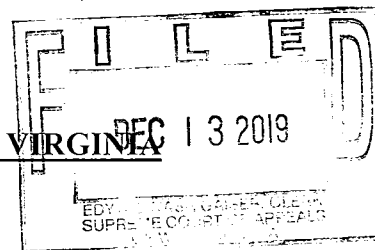


**FILE COPY DO NOT REMOVE
FROM FILE**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 19-0805



(Mineral County Circuit Court, Civil Action No. 18-C-45)

JAMES SCOTT KUHN,

Defendant Below, Petitioner,

vs.

ROBIN L. RAVENSCROFT LIVING TRUST,

Plaintiff Below, Respondent,

ROBIN L. RAVENSCROFT and
NORMAN L. RAVENSCROFT,

Third Party Defendants Below, Respondents.

PETITIONER'S BRIEF

Submitted on behalf of Petitioner,
James Scott Kuhn

By:

David R. Collins - WVSB # 11093
Nelson M. Michael, L.C.
126 East Street
P. O. Box 59
Keyser, West Virginia 26726
(304) 788-6503
drc@nelsonmichael.com

TABLE OF CONTENTS

Table of Contents 2

Table of Authorities 4

Assignments of Error 5

Statement of the Case 5

Summary of the Argument 8

Statement Regarding Oral Argument 9

Argument 9

I. The circuit court erred in finding that “Defendant does not possess an Express Easements [sic] to access his property.” (A.R. 102). 9

A. A right-of-way depicted by plat, within the legal description of the title deed, and set forth by express reservation for the benefit of a subdivision, as well as all owners (such as Petitioner and Respondents here) “whose source title is derived from [common] Grantors” (A.R. 19) constitutes an “express easement.” 10

B. The circuit court’s finding that Petitioner does not possess an express easement is clearly erroneous and deprives the Petitioner of his property rights acquired by deed by defeating Petitioner’s intended use and complete enjoyment of his property. 11

II. The circuit court incorrectly applied the “unity doctrine.” 11

A. Petitioner is entitled to use of the Right-of-Way under the Unity Doctrine. 12

B. Respondents Had Record Notice of the Petitioner’s Front Right-of-Way. 13

III. The circuit court misapplied the law in requiring that Petitioner’s Right-of-Way must first be “opened” to exist. 14

A. The circuit court’s emphasis on the fact that “no actual road was ever constructed or came into existence” (A.R. 103) goes against the long standing legal precedent that an existing right-of-way is not defeated by mere non-user. 15

TABLE OF CONTENTS
(Cont.)

**B. Petitioner’s right-of-way is an easement created by express grant
And therefore cannot be extinguished by nonuser. 15**

**IV. The circuit court erred in finding that no right-of-way existed,
notwithstanding a finding that the plat to Lot 6 “illustrated an
easement extending from the southwestern corner” and that
“the original developer may have intended to construct an
easement.” (A.R. 103). 17**

**V. The circuit court erred in finding that the right-of-way in question
did not enter U.S. Route 50 at the location proffered by Petitioner,
which goes against the clear weight of the testimony. 18**

