IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA

Robert P. Martin and Melanie A. Martin,
Defendants Below,

Petitioners,

v.

Appeal No: 19-0745
Circuit Court of Pocahontas Co. (18-C-9)

Donald W. Lovelace and Ardel A. Lovelace,
Plaintiffs Below,

Respondents.

PETITIONERS' REPLY BRIEF

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In Response to Respondent's Motion to Dismiss Petitioners' Assignment of Error A and B, Petitioners Reply thereto as follows:

ARGUMENT

A

THE TRIAL COURT ERRRED BY FAILING TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHEN THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT THAT THE PLAINTIFFS COULD NOT MEET THE ESSENTIAL ELEMENTS OF ADVERSE POSSESSION AS A MATTER OF LAW.

The Respondents in their Motion to Dismiss Petitioners' Assignment of Error A, set forth the following statements:

1. "There is no Order written or entered by the Circuit Court denying the Motion for Summary Judgment." (Respondents' Motion, p. 1);

2. "Of important note, there is no transcript or record for the Court to review." (Respondents' Motion, p. 1) (Emphasis Added);

3. "The Petitioners have failed to attached (sic) any order of the facts and rulings the Circuit Court made. The Petitioners knowingly filed the Appeal Petition (sic) appealing the Circuit Court's decision without having requested or receiving (sic) a written order from the Court." (Respondents' Motion, p. 2);

Further, in Respondents' Memorandum of Law in Support of Respondents' Motion to Dismiss, as to Petitioners' Assignment of Error A, Respondents set forth the following:

> "4. A hearing on the Motion for Summary Judgment was held on March 18, 2019, wherein Judge Henning stated he would take the matter under advisement and issue his ruling. No other instructions were issued by the Court.
> 5. On or about March 21, 2019, Judge Henning requested that the Circuit Court Clerk inform the parties of his decision to deny the Motion, leaving no other instructions with the Clerk for the parties (see attached Exhibit B).
> 6. On or before March 27, 2019, Petitioners filed a Motion for Relief from Order Denying Summary Judgment.
> 7. On or before March 28, 2019, Respondents filed a response to the Petitioners' Motion for Relief from Order Denying Summary Judgment.
> 8. Petitioners never before trail requested a hearing on Petitioners' Motion for Relief from Order Denying Summary Judgment (see docket sheet, lines 197-200, attached hereto as Exhibit C) or requested a written Order."

And,

> "10. There is no record in the Circuit Court Clerk's docket of an Order ever being entered or requested by the Petitioners regarding the denial of the Petitioners' Summary Judgment Motion." (Respondents' Memorandum, p. 2)."

Accordingly, Respondents confirm that no order was ever entered by the Trial Court on Defendants' Motion for Summary Judgment yet, at the same time, place blame for the lack of an order on Petitioners. Respondents argue that it was somehow Petitioners' duty and obligation to force the Trial Judge to either give them a hearing to ask (again) for an order on their motion or to force the Trial Judge to enter an order. Such position is disingenuous at best and unrealistic at worst. Judge Henning heard argument on Defendants' Summary Judgment Motion on March 18, 2019; had the Clerk inform counsel that he was denying such motion on March 21, 2019

(without any explanation or order); six (6) days later, Defendants filed a Motion for Relief from Order Denying Summary Judgment; and, fourteen days later, the trial commenced. Somehow, Respondents find fault and assign blame on Petitioners for the failure of the Trial Judge to enter an order. As noted in Petitioners' Brief, This Court has routinely held that, "a Court speaks through its orders." State ex rel. Kaufman v. Zakaib, 207 W.Va. 662, 535 S.E.2d 727 (2002).

Obviously, it is problematic that the Trial Court did not enter any kind of order evidencing the Court's ruling. This is indeed odd, given that trial judges have access to a wealth of legal talent to assist them in the preparation of orders. Rule 24.01 of the West Virginia Trial Court Rules confirms that trial judges possess the authority to direct counsel to prepare and present orders for the court's consideration. In this case, Judge Henning did not reach out to, nor direct either counsel to prepare an order and did not do so himself.

A further complicating factor in this case was the fact that Judge Henning was an assigned senior status judge from Randolph County with other senior status assignments and no physical office or staff.

Further, at the time that this issue arose in this case the general and prevailing belief in the community of lawyers in West Virginia was based on This Court's language employed in West Virginia Department of Health and Human Resources v. Payne, 231 W.Va. 563, 746 S.E.2d 554 to the effect that,

> "both the holding in Syllabus Point 3 of Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E. 2d 232 (1997) [although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.] and our cases discussing it made clear that a lower court's factual findings when ruling on summary judgment – whether denying or granting – must be sufficient to elucidate to this Court the basis for its ruling. In fact, in Lilly, this Court stated that 'the circuit court's order must provide clear notice to all parties and the reviewing court as to the rationale applied in granting or denying summary judgment." (Emphasis added).

