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JAN 17 2020

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0745

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

vs.

**Donald W. Lovelace, Sr. and Ardel A. Lovelace
Respondents.**

**On Appeal from Honorable John Henning, Judge
Circuit Court Of Pocahontas County
Civil Action No. 18-C-09**

**RESPONSE BRIEF OF RESPONDENTS
DONALD W. LOVELACE, SR. And ARDEL A. LOVELACE**

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**RESPONDENTS' RESPONSE TO PETITIONERS' STATEMENT OF THE
CASE, PROCEDURAL HISTORY AND STATEMENT OF THE FACTS OF THE CASE**

Now comes the Respondents and present to this Court the following to correct inaccuracies or omissions of the Petitioners' statements regarding certain issues.

Procedural History

The Respondents filed their original Complaint on or about March 7, 2018. However, because of misunderstanding between counsel and Respondents, the Complaint had to be amended to correct Exhibit "A" to the original Complaint. The Amended Complaint was filed on January 18, 2019. However, the Amended Complaint failed to include the Respondents' verification and Petitioners rightly objected to the lack of same. Respondents requested that they be allowed to submit their verification, but the Petitioners objected and requested the Respondents to file a Second Amended Complaint on or about February 11, 2019. See case docket sheet lines 134-135. The Petitioners' Answer did not object to the change in Exhibit "A" to the Second Amended Complaint. Simply stated, the Petitioners cannot argue any content of the original Complaint impeached the content of the Second Amended Complaint because they did not raise the issue in their argument when the Court approved the Respondents' request to amend their Complaint for that very reason. It also is noted that at a hearing held on November 1, 2018, the Circuit Court granted Respondents' Motion to Amend the Complaint concerning Exhibit "A" without objection by Petitioners. See docket sheet, lines 106-108. The Petitioners stated "On October 26, 2018, the Respondents filed a Motion to Amend Complaint, the essence of which was to replace the original Exhibit "A" with a new Exhibit "A". The Petitioners never made any argument to the Circuit Court when said Court approved allowing the amendment nor did they contest the filing of the Second Amended Complaint

on any ground, except as spelled out in their Answer which excluded any objection to the new Exhibit “A”. Thus, this is a blatant attempt to put before this Court an issue that was never presented to the lower court. However, on the trial date of April 8, 2019, the Petitioners presented, and filed, their Position Brief Regarding the Use of Exhibit “A” to the verified original Complaint. See Appendix pages 283 and 284. Conveniently excluded from the Appendix was the service date on Respondents’ counsel (which also occurred on the day of trial). The Respondents argued that the Court should approve the amendment, and no objection was made by the Petitioners to the “new” Exhibit “A” to the Second Amended Complaint. Therefore, the Circuit Court ruled that no reference be made to Exhibit “A” of the original Complaint and would not permit said document into evidence. The Petitioners waited until the day of trial to raise the issue for the first time. The Circuit Court did not allow the Respondents to raise the issue of the Exhibit “A” to the first Complaint because of the “late” filing of the Position Brief and the Court believed the Second Amended Complaint was the “only” Complaint filed for purposes of the trial.

The Petitioners’ attack the Respondents’ statements as being disingenuously made is not appropriate as it is an unfounded summary conclusion. The Petitioners further attack the Respondent’s continuous use of the term “water gap” as the Respondents’ counsel’s euphemism for the 1.25 acre outconveyance from the 66 acres. The Petitioners wrongly state “[s]imply speaking, there is no recognized legal document titled ‘water gap.’” To show the Petitioners’ lack of understanding regarding the importance of the “water gap,” that term can be found in Exhibit A to Petitioner’s Memorandum of Law in Support of Summary Judgment (Appendix, page 67), which is the first deed from Piersons to Waugh’s creating the subject 66 acre tract. In paragraph five (5) of said deed, it states:

The said parties of the first part [Piersons] reserve and except from this conveyance the right to have a water gap leading from the lands now owned by the parties of the first part [Piersons] and running through the lands heretofore conveyed, and said water gap is to be located at a spot to be agreed upon between the parties.

Additionally, on or about February 26, 1969, in a deed, recorded in Deed Book 119, at page 322, from James P. Shisler, James P. Shisler, Bly D. Shisler. Lloyd William Waugh and Flossie C. Waugh joined together to convey a described water gap to Mr. and Mrs. Pierson. It stated “[I]t is mutually agreed between the parties hereto that this is the conveyance and agreement as to the water rights and gap reserved by the deed to Lloyd Waugh, et ux, . . .”

Clearly, the Petitioners’ statement that “there is no recognized legal document titled ““water gap”” is incorrect. The last time this writer checked a deed is a legal document and the original deed reserving a piece of property was labeled a “water gap.”

The Respondents respectfully call to the Court’s attention procedure errors of the Petitioners that impact this appeal.

A. Under this Court’s Scheduling Order dated September 10, 2019, the Court listed the Petitioners’ date to disclose Rule 7(e) list to the Respondents was October 28, 2019. The Court amended the Scheduling Order on November 22, 2019, but did not change the date for Petitioners’ disclosure of the Rule 7(e) list. The Respondents did not receive the Appendix until on or about December 4, 2019. Wherefore, Respondents request the Court not consider Petitioners’ Appendix because the Petitioners did not file the Appendix on time.

B. In their Petition for Appeal, the Petitioners attempt to place fault on the Respondents for the Petitioners not getting a transcript of the Circuit Court record. The Petitioners were the parties who neglected to fill out the Notice of Appeal asking for a transcript. The Petitioners continuously completely disregard the procedures in the Circuit Court and in the Supreme Court.

C. Finally and most seriously, the Petitioners are attempting to appeal the circuit court's denial of the Petitioners' Motion for Summary Judgment without having an Order from the circuit court denying or requesting same. Thus, the Petitioners are requesting this Court to overturn a jury verdict on a hypothetical non-entered order denying a summary judgment, with the Petitioners making no motion during or after trial to judgment as a matter of law. As stated, the case law is clear that the Petitioners did not preserve in any way their right to preserve a summary judgment motion. Therefore, Assignment of Error "A" should be denied.

SUMMARY RESPONSE

Pursuant to West Virginia Rules of Appellate Procedure 10(e), now come the Respondents and respectfully present to the Court the following.

NOTE: The Court should note that the Respondents filed a Motion to Dismiss Assignment of Error “A” and Error “B” because the same are not appealable issues pursuant to West Virginia Rules of Appellate Procedure 31(a)(4). However, in the event the Court denies the Respondents’ Motion, the following is the Respondents’ Summary Response.

Statement of Facts

1. The Complaint in this case was filed on March 7, 2018, and last amended on February 1, 2019, with Court approval. See docket sheet lines 1 and 131 (attached hereto as Exhibit A).
2. Petitioners filed their Motion for Summary Judgment on February 14, 2019.
3. Respondents filed their Opposition to Motion for Summary Judgment on or before February 25, 2019.
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 trial 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.

9. Three Orders were entered by the Circuit Court regarding the verdict in this matter. Said Orders are attached as Exhibits D, E, and F.

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.

11. After the jury verdict was returned, received and read by the Court, the Petitioners did not ask for a new trial. See Orders, Exhibits D and E.

12. At no time during or after trial did the Petitioners request of the Court "judgment as a matter of law."

13. Petitioners filed their Rule 59(e) Motion to Alter or Amend Judgment on or about August 1, 2019.

14. It is noted that the Rule 59(e) motion Order was limited to the issue of "costs" of the action and not Assignment of Errors A and B.

15. On or about October 21, 2019, the Court entered an Order written by Petitioners' counsel and signed by Judge Henning assessing costs against the Petitioners. See attached Exhibit E.

Response to Assignment of Error “A” and Error “B”

- A. THE TRIAL COURT ERRED 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.
- B. THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSIDER AND RULING INADMISSIBLE CERTAIN EXHIBITS

Legal Analysis and Argument

There is only one Order from the Pocahontas Circuit Court that can be appealed. That is the October 21, 2019 Order related to cost which is addressed in Petitioners’ Assignment of Error “C”. The fact is that the Petitioners did not make a timely request for an order from the Circuit Court on summary judgment and failed to make necessary trial and post trial motions. Petitioners’ assignment of Errors A and B should be dismissed.

The Petitioners in this case are estopped from raising the summary judgment issue on appeal for the following legal reasons.

