity to clarify the common law doctrine of prescriptive easements. We endeavor to eliminate archaic and contradictory terms, and establish terms and definitions that are understandable to the modern factfinder. We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored." O'dell v. Robert, 703 S.E.2d 561, at Page 569. (W.Va., 2010).

In O'dell, there was a gravel lane which the Plaintiffs in said case were using to access a back portion of their real estate, even though their property had an alternative access. Said gravel lane was supposedly the only access to the Defendant's property, as their property was landlocked by other property owners. The Defendants' claimed "that the plaintiff does not have a prescriptive easement, and assert that the plaintiff's use will cause wear and tear to the gravel lane which the defendants are contractually obligated to repair." Id., at Page 601. The Plaintiffs in O'dell attempted to argue they had a prescriptive easement over said gravel road, even though they could not clearly designate the owner of the property upon which the gravel lane was located nor could they justify their daily usage being commensurate with that of prior users, who were churchgoers using said road once or twice a week.

When considering the facts presented, the O'dell Court did state that when a person is attempting to establish a prescriptive easement, then one must prove the following "Elements of the Prescriptive Easement Doctrine:"

> **(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. (emphasis added) Id., at Page 567, Syl. Pt 1.

Further, the Court did state that all of the aforesaid elements must be proven by the claimant; with same being proven by clear and convincing evidence; and if any said element is not met then said failure is "fatal to the claim." Id., at 580 and 581. When reviewing said case, the O'dell Court did analyze each element separately and applied the evidence and facts presented, so as to ascertain whether the Plaintiffs did prove, by clear and convincing evidence, that they had established an easement by prescription.

Ultimately, the O'dell Court decided that the Plaintiffs failed to meet all of the aforesaid requirements, as they had failed to present evidence supporting their claim of continuous use (they had attempted to loosely associate their daily use with those of churchgoers who used the right-of-way twice a week), they also failed to prove the use was adverse, as the Plaintiffs could not actually prove who owned the gravel road in question, and the Plaintiffs failed to clearly define the road. Id. at 593 and 594. Therefore, the O'dell Court did state that the Plaintiffs did not establish an easement by prescription.

As was done by the O'dell Court, the Petitioners herein will analyze each element of the "Prescriptive Easement Doctrine" separately and will apply the facts and evidence presented unto the lower Court. Upon so doing, it is Petitioners' belief that it will leave no question in this

Honorable Court's mind that they have established a prescriptive easement across the Respondent's property, via clear and convincing evidence.

Element (1) "the adverse use of another's land":

The O'dell Court stated that adverse use of another's land is defined as "a wrongful use, made without the express or implied permission of the owner of the land. An "adverse use" is one that creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to the law. A use of another's land that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated." Id., at Page 586. When applying the aforementioned guidelines, the O'dell Court found that the claimant therein failed to designate the actual owner of the land upon which the easement in question did lie and therefore the Court did believe that 'the plaintiff failed to prove any use of the gravel lane was adverse to the owner of the servient estate over which the alleged prescriptive easement crosses;" and the Court further stated "the plaintiff failed to show that the prior use of the gravel lane, by himself and his predecessors, was in any way wrongful toward, or without the express or implied permission of, the owner of the servient estate." Id., at Page 593.

First, and most obvious, as you read this brief, it is apparent that the Petitioners use of the subject easement was the "cause of an action by the owner against the person claiming the prescriptive easement;" so the focus then turns to whether the use was permissive or adverse in nature. During the lower Court trial, multiple witnesses were presented by the Petitioners and Respondents, which each witness did have some varying level of knowledge of the easement in question and/or the usage by the Petitioners. However, arguably the most influential arguments

and evidence was gleaned from the testimony of Pauline Beatrice Reel[4], who was one of the Grantors contained in the Deed unto the Petitioners and was also a daughter to Lester Rohrbaugh,[5] and the testimony of Lysle Trenton Veach Jr., one of the Respondents.