**VI. The circuit court erred in denying Petitioner damages in his
counterclaim. 19**

**VII. The circuit court erred in entering two orders for the same
hearing. 19**

Conclusion 19

Certificate of Service 20

TABLE OF AUTHORITIES

West Virginia Cases

| | |
|--|---------------|
| <i>Cook v. Totten</i> , 49 W.Va. 177, 38 S.E. 491 (1901) | 12, 14-15 |
| <i>Cotiga Development Co. v. United Fuel Gas Co.</i> , 147 W.Va. 484, 128 S.E.2d 626 (1962) | 17 |
| <i>Deitz v. Johnson</i> , 121 W.Va. 711, 6 S.E.2d 231 (1939) | 12 |
| <i>Edwards v. Moundsville Land Co.</i> , 56 W.Va. 43 S.E. 754 (1904) | 12, 14 |
| <i>Griffin v. Richardson</i> , 83 W.Va. 442, 98 S.E. 523 (1919) | 12 |
| <i>Huddleston v. Deans</i> , 124 W. Va. 313, 21 S.E.2d 352 (1942). | 9, 11, 12, 14 |
| <i>Lyons v. Lyons</i> , 179 W.Va. 712, 371 S.E.2d 640 (1988) | 15 |
| <i>Moyer v. Martin</i> , 101 W.Va. 19, 131 S.E. 859 (1926) | 15, 16 |
| <i>Orlandi v. Miller</i> , 192 W.Va. 144, 451 S.E.2d 445 (1994) | 12, 15 |
| <i>Paxton v. Benedum-Trees Oil Co.</i> , 80 W.Va. 187, 94 S.E. 472 (1917) | 18 |
| <i>Realty Sec. & Disc. Co. v. Nat'l Rubber & Leather Co.</i> , 122 W. Va. 21, 7 S.E.2d 49 (1940) ... | 12 |
| <i>State Farm Mut. Auto. Ins. Co. v. Am. Cas. Co. of Reading, Pa.</i> , 150 W. Va. 435, 146 S.E.2d 842 (1966) | 17(n.2) |
| <i>Tanning Co. v. Boom Co.</i> , 63 W.Va. 685, 60 S.E. 890 (1908). | 9 |
| <i>Toler v. Merritt</i> , No. 12-0394, 2013 WL 2149858, at 2 (W. Va. May 17, 2013) | 16 |

Other Sources

| | |
|---|----|
| EASEMENT, <i>Black's Law Dictionary</i> (11 th ed. 2019) | 10 |
|---|----|

ASSIGNMENTS OF ERROR

1. The circuit court erred in finding that “Defendant does not possess an Express Easements [*sic*] to access his property.” (A.R. 102).
2. The circuit court incorrectly applied the “unity doctrine.”
3. The circuit court misapplied the law in requiring that Petitioner’s Right-of-Way must first be “opened” to exist.
4. The circuit court erred in finding that no right-of-way existed, notwithstanding a finding that the plat to Lot 6 “illustrated an easement extending from the southwestern corner” and that “the original developer may have intended to construct an easement.” (A.R. 103).
5. The circuit court erred in finding that the right-of-way in question did not enter U.S. Route 50 at the location proffered by Petitioner, which goes against the clear weight of the testimony.
6. The circuit court erred in denying Petitioner damages in his counterclaim.
7. The circuit court erred in entering two orders for the same hearing.

STATEMENT OF THE CASE

By deed dated April 20, 1977, Vaughn T. Amtower and Bertha Amtower conveyed approximately 36.90 acres of land (the “parent tract”) on the north side of U.S. Route 50 in New Creek District, Mineral County West Virginia, unto Ellis M. Doll and Linda A. Doll (Mineral County Deed Book No. 205, at page 322). The Dolls then had the land surveyed by David G. Vanscoy, P.E., into six lots platted as “Claysville Heights” Subdivision, although the **Plat of Subdivision of Claysville Heights** was never recorded. (A.R. 68). Lot 3 (2.00 acres), Lot 5 (2.01 acres), and Lot 6 (2.01 acres) were sold as individual lots of “Claysville Heights,” to three separate grantees and their respective spouses, with each of the three deeds containing virtually identical language, aside from the respective legal descriptions and grantees. (A.R. 10-13; 14-17; and 18-21). Each deed was also accompanied by a “**Plat of Survey of Lot [number] Claysville Heights,**” which: (1) depicts a thirty (30) foot right-of-way along the northern (or