- 1. After the Court denied the Petitioners’ motion on March 21, 2019, the Petitioners did nothing except go to trial.
 - a. The Petitioners made no attempt to schedule a hearing on their motion for relief from the verbal order denying summary judgment.
 - b. 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.
 - c. The Petitioners did not ask the Court to stay the proceedings in order to

appeal the Court's decision.

- d. The Petitioners never asked the Court to reduce the Court's decision to writing.

2. In choosing to go to trial without appealing the Circuit Court's Summary Judgment denial decision, the Petitioners have waived their right to appeal this issue. In State ex rel. Allstate Ins. Co. v. Gaughan, 203 W. Va. 358, 508 S.E. 2d 75 (1998), the Court stated in Syllabus Point 6:

A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

3. Under West Virginia Code Rule of Procedure 59(e) and (f):

(e) Motion to alter or amend a judgment – Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(f) Effect of failure to move for new trial – If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion; . . .

4. In this case at no time before the Circuit Court on the day of trial, or any time during, or end of the trial did the Petitioners request the Court for judgment as a matter of law, and Petitioners have presented no evidence to allege same.

5. The Petitioners did not within ten (10) days after trial renew any motion for judgment as a matter of law as required by W. Va. Rules of Civil Procedure 50.(b). Therefore, the Petitioners have waived any argument concerning the Summary Judgement decision.

6. A motion to alter or amend a judgment under W. Va. Rule of Civil Procedure 59(e) may not be entered where there has been a trial by jury. Williams v. Charleston Area Med. Cnt., 215 W. Va. 15, 592 S.E. 2d 794 (2003).

7. Failure of the Petitioners to timely make a motion for a new trial under 59(f) bars consideration on appeal of alleged errors which occurred during trial. W. Va. Dep't of Transp.. Div. of Highways v. Newton, 235 W. Va. 267, 773 S.E.2d 371 (W. Va. 2015); Miller v. Triplett, 507 S.E. 2d 714, 203 W. Va. 351 (W. Va. 1998).

8. When Petitioners filed their 59(a) motion, it only contained one issue and that was the costs assessment. Since they only raised a single issue, the Petitioners are precluded from raising issues of trial/appeal, that were not raised under W. Va. Rules of Civil Procedure 59(a). See Thompson v. Branches-Domestic Violence Shelter of Huntington, Inc., 207 W. Va. 479, 534 S.E.2d 33, 2000 W.Va. LEXIS 73 (2000), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L.Ed.2d 565, 2000 U.S. LEXIS 8375 (2000).

9. No Court Orders that have been entered (Exhibits D, E, and F) document the Petitioners asking for a "judgment under law" to preserve their Assignment of Errors "A" and "B" and counsel for Petitioners signed each Order without objection.

10. Quoting State ex rel. Scott v. Boles, 150 W. Va., 453, 457, 147 S. E.2d 486, 489 (1966), the Court in Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 107. n.5, 459, S.E.2d 374, 384 n. 5 (1995), found: "And if the record does not reveal an error, a court will conclude

that one does not exist: ‘It will be presumed, where the record is silent, that a court of competent jurisdiction performed its duty in all respects as required by law.’”

11. The Petitioners claim that the Circuit Court was wrong in not allowing the maps of the Assessor’s Office is incorrect because the document on its face states:

DISCLAIMER: This map was developed for taxation purposes and is therefore not suitable for legal, engineering or surveying purposes. Users of this map should review the primary data sources such as deeds and surveys. The Assessor’s Office assumes no liability resulting from the use of this map for any purpose other than tax assessment.

Conclusion to Response to Assignment of Errors A and B

The Respondents have shown the Petitioners effectively waived their right to their Assignment of Errors A and B by not making the required motion prior to trial, during trial or after trial as stated above. Basically, the Petitioners are asking the Court to give them a second bite of the appeal “apple.” Procedural issues are important to every trial. The fact the Petitioners did not pursue a written order for their Summary Judgment Motion to effectuate an appeal of same is a costly error, thus losing the right to argue summary judgment.

Secondly, going through a jury trial and not putting on record a motion for judgment as a matter of law before the Court to preserve any argument regarding summary judgment issue (50(a) - (b)) is an additional major error.

Finally, failing to file 59(e) and (f) motions shows no intent of Petitioners to preserve appeal rights of rulings that occurred at trial. Most telling is that there is no Court Order or record preserving any of the aforementioned issues. Thus, under Tennant, supra, at 10 – with no record -- it is presumed the Court performed its duty in all aspects as required by law. Clearly, as to

Assignment of Error "B", the Petitioners are attempting to appeal the Court's rulings regarding admissions of exhibits because they did not preserve the right by filing a motion for a new trial under 59(e) or (f). Therefore, the Petitioner has waived the right to assert Assignment of Error "B". See Miller v. Triplett, supra at 7.

Response to Assignment of Error "C"

- 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 FINDING 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.

It is proper for the Court to assess costs against the Petitioners because the court costs are not sanctions.

The argument set forth in Petitioners' Rule 59(e) Motion to Alter or Amend Judgment ("Petitioners' Rule 59(e) Motion") argued that the Petitioners should not have court costs assessed against them because they had not committed any wrongdoing nor was there a finding of fault attributed to them. See attached Exhibit G. In Respondents' Response to Petitioners' Rule 59(e) Motion to Alter or Amend Judgment, the Petitioner argued that a losing party can be liable for court costs because court costs are not considered sanctions. See attached Exhibit H. The Petitioners further argued in their brief that the trial judge has discretion to assess and tax costs as the trial judge deems fit. (Petitioner's Brief, p. 30-31). The Petitioners tried to confuse the trial judge that the appropriate standard when deciding who might be liable for costs is the at fault party. Respondent's

position is that when deciding cost allocations, it is completely in the Court's discretion to assess costs to the losing party, not the at fault party. An argument that was clearly made in the Respondents' response to the Petitioners' Rule 59(e) Motion that Judge Henning received prior to deciding to assess costs against the Petitioners. Exhibit H.

In Respondents' response to Petitioners' Rule 59(e) Motion, the Respondents explained that under West Virginia Rule of Civil Procedure 54(d), "except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.. . ." The trial court is vested with a wide discretion in determining the amount of court costs. Multiplex, Inc. v. Poff, 231 W. Va. 728, 749 S.E.2d 621 (2013). Under West Virginia Rule of Civil Procedure Rule 54, "except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Typically, costs under West Virginia Rule of Civil Procedure Rule 68(c) will be limited to "court costs," i.e., the costs taxable under W. Va. R. Civ. P. 54(d). "Costs" under W. Va. R. Civ. P. Rule 68(c) do not include attorney fees, expert witness fees, or any other expenses that are not traditionally taxed as "court costs," unless (1) the statute applicable to the case expands the definition of "costs" to include such expenses, and (2) the statute does not limit the award of such costs to the "claimant" or "plaintiff." Carper v. Chad Watson & Burkharts, Inc., 226 W. Va. 50, 697 S.E.2d 86, 2010 W. Va. LEXIS 73 (2010).

The above argument was made in Respondents' response to Petitioners' Rule 59(e) Motion filed with the trial court. Thus, the argument that Petitioners make in their brief that Judge Henning was unaware that he had the discretion to not assess costs against the Petitioner is false and misleading.


Further, Petitioners' argument that they should fall under equitable exceptions to Rule 54(d) of West Virginia Rules of Civil Procedure is misconstrued. In a roundabout way, the Petitioner argues that the Respondent should be assessed with court costs because he brought the civil court action . See Petitioners' Brief at 31-32. The Petitioner further argues that because this Court believed that the appellant from Hunt v. Shamblin, et al., 179 W.Va. 63, 371 S.E.2d 591 (1988) should have prevailed, the circuit erred in assessing costs against the Petitioners. First, the continuing assertion that the trial judge has discretion in assessing costs against the losing party is still the main argument on this issue. Second, the Petitioners were denied summary judgment and a jury of their peers, after listening to all evidence and arguments presented at trial, returned a verdict that the Respondents had met all the elements of adverse possession. See Exhibit D. The Petitioners should not have and did not win the jury trial, thus their argument under Hunt is a red herring and should not be considered by this Court.

Additionally, the taxpayers should not have the burden of paying the court costs, especially because the Petitioner, Mr. Martin, is a licensed West Virginia attorney and should have been put on notice that there was a potential issue with the disputed .75 acres. When walking the property with Rex Shelton, II, Mr. Martin should have known that there was a potential issue with the disputed .75 acres since the fence line did not include the disputed .75 acres. As a licensed attorney, he should have been put on notice that there was a potential claim on the land separated by fence line. Especially since the property was not included within his fenced boundary and it was clear that his neighbor, the Respondents, was actively using the disputed land for cattle grazing.