In consideration of element (1) of the "Prescriptive Easement Doctorine," the Respondents counsel did focus Mr. Veach's testimony on the usage by the Petitioners of the easement in question and also his knowledge of the history pertaining to prior usage. In part, Mr. Veach did testify about a conversation he had with his father, who is now deceased, wherein he was asking his father about how he, Mr. Veach, could access a piece of property he had just bought at an auction. For reference purposes, this property happened to be located between the Petitioner's real estate and the Roy Babb tract, with both tracts now being owned by Mr. Veach or all the Respondents together, and both tracts being the same real estate upon which the easement in question is located upon. In said alleged conversation with his father, Mr. Veach was stating that he was lucky that his Grandfather owned the "Babb Tract," because he would need it to access the real estate he had recently bought. Further, Mr. Veach said he asked his father how other "folks up the hollow accessed their property" to which his father allegedly stated that Mr. Veach's grandfather had "always let them [the Rohrbaughs] come out that way...." Mr. Veach went on to say that "he [his dad] kind of looked like—at me like---well, he had a great respect for his father, and kind of looked as, "and we will too." (Appendix Page 394) Mr. Veach went on to say that he did not think anything about the "Rohrbaughs" usage of the easement as trespassing "because they had permission to go through there – at least they had permission to go through this portion – the Babb portion. So my dad kind of inferred that that's what you'll do [referencing to the tract Mr.

[4] Mrs. Reel did testify that she was 89 years old, at the time of the lower Court trial, and did originally move onto the property, which the Petitioners property did originate from, when she was a freshman in college. (Appendix Page 457)
[5] A prior owner in the chain of title to the Petitioner's real estate, whom did receive title to said real estate via Deed from the aforementioned G.Y. Dolly.

Veach had just purchased (Tucker Tract]. You'll continue it." (Appendix Page 395) Later in his testimony, Mr. Veach was discussing an instance where he locked a gate located on the easement in question and in doing so he gave Pauline Beatrice Reel a key. He said he gave her a key because "[w]ell, they had permission to be in there, and I wasn't going to lock them out." Mr. Veach later defined said permission as "from what I understand, my grandfather and Mr. Rohrbaugh [Mrs. Reel's father] were good friends and neighbors. And they both bought those tracts of land about the same time. I think they were business associates. And from what I understand, he gave them permission to go through there. I wasn't around then to know, but thats my understanding." (Appendix Page 420 and 421)

What was severely lacking from the Respondents' case was any actual evidence, via first hand witness/claimant testimony or by documentation, which effectively showed that Mr. Veach's grandfather, father or Mr. Veach had a discussion with the Petitioners, or a prior owner in their chain of title, wherein some type of "permission" was expressly given to utilize the subject easement. There is absolutely no proof, short of the Respondent's self-serving hearsay statements, that the Petitioners or any prior owner in the chain of their title had an understanding of permission by the Respondents or prior owners in their chain of title. In part, when asked by Petitioners' counsel if she recalled her father "ever asking permission to go from Knobley Road to where his real estate was back there," Pauline Beatrice Reel replied "[n]o, I do not remember anything mentioned about a right-of-way." She went on to say that "[w]e've always used it" (Appendix Page 471); and that she has used said road for seventy (70) years (Appendix Page 475) on an almost weekly basis (Appendix Page 463). It should also be noted that prior to selling unto the Petitioners, Mrs. Reel was conveyed an 80 acre tract of land by her parents, which was listed as an

out-conveyance in the Deed unto the Petitioners and she regularly continued to travel the easement in question to access her said 80 acres tract.

It is clear by Mrs. Reel's testimony, that she and her family had utilized and accessed the easement in question for over seventy (70) years and had done so under the belief that they had a legal, not permissive, right to do so. In O'dell, the Court did state the permission may be expressed or implied, and "that even if the property owner has not given explicit permission, any use 'made in subordination to the property owner' is not adverse. "Subordination" means that the user is acting with authorization, express or implied, from the landowner, or acting under a right that is derivative from the landowner's title." Id. at 615, *citing* Restatement (Third) of Property (Servitudes) However, the Court also stated if one wants to attempt to express their right as acting adversely, then one must show their usage is under the claim of right. Id. It went on to define a "[u]se under claim of right may also mean that the user acts as the owner of the servitude would act, as opposed to the way a casual trespasser would act." Id. Mrs. Reel's testimony that she was not aware of any type of permission and that she had used the right of way in question for seventy (70) years, because "we have always used it" shows that she, along with her family, were acting in a manner that a servitude and/or landowner would act when they had an expressed legal right to do so.

