IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0803

JOHN R. DOSCH, individually and as Trustee of the John R. Dosch Revocable Trust,

Petitioner,

v.

RICHARD E. DUNN and CHERYL C. DUNN,

Respondents.

Appeal from a final order of the Circuit Court of Ritchie County (16-C-48)

BRIEF OF PETITIONERS JOHN R. DOSCH, individually and as Trustee of the John R. Dosch Revocable Trust

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Assignment of Error No. 2 - The trial court erred by granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion for summary judgment on the grounds that the Dunns had a prescriptive easement through the application or res judicata, collateral estoppel, or virtual representation.

Assignment of Error No. 3 - The trial court erred by denying Mr. Dosch's motion to amend the judgment to correct clear errors and grant summary judgment in favor of Mr. Dosch.

II. STATEMENT OF THE CASE

A. The relevant properties and the Lantz Roadway.

Defendants/Appellants, Mr. Dosch (named as a defendant in his individual and trustee capacity), acts as trustee of the John R. Dosch Revocable Trust, which owns approximately 35 acres of property on the east side of SR 53/1 in Ritchie County, West Virginia; said property was formerly owned by a Mr. Lantz (the "Lantz Property"). (R. at 148,[1] Deposition of John Dosch ("Dosch Depo.") 17:17–18:4; R. at 23, Compl. Ex. C.). An approximately quarter-mile private roadway (the "Lantz Roadway"), which is the subject of this current dispute, winds throughout the Lantz Property. (R. at 150, Dosch Depo. 25:3–8.)[2]

Plaintiffs, the Dunns, own a parcel of property (the "Dunn Property") to the west of the Lantz Property. (*See* R. at 2, 26, Compl. ¶¶ 5, 7, Ex. D.) The Dunns do not live on the property, but do maintain a cabin there. (R. at 219, Deposition of Richard Dunn ("Dunn Depo."), 13:5–13.) Although the vast majority of the Dunn Property and the cabin are on the west side of SR 53/1, a

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[1] (R. at ___) denotes citation to the relevant page of the Joint Appendix submitted to this Court by the parties.

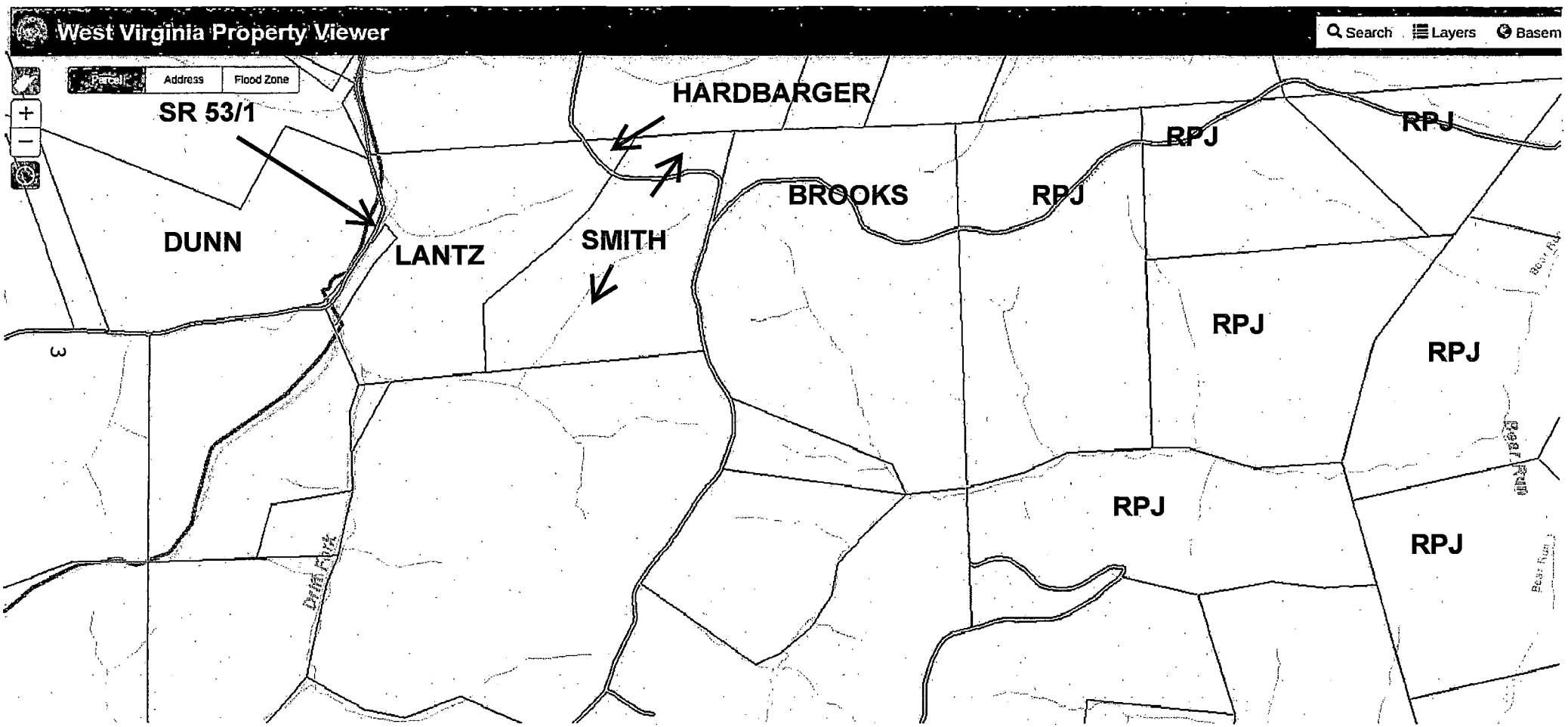
[2] Stevie and Buck Hardbarger also bought a corner of what was formerly the Lantz Property. (R. at 147, Dosch Depo., 15:21–24.) The Lantz Roadway stops when it meets the portion of the Lantz Property now owned by the Hardbargers. (R. at 147, Dosch Depo., 16:3–10.)