Conclusion to Response to Assignment of Error C

In conclusion, the trial court, in its own discretion, has the right to assess costs as it deems fit, whether or not the party whom costs are assessed against are at fault. Thus, the Petitioners, as the losing party in the trial court, are liable for court costs. Judge Henning, being fully aware of the law after reading both the Petitioners' Rule 59(e) Motion and Respondent's response to said motion, determined that court costs should be paid by the Petitioners, as was within his right. There is no statute in West Virginia that limits the losing party to pay court costs, regardless if the losing party acted in bad faith. The costs are not acting as sanctions, and it is completely in the judge's discretion to assess court costs against the losing party.

**DONALD W. LOVELACE, SR. and
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0745

Robert P. Martin and Melanie A. Martin
Petitioners,

vs.

Donald W. Lovelace, Sr. and Ardel A. Lovelace
Respondents.

CERTIFICATE OF SERVICE

I, Barry L. Bruce, Barry L. Bruce and Associates, L. C., Counsel for the Respondents, do hereby certify that I have delivered a true and correct copy of the foregoing Respondents' Brief upon counsel for the Petitioners by depositing same in the U. S. Mail, first-class, postage prepaid, this the 17th day of January 2020 and addressed as follows:

Robert P. Martin, Esquire
2276 Huntersville Drive
Marlinton, WV 24954



Barry L. Bruce

DONALD W. LOVELACE

VS. ROBERT MARTIN

LINE DATE ACTION

1 03/07/18 CIVIL COMPLAINT FILED BY BARRY BRUCE ESQ. ALONG WITH EXHIBIT.
2 SUMMONS/COMPLAINT HANDED TO J&M SERVICES TO SERVE DEFENDANTS PER
3 MR. BRUCE'S INSTRUCTIONS.
4 03/12/18 CERTIFICATE OF SUBSTITUTE SERVICE RETURNED BY JOSEPH W.
5 BOSWELL FOR ROBERT P. MARTIN SERVED TO MELANIE A. MARTIN DATED
6 3-7-18 RCVD.
7 03/12/18 CERTIFICATE OF PERSONAL SERVICE RETURNED BY JOSEPH W. BOSWELL
8 FOR MELANIE A. MARTIN DATED 3-7-18 RCVD.
9 03/28/18 ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF DEFENDANTS
10 ROBERT AND MELANIE MARTIN FILED BY JOHN P. FULLER ESQ.
11 03/28/18 CERTIFICATE OF SERVICE FOR DEFS' FIRST REQUESTS FOR PRODUCTION
12 OF DOCUMENTS TO PLAINTIFFS DONALD W. LOVELACE AND ARDEL A.
13 LOVELACE FILED BY JOHN P. FULLER ESQ.
14 04/02/18 SCHEDULING FORM PREPARED W/TENTATIVE DATE OF 5-16-18 AT 11:45
15 04/02/18 AM & FWD TO JUDGE DENT.
16 04/16/18 FAXED PLFS' ASSERTION OF DEFENSES TO DEFS' COUNTERCLAIM AND
17 ANSWER TO COUNTERCLAIM FILED.
18 04/17/18 ORIGINAL PLAINTIFFS' ASSERTION OF DEFENSES TO DEFENDANTS'
19 COUNTERCLAIM AND ANSWER TO COUNTERCLAIM FILED.
20 04/18/18 LETTER FROM JUDGE DENT ADDRESSED TO MARGARET WORKMAN, CHIEF
21 JUSTICE REQUESTING FOR HERSELF AND JUDGE RICHARDSON TO BE
22 DISQUALIFIED FROM THIS MATTER RCVD THIS DATE.
23 04/25/18 CERTIFICATE OF SERVICES FOR PLAINTIFFS' FIRST REQUEST FOR
24 AMMISSIONS TO DEFENDANTS, FIRST SET OF INTERROGATORIES TO
25 DEFENDANTS AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO
26 DEFENDANTS FILED BY BARRY L. BRUCE ESQ.
27 04/25/18 ADMINISTRATIVE ORDER ENTERED APPOINTING THE HONORABLE JOHN L.
28 HENNING TO THIS MATTER.
29 05/16/18 CERTIFICATE OF SERVICE FOR PLAINTIFFS' RESPONSE TO DEFENDANTS'
30 REQUEST FOR PRODUCTION OF DOCUMENTS FILED BY BARRY L. BRUCE ESQ.
31 05/18/18 NOTICE OF SCHEDULING CONFERENCE TO BE HELD ON TUESDAY JUNE 12,
32 05/18/18 2018 AT 9:30 A.M. IN THE POCAHONTAS CO. COURTROOM WITH SENIOR
33 STATUS JUDGE JOHN L. HENNING.
34 05/22/18 CERTIFICATE OF SERVICE FOR DEFENDANTS' SECOND COMBINED DISCOVER
35 REQUESTS TO PLAINTIFF DONALD LOVELACE FILED BY JOHN FULLER ESQ.
36 05/22/18 MOTION TO RESCHEDULE SCHEDULING CONFERENCE OF 6/12/18 FILED BY
37 JOHN FULLER ESQ.
38 05/25/18 CERTIFICATE OF SERVICE FOR DEFENDANTS' RESPONSES TO PLAINTIFFS'
39 FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS;
40 AND DEFENDANTS' ANSWERS TO PLAINTIFFS' FIRST SET OF
41 INTERROGATORIES TO DEFENDANT AND DEFENDANTS' RESPONSES TO
42 PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANTS
43 FILED BY JOHN P. FULLER.
44 05/29/18 NOTICE OF DEPOSITION OF DONALD LOVELACE SET FOR 7-9-18 AT 10:00
45 AM AT POCAHONTAS COUNTY COURTHOUSE JURY ROOM FILED.
46 06/15/18 SCHEDULING CONFERENCE WORKSHEET RCVD.
47 06/18/18 ORDER ENTERED SETTING SCHEDULING/STATUS CONFERENCE ON 6/18/18
48 AT 9:30 A.M. AT THE POCAHONTAS COUNTY COURTHOUSE.
49 06/18/18 SCHEDULING CONFERENCE/STATUS CONFERENCE-PRESENT: PLFS, ATTY-
50 06/18/18 BARRY BRUCE, DONALD LOVELACE, DEFS' ATTY-JOHN FULLER. COUNSEL