“back”) property line, (2) references the deed book and page and tax map and parcel number of the parent tract, (3) identifies the respective lot number for each lot, and (4) specifies that each is a part of “Claysville Heights.” *Id.* Lot 6—which sold for \$1,000.00 more than Lots 3 and 5 at severance—contains a plat depicting an additional thirty (30) foot right-of-way (“Right-of-Way”), the centerline beginning point of which is the southwestern corner of Lot 6, and which depicts the centerline of said right-of-way as traversing along the boundary line of Lot 4, extending fifteen (15) feet in width into Lot 4 and fifteen (15) feet in width along the retained parent tract. (A.R. 21). The legal description of Lot 6 begins at the centerline of this Right-of-Way, which is described as “leading to U. S. 50,” and is shown on the **Plat of Subdivision of Claysville Heights** as extending beyond Lot 4 in a straight line toward U.S. Route 50. (A.R. 18; 21; 68). Ultimately, the Dolls filed Chapter 7 bankruptcy, and the remaining real estate was sold by the bankruptcy trustee, of which approximately 28.38 acres was ultimately conveyed to Norman L. Ravenscroft and Robin L. Ravenscroft (then Telljohann), followed by a conveyance by them to the Robin L. Ravenscroft Living Trust (collectively “Respondents”). (A.R. 65-67; 6-8).

James Scott Kuhn (“Petitioner”) was conveyed Lots 3, 5, and 6 via deed dated March 28, 2018, from Michael L. Fitzgerald and Elizabeth J. Fitzgerald, who in turn acquired the real estate from a chain of title traceable back to the Amtower to Doll deed. Likewise, the Respondents’ real estate, which is approximately 28.38 acres, traces back to the same parent tract. Respondents’ deeds state that the subject real estate is “subject to all reservations, exceptions and easements of record in the chain of title, and includes all appurtenances and privileges passed through prior deeds” and are expressly “subject to those rights of way set forth in . . . Deed Book 243, page 373 [the original deed to Lot 6]” (A.R. 7 and 66). Having such record notice of

the Right-of-Way, Respondents nevertheless expended a substantial sum of money over the years to build a paved road from their house to U.S. Route 50, the lower one-third to one-half of which was constructed over the course of the Right-of-Way, as determined by Mr. Vanscoy at trial.

Petitioner and Respondents had some heated discussions about the use of the Right-of-Way, and at some point Petitioner believed that the parties had reached an agreement—which the Respondents dispute—whereby the Petitioner was to receive several acres of real estate from the Respondents to allow the Petitioner room to expand the “back” right-of-way in exchange for monetary consideration and a relinquishment of the Right-of-Way. However, when the parties reached an impasse, and the Petitioner began marking trees to be removed from his Right-of-Way to construct a road to extract timber and construct his residence on his lots, the respondent trust filed the case below, seeking a declaratory judgment and injunctive relief against the Petitioner’s use of the Right-of-Way, for which the Petitioner counterclaimed and joined the respondent individuals as third party defendants.

A temporary injunction was granted to the respondent trust by **Temporary Injunction Order**, entered October 10, 2018. By **Trial Order**, entered June 26, 2019, the circuit court found that Petitioner did not have a right-of-way as aforesaid, and the temporary injunction was continued. Costs were assessed to Petitioner, and the circuit court denied an award of damages pursuant to Petitioner’s counterclaim. The order directed Petitioner to file a memorandum in support of his position, which he did, together with a timely motion to alter or amend judgment, which was filed pursuant to Rule 59(e), and denied by **Order**, entered August 16, 2019. The **Order** of August 16, 2019 also denied Respondents a permanent injunction. Respondents filed a motion to amend the judgment, which was not ruled upon.

For the reasons set forth, *infra*, the Petitioner respectfully requests that this Honorable Court reverse and remand the circuit court's **Trial Order**, entered June 26, 2019, which denied the Petitioner a right-of-way as aforesaid, assessed costs to the Petitioner, and denied Petitioner an award of damages pursuant to Petitioner's counterclaim.