recent survey reflects that a sliver of the Dunns' property extends to the east of SR 53/1. (R. at 3, 26, Compl. ¶ 16, Ex. D.) Within that sliver of property on the east of SR 53/1 is a "small portion of roadway" that connects the Lantz Roadway to SR 53/1. (R. at 26, Compl. Ex. D; R. at 155, Dosch Depo. 45:10-13.)

After the Lantz Roadway weaves east from SR 53/1 through the Lantz Property and up a hill, it dead-ends at the boundary of the Lantz Property into a T-intersection with an entirely different road known as Ridge Road. (R. at 147, 151, Dosch Depo. 16:11–13, 29:9–12, 31:14–19.) Ridge Road then continues east and intersects with an old logging road that provides access to the "Smith Property," the "Brooks Property," and then a series of properties owned by RPJ Enterprises ("RPJ Properties"), an entity of which Mr. Dosch is a manager. (R. at 145, 148, 152, 173, Dosch Depo. 8:5, 19:19–20:3, 33:13–14, Ex. 2.) Mr. Dosch owned the RPJ Properties before they were transferred to RPJ Enterprises. (R. at 145, Dosch Depo. 7:9–8:1.)

At his deposition, Mr. Dosch drew a map of the area properties, the Lantz Roadway, Ridge Road, and the old logging road, which is included in the record. (*See* R. at 173, Ex. 2 to Ex. 2 to Dosch Motion for Summary Judgment.) And, simply for ease of the Court's reference, the following page is a map taken from the State of West Virginia's Property Viewer with labels showing the Dunns' Property starting in the west, and then moving east over SR 53/1, the Lantz Property, the Smith Property, the Brooks Property, and then the RPJ Properties before reaching Bear Run.[3]

[3] Although Mr. Dosch provides this map simply as a way to help orient the Court and not as a form of evidence, the Court may take judicial notice of the geography of the state, its lines and sub-divisions. *Deepwater Ry. v. Lambert*, 54 W.Va. 387, 390, 46 S.E. 144 (1903). This is especially true when the information is from the property viewer on the State's website, which is capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned. *See* 1 Handbook on Evidence for West Virginia Lawyers § 201.04 (2020) (citing *Farris v. Comm'r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 60247 (S.D. Ohio Apr. 30, 2012).)


West Virginia Property Viewer
Search
Layers
Basem
Parcel
Address
Flood Zone
SR 53/1
HARDBARGER
DUNN
LANTZ
SMITH
BROOKS
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Mr. Dosch maintains a hunting cabin on one of the RPJ Properties. (R. at 154, Dosch Depo. 42:5–11.) He uses the Lantz Roadway to access the RPJ Properties and his hunting cabin. (R. at 151, Dosch Depo. 30:5–18.) Mr. Dosch maintains locked gates on the Lantz Roadway where it ends at the Lantz Property boundaries on the west and at the top of the hill on the northeastern boundary. (R. at 149–50, Dosch Depo. 24:20–25:8.) The other owners of the Smith and Brooks Properties that are also located east on the old logging road have the ability to open the gates on the Lantz Roadway so they may use the Lantz Roadway to access SR 51/3. (R. at 150, Dosch Depo. 26:14–27:13.)

