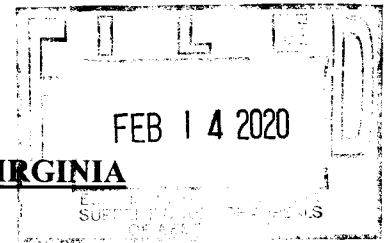


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 REPLY BRIEF

Submitted on behalf of Petitioner,
James Scott Kuhn

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REPLY ON BEHALF OF JAMES SCOTT KUHN

NOW COMES the petitioner, James Scott Kuhn (“Petitioner”), by and through his counsel, David R. Collins and Nelson M. Michael, L.C., and replies to the **Respondents’ Brief**, filed by the respondents, the Robin L. Ravenscroft Living Trust, Robin L. Ravenscroft, and Norman L. Ravenscroft (“Respondents”), as follows:

STATEMENT REGARDING ORAL ARGUMENT

Neither the Petitioner nor the Respondents requested oral argument in their respective briefs; therefore, pursuant to Rule 18(a)(1) of the *West Virginia Rules of Appellate Procedure* (2010), oral argument is unnecessary.

ARGUMENT

I. PETITIONER HAS AN EXPRESS EASEMENT.

The circuit court specifically found 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 in the metes and bounds as “coming from Lot 6 to US Route 50” and is “shown on the plat to Lot 6 and mentioned in the description,” although a road was not constructed. (A.R. 102-103). An “express” easement is simply one which is voluntarily created by a written instrument for a specified purpose, by either grant or reservation (*see Petitioner’s Brief*, p. 10). As such, the deed to Lot 6 contains an easement voluntarily made by the developer to the original grantee for the purpose of creating a 30’ wide means of ingress and egress from the southwestern corner of Lot 6 to U.S. Route 50. (A.R. 21). The right-of-way is reserved and partially depicted on the recorded plat to the severance deed to which Respondents’ deeds are all expressly subject. (A.R. 7 and 66). Accordingly, Petitioner has a recorded, express easement, of which Respondents had record notice at the time of the conveyance of the servient estate to them.

II. PETITIONER OBTAINED ALL RIGHTS OF HIS PREDECESSORS IN TITLE.

Petitioner obtained all rights of his predecessors in title, as each successive conveyance of Lot 6 from severance was via general warranty deed. Whether the right-of-way verbiage created by the severance deed of Petitioner's predecessor in title appears in Petitioner's own deed is irrelevant: "[e]very deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced." *W. Va. Code* § 36-3-10 (1923). A grantor who conveys real property by general warranty deed transfers all existing appurtenances in the chain of title. Moreover, Petitioner's own deed conveyed "the above described real estate, together with all . . . the rights, privileges and appurtenances thereunto belonging, or in anywise appertaining." (A.R. 24). Petitioner's predecessor took title subject to a reservation of 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). All of Respondents' deeds were subsequent conveyances and were expressly subject to this right-of-way, as stated in the deeds themselves. (A.R. 7 and 66). Therefore, Petitioner was granted all of the same privileges and appurtenances as were contained in the severance deed to Lot 6. (A.R. 18-21).

III. RESPONDENTS HAD RECORD NOTICE OF PETITIONER'S RIGHT-OF-WAY.

Because all conveyances to Respondents: (1) occurred subsequent to the severance deed to Lot 6; (2) are "subject to all reservations, exceptions and easements of record in the chain of title, and include[] all appurtenances and privileges passed through prior deeds;" and (3) are

expressly “subject to those rights of way set forth in . . . Deed Book 243, page 373 [the severance deed to Lot 6],” Respondents had record notice of Petitioner’s right-of-way and therefore cannot claim status as *bona fide* purchasers without notice. (A.R. 7 and 66). Accordingly, whether the roadway ever came into existence is irrelevant. (*See* Part VI of this section, *infra*).

IV. WEST VIRGINIA CODE § 36-3-5A IS IRRELEVANT TO THIS CASE.

The right-of-way in controversy was partially platted and attached to the deed dated April 29, 1986, from which Petitioner subsequently obtained title. (A.R. 18-21). Respondents argue, *inter alia*, that this right-of-way is ineffective because it fails to meet the requirements of *West Virginia Code* § 36-3-5a (*Respondents’ Brief*, p. 7). A similar argument was recently rejected by this Court in *Conn v. Beckman*, No. 18-0551, 2019 WL 4257294, at *5 (W. Va. Sept. 9, 2019) (memorandum decision). Accordingly, *West Virginia Code* § 36-3-5a is irrelevant to this case.