SUMMARY OF THE ARGUMENT

Petitioner's lots were created and sold pursuant to a subdivision known as "Claysville Heights," and Petitioner bargained for the Right-of-Way in acquiring title to the said Lot 6 to benefit Lot 6, as well as his other parcels, which are adjacent to one another. Such Right-of-Way exists by, *inter alia*, express reservation, and the circuit court deprived Petitioner of his intended use—as well as the full and complete enjoyment—of his property in granting the injunction and in ultimately denying Petitioner the Right-of-Way. The circuit court's finding that "[Petitioner] does not possess an Express Easements [*sic*] to access his property" (A.R. 102) is clearly erroneous, as Petitioner's deed to Lot 6 states "[t]here is hereby RESERVED an easement as necessary in, along, over, under and through an roadway or right of way constructed and to be constructed by the Grantors *for the benefit of the subdivision* . . . for the use and benefit of all owners of property whose source title is derived from the Grantors" (first emphasis in original; bold emphasis added). (A.R. 18-19). Additionally, with regard to the Right-of-Way, Petitioner's deed states the "[r]ight-of-way shown above is reserved by grantor for use of all property owners along roadway and any others entitled to use said right-of-way." (A.R. 18). Moreover, the plat recorded with the original conveyance to Petitioner's predecessor in title depicts the Right-of-Way, showing its starting point, width, and direction with only one logical output to the public road (U.S. Route 50) under the path of the platted portion of the Right-of-Way. (A.R. 21, 68, 70, and 71). This is an express reservation of the Right-of-Way for the

benefit of, *inter alia*, Petitioner. Furthermore, Petitioner provided evidence at the hearing of September 5, 2018 in the form of testimony regarding his damages, later set forth in his counterclaim, and further developed at trial, all which was not rebutted by the Respondents. Accordingly, Petitioner proved his claim for damages by a preponderance of evidence, and the same should have been awarded to him.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner does not request oral argument. Pursuant to Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, the Petitioner submits that oral argument is unnecessary, as the dispositive issues have been authoritatively decided, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT “DEFENDANT DOES NOT POSSESS AN EXPRESS EASEMENTS [S/C] TO ACCESS HIS PROPERTY.” (A.R. 102).

The Right-of-Way is described in the metes and bounds of Lot 6 as “leading to U.S. Route 50” from the southwestern corner of Lot 6, along Lot 4 (which was conveyed as part of what is now the Respondents’ 28.38 acres) and is depicted on the **Plat of Survey of Lot 6**, which is recorded with the original deed to Lot 6. (A.R. 18 and 21). The Respondents had record notice of this Right-of-Way, as they took title to the 28.38 acres explicitly subject to the deeds to Lots 3, 5, and 6 and “those rights of way set forth” therein, with detailed deed references reported in each of the Respondents’ deeds. (A.R. 6-8; 65-67). “Whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice.” Syl. Pt. 1, *Tanning Co. v. Boom*

Co., 63 W.Va. 685, 60 S.E. 890 (1908). Accordingly, the Respondents are estopped from denying Petitioner his Right-of-Way. Syllabus by the Court, ¶ 1, *Huddleston v. Deans*, 124 W. Va. 313, 21 S.E.2d 352 (1942).

A. A right-of-way depicted by plat, within the legal description of the title deed, and set forth by express reservation for the benefit of a subdivision, as well as all owners (such as Petitioner and Respondents here) “whose source title is derived from [common] Grantors” (A.R. 19) constitutes an “express easement.”

An “express” easement is simply “[a]n easement that is voluntarily created by a written instrument to serve a specified purpose. — Also termed easement by express grant; easement by express reservation.” EASEMENT, *Black’s Law Dictionary* (11th ed. 2019). When Petitioner’s predecessor in title received and recorded the deed to Lot 6, the grantors voluntarily created, by written instrument, an easement in the form of a right-of-way “in, along, over, under and through any roadway or right of way constructed *and to be constructed* by the Grantors [*i.e.*, the Dolls] *for the benefit of the subdivision. . . .* [F]or the *use and benefit of all owners of property whose source title is derived from the Grantors*” (A.R. 18 and 19) (emphasis added). The circuit court specifically found that that “in the deed at time of severance, there was attached a plat that illustrated an easement extending from the southwestern corner” which is described as in the metes and bounds as “coming from Lot 6 to US Route 50” and is “shown on the plat to Lot 6,” although a road was not constructed. (A.R. 102-103). Because Petitioner was granted an express right-of-way from the southwestern corner of Lot 6, the circuit court erred in its determination that he did not possess the Right-of-Way.

B. The circuit court's finding that Petitioner does not possess an express easement is clearly erroneous and deprives the Petitioner of his property rights acquired by deed by defeating Petitioner's intended use and complete enjoyment of his property.