LINE	DATE	ACTION
101		PLF'S DOCUMENTS IN DISCOVERY OR DOCUMENTS OF PUBLIC RECORD AT
102		THE COURTHOUSE. MR. BRUCE FEELS MR. FULLER HAS VIOLATED THE
103		STANDARD BY WRITING AN EX PARTE LETTER TO THE JUDGE WITHOUT
104		INVITATION AND NOT AGREED TO BY ALL COUNSEL. THE COURT FINDS
105		NO VIOLATION OF PROFESSIONAL CONDUCT AND DIRECTS THE ATTORNEYS
106		TO BE PROFESSIONAL AND GET ALONG. THE COURT GRANTS MOTION OF
107		PLF TO AMEND THE COMPLAINT CONCERNING AN EXHIBIT. ATTORNEYS
108		ARE TO PREPARE THE ORDER FROM TODAY'S HEARING TOGETHER. ORD ENT
109	12/06/18	NOTICE OF TENDER OF PROPOSED ORDER FOR ENTRY PURSUANT TO TRIAL
110		COURT RULE 24.01 FILED BY ATTY JOHN FULLER.
111	12/11/18	DEFS' OBJECTION TO PLFS' PROPOSED ORDER UNDER COVER OF
112		CORRESPONDENCE DATED DECEMBER 5, 2018 PURSUANT TO RULE 24.01 OF
113		THE WV RULES FOR TRIAL COURTS RECORD FILED.
114	12/21/18	JOINT STIPULATION REGARDING TESTIMONY OF PLAINTIFF ARDEL A.
115		LOVELACE AND DEFENDANT MELANIE A. MARTIN FILED.
116	01/09/19	NOTICE OF DEPOSITION DUCES TECUM OF DAVID O. HOLZ FILED BY JOHN
117		P. FULLER, ESQ.
118	01/18/19	AMENDED COMPLAINT FILED BY BARRY L. BRUCE, ESQ. ALONG WITH
119		EXHIBIT. SUMMONS/COMPLAINT GIVEN TO J.W. BOSWELL, PRIVATE
120		PROCESS SERVER TO SERVE UPON ON ROBERT MARTIN & MELANIE MARTIN
121		PER BARRY BRUCE'S REQUEST.
122	01/25/19	CERTIFICATES FOR RETURN OF SERVICE OF ROBERT MARTIN Y MELANIE
123		MARTIN ON THE AMENDED COMPLAINT FILED BY BARRY L. BRUCE, ESQ.
124		PERSONAL SERVICE FOR MR. MARTIN WAS MADE BY JOSEPH W. BOSWELL JR
125		ON 1/18/19 AND SUB SERVICE FOR MELANIE MARTIN SERVED ON ROBERT
126		MARTIN BY JOSEPH W. BOSWELL JR. ON 1/18/19.
127	01/30/19	ANSWER, AFFIRMATIVE DEFENSES TO PLAINTIFFS' AMENDED COMPLAINT
128		FILED BY JOHN P. FULLER, ESQ.
129	02/01/19	ORIGINAL TRANSCRIPT OF PROCEEDINGS HELD (MOTIONS HEARING) ON
130		11-1-18 FILED BY JEAN B. SPEIGHTS, COURT REPORTER.
131	02/01/19	PLAINTIFFS' SECOND AMENDED COMPLAINT FILED BY BARRY BRUCE, ESQ.
132	02/01/19	NOTICE OF DEPOSITION DUCES TECUM OF VICTOR M. DAWSON FILED BY
133		BARRY BRUCE, ESQ.
134	02/11/19	ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' SECOND AMENDED
135		COMPLAINT FILED BY JOHN FULLER, ESQ.
136	02/14/19	DEFS' MOTION TO EXCEED PAGE LIMITS, DEFS' MOTION FOR SUMMARY
137		JUDGEMENT AND MEMORANDUM OF LAW IN SUPPORT OF ROBERT P. MARTIN
138		AND MELANIE MARTIN'S MOTION FOR SUMMARY JUDGMENT FILED BY ATTY
139		JOHN P. FULLER.
140	02/15/19	ORDER ENTERED 2-11-19 REGARDING PLFS' MOTION TO EXCLUDE EVIDENCE
141	02/15/19	PURSUANT TO STANDARDS OF PROFESSIONAL CONDUCT W.C.1.
142	02/25/19	PLFS' MOTION IN OPPOSITION TO DEFS' MOTION FOR SUMMARY JUDGMENT
143		FILED BY ATTY BARRY L. BRUCE.
144	03/18/19	HEARING ON DEFS' MOTION FOR SUMMARY JUDGMENT-PRESENT: DONALD
145		LOVELACE WITH COUNSEL BARRY BRUCE, ROBERT MARTIN WITH COUNSEL
146		JOHN FULLER. AFTER HEARING THE PRESENTMENT OF THE DEFENSE
147		MOTION AND RESPONSES FROM PLF'S COUNSEL, THE COURT TAKES THE
148		MATTER UNDER ADVISEMENT AND WILL RULE ON THE MOTION.
149	03/22/19	FAXED PLAINTIFFS' MOTION IN LIMINE TO HAVE THE DEFS' ESTOPPED
150		FROM PRESENTING LACHES AND ACCORD AND SATISFACTION AS DEFENSES

Barry Bruce Law

From: Carr, Connie <Connie.Carr@courtsww.gov>
Sent: Thursday, March 21, 2019 5:46 PM
To: Barry Bruce; John Fuller
Subject: 18-C-09, Lovelace v Martin

Gentlemen:

Judge Henning has asked me to relay to you he has respectfully denied the motion for summary judgment.

CONNIE M. CARR, CIRCUIT CLERK
POCAHONTAS COUNTY CIRCUIT/FAMILY COURT
900 D 10th Avenue
Marlinton, West Virginia 24954
(304)799-4604 Fax: (304)799-0833

DONALD W. LOVELACE

VS. ROBERT MARTIN

LINE DATE ACTION

151 TO ADVERSE POSSESSION FILED BY BARRY BRUCE, ESQ. ALONG WITH
152 EXHIBITS 1-10.
153 03/25/19 FAXED PLAINTIFFS' TRIAL EXHIBIT LIST FILED BY BARRY BRUCE, ESQ.
154 03/25/19 FAXED PLAINTIFFS' JURY TRIAL INSTRUCTIONS FILED BY BARRY BRUCE,
155 ESQ.
156 03/25/19 ORIGINAL PLAINTIFFS' MOTION IN LIMINE TO HAVE THE DEFS' ESTOPPED
157 FROM PRESENTING LACHES AND ACCORD AND SATISFACTION AS DEFENSES
158 TO ADVERSE POSSESSION FILED BY BARRY BRUCE, ESQ. ALONG WITH
159 EXHIBITS 1-10.
160 03/25/19 DEFENDANTS' MOTION IN LIMINE TO PRECLUDE PLFS' COUNSEL FROM
161 OFFERING, OR ATTEMPTING TO OFFER, "TESTIMONY" LIKE STATEMENTS
162 IN THE PRESENCES OF THE JURY FILED BY JOHN P. FULLER, ESQ.
163 03/25/19 DEFS' MOTION IN LIMINE WITH REGARD TO HEARSAY AS TO DR. SHABB,
164 MRS. SHABB, MABLE PIERSON, LLOYD WILLIAM WAUGH, FLOSSIE G. WAUGH
165 JAMES W. SHISLER, JAMES P. SHISLER, BLY D. SHISLER, H.V. PIERSON
166 AND THELMA SHINABERRY FILED BY JOHN P. FULLER, ESQ.
167 03/25/19 DEFS' MOTION IN LIMINE WITH REGARD TO AFFIDAVITS OBTAINED BY THE
168 PLAINTIFF FILED BY JOHN P. FULLER, ESQ.
169 03/25/19 DEFS' MOTION IN LIMINE REGARDING REDUNDANT OR CUMULATIVE
170 EVIDENCE OR TESTIMONY WITH REGARD TO PERSONS WHO HAVE EXCUTED
171 AFFIDAVTIS FILED BY JOHN P. FULLER, ESQ.
172 03/25/19 DEFS' MOTION IN LIMINE REGARDING DESCRIPTION OF GATES AND FENCES
173 IN DEED BOOK 119 PAGE 322 FILED BY JOHN P. FULLER, ESQ.
174 03/26/19 FAXED PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RELIEF FROM
J ORDER DENYING SUMMARY JUDGMENT FILED BY BARRY BRUCE, ESQ.
1 03/26/19 DEFENDANTS' DISCLOSURE OF TRIAL EXHIBITS FILED BY JOHN P. FULLER
177 ESQ.
178 03/27/19 ORIGINAL PLAINTIFFS' TRIAL EXHIBIT LIST AND JURY INSTRUCTIONS
179 FILED BY BARRY BRUCE ESQ.
180 03/27/19 FAXED PLFS' RESPONSE TO RESPS' MOTION IN LIMINE TO PRECLUE PLFS'
181 FROM OFFERING, OR ATTEMPTING TO OFFER, TESTIMONY LIKE STATEMENTS
182 IN THE PRESENCES OF THE JURY FILED BY BARRY BRUCE, ESQ.
183 03/27/19 FAXED PLFS' RESPONSE TO DEFS' MOTION IN LIMINE WITH REGARD TO
184 HEARSAY AS TO DR. SHABB, MRS. SHABB, MABLE PIERSON, LLOYD WAUGH,
185 FLOSSIE WAUGH JAMES SHISLER, JAMES P. SHISLER, BLY D. SHISLER,
186 H.V. PIERSON AND THELMA SHINABERRY FILED BY BARRY BRUCE, ESQ.
187 03/27/19 FAXED PLFS' RESPONSE TO DEFS' MOTION IN LIMINE WITH REGARD TO
188 AFFIDAVITS OBTAINED BY THE PLF. FILED BY BARRY BRUCE, ESQ.
189 03/27/19 FAXED PLFS' RESPONSE DEFS' MOTION IN LIMINE REGARDING REDUNDANT
190 OR CUMULATIVE EVIDENCE OR TESTIMONY WITH REGARD TO PERSONS
191 WHO HAVE EXCUTED AFFIDAVTIS FILED BY BARRY BRUCE, ESQ.
192 03/27/19 PLFS' RESPONSE TO DEFS' MOTION IN LIMINE REGARDING DESCRIPTION
193 OF GATES AND FENCES DEED BOOK 119 PAGE 322 FILED BY BARRY BRUCE,
194 ESQ.
195 03/27/19 FAXED PLAINTIFFS' PRETRIAL MEMORANDUM FILED BY BARRY BRUCE, ESQ.
196 03/27/19 DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE AND DEFS'
197 MOTION FOR RELIEF FROM ORDER DENYING SUMMARY JUDGMENT FILED BY
198 JOHN P. FULLER, ESQ.
199 03/28/19 ORIGINAL PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RELIEF
200 FROM ORDER DENYING SUMMARY JUDGMENT FILED BY BARRY BRUCE, ESQ.