Further, Gloria Jean Carr, one of the Petitioners herein, upon being asked by Counsel for the Respondents as to whether she had any personal knowledge if anyone in the Veach family had given anyone in the Rohrbaugh family permission to utilize the subject easement, did state "No, I don't" (Appendix Page 239) and also stated she herself had not asked Mr. Veach for permission to utilize said easement. (Appendix Page 241). It was understood at Trial that the Petitioners regularly used the easement in question to access their real estate, since purchasing same in late

2013, as they did reside on said land and considered this their only access to the public road (Knobley Road).

The Respondents attempted to raise multiple issues pertaining to instances where the Petitioners had interactions with Mr. Veach which pertained to maintenance of the right of way or whether they could use "electronic clickers" (electronic gate openers) to access a gate at the beginning of the easement. In making said references, Respondents argued that Petitioners' acts were that of someone who was acting under the guise of permission. However, in Lowe v. Hegyi, a 2016 West Virginia Supreme Court Case, this Court considered whether communications between parties over whether they could agree on a chain being used to control access to a lane, which was the subject of a prescriptive easement action, should be considered an act of acknowledging permission. Upon consideration of same, the Lowe Court found that said act by the claimant did not fall within the realm of being an act wherein one was asking "permission to the use lane, but rather, was confirming his right to use the lane." Lowe v. Hegyi, No. 15-0718, Memorandum Decision (W.Va. 2016). The Lowe Court went on to quote the O'dell Court and stated that "the term "adverse use" does not imply that the person claiming a prescriptive easement has animosity, personal hostility, or ill will toward the landowner; the uncommunicated mental state of the person is irrelevant. Instead, adverse use is measured by the observable actions and statements of the person claiming a prescriptive easement and the owner of the land." Id., at Page 8. Consequently, the Petitioners multiple interactions with the Respondents at no point consisted of actual statements about permission to use the easement and should be considered observable actions of confirming their right to use said right of way.

In conclusion, pertaining to element (1) of the Doctrine of Prescriptive Easements, the Petitioners did present ample evidence and testimony at trial which, by a clear and convincing

standard, proved that no type of permission, express or implied had been given to them or any predecessors in the chain title and that they along with their predecessors in title had always acted as someone with claim of right to utilize said easement; instead of as someone trespassing or acknowledging the necessity of permission to use same. Therefore, the Petitioners do meet and prove element (1).

Element (2) "the adverse use was continuous and uninterrupted for at least ten years":

In O'dell, the Court stated that for a claimant to prove that their adverse use was continuous, then one must show that "there was no abandonment of the adverse use during the ten-year prescriptive period, or recognition by the person that he or she was using the land with the owner's permission. Additionally, the adverse use need not have been regular, constant or daily to be "continuous," but it must have been more than occasional or sporadic." O'dell, at Page 599. The O'dell Court went on to state that for an adverse use to be "uninterrupted" one must show that the owner of the land did not overtly assert ownership of the land during the ten-year prescriptive period. Mere unheeded requests, protests, objections, or threats of prosecution or litigation by the landowner that the person stop are insufficient to interrupt an adverse usage." Id.

In consideration of the aforementioned guidelines pertaining to element (2) of the Prescriptive Easement Doctrine, Petitioners would again reference the testimony of Pauline Beatrice Reel, wherein she testified that in 1943 she moved with her parents to the property, the residue of which is now owned by the Petitioners. (Appendix Pages 457 and 458). When asked how often she has used the road, which is considered the subject easement, Mrs. Reel did state "Oh, every week."(Appendix Page 465)[6] Further, at one point in Mrs. Reel's testimony, she was

[6] Again for the Court's knowledge, it should be known that Mrs. Reel still owns an 80 acre tract adjacent to the Petitioners' real estate and that she continues to access said 80 acres by crossing the Respondents' and Petitioners' property via the right of way/easement, which is the subject of this Appeal.