Based upon the foregoing, the circuit court's conclusion that Petitioner "does not possess an Express Easements [*sic*] to access his property" is erroneous. Petitioner purchased Lots 3, 5, and 6 for fair market value in an arm's length transaction and is entitled to the full use and enjoyment of the Right-of-Way to Lot 6. Since Petitioner's lots are side-by-side, the deprivation of the Right-of-Way to Lot 6 devalues all three of Petitioner's lots. Although Petitioner has access to the lots from the "back" right-of-way, it is a difficult trek for any large, commercial vehicle up a steep dirt road (despite Petitioner's efforts and expense to improve it), with a sharp turn, and is partially blocked at the lower portion due to structure encroachments, thereby preventing it from being thirty (30) feet in width. Petitioner testified in the circuit court that this "back" right-of-way was insufficient for his timbering and construction purposes, for which he purchased the said lots. Accordingly, the circuit court's rulings on this issue were clearly erroneous and deprived Petitioner of his property rights accompanying the conveyance to him of Lot 6.

II. THE CIRCUIT COURT INCORRECTLY APPLIED THE "UNITY DOCTRINE."

There can be little doubt that sale of town lots from a plat showing a tract of land divided into lots, blocks, streets and alleys *creates a private easement* in common over the streets and alleys in which the purchasers of lots become the dominant estate and the interest retained by the owner becomes the servient estate. This is so *regardless of whether the plat is recorded or is not*. This principle is called the "Unity Plan" to which this Court is definitely committed. . . . Undoubtedly, [the lot purchasers] are entitled to as much of the platted easements as will assure the *full enjoyment of their property*. . . . The opinion in the Edwards case makes

it quite plain that *the purchaser of lots shown upon an unrecorded plat, generally used and referred to in the conveyance to him, acquires an easement entitling him to the use of all the streets and alleys shown upon the plat*

Huddleston v. Deans, 124 W. Va. 313, 21 S.E.2d 352, 358 (1942) (Kenna, J., concurring) (internal citations omitted, emphasis added).

A. Petitioner is entitled to use of the Right-of-Way Under the Unity Doctrine.

Petitioner is entitled to the use of the Right-of-Way under the “unity doctrine,” sometimes referred to as the “unity plan” or “unity rule.” This doctrine was recognized in the public context in *Cook v. Totten*, 49 W.Va. 177, 38 S.E. 491 (1901), and later expanded to include private rights, even where the subdivision plat is not recorded (*see* Syllabus by the Court, ¶ 2, *Huddleston v. Deans*, 124 W. Va. 313, 21 S.E.2d 352 (1942); *Deitz v. Johnson*, 121 W.Va. 711, 6 S.E.2d 231 (1939); *Edwards v. Moundsville Land Co.*, 56 W.Va. 43, 48 S.E. 754, 754 (1904)). The doctrine provides that a purchaser of a lot sold as part of a general plan or common scheme of development to create a subdivision is entitled to use of any road indicated on the plat attached thereto or referenced therein. *Griffin v. Richardson*, 83 W.Va. 442, 98 S.E. 523, 524 (1919). This is the case whether the subdivision later comes into existence or not (*see, e.g., Deitz, supra*) and regardless as to whether the right-of-way is ever used. *Orlandi v. Miller*, 192 W.Va. 144, 150, 451 S.E.2d 445, 450 (1994); *Cook, supra* at 491-492; *Edwards, supra* at 756-757. Any ambiguity in a deed is construed in favor of the grantee. Syl. Pt. 5, *Realty Sec. & Disc. Co. v. Nat’l Rubber & Leather Co.*, 122 W. Va. 21, 7 S.E.2d 49, 49 (1940). Here, Petitioner purchased three lots, each of which trace back to plats titled “**Plat of Survey of Lot [number] Claysville Heights,**” under a general plan or common scheme to create a subdivision. Additionally, the “**Plat of Subdivision of Claysville Heights,**” which was not recorded, but was rather used to depict the general plan or common scheme of the subdivision, clearly sets forth the

beginning, direction, and course of the Right-of-Way. Therefore, Petitioner is entitled to use the Right-of-Way shown on his plat to the extent necessary for the full enjoyment of his property.