Since Mr. Dosch bought the Lantz Property, he widened the Lantz Roadway and added "enormous amounts of gravel" to it. (R. at 158, 152, Dosch Depo. 57:15-58:4, 35:5–14.) In some places, Mr. Dosch has nearly doubled the width of the Lantz Roadway from when Mr. Lantz owned it, such that it is now wide enough to drive a dump truck through it. (R. at 158, Dosch Depo. 57:20-58:4.) Further, at some point when Lantz owned the property, a new fork in the Lantz Roadway about two-thirds up the hill because the road got so bad the original way. (R. at 157, Dosch Depo. 55:13–56:17.)

B. <u>The Dunns' alleged use of the Lantz Roadway.</u>

The Dunns purchased the Dunn Property in December 1986. (R. at 2, 7, Compl., ¶ 5, Ex. A; R. at 29, Answer, ¶ 1.) The Dunns allege in their complaint that they began using the Lantz Roadway "since purchasing their property in 1986." (R. at 4, Compl., ¶ 20; *see* R. at 217, Dunn Depo. 11:13–14 ("[w]hen I purchased property up off Drift Fork Road, I used that roadway immediately").) Mr. Dunn later claimed, however, to have first used the Lantz Roadway in 1985. (R. at 219, Dunn Depo. 13:3–4.) Mr. Dunn testified that he used the roadway at least a few times every month until Mr. Lantz put gates up in the early 1990s, at which point the Dunns stopped using the Lantz Roadway. (R. at 217, 219–20, Dunn Depo., 11:13–24, 13:19–14:10.) Mr. Dunn

claims that the gates temporarily came down in late 2004 and that he used the Lantz Roadway just a couple more times after that until Mr. Dosch put the gates back up[4] around 2011. (R. at 225–26, Dunn Depo. 19:5–20:17.) Mr. Dunn asked Mr. Dosch if he could use the Lantz Roadway in the 2012–2014 time period, and Mr. Dosch said no because there was no reason for Mr. Dunn to be back in that area. (R. at 228–29, Dunn Depo. 22:21–23:12.)

C. Previous litigation regarding the Lantz Roadway.

After Mr. Lantz placed gates on the Lantz Roadway, the then-owners of the Smith, Brooks, and RPJ Properties who had used the Lantz Roadway to access their eastern properties from SR 53/1, sued Mr. Lantz in Circuit Court. (*See* R. at 166–72, October 7, 2004 Order, Circuit Court of Ritchie County Civil Action Nos. 99-C-45 and 00-C-27 ("2004 Order").) The Dunns, who did not use the Lantz Roadway to access their property because their property was on the west side of SR 53/1, did not join as a party. (R. at 220–21, Dunn Depo. 14:23–15:1.) Mr. Dunn had heard that the case had started, but he made no effort to join in the litigation. (R. at 221, Dunn Depo. 15:7–16.) Similarly, after it was over, Mr. Dunn heard that the litigation had concluded but did nothing in response to it. (R. at 224, Dunn Depo. 18:2–17.)

At the conclusion of that litigation, Judge Holland issued an order concluding that "[t]he Plaintiffs [Dosch, Smith, Brooks] have established the existence of a prescriptive easement." (R. at 170, 2004 Order, at 5.) Therefore, Judge Holland held that "[t]he Plaintiffs [Dosch, Smith, Brooks] have a right of way over the roadway that should not be restricted in any way" and that the roadway "shall be subject to use by all the Plaintiffs, [Mr. Lantz], their respective families, social or business invitees, their heirs, assigns, and/or successors for ingress and egress and for

[4] Mr. Dosch testified that Mr. Lantz never took his gates down in 2004, and when a Ms. Somerville bought the property she kept the gates up but provided Mr. Dosch with access to the Lantz Roadway pursuant to a court order. (R. at 153–54, Dosch Depo. 39:5–41:22.)

access to and from the public roadway." (R. at 171, 2004 Order, at 6.) Judge Holland also permanently enjoined "Mr. Lantz, his agents, servants, and/or employees . . . from erecting or placing any barrier, natural or man-made, upon the subject roadway[.]" (*Id.*)

D. The current lawsuit.

On August 11, 2016, the Dunns filed a complaint against John R. Dosch, individually and as trustee of the John R. Dosch Revocable Trust (collective "Mr. Dosch" for purposes of this brief), asserting three counts: (1) collateral estoppel; (2) easement by prescription; and (3) injunctive relief. (*See* R. at 1, Compl.) Dosch answered on August 26, 2016. (*See* R. at 29, Answer.)

After discovery, the Dunns filed a motion for summary judgment, arguing that, based on the deposition testimony of Mr. Dunn and the findings of fact and conclusions of law set forth in the 2004 Order, they were entitled to a prescriptive easement for the Lantz Roadway. (R. at 48–49, Oct. 29, 2018 Mot. for Summ. J., 14–15.) The Dunns argued that *offensive* collateral estoppel entitled them to the benefit of the 2004 Order, despite the fact that the Dunns were not parties to the 2004 action and the Dunns' use of the roadway was not addressed in the 2004 action. (R. at 46–47, *id.* at 12–13.) They asked the trial court to issue an order finding that the Dunns had a prescriptive easement over the roadway as identified in the 2004 Order and to issue an injunction prohibiting Mr. Dosch from erecting or maintaining any barrier on the roadway. (R. at 49, *id.* at 15.)