asked "[w]as there ever any talk of – were there ever any discussions about how Leonard and Gloria [Petitioners] were going to access this 204 acre tract they purchased from you and your sisters," to which Mrs. Reel replied, "No, not that I know of....[b]ecause that had been the road through there as long as I can remember." (Appendix Page 469) Upon cross examination, Counsel for the Respondents did also ask Mrs. Reel "[y]ou testified that you have used this road for 70 years, is that a fair statement?" to which Mrs. Reel replied "[t]hat is a fair statement.) (Appendix Page 476)

For timeline awareness, it should be noted that Mrs. Reel did not become an actual owner of the subject real estate until 1997. Prior to that, Mrs. Reel's father, Lester Rohrbaugh, did purchase the real estate, which the Petitioners real estate is the residue thereof, in 1943 and owned said property either individually or with his wife, Marie C. Rohrbaugh, until his death in 1985. Mrs. Reel did testify that she lived with her family from 1943 until 1951 and after moving still continued to regularly travel to the subject easement to see them about every week. (Appendix Page 463) Marie C. Rohrbaugh did depart this life in 1997 and said real estate did pass unto her five (5) daughters, Pauline B. Reel, Reva G. Reel, Freda F. Curtis, Hilda K. Perry and Vauda Amy Shafer. The said five daughters and/or their respective trusts acted as the owners of the Petitioners' property until conveying same to the Petitioners in 2013, who continued to utilize the subject easement for daily use of ingress and egress to their respective property up to 2016, when this action began in the Circuit Court of Grant County, West Virginia, and did continue to use the same throughout the lower court proceedings. (Appendix Page 81)

It is clear by the aforementioned testimony and timeline that Lester Rohrbaugh and/or his wife, Marie C. Rohrbaugh, regularly utilized said easement from 1943 until 1997, that being fifty-four (54) years as they lived on the Property now owned by the Petitioners and said easement was

their only access to public road. It is also clear that Pauline B. Reel utilized said easement during the time she grew up with her family and generally on at least a weekly basis for her entire life thereafter. The Petitioners continued to utilize said easement, acting under the assumption of having a legal right to do so, for daily access to their respective real estate for five (5) years. Therefore, when applying the legal theory of "tacking"[7] and taking into consideration the testimony of Mrs. Reel, the Petitioners and their predecessors in the chain of title have adversely used the subject easement in a continuous and uninterrupted manner for about seventy six (76) years, that being from 1943 until the final lower Court Order in 2019; wherein the Petitioners right to access said easement became limited to a life estate interest.

Element (3) "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;":

In consideration of element (3), the O'dell Court held "[t]o establish that an adverse use was 'open and notorious,' the person claiming a prescriptive easement must show that the wrongful use was visible and apparent, was not made stealthily or in secret, and was so conspicuous and obvious that a reasonable, prudent owner of land would have noticed." O'dell, at Page 591. However, the Court went on to say that "where the owner of the land had actual knowledge of the adverse use, the person claiming a prescriptive easement need not show that the use was open and notorious." Id. Ultimately, the O'dell Court found that the claimant therein failed to prove element (3), as said claimant could not prove the actual owner of the property upon which the easement in question did lie; and therefore was unable to prove the adverse use was actually known or even open and notorious to said unknown owner. Id., at Page 594.

[7] A theory accepted by this Honorable Court, as in the past it has held "that 'tacking' permits adding together the time period that successive adverse possessors claim property, and that should this period of time added together be more than ten years, adverse possession may be allowed." Brown v. Gobble, 474 S.E.2d 489, 196 W.Va. 559 (W. Va., 1996), citing Reger v. Wiest, 172 W.Va. 738, 310 S.E.2d 499 (1983)."