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**DONALD W. LOVELACE and
ARDEL A. LOVELACE,****PLAINTIFFS,****VS.****CIVIL ACTION NO. 18-C-09****ROBERT P. MARTIN and
MELANIE A. MARTIN,****DEFENDANTS.****ORDER**

This cause came before this Court, the Honorable Judge John L. Henning presiding, for trial by jury on April 8, 2019. The Plaintiffs, Donald W. Lovelace and Ardel A. Lovelace, were represented by Barry L. Bruce, Barry L. Bruce and Associates and with Donald W. Lovelace appearing in person. The Defendants, Robert P. Martin and Melanie A. Martin, were represented by John P. Fuller, Bailey and Wyant, PLLC and Robert P. Martin appearing in person. Pursuant to a hearing held before Judge Henning on the 30th day of May 2019, regarding the captioned case, the Court ordered Plaintiffs' attorney to prepare the following order.

On April 8, 2019, the case was called and a jury of six (6) with two (2) alternates was seated and impaneled. Thereafter, opening statements were made and a site inspection by the jury was conducted. Plaintiffs then presented their testimony and evidence through various witnesses. Once Plaintiffs rested, the Defendants presented their testimony and evidence through various witnesses. Upon the Defendants resting, Plaintiffs stated that they had no rebuttal. Thereafter, the Court instructed the jury as to the law and closing arguments were presented.

After retiring to deliberate, on April 11, 2019, the jury returned a verdict in favor of the Plaintiffs finding that the Plaintiffs had met their legal burden by clear and convincing evidence and are the owners, by adverse possession, of the .75 acre tract in fee simple. Further, the jury found that

**POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT**
RECEIVED 7/24/19
By: C. M. C. B.


the Defendants had not proved that Plaintiffs had committed a trespass upon the subject real property by a preponderance of the evidence; thereby, returning a verdict in favor of the Plaintiffs with regard to the claim of trespass. At the request of the Defendants, the jury was polled and each responded that this was indeed their verdict.

WHEREFORE, it is hereby **ORDERED** that the verdict of the jury is hereby entered by the Court with a finding in the Plaintiffs' favor with regard to the claims of adverse possession, as well as a finding in favor of the Plaintiffs with regard to Defendants' counterclaim of trespass.

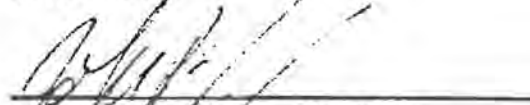
clerk to send copies to counsel & record and the undersigned
ORDERED AND ENTERED this 19th day of July, 2019


John L. Henning, Senior Status Judge

Prepared for entry by:


Barry L. Bruce (WV Bar No. 511)
Barry L. Bruce and Associates, LC
P.O. Box 388
Lewisburg, West Virginia 24901
(304) 645-4182
Counsel for Plaintiffs

Reviewed by:


John P. Fuller (WV Bar No. 9116)
Baily and Wyant, PLLC.
500 Virginia Street East #600
Charleston, West Virginia 25301
(304) 345-4222
Counsel for Defendants

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE AND ARDEL
A. LOVELACE,

Plaintiffs,

v.

Civil Action No. 18-C-09
Honorable John Henning

ROBERT P. MARTIN AND MELANIE A.
MARTIN,

Defendants.

JURY VERDICT FORM

1. Based upon the instructions of the Court, do you find by clear and convincing evidence that the Plaintiffs have met each element of Adverse Possession such that they should take ownership of the .75 acres by a claim of Adverse Possession?

Yes ☒

No ☐

2. Based upon the instructions of the Court, do you find by a preponderance of the evidence that the Plaintiffs committed a trespass upon the real property by allowing their livestock to enter upon the .75 acres?


Yes ☐

No ☒

[If you answered "Yes" to Question 2, proceed to Question 3. If you answered "No" to Question 2 then you do not answer Question 3.]

3. What damages do you find the Defendants suffered as a result of Plaintiffs' trespass upon the .75 acres?

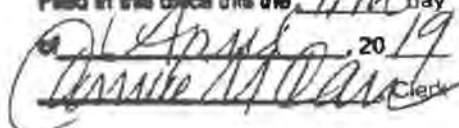
\$ _____


Jury Foreperson

04/11/2019
Date

CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.

Filed in this office this the 11th day

of April, 2019

Clerk

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE and
ARDEL A. LOVELACE,

PLAINTIFFS,

VS.

CIVIL ACTION NO. 18-C-09

ROBERT P. MARTIN and
MELANIE A. MARTIN,

DEFENDANTS.

ORDER

This cause came before this Court, the Honorable Judge John L. Henning presiding, for trial by jury on April 8, 2019. The Plaintiffs, Donald W. Lovelace and Ardel A. Lovelace, were represented by Barry L. Bruce, Barry L. Bruce and Associates and with Donald W. Lovelace appearing in person. The Defendants, Robert P. Martin and Melanie A. Martin, were represented by John P. Fuller, Bailey and Wyant, PLLC and Robert P. Martin appearing in person. Pursuant to a hearing held before Judge Henning on the 30th day of May 2019, regarding the captioned case, the Court ordered Plaintiffs' attorney to prepare the following order.

On April 8, 2019, the case was called and a jury of six (6) with two (2) alternates was seated and impaneled. Thereafter, opening statements were made and a site inspection by the jury was conducted. Plaintiffs then presented their testimony and evidence through various witnesses. Once Plaintiffs rested, the Defendants presented their testimony and evidence through various witnesses. Upon the Defendants resting, Plaintiffs stated that they had no rebuttal. Thereafter, the Court instructed the jury as to the law and closing arguments were presented.

After presentation of evidence by the parties, testimony of the parties and witnesses, and argument of Counsel, the jury returned a verdict in favor of the Plaintiffs finding that the Plaintiffs

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT
RECEIVED 7-24-19
By: CMC/CDB

had met their legal burden by clear and convincing evidence and are the owners, by adverse possession, of the .75 acre that is the subject of this cause of action, further described in attached Exhibit "A" and "B," under the doctrine of adverse possession that they possessed the property adversely and hostilely, that the possession has been actual, open and notorious, exclusive, continuous, and under color of title/ claim of right for at least ten consecutive years.

Further, the Court orders that the Defendants shall be assessed costs as provided by law. The Court notes the Defendants' objection to the assessment of costs.

WHEREFORE, it is hereby **ORDERED** that the Plaintiffs, under the doctrine of adverse possession, possess the .75 acres described in Exhibit A and B.

It is **ORDERED** that a copy of this order, along with the attached exhibits, be placed of record for reference purposes in the Office of the Clerk of the County Commission of Pocahontas County.

It is further **ORDERED** that, pursuant to West Virginia Civ. P. R. 54(d), the clerk shall tax the costs within 10 days after judgment is entered, and shall send a copy of the bill of costs to the Defendants.

clerk to send copies to counsel of record and the undersigned

ORDERED AND ENTERED this 19th day of July, 2019

A TRUE COPY, Certified this 29th

day of July, 2019

Cornie M. Case Clerk
POCAHONTAS COUNTY CIRCUIT/FAMILY COURT
Marlinton, West Virginia 24854

B. Ann M. Case Deputy

Prepared for entry by:

Barry L. Bruce
Barry L. Bruce (WV Bar No. 511)
Barry L. Bruce and Associates, LC
P.O. Box 388
Lewisburg, West Virginia 24901
(304) 645-4182
Counsel for Plaintiffs

John L. Henning
John L. Henning, Senior Status Judge

Reviewed by:

John P. Fuller (WV Bar No. 9116)
Baily and Wyant, PLLC.
500 Virginia Street East #600
Charleston, West Virginia 25301
(304) 345-4222
Counsel for Defendants

DESCRIPTION OF PROPERTY PREPARED FOR THE FINAL ORDER (LOVELACE v. MARTIN 18-C-09).