Mr. Dosch opposed the Dunns' motion and moved for summary judgment in his favor. (R. at 188, Jan. 3, 2019 Mot. for Summ. J.) Mr. Dosch responded that collateral estoppel did not apply to the Dunns' benefit on any issue determined in the 2004 Order. (R. 120–23, *id.* at 4–7.) Mr. Dosch further argued that the Dunns failed to produce evidence to support the elements for a prescriptive easement in their favor. (R. at 123–31, *id.* at 7–15.)

After the parties submitted proposed findings of fact and conclusions of law, the trial court issued an order granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion. (R. at 331, April 20, 2020 Order ("Order"), p. 24.) The trial court concluded that, based on the evidence in this case and the findings from the 2004 Order, the Dunns have a prescriptive easement over the roadway. (R. at 327–28, Order, Conclusions of Law ¶¶ 14–17.) The trial court also seemed to conclude that res judicata (R. at 322–25, Order, Conclusions of Law 5-11), collateral estoppel (R. at 325–27, Order, Conclusions of Law 12–13), and virtual representation (R. 323, 328–30, Order, Conclusions of Law, 9, 18–20) all applied in some manner to the benefit of the Dunns regarding the 2004 Order. The trial court ordered that the Dunns, their family, their invitees, their heirs, assigns, and successors have a right of way over the roadway through prescriptive easement and permanently enjoined Mr. Dosch from erecting any barrier on the roadway. (R. at 330–31, Order, pp. 23–24.)

Mr. Dosch filed a motion to amend the Order pursuant to Rule 59(e), arguing that the trial court made several clear errors and requesting that the Court grant the Defendant's motion for summary judgment or to set aside the judgment and find that there are genuine issues of material fact that require an evidentiary hearing. (R. at 341, May 15, 2015 Motion to Amend J., p. 9.) Mr. Dosch argued that the Dunns had failed to present evidence that could establish a prescriptive easement and that the various doctrines of res judicata, collateral estoppel, and virtual representation did not apply here. (*See id.*) The Dunns opposed the motion to amend. (R. at 343, May 28, 2020 Memo. in Opp.) On September 16, 2020, the trial court denied the motion. (R. at 351, September 16, 2020 Order.)

III. SUMMARY OF ARGUMENT

The Dunns list three counts in their complaint, (1) collateral estoppel; (2) easement by prescription; and (3) injunctive relief. In reality, however, only easement by prescription is an

actual cause of action. Collateral estoppel is not a cause of action, but a legal doctrine that may help resolve or bar litigation of issues within a cause of action. *Charleston Academy of Beauty Culture, Inc. v. W. Virginia Human Rights Comm.*, No. 11-1286, 2012 W. Va. LEXIS 552, at *32 (May 25, 2012) (memorandum decision) ("Collateral estoppel is a legal doctrine which can prohibit the relitigation of issues. . ."). An injunction is a remedy for a cause of action. *Standiford v. Rodriguez-Hernandez*, N.D.W.Va. Civil Action No. 5:10CV24, 2010 U.S. Dist. LEXIS 96743, at *10 (Sep. 15, 2010) ("A request for injunctive relief does not constitute an independent cause of action; rather the injunction is merely the remedy sought for the legal wrongs alleged in the . . . substantive counts") (quoting *Pinnacle Min. Co., LLC v. Bluestone Coal Corp.*, 624 F. Supp. 2d 530, 539-40 (S.D. W. Va. 2009)).

Thus, the two primary substantive questions that need to be answered in this appeal are:

(1) Did the Dunns provide evidence to create a genuine issue of material fact regarding whether their use of the Lantz Road constituted a prescriptive easement?

(2) Does either res judicata or collateral estoppel apply here regarding the 2004 Order, and, if so, does the application of either doctrine create a genuine issue of material fact regarding all elements of a prescriptive easement?

The Court erred in answering both questions in the Dunns' favor and granting the Dunns summary judgment and denying summary judgment to Mr. Dosch, and then compounded that error by denying Mr. Dosch's motion to amend the judgment.

The Dunns' threadbare evidence of <u>their</u> use of the Lantz Roadway fails to create a genuine issue of material fact regarding whether the Dunns can meet their burden of establishing by clear and convincing evidence that <u>they</u> hold a prescriptive easement. Primarily, there is no evidence that the Dunns used the Lantz Roadway for a continuous and uninterrupted 10-year period at any

point. There is no evidence that the Dunns' alleged short-lived use of the Lantz Roadway was adverse to the owner of the Lantz Property. Finally, there is insufficient evidence regarding the parameters of the portions of the Lantz Roadway that the Dunns allegedly used for a short period of time. The trial court did not recognize this lack of evidence and did not analyze whether the Dunns met each element of prescriptive easement and, thus, it therefore erred in not granting summary judgment to Mr. Dosch against the Dunns.