In the present case, there is no valid argument or objection to the fact that the Petitioners'' adverse use was actually known by the Respondents. Albeit, as already referenced herein, the Respondents were allegedly acting under the assumption that the usage was via permission, and not adverse. Either way though, by the lower Court testimony of Mrs. Reel, Mr. Veach and Mr. and Mrs. Carr, it was and is clear that the usage by the Petitioners of the easement in question, coupled with that of their predecessors in the chain of title, was done so in plain sight of Mr. Veach, a Respondent, on countless occasions over the years in question and therefore said usage was unequivocally "actually known."

Element (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":

The fourth and final element a claimant must prove to claim a prescriptive easement is that said easement must have a 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. O'dell. The O'dell Court held that the claimant "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." Id., at Page 592. The O'dell Court expounded upon what is required when attempting to establish the usage by stating "[t]he manner in which a prescriptive easement may be used is defined by the manner in which the easement was used historically. 'The character and purpose of the easement acquired by prescription are determined by the use made of it during the prescriptive period.'" O'dell, at page 592; *citing* Syllabus Point 3, Burns v. Goff, 262 S.E.2d 772 (1980) (per curiam). In O'dell, the

Court stated that the claimants had failed to prove element (4), "because plaintiff also did not introduce clear evidence that the use for which he sought the easement was similar to the alleged adverse use during the prescriptive period," as the claimant was using the road in question on a daily basis when prior users did so approximately twice a week. Id. at page 594.

In the case at hand, the Petitioners utilized the easement in question on a daily basis from early 2014 up until and throughout the lower Court proceedings, which were finalized in early 2019. Said usage by the Petitioners was for ingress and egress purposes due to the fact that they had built their residence on their respective real estate and they believed the subject easement was their access to the public road (Knobley Road). The Petitioners' said usage would have been commensurate and/or identical with that of Pauline Beatrice Reel's father and mother, Lester Rohrbaugh and Marie C. Rohrbaugh, who also lived on the real estate now owned by the Petitioners; and, by Pauline Reel's testimony previously referenced herein, used said easement for ingress and egress to their home situate thereon. After her parents' deaths, Mrs. Reel continued to use said easement on at least a weekly basis for the purposes of ingress and egress to not only access her parent's land, but to also access her 80 acre tract, which she still owned and which originated from her parents real estate. In consideration of O'dell, wherein the Court stated "[t]he manner in which a prescriptive easement may be used is defined by the manner in which the easement was used historically," it is exceedingly clear that the regular usage by the Petitioners was identical to and commensurate with the defined usage of ingress and egress for residential access from the public road (Knobley), which had been clearly defined by their predecessors in the chain of title for seventy (70) years.

As for the location of said easement, Mrs. Reel defined it as "coming off Knobley, going up the gap, and pass the house where Gloria and Leonard live [Petitioners]" (Appendix Page 460)

which was the way she continues to travel to access her 80 acre tract. For reference purposes, it was understood by all parties that the easement in question was designated as "Copperhead Canyon" and did begin at a gate situate on the boundary of the Respondents' property and along the side of Knobley Road. Then, as a gravel road, said easement does traverse across field land owned by the Respondents, then through "the gap," which was a hollow with steep hills on both sides (Appendix Page 458), and then onto land owned by the Petitioners. The boundary line between the Petitioners' and Respondent's respective real estate is actually located in "the gap."

At the lower Court proceedings, the Respondents did not object to the location of the easement, but they did attempt to argue that there was another easement for the Petitioners to use and that the present easement in question had been altered, which would defeat any claim to an easement by prescription. Both said arguments revolved around the construction of Corridor-H[8] by the State of West Virginia and its effect it had upon the subject easement and access to the Petitioners' property.

In so doing, the Respondents' Counsel questioned Mrs. Reel on whether the State, during construction of Corridor-H, built an access road to connect to the back side of her 80 acre tract and whether said access road was a "public road." To which Mrs. Reel replied in general that the State had put in an access road during the construction of Corridor-H and that she was allowed to use same, however she was unsure of anyone else having a right to use it. (Appendix Page 484) Upon redirect, Mrs. Reel again stated that she had access to Corridor-H off of the backside of her property, but the public does not; and she in turn described the alternate road as "you better have four wheel drive to get up there." (Appendix Page 489). In her direct testimony, Mrs. Reel had referred to said road as "a hunting trail" and that if the Petitioners were to have to use said alternate