Being a description of a parcel of land lying, being and situate in Huntersville District, Pocahontas County, West Virginia, the remainder of that $1\frac{1}{4}$ (one and one quarter) ACRE parcel first conveyed unto Mabel Pierson (see DEED BOOK 119 PAGE 322 2/26/1969), subsequently incorporated by a 1984 Randy Gardner PS survey for Mabel Pierson (see SURVEY BOOK 5 PAGE 27) to be within the bounds of a 41.9 ACRE parcel which, in turn, was conveyed unto Robert and Melanie Martin, defendants in the CIVIL ACTION CASE # 18-C-09 by a deed of conveyance dated the 8th day of January, 2016 of record in DEED BOOK 356 PAGE 594. Following deliberation, the jury found for the plaintiffs, Donald W. Lovelace, Sr. and Ardel A. Lovelace, awarding them that portion of the aforementioned $1\frac{1}{4}$ (one and one quarter) ACRE TRACT that lays to the west of the existing wire fence line and to the east of Cummins Creek (defined here as the existing centerline of the creek as found and surveyed in October of 2018), and also to the east of that $\frac{1}{2}$ (one half) ACRE, more or less, PARCEL, a portion of the aforementioned $1\frac{1}{4}$ (one and one quarter) more or less ACRE PARCEL, that had previously been conveyed unto Donald W. Lovelace, Sr. and Ardel A. Lovelace, husband and wife, by Samir Shabb and Margaret June Shabb, husband and wife, dated the 1st day of April, 1985 of record in DEED BOOK 182 PAGE 520, all Instruments of record in the Office of the Clerk of the Pocahontas County Commission in Marlinton, West Virginia.

The remainder of the aforementioned $1\frac{1}{4}$ (one and a quarter) ACRE PARCEL awarded unto Donald W. Lovelace, Sr. and Ardel A. Lovelace by the jury following deliberations in CIVIL ACTION # 18-C-09 shall be described following a survey of existing evidence found and close interpretation of previous deeds and surveys noted and incorporated in a LEGAL DESCRIPTION by David O. Holz PS as follows:

BEGINNING at a point on the northeastern right of way of West Virginia Route 39, a corner now to the remainder of that property heretofore conveyed unto Robert and Melanie Martin (see 356/594), said point being 40' (forty feet) northeast of and perpendicular to the existing center line of West Virginia Route 39 as called for and found and further referenced by a fence corner found as called for, an original corner to the Lovelace 66 ACRE TRACT (see 147/174) located N04-23-33E 8.80' distant, thence leaving the remainder of the Martin property and running with the northeastern limit of West Virginia Route 39 with a line 40' (forty feet) northeast of and parallel to the existing center line of Route 39 (see Project 579-(2) 1946 Department of Highways Plan),

N39-47-25W 231.96' to a point on the northeastern limit of Route 39 at its intersection with the center line of Cummins Creek as found and surveyed, a corner also to that $\frac{1}{2}$ (one half) ACRE PARCEL and portion of that $1\frac{1}{4}$ (one and one quarter) ACRE PARCEL extending to Cummins Creek that had previously been conveyed unto Donald W. Lovelace, Sr. and Ardel A. Lovelace by Samir Shabb and Margaret June Shabb but had not, however, been excepted in the Robert and Melanie Martin deed (see 356/594). Thence leaving the northeastern limit of West Virginia Route 39 and running with the center line of Cummins Creek as found and surveyed in October of 2018, and running also with the intent of the aforementioned $\frac{1}{2}$ (one half) ACRE Shabb to Lovelace deed,

N07-09-35E 103.52' to a point in the center line of the creek,



N07-40-31E 53.23' to a point in the center line of the creek, and,

N02-19-11W 68.70' to a point in the center line of the creek on the line of the aforementioned 1 ½ (one and one quarter) ACRE TRACT. Thence leaving Cummins Creek and running with the line of said 1 ½ (one and one quarter) ACRE TRACT,

S68-35-00E 97.70' to a point in the existing fence and property line with Robert and Melanie Martin. Thence leaving Lovelace and running with Martin, and with the existing fence as found and surveyed, according to the specific instructions of the jury,

S14-26-00W 12.00' to the center of a maple snag found as called for at a turn in the fence line,

S13-27-52E 212.16' to a metal fence post, at a turn in the fence line,

S01-59-55E 47.24' to a metal fence post at a turn in the fence line, and,

S04-23-33W 101.80' to THE POINT OF BEGINNING, containing by survey 0.850 ACRE as surveyed by David O. Holz PS as further depicted on a "PLAT PREPARED FOR THE FINAL ORDER: LOVELACE v. MARTIN CIVIL ACTION No. 18-C-09, and being determined to be the remainder of that property to the northeast of the northeastern limit of West Virginia Route 39, east of the existing center line of Cummins Creek and that ½ ACRE PARCEL heretofore conveyed unto Donald W. Lovelace, Sr. and Ardel A. Lovelace (see 182/520), southwest of the northern line of the aforementioned 1 ½ (one and one quarter) ACRE TRACT and west of the existing fence line with the Robert and Melanie Martin property as it is now defined.

PLAT PREPARED FOR THE FINAL ORDER:

LOVELACE v MARTIN

CIVIL ACTION No. 18-C-09

STATE: WEST VIRGINIA

COUNTY: POCAHONTAS

DISTRICT: HUNTERSVILLE

TAX MAP 36, A PORTION OF PARCEL 8.

A PORTION OF THAT 41.8 ACRE PARCEL CONVEYED UNTO ROBERT & MELANIE MARTIN (358584).

BEING ALSO THE REMAINDER OF THAT PROPERTY FIRST CONVEYED TO MABEL PIERSON (SEE 118/322 2/28/1999).

PROPERTY AWARDED TO LOVELACE DESCRIBED AS WEST OF "OLD LINE" & EAST OF CUMMINS CREEK.

PLAT BASED ON 1884 GARDNER SURVEY FOR MABEL PIERSON (PLAT BOOK 8 PAGE 27).

NORTH OF AND ADJOINING THE NORTHERN RIGHT OF WAY LINE OF ROUTE 39.

PLAT PREPARED BY DAVID O. HOLZ PS 6739

CG41783-6008

4/19/2019

SCALE 1" = 50'

DONALD & ARDEL LOVELACE
DEED BOOK 147 PAGE 174
TAX PARCEL 7.1

ROTATED TO 1884 GARDNER SURVEY (78 & 80 87)

181488
TO
LOVELACE
182/520
TAX PARCEL 7.2

REMAINDER:
ROBERT P. & MELANIE A. MARTIN
DEED BOOK 358 PAGE 584
SEE ALSO PLAT BOOK 5 PAGE 27
TAX PARCEL 9

NOTE:
THIS PLAT WAS PRODUCED USING THE CALLS OF THE
88 ACRE LOVELACE PROPERTY DEED 147/174 & 110/322
ALONG WITH THE CALLS OF THE 1884 GARDNER SURVEY
FOR MABEL PIERSON (SEE PLAT BOOK 8 PAGE 27) WHICH
INCLUDED THE 1.38 ACRE TRACT THAT HAD BEEN CONVEYED
UNTO MABEL PIERSON (SEE 118/322 2/28/1999). MY SURVEY
INCLUDED THE LOCATION OF THE MAPLE BRAG FENCE
POST AT THE ROAD, THE BRIDGE PIER, EXISTING FENCE
LINES, THE RIGHT OF WAY LINE OF ROUTE 39 AND THE
EXISTING CENTER LINE OF CUMMINS CREEK.



IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE AND ARDEL
A. LOVELACE,

Plaintiffs,

v.