B. Respondents Had Record Notice of the Petitioner's Front Right-of-Way.

The deed to Lot 6 states that it is “more fully shown on Plat of Survey of Lot 6 of Claysville Heights,” which depicts a 30’ right-of-way, half of which is over Petitioners’ property and half of which is over Respondents’ property, traversing south to U.S. Route 50. Petitioner’s deed provides that the Right-of-Way, the location of which is described in the metes and bounds, “is reserved by the grantor for use of all property owners along roadway and any others entitled to use said right-of-way.” (A.R. 18-21). Petitioner’s predecessors’ deeds all reserve “an easement as necessary in, along, over, under and through any roadway or right of way constructed and to be constructed by the Grantors for the benefit of the subdivision. . . . for the use and benefit of all owners of property whose source title is derived from the Grantors.” (A.R. 18 and 19). Mr. Vanscoy, the person who surveyed the same, testified that the Right-of-Way could only come out at the 30’ clearance where Respondents’ property meets Route 50 on the western end, and was able to plat off exactly where that is, based upon existing rebar and recorded references. (A.R. 161-165; 204-231). Respondents’ own deed, the source title of which is a subsequent conveyance vis-à-vis Petitioner’s source title, is expressly subject to Petitioner’s lots and “those rights of way set forth in the deeds of record” to such lots, including Deed Book 243, page 373, the plat attached to which depicts the Right-of-Way. Therefore, Respondents were given record notice of the Right-of-Way at the time each respectively took title to the property at issue, and when the respondent individuals constructed the road over the Right-of-Way, they did so at their own peril¹ and should not be permitted to rely on this fact to

¹ The law imposes a duty to the easement holder to maintain the easement. Petitioner seeks only to traverse over the Respondents’ roadway where it was built across the Right-of-Way, and would be responsible for any harm thereto.

deny Petitioner his Right-of-Way:

The defendants cannot invoke laches against plaintiffs to defeat the purpose of their common grantor in dedicating the alley. Defendants are charged with knowledge of the existence of the alley. The instruments of conveyance by which they acquired their title made reference thereto or to the Settle map on which an alley is shown. The knowledge of the defendants was equal to that of the plaintiffs. Under this state of facts an estoppel does not exist as against plaintiffs and in favor of defendants. *The people who placed the structures in the alley did so at their own risk and should not be heard to complain when removal is enforced, the removal being a compliance with an easement imposed on the land by the original land owners.*

Huddleston v. Deans, 124 W. Va. 313, 21 S.E.2d 352, 356 (1942) (emphasis added).

Accordingly, Petitioner is entitled to the full and complete use and enjoyment of the Right-of-Way and to recover his loss of use and enjoyment of it while the prohibition of his use of it remains in effect. In ruling that “[n]o master plat was ever filed for this proposed subdivision,” and therefore, “the Unity Doctrine does not apply” (A.R. 102 and 103), the circuit court incorrectly applied the law. (See A.R. 156: “At the time these lots were off-conveyed . . . the Planning Commission was not in existence at that time.”). Under the unity doctrine, the fact that the master plat was not recorded is irrelevant, and Respondents took title subject to the rights-of-way in previous off-conveyances, which were expressly referenced in their deeds.

III. THE CIRCUIT COURT MISAPPLIED THE LAW IN REQUIRING THAT PETITIONER’S RIGHT-OF-WAY MUST FIRST BE “OPENED” TO EXIST.

A right-of-way created by instrument need not be “opened” prior to use. “the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases.” *Edwards v. Moundsville Land Co.*, 56 W.Va. 43, 48 S.E. 754, 756 (1904). “Having sold the lots according to the plat, [the developer] must accord to the purchasers the use of the streets and ways as shown thereon. . . . *thus making the plan and*

survey a part of the conveyance—as much so as if fully set out in such deeds.” *Cook v. Totten*, 49 W.Va. 177, 38 S.E. 491, 492 (1901) (emphasis added). Accordingly, the circuit court’s implicit conclusion of law that an existing roadway is a prerequisite the existence of the Right-of-Way is not supported by legal authority.