A. *West Virginia Code* § 36-3-5a was not enacted until 2003 and is therefore inapplicable to a right-of-way created in a 1986 deed.

The code section on which Respondents’ argument relies was first promulgated in 2003—nearly seventeen years *after* the instrument creating the right-of-way at issue—and is therefore inapplicable to this case. This point was conceded by Respondents’ own counsel. (A.R. 173, lines 18-19). Furthermore, assuming, *arguendo*, the applicability of *West Virginia Code* § 36-3-5a to the case below, the language of the code itself provides that an “easement or right-of-way is not invalid because of the failure of the easement or right-of-way to meet the requirements of this subsection or subsection (a) above.” *W. Va. Code*. § 36-3-5a (2013).

B. A recorded right-of-way which does not conform to *West Virginia Code* § 36-3-5a is still valid.

Although now tucked into subsection (b) of the code, the above-stated *proviso* was originally contained within subsection (a) of both prior versions of it: as originally enacted in 2003, and as amended in 2004. Accordingly, *West Virginia Code* § 36-3-5a is primarily for guidance to county clerks in determining whether to record or reject such an instrument, and by its own terms does not render a grant or reservation of right-of-way invalid, once recorded. *Id.* “[West Virginia] Code § 36-3-5a(a) (2004) provides that a right-of-way cannot be declared invalid because of the failure of the granting instrument to include a metes and bound description, a centerline specification, or a drawing or plat reference.” *Conn*, No. 18-0551, 2019 WL 4257294, at *5 (quoting *Folio v. City of Clarksburg*, 221 W. Va. 397, 401, 655 S.E.2d 143, 147 (2007)). Accordingly, all that is required is a “sufficient description which serves as a *guide* to identify the land upon which the easement is located.” *Folio*, 221 W. Va. at 401, 655 S.E.2d at 147 (emphasis added). Because Petitioner’s expert was able to plat the right-of-way based upon existing surveys and extrinsic evidence, such as markers on the site (which were not contested by any evidence proffered by Respondents), Respondents’ argument fails. (A.R. 204-211).

V. RESPONDENTS’ CLAIM THAT PETITIONER’S COUNSEL CONCEDED THAT NO EXPRESS EASEMENT EXISTS IS NOT SUPPORTED BY THE RECORD.

In light of the record, Respondents’ claim—made in triplicate in their brief—that Petitioner’s counsel conceded that Petitioner does not have an express easement is disingenuous. (*Respondents’ Brief*, pp. 6, 7, and 17). Assuming, *arguendo*, that Respondents were referring to Petitioner’s *actual* deed, this is irrelevant for the reasons set forth in Part II of this section, *supra*.

Moreover, Petitioner's own deed has no bearing on the existence of the easement because Respondents' deeds, dated 1996 and 2001, respectively (A.R. 6 and 65), both predate that of Petitioner, and therefore, could not be affected by a conveyance occurring in 2018.

A review of the transcript makes it clear that Petitioner's counsel made no such concession, but was rather making an argument by analogy:

THE COURT: Here's what I want to hear from you two. I tend to agree with Mr. Sites, there's no express easement in that deed. What's your response to that?

MR. COLLINS: Your Honor, my response to that is there's no express easement for the back right-of-way, but we all agree that there's a right-of-way there. There's no reference to it on the composite plat. There's no right-of-way on either side.

THE COURT: (To witness) You can step down.

MR. COLLINS: And the Ravenscroft deeds all say that this conveyance is made subject to all reservations, exceptions, and easements of record in the chain of title. Mr.—and it also expressly references—it says, “The above described real estate is subject to those rights-of-ways set forth in the following deeds in the county commission's office,”—and those are the three deeds that—

THE COURT: Right. I know.

MR. COLLINS: —Mr. Kuhn claims his title from. So **it's expressly reserved for the benefit of the property owners in those deeds which were recorded prior to the off-conveyance of the 30 acres** to—which ultimately—

[...]