Civil Action No. 18-C-09
Honorable John L. Henning

ROBERT P. MARTIN AND MELANIE A.
MARTIN,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT

Defendants' Motion came before the Court on September 24, 2019, with the Plaintiffs appearing by their counsel, the law firm of Barry L. Bruce & Associates, L.L.C. and Barry L. Bruce, and the Defendants appearing by their counsel, the law firm of Bailey & Wyant, PLLC and John P. Fuller, with Robert P. Martin also appearing in person. While this hearing was set to commence at 8:30 a.m., the same was delayed when Plaintiffs filed a Motion for Stay with the Supreme Court of Appeals of West Virginia, serving the same upon this Court and the Defendants via an undated Certificate of Service. In any event, the Motion to Stay filed by the Plaintiffs was not received by this Court until the evening of September 23, 2019 and, upon representation by counsel for the Defendants, was not received by the Defendants until September 23, 2019¹. Ultimately, prior to taking up the instant motion, as well as other matters noticed for September 24, 2019, the Court consulted with Staff of the Supreme Court of Appeals of West Virginia and was advised that simply filing a Motion for Stay did not strip this Court of its jurisdiction over the pending motions and that the matter was not "Stayed" unless, and until, the Supreme Court of Appeals issued a "stay," should

¹ Through the course of this litigation the Parties have provided courtesy copies of numerous pleadings and other documents to the Court and opposing parties via email as well as U.S. Mail. For reasons of his own, Mr. Bruce deviated from this practice with regard to the Motion for Stay. As a result, the Court did not receive the same until after regular business hours on September 23, 2019 and was not able to seek guidance from the Supreme Court of Appeals of West Virginia prior September 24, 2019.

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT
RECEIVED 10/23/19
By: CMC/CD3

the Supreme Court of Appeals of West Virginia decide to issue such stay at all. With this direction from the Supreme Court of Appeals of West Virginia, this Court proceeded with the scheduled hearing on Defendants' Motion to Alter or Amend.

After review of the Parties' Pleadings, hearing arguments of the Parties, and after careful and mature consideration, the Court **FINDS** as follows:

1. By entry of an Order of July 24, 2019, among other matters, the Court assessed the costs to the Defendants and directed the Clerk of the Court to tax the costs within 10 days after entry of the judgment was entered and send a copy of the bill of costs to the Defendants.

2. By certificate of service dated July 20, 2019, Defendants filed their Motion to Alter or Amend the Judgment, specifically challenging the assessment and taxation of costs.

3. The Defendants asserted separate grounds in arguing that the Court should alter or amend the judgment and not assess costs against the Defendants. The Court will address each separately hereinbelow.

4. First the Defendants argued that it is improper to assess the costs against the Defendants because the same was effectively a sanction and that there was no finding of wrongdoing by Robert P. Martin or Melanie A. Martin. While the Court believes it cannot grant the Motion to Alter or Amend on these grounds, the Court does specifically **FIND** that neither Robert P. Martin nor Melanie A. Martin committed any wrongdoing, malfeasance or nonfeasance. In fact, the Court specifically notes that this was a claim brought by the Plaintiffs seeking to take ownership of property legally owned by the Defendants through a claim of adverse possession. As such, there can be no finding that the Defendants had engaged in any wrongful conduct as though this was a claim asserting negligence or an intentional tort.

5. Next, the Defendants argued that to assess costs against the Defendants, who were essentially litigating this matter to vindicate their alleged ownership interest in the subject real

property would incentivize further litigation. More specifically, Defendants argued that, as they obtained ownership of the subject real property by way of a general warranty deed from William R. Shelton, II, they would have a viable cause of action against William R. Shelton, II. The Defendants argued that, should such cause of action be filed, it would likely result in a third-party complaint by William R. Shelton, II; however, Defendants did not elaborate on who they believed would be the target of such third-party complaint. Finally, Defendants argued that such potential claim against William R. Shelton, II would likely be ripe for summary judgment upon the filing of the same based upon Affidavits signed by William R. Shelton, II that were prepared by Barry Bruce, Esq. during a series of meetings between Mr. Bruce, Mr. Shelton and various other individuals, some of whom did appear as witnesses at the trial of this matter and some who did not. In short, the Defendants argued that the assessment of these costs could incentivize “snowball” litigation against Mr. Shelton based upon the general warranty deed for the subject property and then further litigation by Mr. Shelton. This Court specifically makes no finding as to whether such potential litigation has any merit.

6. The Defendants next argued that the assessment of cost against the Defendants would have a “chilling effect” upon those seeking to defend their ownership in real property.

7. Finally, the Defendants argued that any costs related to the jury should not be assessed pursuant to the Declaratory Judgment Act as the jury did not return its verdict pursuant to the Declaratory Judgment Act.

9. 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* which provides, in part:

Except when express provision therefor is made in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; ...

10. The Defendants argued that *Rule 54(d)*, by using the language “...shall be allowed...”

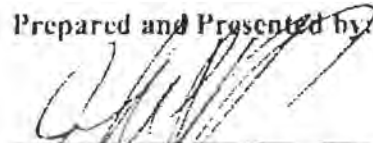
gave the Court discretion to assess and tax or not assess and tax costs. However, as the Defendants could produce no authority to support their interpretation of the *Rule*, the Court remains of the belief that it has no discretion. The Court does note that the Defendants have already filed a Notice 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.

WHEREFORE, by entry of this Order, the Court hereby **DENIES** the Defendants' Motion to Alter or Amend Judgment. Upon entry of this Order the Clerk of the Court shall transmit a copy to all counsel of record. The Parties objections to this Order are noted.

ENTERED this 21st day of October, 2019.


HONORABLE JOHN L. HENNING

Prepared and Presented by:


John P. Fuller (WV Bar #9116)
Bailey & Bryant, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222
Counsel for Defendants

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE AND
ARDEL A. LOVELACE,

Plaintiffs,

v.

Civil Action No. 18-C-09
Honorable John L. Henning, Jr.

ROBERT P. MARTIN AND
MELANIE A. MARTIN,

Defendants.

DEFENDANTS' RULE 59 MOTION TO ALTER OR AMEND JUDGMENT

COME NOW. Defendants Robert P. Martin and Melanie A. Martin, by their counsel, the law firm of Bailey & Wyant, PLLC and John P. Fuller, pursuant to *Rule 59(e) of the West Virginia Rules of Civil Procedure*, and hereby moves this Court for entry of an Order altering and/or amending the Order¹ entered July 24, 2019, and in support thereof shows this Court the following:

1. This matter came before the Court for a jury trial on April 8, 2019.
2. Thereafter, on April 11, 2019, the Jury returned its verdict, finding that the Plaintiffs had taken real property owned by the Defendants through adverse possession. By Order of July 24, 2019, the Court entered the Jury's verdict.
3. By separate Order of July 24, 2019, the Court awarded possession of the subject real property to the Plaintiffs, based upon the Jury's verdict that the Plaintiffs had taken the same through adverse possession.
4. As this Court has repeatedly stated, until such time as the Order granting possession was entered, Defendants were the legal owners of the subject real property. As such, it is crystal

¹ Two Orders were entered by the Clerk on July 24, 2019. Both are titled "Order." One Order enters the Jury's Verdict and the second addresses possession of the subject real property. This Motion is directed at the Order addressing possession of the subject property.

clear that in defending the instant action, the Defendants were defending what this Court recognized as their legal ownership interest in the subject real property up to, and until, July 24, 2019. Upon entry of the Order of July 24, 2019, by Judicial Taking, the Defendants were divested of their legal ownership interest and the same was conveyed to the Plaintiffs, a legal ownership interest in the subject real property for which they have never paid any consideration.

5. By letter of July 3, 2019, Plaintiffs' counsel submitted to the Court a proposed Order that was ultimately entered on July 24, 2019. *See Correspondence of July 3, 2019 attached hereto as Exhibit A.*

6. Defendants timely objected to the same on July 8, 2019. *See Defendants' Objection attached hereto as Exhibit B.*

7. In their objection, Defendants asserted their grounds for objection to the assessment of costs against the Defendants, specifically asserting that:

- a. It is improper for the Court to assess costs against the Defendants because there has been no wrongdoing on the part of the Defendants;
- b. An assessment of costs against the Defendants would only serve to incentivize further litigation; and,
- c. As the "jury verdict" was separate and apart from the action for declaratory judgment, the costs of the jury were not properly assessable under the Declaratory Judgment Act.

8. In addition to objecting to the Order proposed by the Plaintiffs, Defendants moved this Court for an evidentiary hearing to determine what wrongful conduct, if any, the Defendants had engaged in that would merit a sanction. However, the Court entered the Plaintiffs' proposed Order without holding such an evidentiary hearing.

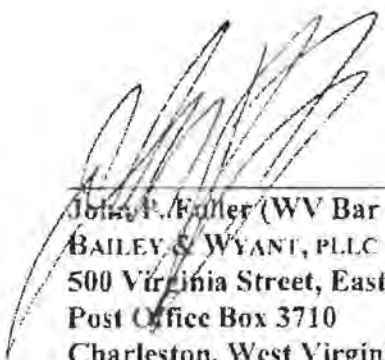
9. To be blunt, the Court, by entry of the subject Order, which is essentially a judicial taking of real property legally owned by the Defendants, works to sanction the Defendants for

appearing and defending their real property rights in the instant case and punishes them for defending their rights.