A. The circuit court’s emphasis on the fact that “no actual road was ever constructed or came into existence” (A.R. 103) goes against the long standing legal precedent that an existing right-of-way is not defeated by mere non-user.

The circuit court ruled that “[a]lthough the easement is shown on the plat to Lot 6 and mentioned in the description, no actual road was ever constructed or came into existence” (A.R. 103). Particularly, the circuit court found that “[a]lthough the original developer may have intended to construct an easement leading from Lot 6 to US Route 50, this was never done” *Id.* Although not explicitly stated, the circuit court appears to have based its decision, at least in part, on the assumption that a right-of-way must first be “opened” to exist. This clearly goes against the weight of authority and is therefore an incorrect legal conclusion: “there is law in this State that an existing right-of-way is not defeated by mere non-user. Additionally . . . while easements created equitably may be extinguished by acts including abandonment, easements by grant . . . may not.” *Orlandi v. Miller*, 192 W. Va. 144, 149, 451 S.E.2d 445, 450 (1994) (citing note 5 of *Lyons v. Lyons*, 179 W.Va. 712, 371 S.E.2d 640 (1988); *Moyer v. Martin*, 101 W.Va. 19, 131 S.E. 859 (1926) (internal citation omitted).

B. Petitioner’s right-of way is an easement created by express grant and therefore cannot be extinguished by nonuser.

Whether the right-of-way was ever used is irrelevant, since it was platted to Petitioner’s source title deed. (*See also* section I, *supra*). The case law is clear that a right-of-way created by grant or reservation cannot be defeated by non-user. “[T]he owner of an easement by grant

cannot lose that easement by his mere nonuse; there must also be proof of an intent to abandon.” *Toler v. Merritt*, No. 12-0394, 2013 WL 2149858, at 2 (W. Va. May 17, 2013) (citing *Moyer v. Martin*, 101 W.Va. 19, 24, 131 S.E. 859, 861 (1926)). In the context of express easements, the cases use the terms “created by grant” and “created by reservation” interchangeably. Respondents, apparently recognizing that the Doll conveyances did create the Right-of-Way, attempted to defeat this by proffering an **Affidavit** from Daniel D. Shrou (the original grantee of Lot 6 from the Dolls), purporting to manifest an intent to abandon the Right-of-Way into evidence, over Petitioner’s objection, which states “I abandoned any claim I had to the 30’ right of way. If I ever had any right to use a road on the Northern end of my property I positively gave up that right. . . . after Norm[an L. Ravenscroft] built his road I made it clear that I was not going to use any road on that side of my property.” (A.R. 99). This affidavit, then, raises the question: why would one “positively” give up a right believed to be nonexistent? However, the circuit court made no finding or indication that this issue was relevant in its **Trial Order** or otherwise, and instead focused on the physical existence of a road. Furthermore, Mr. Shrou conveyed Lot 6 by general warranty deed to Petitioner’s predecessor in title (the “Doug Love” referred to in the affidavit), making no mention in the deed or otherwise among the land records that any such right-of-way was ever abandoned. This does not satisfy the Respondent’s burden of proof by clear and convincing evidence that the Right-of-Way was abandoned. Assuming, *arguendo*, that Respondents could make such showing, they still would not prevail under the “unity doctrine” (discussed in section II, *supra*).

IV. THE CIRCUIT COURT ERRED IN FINDING THAT NO RIGHT-OF-WAY EXISTED, NOTWITHSTANDING A FINDING THAT THE PLAT TO LOT 6 “ILLUSTRATED AN EASEMENT EXTENDING FROM THE SOUTHWESTERN CORNER” AND THAT “THE ORIGINAL DEVELOPER MAY HAVE INTENDED TO CONSTRUCT AN EASEMENT.” (A.R. 103).