Bizarrely, rather than provide evidence of their own use of the Lantz Roadway to establish a prescriptive easement, the Dunns attempted to establish a prescriptive easement by arguing collateral estoppel and pointing to evidence regarding how other people used the Lantz Roadway in such a manner that entitled those other people to a prescriptive easement. That is not how prescriptive easements work. The trial court erred by adopting the Dunns' misguided arguments and applying the disfavored doctrines of offensive collateral estoppel and offensive res judicata (with the aid of the also disfavored doctrine of virtual representation). These disfavored doctrines do not apply, and certainly may not be applied offensively, when the Dunns were not parties to the previous litigation and where entirely different claims and issues were raised and litigated in the previous litigation. The Dunns' use of the Lantz Roadway was never at issue or litigated in the previous litigation, and no party to the previous litigation had any reason to litigate over the Dunns' use or rights to the Lantz Roadway. The facts, evidence, and claims are different in the two actions, and even the elements of prescriptive easement have changed in West Virginia between 2004 and 2020.

Finally, even if collateral estoppel could apply here—which it cannot—regarding some of the broader factual issues decided in the 2004 Order, those facts still do not establish a prescriptive

easement in favor of the Dunns and the trial court failed to explain how those general facts met the elements necessary to establish prescriptive easement.

The Dunns' arguments and the trial court's decision seem to derive from a fundamental misunderstanding of the 2004 Order. Both the Dunns and trial court treat the 2004 Order as if it created some public road or right-of-way to which everyone in the area automatically has a right. It did not, and it could not, as there is no such thing as a public prescriptive easement and the elements for establishing a public road through general public use are substantially different than the private prescriptive easement analysis applied in the 2004 Order. The 2004 Order established only that the plaintiffs in the previous litigation established a prescriptive easement and had a right to use the Lantz Roadway. Anyone else, including the Dunns, are still required to prove that their use of the Lantz Roadway meets all of the elements of a prescriptive easement.

The Court should have denied the Dunns motion for summary judgment and instead granted summary judgment to Mr. Dosch. The Court compounded that error by failing to correct its flawed decision upon consideration of Mr. Dosch's motion for reconsideration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for a Rule 19(a) argument, because the trial court misapplied settled law regarding prescriptive easements, collateral estoppel, and res judicata when it granted summary judgment in favor of the Dunns, denied summary judgment to Mr. Dosch, and denied Mr. Dosch's motion to amend the judgment; and, the Court's rulings were against the weight of the evidence.

V. ARGUMENT

A. Standard of Review.

This appeal arises from the trial court's grant and denial of summary judgment. Such decisions are "reviewed de novo." *Mt. Lodge Assn. v. Crum & Forster Indemn. Co.*, 210 W.Va.

536, 541, 558 S.E.2d 336 (2001) (quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). It also arises from the trial court's denial of Mr. Dosch's Rule 59(e) motion, which requires the application of the same de novo standard of review as the underlying summary judgment decision on which the motion was based. Syl. Pt. 1, *Wickland v. American Travellers Life Ins.*, 204 W.Va. 430, 513 S.E.2d 657 (1998).

A grant of summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. Rule of Civil Procedure 56(a). When reviewing a grant of summary judgment, a court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter*, 192 W.Va. at 192.

"[A] genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). "If the evidence favoring the nonmoving party is 'merely colorable . . . or is not significantly probative' a genuine issue does not arise, and summary judgment is appropriate." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60-61, 459 S.E.2d 329, 337-338.

Applying this standard, the Court should review the trial court's decision de novo and hold that the trial court erred in granting summary judgment to the Dunn's and in denying summary judgment to Mr. Dosch.

Assignment of Error No. 1 - The trial court erred by granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion for summary judgment on the grounds that the Dunns had a prescriptive easement over the real estate of Mr. Dosch, because the Dunns failed to present evidence that their use of the property met the elements of prescriptive easement.

The trial court granted the Dunns' motion for summary judgment and denied Mr. Dosch's motion for summary judgment, finding that the Dunns had a prescriptive easement over the Lantz Roadway on Mr. Dosch's property. (R. at 328, Order, p. 21) (finding plaintiffs are "entitled to a finding they have a prescriptive easement for the roadway.") The trial court erred, however, because the Dunns failed to provide evidence to create a genuine issue of material fact that their use of the Lantz Roadway met each of the elements necessary to establish such a right.