MR. COLLINS: **An express easement, which is what's included in Mr. Kuhn's deed** and, as I said, the Ravenscroft deed refers back to that and says it's subject to that—an express easement cannot expire from lack of use. There's case law to support that.

(A.R. 56-59)(emphasis added). Therefore, Respondents' claim that Petitioner's counsel stated that “[t]here is no express grant or reservation” for the right-of-way (*Respondents' Brief*, p. 17) is simply wrong.

VI. PETITIONER'S RIGHT-OF-WAY IS NOT DEPENDENT ON THE CREATION OF A "ROADWAY."

The existence of the right-of-way is determined by the severance deed, not the creation or existence of an actual roadway. "[T]here 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). Therefore, for the reasons set forth in Parts I and II of this section, *supra*, it was not incumbent upon Petitioner to prove that the right-of-way was ever opened.

VII. THE "BACK ROAD" IS INSUFFICIENT FOR PETITIONER'S INTENDED USE OF THE REAL ESTATE HE PURCHASED.

Petitioner testified in the trial court that the "back" right-of-way was insufficient for his timbering and construction purposes, for which he purchased the three lots. Petitioner is a professional logger who purchased the lots for the purpose of removing the timber for sale from the lots and building his home there. Petitioner testified that, due to the steep grade, topography, and obstructions in the "back" right-of-way, he did not have enough clearance to get the necessary equipment in and out of the three lots without the benefit of the "front" right-of-way. The right-of-way added value to Lot 6 (which is likely the reason Lot 6 was sold for 1/6th more than Lots 3 and 5 (*see Petitioner's Brief*, p. 6)). The denial of Petitioner's right-of-way by Respondents deprived Petitioner from moving equipment, building his residence, and extracting timber from all three lots, causing him damages. Respondents' counsel claims that the respondent individuals were able to construct a garage using the "back" right-of-way. Assuming, *arguendo*, that this is true, a garage is not a house and does not require the same

equipment as does foundation work and commercial logging, and such a claim does not provide “evidence” that the back right-of-way is “just as good,” as Respondents argue. (*Respondents’ Brief*, p. 11). The reference to the statement of Mr. Fitzgerald does not control the issue, as he never attempted to build a house on the lots, as his home is located on a parcel below them. Nor has any other previous owner attempted to do so prior to Petitioner, as all three lots are unimproved. Accordingly, Petitioner’s use for which he purchased Lot 6 is dependent upon, and essential to, the “front” right-of-way.

VIII. PETITIONER’S EXPERT WAS CLEAR THAT THE TERMINI OF THE RIGHT-OF-WAY AT ROUTE 50 COULD ONLY BE IN THE LOCATION PROFFERED BY PETITIONER.

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. 204-215). Petitioner’s expert testified multiple times that Petitioner’s “front” right-of-way, which is thirty feet in width, could only link to U.S. Route 50 at the location proffered by Petitioner. *Id.* Respondents are simply attempting to muddy the waters in arguing that “[t]here was another road nearby in existence at the time of conveyance crossing land leased by the developer.” (*Respondents’ Brief*, p. 19). Assuming, *arguendo*, that this statement is correct, this is not the location of the right-of-way as reconstructed by the original surveyor from existing plats of record and the unrecorded “Plat of Subdivision.” (A.R. 68-71). A developer is not going to have a road platted in a subdivision over property held by lease. Because the developer only owned thirty feet of land frontage along Route 50 at that location at the time of the original conveyance of Lot 6 (A.R. 9), “that’s the only place it could go.” (A.R. 215, line 15). This was not refuted by any actual evidence proffered by Respondents. Although Respondents proffered a version of the plat at A.R. 9 with their counsel’s hand-drawn lines on it

(A.R. 82), the course of the lines indicate a path crossing over land not even belonging to the developer. It makes no sense that the developer would intend to place a right-of-way for the benefit of the subdivision with no access to any other road without crossing over two separate parcels of land the developer did not even own. Accordingly, the location of the right-of-way was not a mere “assumption,” as Respondents claim, but was determined by a professional surveyor who was recognized as an expert by the trial court and platted to surveys entered into evidence at trial. (A.R. 69-71).