[8] Corridor-H is a four lane highway traversing through Hardy County, Grant Count and now Tucker County with an ultimate goal of connecting to Elkins, West Virginia and the Virginia state line.

road, then "[i]t would be rough." (Appendix Page 489). Mrs. Reel went on to testify that the alternate road was located on multiple tracts of land owned by persons not associated with this action. At no time did Mrs. Reel state that the Petitioners had legal access to said road off the back of her 80 acre tract, which in-turn leaves the Petitioners only access to a public road as being the very road which they had used since purchasing their property in late 2013 and being the very same road that Mrs. Reel and her parents had used since 1943.

The Respondents, further attempted to claim that the original easement had been altered, which thereby terminated any entitlement the Petitioners may have had to access same. In so doing, Mr. Veach pointed out the fact that in 2009 the State of West Virginia did "take" a portion of his land along with a portion of Mrs. Reel and her sisters' land, when the West Virginia Department of Highways built Corridor-H. Thereafter, during construction of Corridor-H, the State had to back fill part of "the gap;" which caused a stream located therein "the gap" to be slightly adjusted. Mr. Veach estimated the stream was moved approximately 22 feet to where said stream was then situate on a small portion of the easement in question. (Appendix Page 406) The State, not the Petitioners nor Respondents, proceeded to rebuild the small portion of the road, which had been covered by the stream adjustment, and placed the rebuilt portion along the stream bank and did ensure that this small portion connected to the larger remaining portion of the original easement located on the Respondents land, which is the subject of this Appeal, and also connected to the remaining portion of the gravel road leading onto the Petitioners' real estate. This newly constructed portion, built by the State, was constructed in a manner and location which in no way adjusted the general location of the easement nor the direction in which people traveled upon it. When Mrs. Reel was asked about the slight adjustment by the State, she stated "they [the State] moved it down towards the stream," however, when asked if it was still the same way of travel,

she replied "yes sir." (Appendix Page 461). What was clearly lacking in the Respondents arguments and evidence, presented at trial, was any type influential statement that showed that the State's adjustment of the easement formed a wholly new way of travel or altered the historic use thereof. Therefore it is more than apparent that whatever adjustment was made by the State, should be consider slight in nature and that it did not ultimately alter the "reasonably precise location" of the easement in question in manner which would terminate the easement in question. With this in mind, it is clear that the Petitioners presented more than enough evidence to reasonably identify the starting point, ending point, line, and width of the land that was adversely used as an easement located upon the property of the Respondents, and did also clearly define the manner or purpose for which the easement had been historically used, since 1943.

Conclusion

Upon consideration of the aforementioned arguments, it is Petitioners' belief that, at the lower Court proceedings, they produced more than sufficient evidence to establish that they had an express easement to cross the lands of the Respondents; and in the alternative, that they had produced more than ample evidence to make a claim of an easement by prescription across the lands of the Respondents. As stated herein, the Petitioners, via clear and convincing evidence, did meet all of the necessary elements to establish a legal claim of an easement by prescription. In particular, the Petitioners did prove: **(1)** that they and their predecessors in the chain of title had adversely used a gravel road located on the Respondents property as a way of ingress and egress to access their respective real estate; **(2)** that the adverse use of said easement had begun in 1943, by Lester Rohrbaugh and Marie C. Rohrbaugh, and continued via their heirs and the Petitioners up until the Lower Court's final ruling in early 2019; **(3)** that the use of said easement was actually known and abundantly clear to the Respondents; and **(4)** that the generally precise location of said

easement was easily identifiable and had not been significantly altered during the prescriptive claim period, and that their usage for ingress and egress to their residence was commensurate with the usage of their predecessors in title. With that being said, it is clear that the lower Court erred in its findings for the Respondents and this Honorable Court is well within its rights and powers to wholly overturn the lower Court's decision and remand this matter for entry of judgment in favor of the Petitioners, or in the alternative to reverse and remand this matter for a New Trial.

Leonard D. Carr (now deceased DOD: 3/8/19)
and Gloria J. Carr
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