WHEREFORE, Defendants hereby move this Court for entry of an Order relieving the Defendants of any obligation to pay costs as previously assessed in the prior Order, or, in the alternative, for entry of an Order setting this matter for an evidentiary hearing with regard to any alleged wrongful conduct by the Defendants to warrant the assessment of the sanction, and all other relief that this Court deems just and proper.

**ROBERT P. MARTIN AND
MELANIE A. MARTIN,**

By Counsel,



John P. Fuller (WV Bar #9116)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE AND
ARDEL A. LOVELACE,

Plaintiffs,

v.

Civil Action No. 18-C-09
Honorable John L. Henning, Jr.

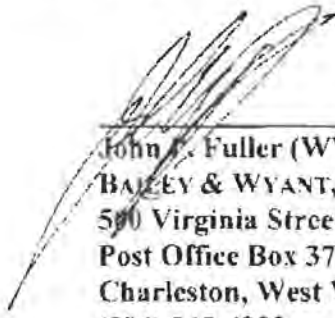
ROBERT P. MARTIN AND
MELANIE A. MARTIN,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Defendants' Rule 59 Motion to Alter or Amend Judgment" was served upon the following parties by U.S. Mail on this day, Tuesday, July 30, 2019:

Barry L. Bruce
Barry L. Bruce & Associates, LLC
P.O. Box 388
Lewisburg, WV 24901
Counsel for Plaintiffs


John C. Fuller (WV Bar #9116)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.

Filed in this office this the 1st day
of August, 2019
Connie M. Conn, Clerk

By Candy D. Beverage, Deputy

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE, SR. and
ARDEL A. LOVELACE,

PLAINTIFFS,

VS.

CIVIL ACTION NO. 18-C-09
Honorable John Henning

ROBERT P. MARTIN and
MELANIE A. MARTIN

DEFENDANTS.

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
RULE 59 MOTION TO ALTER OR AMEND JUDGMENT**

COME NOW, Plaintiffs Donald W. Lovelace, Sr. and Ardel A. Lovelace, by counsel, Barry L. Bruce of Barry L. Bruce and Associates LC and in support thereof shows this Court the following:

1. This matter came before the Court for a jury trial on April 8, 2019.
2. Thereafter, on April 11, 2019, the Jury returned its verdict, finding that through the doctrine laches, the Plaintiffs were able to meet all the elements of adverse possession. Thus, the jury returned the verdict granting the Plaintiffs the true and legal title to the disputed .75 acres. By Order of July 24, 2019, the Court entered the Jury's verdict.
3. By separate Order of July 24, 2019, the Court awarded possession of the .75 acres to the Plaintiffs, based upon the Jury's verdict that, through the doctrine laches, the Plaintiffs were able to meet all the elements of adverse possession.
4. As a general rule in West Virginia, when the period of the statute of limitations (ten years) as to recovery of land has run out, "the statute vests good title in the occupant against his

adversary.” As such, the statute operates as a transfer of the legal title; hence, “a disseisin of the holder of the better title.” 1A M.J., *Adverse Possession*, § 55 (2017).

5. Further, actual possession of land is notice to purchasers of the occupant’s right to the land even if the occupier’s title is not recorded. When a seller does not have actual possession of the land, the non-possession is enough to put the purchaser on notice that a further inquiry needs to be made as to who owns the land. *George v. Stansbury*, 90 W. Va. 593, 111 S.E. 598 (1922), see also Syl. pt. 4, *Smith v. Owens*, 63 W. Va. 60, 59 S.E. 762 (1907).

6. If the purchaser purchases the land from such seller not in actual possession of the land, the purchaser will be charged in favor of the person so in possession with all information such inquiry would have given him if diligently pursued. Actual possession of land is notice to purchasers of the occupant’s right to the land even if the occupier’s title is not recorded. *Id.*

7. In their response to Defendants’ objection to the proposed Order, the Plaintiffs asserted their grounds for why it is proper for the court to assess costs against the Defendants because the court costs are not sanctions.

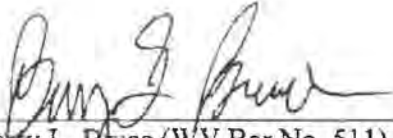
8. Under West Virginia Rule of Civil Procedure 54, “except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.”

9. The Court, in its own discretion, has the right to assess costs as it deems fit. The Defendants, as the losing party are liable for court costs. The Court determined that court costs should be paid by the Defendant, as is within its right. There is no statute in West Virginia that limits the losing party to pay court costs, regardless if the losing party acted in bad faith. The costs are not acting as sanctions. Therefore, The Defendants should be liable for the court costs.

WHEREFORE, Plaintiffs believe that the Court was well within its discretion in assessing court costs against the Defendants.

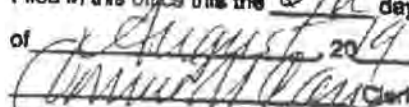
**DONALD W. LOVELACE, SR. and
ARDEL A. LOVELACE**

By Counsel,



Barry L. Bruce (WV Bar No. 511)
Barry L. Bruce & Associates, L.C.
P. O. Box 388
Lewisburg, West Virginia 24901
(304) 645-4182 (telephone)
(304) 645-4183 (facsimile)

**CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.**

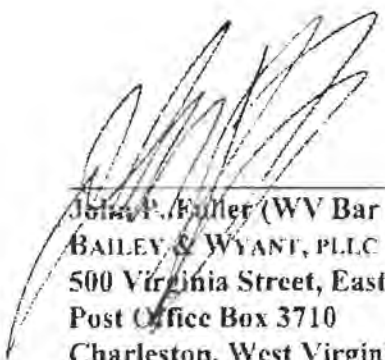
Filed in this office this the 5th day
of August, 2019
 Clerk

appearing and defending their real property rights in the instant case and punishes them for defending their rights.

WHEREFORE, Defendants hereby move this Court for entry of an Order relieving the Defendants of any obligation to pay costs as previously assessed in the prior Order, or, in the alternative, for entry of an Order setting this matter for an evidentiary hearing with regard to any alleged wrongful conduct by the Defendants to warrant the assessment of the sanction, and all other relief that this Court deems just and proper.

**ROBERT P. MARTIN AND
MELANIE A. MARTIN,**

By Counsel,



Jeffrey P. Butler (WV Bar #9116)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE AND
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Honorable John L. Henning, Jr.

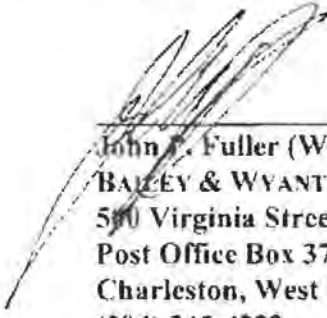
ROBERT P. MARTIN AND
MELANIE A. MARTIN,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Defendants' Rule 59 Motion to Alter or Amend Judgment" was served upon the following parties by U.S. Mail on this day, Tuesday, July 30, 2019.

Barry L. Bruce
Barry L. Bruce & Associates, L.C.
P.O. Box 388
Lewisburg, WV 24901
Counsel for Plaintiffs


John F. Fuller (WV Bar #9116)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.

Filed in this office this the 1st day
of August 2019
Connie M. Conn Clerk

By: Candy D. Buerge, Deputy

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

DONALD W. LOVELACE, SR. and
ARDEL A. LOVELACE,

PLAINTIFFS,

VS.

CIVIL ACTION NO. 18-C-09
Honorable John Henning

ROBERT P. MARTIN and
MELANIE A. MARTIN

DEFENDANTS.

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
RULE 59 MOTION TO ALTER OR AMEND JUDGMENT**

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WHEREFORE, Plaintiffs believe that the Court was well within its discretion in assessing court costs against the Defendants.

**DONALD W. LOVELACE, SR. and
ARDEL A. LOVELACE**

By Counsel,



Barry L. Bruce (WV Bar No. 511)
Barry L. Bruce & Associates, L.C.
P. O. Box 388
Lewisburg, West Virginia 24901
(304) 645-4182 (telephone)
(304) 645-4183 (facsimile)

**CIRCUIT/FAMILY COURT
POCAHONTAS COUNTY, W.VA.**

Filed in this office this the 5th day
of August, 2019


Clerk