A. Prescriptive easements are disfavored. To succeed on a prescriptive easement claim, the Dunns must prove all elements by clear and convincing evidence.

Generally, "[p]rescriptive easements are based on the notion that if one uses the property of another for a certain period without permission and the owner fails to prevent such use, the prolonged usage should be treated as conclusive evidence that the use is by right." *O'Dell v. Stegall*, 226 W.Va. 590, 605, 703 S.E.2d 561 (2010) (citing Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, § 5:1 (2010).). A prescriptive easement "rewards the long-time user of property . . . it rewards the person who has made productive use of the land." *O'Dell*, 226 W.Va. at 605 (citing *Restatement (Third) of Property (Servitudes)*, § 2.17, cmt. c.).

Prescriptive easements, however, are disfavored in the law. *O'Dell*, 226 W.Va. at 608-609. Thus, the Dunns have the burden of proving that their use of the Lantz Roadway met all elements of a prescriptive easement by clear and convincing evidence. *Id.* at 608. The elements of a prescriptive easement claim are: "(1) the adverse use of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used." *Id.*

B. The Dunns failed to present evidence to create a genuine issue of material fact regarding whether they would be able to meet their burden of proving all elements of a prescriptive easement by clear and convincing evidence.

The Dunns failed to meet their burden of providing clear and convincing evidence for all elements necessary to establish a prescriptive easement. The trial court only summarily concluded that "Plaintiffs are entitled to a finding that they have a prescriptive easement for the roadway" based on the evidence. (R. at 328, Order, p. 21, Conclusions of Law ¶ 16.) Indeed, the Court broadly held that because "the existence and location of a right-of-way easement has been previously established. . . the issue of whether the plaintiffs have independently established the same is moot." (R. at 330, *id.* at ¶ 20.) Based on the lack of evidence, the trial court erred in granting summary judgment to the Dunns and should have granted summary judgment to Mr. Dosch instead.

1. The Dunns failed to provide evidence to create a genuine issue of material fact that their use of the Lantz Roadway was continuous and uninterrupted for at least ten years.

Perhaps the most glaring error in the trial court's decision was the complete lack of evidence that the Dunns' use of the property ever occurred continuously for ten uninterrupted years. "The term 'continuous' means that an adverse possession has not been abandoned by the claimant during the ten-year period; 'uninterrupted' means that no other party, unrelated to the party claiming adverse possession, has broken the chain of possession." *O'Dell*, 226 W.Va. at 615-616. "For a use to be continuous, it is critical that there be no break in the attitude of mind of the claimant or the claimant's predecessor which would amount to a recognition of subordination to the servient owner's consent or an abandonment of the use in response to the servient owner's demand." *O'Dell*, 226 W.Va. at 616. "A claimant's adverse use may be interrupted by the owner of the servient estate physically blocking the way during the prescriptive period" and when the owner, by either threats or physical barriers, succeeds in causing a discontinuance of the use, no

matter how brief, the running of the prescriptive period is stopped." *Id.* (quoting *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005).)

The trial court seemed to place great importance on the fact that Mr. Dunn testified that he first began using the Lantz Roadway in 1985. (R. at 328, Order, Conclusions of Law ¶ 16.) ("Mr. Dunn testified that he first began using the roadway over Lantz's property and accessing Bear Run in 1985."); R. at 352, Order on Motion to Amend, p. 2 (repeating again that Plaintiffs were "entitled to a prescriptive easement based. . . on the Plaintiff's testimony that he had been using the roadway since 1985.") But, the trial court failed to analyze what occurred after 1985 and how Mr. Dunn's alleged use was interrupted within the 10-year period by the early 1990s.

Mr. Dunn testified that he used the Lantz Roadway starting in 1985, although he also alleged in his complaint and testified that he did not start using the Lantz Roadway until after he purchased his property, which occurred in December of 1986. (*See* R. at 4, Compl., ¶ 20; Dunn Depo. 13:3–4.) Regardless, Mr. Dunn testified that he stopped using the Lantz Roadway when Mr. Lantz, the property owner, put in locked gates in the early 1990s. (R. at 219–20, Dunn Depo., 13:19–14:10.) The Dunns cannot establish ten years of continuous and uninterrupted use because Mr. Lantz's actions stopped the prescriptive period. *See O'Dell*, 226 W.Va. at 616. Mr. Dunn alleges that he used the Lantz Roadway only a few times after it reopened in 2004 (although whether it ever re-opened is in dispute), but stopped using it again in 2011 when Mr. Dosch put the locked gates back up. (R. at 225–26, Dunn Depo. 19:5–14, 19:18–20:4). There is no genuine issue of material fact that the Dunns failed to use the Lantz Roadway for ten continuous and uninterrupted years.

2. The Dunns failed to provide evidence to create a genuine issue of material fact that their use of the Lantz Roadway was adverse to the true owner.