Counsel is certainly aware of This Court's decision in State ex rel. Vanderra Resources v. Hummel, 829 S.E.2d 35, (W.Va., 2019) at this juncture however that decision was not filed by This Court until June 3, 2019 months after the trial of this case.

Consequently, with the West Virginia Rules of Civil Procedure, Rule 56, providing a mechanism for summary disposition of litigation and litigants expending significant time and resources on summary judgment motions (in this case a 161-page summary judgment motion with exhibits as well as a motion for relief from the trial court's action or inaction thereon) without placing any duty or responsibility upon the trial court to not only enter an order thereon but to enter an order with no explanation therefore whatsoever, renders Rule 56 meaningless.

Particularly in this case and as dealt with in greater detail in Petitioners' Assignment of Error A, at summary judgement herein the Respondents had sworn, under oath to four (4) separate and distinct property boundary lines. To wit – "Original" Exhibit A attached to Plaintiffs' (verified) Complaint; the written description in the 27 affidavits; Respondent Donald Lovelace's deposition description; and, Exhibit A attached to Plaintiffs' Amended and Second Amended Complaints.

Perhaps this is the specific reason why Respondents objected to any and all transcripts being included in the appendix. The Court will note Respondents' counsels' objection filed in response to Petitioners' Rule 7(e) designation. This fact, coupled with the complete failure of Respondents to meaningfully or factually, in any way, to challenge the facts and argument contained in Petitioners' Assignment of Error A demonstrates that Respondents did not and could not present the requisite scintilla of evidence to refute such argument. Rule 10(d) WVRAP states that, "If the respondents' brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue."

However, and more importantly to this appeal, the trail court's failure to enter any order whatsoever deprives This Court of any meaningful appellate review of the trial court's decision. It is almost comical that Respondents' counsel quips at least twice in his pleadings that,

"...Petitioners are asking the Court to give them a second bite of the appeal 'apple'." It is difficult to imagine even what counsel means by this, as there has been no "first bite" on an appeal and not even an order from the trail court.

Finally, Respondents state that "Petitioners did nothing (about the lack of an order on summary judgment) except to go to trial." Respondents further assert as follows: "The Petitioners made no attempt to schedule a hearing on their motion for relief from the verbal order denying summary judgment." (Respondents' Memorandum, p. 3). Petitioners filed a properly supported Motion for Summary Judgment; argued same before the Court; and, filed a Motion for Relief. Lawyers rarely are able to control a trial judge's behavior. "The Petitioners did not appeal the Court's decision to the Supreme Court as a 'final decision' before trial, thus considering same an interlocutory order." (Respondents' Memorandum, p. 4). Obviously, there was no order to appeal and even had there been, an order denying a motion for summary judgment is not appealable except in "really extraordinary cases." "The Petitioners did not ask the Court to stay the proceedings in order to appeal the Court's decision." (Respondents' Memorandum, p. 4). Again, counsel for Respondents ignores the fact (acknowledged by Respondents at least 6 times in their appellate documents) that there was no order entered by the trial court and that the denial of a motion for summary judgment (except in "really extraordinary cases") is not an appealable order.

It is also noteworthy that Respondents state in their Motion to Dismiss that, "Of important note, there is no transcript or record for the Court to review." (Respondents' Motion to Dismiss, p. 1). Such a statement is not only disingenuous, it is outright underhanded. Respondents' counsel filed with This Court on November 1, 2019 a document titled "Respondents' Response to Rule 7(e) Designation of Petitioners." Therein counsel put forth the argument that on the notice of appeal form (which, This Court recognizes as an administrative form) Petitioners' counsel checked "no" regarding the need for transcripts and that Petitioners were not entitled to transcripts to be included in the Appendix. As a result of such objection, Petitioners filed an appendix without transcripts

Nevertheless, the trail court erred in failing to grant Defendants' Motion for Summary Judgment. As a result of the fact that there is no order; no findings of fact; and, thus the trail court's determination to deny Defendants' motion for summary judgment cannot be the subject of meaningful appellate review.

B.

THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSIDER AND FINDING INADMISSABLE CERTAIN EXHIBITS

The gravamen of Respondents' Motion to Dismiss as to Petitioners' Assignment of Error B is that Petitioners' did not "request of the Court 'judgement as a matter of law'." It is incomprehensible how Respondents can make such a claim. First and foremost, Petitioners filed a motion for summary judgment which by its very terms prays for judgment "as a matter of law." Thereafter, Petitioners filed a motion for relief which requested "judgment as a matter of law." At the end of Plaintiffs' case in chief at trail, Petitioners' counsel moved for judgment "as a matter of law." And, finally, at the end of all of the evidence at trial, Petitioners' counsel again moved for judgment "as a matter of law."

C.