IX. THE CASE LAW CITED BY RESPONDENTS IS INAPPLICABLE TO THIS CASE.

Respondents argue that *Rose v. Fisher*, 130 W. Va. 53, 42 S.E.2d 249 (1947) “offers that the land outside the plat cannot be located or identified and thus not controlled by the plat” and that “[t]his is helpful in the present matter in that the easement ‘outside the plat’ cannot be identified and would therefore be void if it ever existed.” (*Respondents’ Brief*, p. 10). In *Rose*, this Court rejected a claim raised by the plaintiffs that they had a right to open and use an alley located between two lots in an existing subdivision to access the parent tract because there was no public dedication. *Rose*, 130 W. Va. at 54, 62, 42 S.E.2d at 249, 254. However, “[t]he plaintiffs’ land [was] not a part of the [subdivision], according to the plat . . . [but rather] was owned by [the developer] as a part of the same tract in which the [subdivision] lay at the time it was surveyed and the plat prepared and recorded.” *Id.* at 55, 250. In other words, the grantees of the parent tract bordering a subdivision sought to avail themselves of an easement claimed over an alley within the subdivision leading to an unconstructed, proposed road platted for the benefit of the subdivision. This is essentially the reverse scenario from this case. Here, Petitioner is claiming the use of a right-of-way partially platted an attached to his predecessor’s deed, within

what was intended to become the subdivision; Respondents own the remainder retained by the common source of title, *i.e.*, the developer, at the time of severance of Petitioner's lots. Here, the surveyor who platted Petitioner's lots (as well as other lots intended to become part of Claysville Heights subdivision) testified that he was able to identify the exact location of the right-of-way and platted it on surveys which were entered into evidence at trial. (A.R. 69-71). *Rose* is further distinguishable from this case in that the *Rose* Court could not find "that there was any intention on the part of [developer] in recording the plat to establish ways of ingress or egress to his hill or back land." *Id.* at 62, 254. Here, it was clearly the intent of the developer to grant the "front" right-of-way to Lot 6, as shown on the plat attached to the severance deed and as testified to by the surveyor, who was in direct contact with the developer at the time the lots were originally conveyed. (A.R. 21; 163, 209-2010). It was also the intent of the developer for the right-of-way to "continue on up to service other parcels" of the subdivision, which never materialized. (A.R. 163, lines 3-12). Accordingly, *Rose* is inapplicable to the facts presented by this case to the extent argued by Respondents.

Similarly, another case cited by Respondents to argue that "a reservation for the benefit of other lot owners is not an express easement," *Husson v. Teays Valley Indus. Park Owners & Users Ass'n*, No. 15-0088, 2016 WL 1417863, at *1 (W. Va. Apr. 8, 2016) (memorandum decision), is distinguishable from this case. In *Husson*, the defendant petitioners' deed stated "[t]here is reserved from the above conveyance eight feet along the lane *as an outlet of the other lots in the division.*" This is the *only* language in petitioners' deed referencing what is now known as Erskine Lane." *Id.* at *1 (emphasis added). The trial court concluded that this language "did not create an express easement because it reserved an outlet for 'other lots in the subdivision'" and found that: (1) "unlike the owners of the other lots, it was not necessary for

petitioners to use Erskine Lane as an outlet” and (2) that the lane in question did not abut the petitioners’ land, as there was a gap of two feet between the land and the lane. *Id.* at *2. This Court found that the language used in the defendants’ deed “conditions or limits the easement based on whether the owner requires an ‘outlet’ from their property.” *Id.* note 7, at *5. In this case, the reservation is “for the benefit of the subdivision” and “for the use and benefit of all owners of property whose source title is derived from the Grantors,” the latter of which includes the Petitioner and the Respondents. (A.R. 18 and 19). Although the subdivision was never completed or dedicated to the public due to the developer’s bankruptcy, Lots 3, 5, and 6 were separately conveyed as lots to “Claysville Heights,” as shown on the plats referenced in their respective legal descriptions and attached to and recorded with each such deed. (A.R. 10-21). The “front” right-of-way is depicted on the plat and legal description to Lot 6. Accordingly, *Husson*, a memorandum decision, is likewise inapplicable to the facts presented by this case to the extent argued by Respondents.

CONCLUSION

For the reasons set forth in the **Petitioner’s Brief** and in this reply, the Petitioner respectfully requests that this Honorable Court reverse and remand the circuit court’s **Trial Order**, entered June 26, 2019.

Respectfully submitted,

JAMES SCOTT KUHN,
PETITIONER, BY COUNSEL.

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