In *O'Dell*, this Court overruled a long line of West Virginia cases and established that a plaintiff's use of another's property must be adverse to the true owner in order to establish a prescriptive easement. *O'Dell*, 226 W.Va. at 615 n. 28 ("[t]o the extent our prior cases suggest that proof of adverse use is not required, or that the continuous and uninterrupted use of another's land for ten years is presumed to be adverse, they are hereby overruled."). This Court explained that a plaintiff seeking a prescriptive easement must prove that "[h]is or her use of the servient estate was 'adverse' to the rights of the true owner." *Id.* at 609. Adverse use means "a wrongful use, made without the express or implied permission of the owner of the land." *Id.* at 614.

Here, during the 1985 to early 1990s time period, Mr. Dunn testified that "the person who owned the property that Mr. Dosch now owns never had an issue with [the Dunns using it]." (R. at 217, Dunn Depo. 11:13-18.) Mr. Dunn testified that the previous owner's name was Mr. Ray and that Mr. Ray knew he was using the Lantz Roadway and never objected to it. (R. at 235–36, Dunn Depo. 29:24–30:12.) Mr. Dunn further testified that, in the beginning, Mr. Lantz did not have an issue with Mr. Dunn using the Lantz Roadway and never objected to it until he decided to put the gates up. (R. at 237, Dunn Depo. 31:1-4; *see also* R. at 318, Order, Findings of Fact ¶ 23.)

This testimony does not establish that Mr. Dunn's use of the Lantz Roadway was adverse to the owner. In *O'Dell*, this Court found that similar evidence failed to demonstrate that the use of a gravel lane, by the petitioner and his predecessors, was "in any way wrongful toward, or without the express or implied permission of, the owner of the servient estate." *O'Dell*, 226 W.Va. at 621. The Court reiterated that "[t]he plaintiff was required to prove that his actions . . . amounted to trespassing, and that the owner . . . would have wanted to prevent the plaintiff's use[.]" *Id.* The Court explained that the O'Dell plaintiff had failed to prove that the "use of the gravel lane was

anything more than a neighborly accommodation by the owner of the gravel lane." *Id.* Here, Mr. Dunn's testimony similarly indicates a "neighborly accommodation" by the previous owners of the Lantz Property and similarly cannot constitute adverse use.

Mr. Dunn also speculated that the owner before Mr. Lantz permitted people to use the road because "[h]e understood at that point at that time the roadway was a community roadway. And everyone used it." (Dunn Depo. 11:13-24; Dunn Depo. 45:5 – 7 ("it was a community road and I believe I have a right to use it for that.").) As this Court has explained, however, such a theory undercuts a prescriptive easement claim and instead raises "**a presumption that the use is permissive.**" *O'Dell*, 226 W.Va. at 621 n. 36 (citing *Town of Paden City v. Felton*, 136 W.Va. at 137, 66 S.E.2d at 287, Bruce & Ely, § 5:9, and *Hall v. Strawn*, 108 Idaho 111, 112-13, 697 P.2d 451, 452-53 (Ct.App. 1985).) (emphasis added) In other words:

> Where . . . the same degree of use upon which the adverse claim is based has been exercised indiscriminately by the general public, individual acquisition of a prescriptive easement has generally been held impossible. [] In such a case, the claimant must perform some act whereby the adverse nature of the claim is clearly indicated to the owner of the servient estate.

Id. (quoting *Hall*, 108 Idaho 111, 112-13.) Here, the fact that the general public allegedly used the Lantz Roadway alongside the Dunns undermines their claim for a prescriptive easement.

The Dunns failed to present evidence sufficient to create a genuine issue of material fact that their use of the Lantz Roadway was ever adverse to the owner, and therefore cannot establish a prescriptive easement.

3. The Dunns also failed to establish "the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used."

The trial court declined to independently determine the location of the prescriptive easement and instead broadly found that "the entire roadway shall be subject to use by the Plaintiffs . . . their respective families, social or business invitees, their heirs, assigns, and/or successors."

(R. at 330-31, Order, Conclusions of Law pp. 23–24.) West Virginia law is "clear" that "[w]hen an easement has been acquired by prescription, the extent of the right so acquired is measured and determined by the extent of the user out of which it originated" and "the precise location of an easement sought to be established should be described either by metes or in some other way." *O'Dell*, 226 W.Va. at 619 (quoting Syl Pt. 4, *Foreman v. Greenburg*, 88 W.Va. 376, 106 S.E. 876 (1921) and Syl. Pt. 1, in part, *Nutter v. Kerby*, 120 W.Va. 532, 199 S.E. 455 (1938)).