THE TRIAL COURT ERRED BY RULING THAT IT HAD NO DISCRETION WITH REGARD TO THE ASSESSMENT AND TAXATION OF COSTS UNDER RULE 54(d) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE DESPITE SPECIFICALLY FIDING THAT PETITIONERS COMMITTED NO WRONGDOING OR SANCTIONABLE CONDUCT BY DEFENDING A SUIT BROUGHT AGAINST THEM SEEKING TO TAKE OWNERSHIP OF PROPERTY LEGALLY OWNED BY THE PETITIONERS THROUGH A CLAIM OF ADVERSE POSSESSION

The problem with attempting to reply to Respondents' Response as to this Assignment of Error is that in the first instance it is clear that Respondents' counsel simply does not understand the issue presented. Secondly, he does not dispute, and in fact argues the position of Petitioners' Assignment that the trial court had discretion as to the assessment of costs.

Obviously, the issue is that Judge Henning in clear and unambiguous language in the trial court's Order of October 21, 2019 stated, "Ultimately, the Court believed that it had no discretion

with regard to the assessment and taxation of costs pursuant to Rule 54(d) of the West Virginia Rules of Civil Procedure...." (See Order of October 21, 2019, Appendix, Order C). (Emphasis added). Also, Judge Hennig stated that, "...the Court remains of the belief that it has no discretion." (See Order of October 21, 2019, Appendix, Order C). (Emphasis added). Finally, and most importantly, Judge Henning specifically reached out to This Court when he set forth in his Order,

> The Court does note that the Defendants have already filed a Notice of Appeal with regard to this case and requested that the Defendants seek guidance from the Supreme Court of Appeals of West Virginia with regard to the issue of whether a Circuit Court has discretion with regard to the assessment and taxation of cost under Rule 54(d) in such a case." (See Order of October 21, 2019, Appendix, Order C). (Emphasis added).

How, in light of the above language, taken directly out of the trial Court's Order, can Respondents' counsel write:

> "Thus, the argument that Petitioners' make in their brief is that Judge Henning was unaware that he had the discretion to not assess costs against the Petitioner is false and misleading." (Respondents' Brief, p. 14). (Emphasis added).

Respondents' counsel went even further overboard when he tries to place a higher burden on the undersigned than upon any other litigant due to the fact that the undersigned is an attorney. (Respondents' Brief, p. 14).

Therefore, because the trial judge had discretion and the trial judge believed that he had no discretion, he exercised no discretion. Respondent states: "...it is completely in the Court's discretion to assess costs..." (Response Brief, p. 13) "The trial court is vested with a wide discretion in determining the amount of court costs." (Response Brief, p. 13).

As such, This Court should remand this issue to the trial court in order that Judge Henning may exercise his discretion with regard to the assessment of costs as requested by Judge Henning in his Order of October 21, 2019.

Statement Regarding Oral Argument

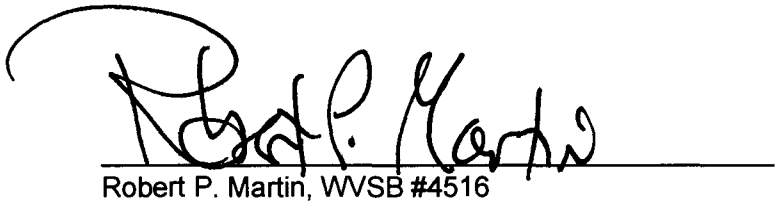
Petitioners request oral argument per Petitioners' Brief. Petitioners understand that due to Respondents election to file a Summary Response pursuant to Rule10 (e) of the West Virginia Rules of Appellate Procedure, Respondents are deemed to have "...consented to the waiver of oral argument."

Conclusion

Accordingly, Petitioners pray that This Court reverse the decision of the trail court upon Petitioners' Motion for Summary Judgment and grant summary judgment to Petitioners; alternatively, Petitioners pray that This Court set aside the verdict of the jury herein and award Petitioners a new trial with directions to admit the otherwise proper exhibits excluded by the trial court; alternatively, Petitioners pray for an order from This Court relieving Petitioners of and from the assessment and taxation of court costs, and for such other relief as This Court may deem proper.

Robert P. Martin and Melanie A. Martin, Petitioners,

By Counsel,



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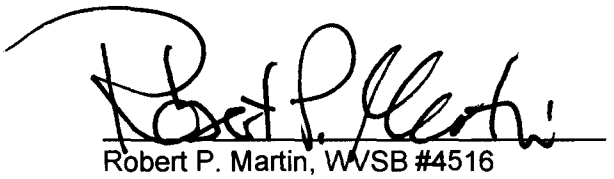
Plaintiffs Below, Respondents

CERTIFICATE OF SERVICE

I, Robert P. Martin, counsel for Petitioners, do hereby certify that on February 5, 2020, I served the foregoing "**Petitioners' Reply Brief**" upon counsel by placing same in the United States Mail, postage prepaid, as follows:

Barry L. Bruce, Esquire
PO. Box 388
Lewisburg, WV 24901
Counsel for Respondents



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