The circuit court violated Petitioner’s property rights when it: (1) found that the developer possibly intended a right-of-way, (2) found that the developer depicted the Right-of-Way on a recorded plat attached to Petitioner’s predecessor’s deed, and (3) heard testimony from the surveyor of the subdivision lots that the grantor’s intent was to create such a right-of-way, but nevertheless proceeded to construe the deed as not granting Petitioner a right-of-way. (*See also* A.R. 161-163).

A trial court may not construe the rights of a party to a recorded deed in violation of the expressed intent of the grantor, and to do so is clear error and/or abuse of discretion². “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). Here, the deed to Lot 6 clearly manifests the intent of the Dolls to grant the Right-of-Way at severance, which occurred prior to severance of Respondents’ tract. Additionally, having direct knowledge of the circumstances surrounding the platting and of the subdivision, Petitioner’s expert, Mr. Vanscoy, testified that the Dolls intended to grant Petitioner’s predecessor in title the Right-of-Way. (A.R. 209), which was not refuted. “Where there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted

² Additionally, “issues of fact are open for review on appeal where the findings below are based entirely on documentary evidence, such as written affidavits, or depositions.” *State Farm Mut. Auto. Ins. Co. v. Am. Cas. Co. of Reading, Pa.*, 150 W. Va. 435, 441, 146 S.E.2d 842, 846 (1966).

which is most favorable to the grantee.” Syl. Pt. 6, *Paxton v. Benedum-Trees Oil Co.*, 80 W.Va. 187, 94 S.E. 472 (1917). Accordingly, the circuit court’s task was to first determine if the original deed to Lot 6 was ambiguous as to the creation of the Right-of-Way, and if so, consider the extrinsic evidence before the court to determine its existence, making all inferences in favor of the grantee—which means more rights, not less. The weight of the evidence clearly favored the interpretation that the Right-of-Way was granted to Petitioner’s predecessor in title. Notwithstanding this, the circuit court found that “[a]lthough the original developer may have intended to construct an easement leading from Lot 6 to US Route 50, this was never done” and that the Petitioner therefore “does not possess” a right-of-way, express or implied. (A.R. 102-103). This was clear error and/or an abuse of discretion.

V. THE CIRCUIT COURT ERRED IN FINDING THAT THE RIGHT-OF-WAY IN QUESTION DID NOT ENTER U.S. ROUTE 50 AT THE LOCATION PROFFERED BY PETITIONER, WHICH GOES AGAINST THE CLEAR WEIGHT OF THE TESTIMONY.

Petitioner met his burden of proof as to the location of the right-of-way. The testimony of Petitioner’s expert witness set forth the location of the right-of-way, based upon existing surveys, markers on the site, and a new survey conducted by Petitioner’s expert. (A.R. 204-211). Although challenged by opposing counsel on cross examination, Respondents did not overcome the expert’s opinion that Petitioner has the Right-of-Way and its location, and no expert testimony was proffered by Respondents to refute Petitioner’s expert. The circuit court, therefore, substituted its judgment for that of a professional surveyor, which it recognized as an expert.

VI. THE CIRCUIT COURT ERRED IN DENYING PETITIONER DAMAGES IN HIS COUNTERCLAIM.

Petitioner met his burden of proving pecuniary damages in his counterclaim, which were not refuted by Respondent's evidence. (A.R. 138-141; 223-225). Petitioner testified as to his pecuniary damages as a commercial logger, due to his inability to extract timber as a result of Respondent's denial of use of the Right-of-Way. Petitioner's burden on this point was a mere preponderance, and in the absence of conflicting or rebuttal evidence, Petitioner should have been awarded damages.

VII. THE CIRCUIT COURT ERRED IN ENTERING TWO ORDERS FOR THE SAME HEARING.

By entering two orders from the preliminary injunction hearing, the circuit court created unnecessary confusion, and the Respondents should not benefit from such error. (A.R. 31-35). This issue is necessary for review only to the extent that Respondents rely on it to argue a procedural time bar to the findings or rulings therein.

CONCLUSION

The circuit court's decision in its **Trial Order** goes against long standing legal authority as well as the weight of the evidence at trial and should be overturned. For these reasons, the Petitioner respectfully requests that this Honorable Court reverse and remand the circuit court's **Trial Order**, entered June 26, 2019.