Here, the trial court simply stated that the Dunns generally have a right to use the entire roadway. But, even if they did have a prescriptive easement based on their previous use—which they do not—it is undisputed that the roadway has been improved and doubled in width since that time. (R. at 158, Dosch Depo. 57:20-58:4.) Moreover, there is evidence that the roadway has forked and now follows a new path since the time that the Dunns allegedly used the Lantz Roadway, because the old route got so bad. (R. at 157, Dosch Depo. 55:13-54:10.) There is no evidence regarding the width of the roadway that the Dunns allegedly used in the 1980s, and neither they nor the trial court established metes and bounds or any other parameters of the alleged prescriptive easement.[5]

The Dunns completely failed to submit evidence sufficient to create a genuine issue of material fact regarding whether they could establish each element of prescriptive easement through clear and convincing evidence, and the trial court therefore erred in granting them summary judgment and denying summary judgment to Mr. Dosch.

Assignment of Error No. 2 - The trial court erred by granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion for summary judgment on the grounds that the Dunns

[5] Based on this, it is also unclear whether the trial court's decision extends the Dunns' prescriptive easement continues onto the Ridge Road or the old logging road that goes to the Smith, Brooks, and RPJ Properties. As a matter of law, it appears that it could not, as those roads are located on different properties and those landowners are not named defendants in this action. But, the Dunns lack of evidence and the trial court's lack of specificity does not make this clear.

had a prescriptive easement through the application or res judicata, collateral estoppel, or virtual representation.

In its Order, the trial court mentions three doctrines to justify applying the findings and conclusions in the 2004 Order to the benefit of the Dunns in this case: (1) Res judicata (offensive claim preclusion); (2) collateral estoppel (offensive issue preclusion); and (3) virtual representation. Both offensive issue preclusion and virtual representation are disfavored, and it is not clear that the doctrines of offensive virtual representation and offensive claim preclusion exists at all under West Virginia law and, in any event, offensive res judicata was never asserted by the Dunns. In sum, the trial court applied several disfavored legal doctrines to backfill the Dunns' lack of evidence regarding the existence of a prescriptive easement, which is similarly disfavored by law. But these doctrines cannot apply in this case and the trial court erred in finding that they did.

A. The trial court misapplied the disfavored legal doctrine of offensive collateral estoppel.

The Dunns asserted in their complaint and motion for summary judgment that collateral estoppel—not res judicata—applies, such that the 2004 Order has some preclusive effect on this action. (R. 4–5, Compl., ¶¶ 25–29; R. at 46, October 29, 2018 Motion for Summary Judgment, at 12.) Essentially, the Dunns incorrectly argue that because other landowners proved that their use of the Lantz Roadway established a prescriptive easement in their favor that the Dunns should automatically get a prescriptive easement as well. But neither collateral estoppel nor prescriptive easements work in such a fashion. The trial court erred in applying collateral estoppel at all, and then further erred by analyzing how any of the allegedly already-decided issues helped the Dunns actually meet any of the elements of a prescriptive easement.

1. Offensive collateral estoppel is disfavored in West Virginia.

Collateral estoppel is a doctrine "designed to foreclose relitigation of issues in a second suit that have actually been litigated in an earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." *W. Virginia DOT v. Veach*, 239 W.Va. 1, 10, 799 S.E.2d 78 (2017) (quoting Syl. Pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).) Collateral estoppel will apply if four conditions are met: "(1) The issue previously decided is identical to the one presented in the action in question; (2) there is final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Id.* (quoting Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

Collateral estoppel is considered to be "offensive" when, like here, "a plaintiff presses for collateral estoppel . . . on the theory that the plaintiff is using the estoppel as an affirmative device to avoid having to prove liability against the defendant." The offensive use of collateral estoppel is "generally disfavored" in West Virginia. *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 274-275, 617 S.E.2d 816 (2005).

B. <u>The requirements to apply offensive collateral estoppel are not met in this case.</u>

1. The issues previously decided in 2004 are not identical to the issues presented in the action in question.

The use of collateral estoppel was improper here because the issues decided in the 2004 Order are not identical to the issues presented in this case. As this Court has explained, issues presented in two cases are not identical "if the second action involves different facts, legal standards or procedures." *Holloman*, 217 W.Va. at 274; *see Conley*, 171 W.Va. at 591 (collateral estoppel will not apply where "the controlling facts or legal principles have changed substantially

since the earlier case.") Here, both the key facts and the legal standards are different than those applied in the previous litigation.

a. The earlier litigation necessarily focused on how the previous plaintiffs used the Lantz Roadway. This litigation must necessarily focus on how the Dunns used the Lantz Roadway.

As set forth earlier, a prescriptive easement analysis is a fact-specific inquiry regarding how the specific plaintiff used a specific piece of property to determine whether those individuals have a prescriptive right to continue using the property in that manner. *See generally O'Dell*, 226 W.Va. 590 (focusing on how a specific "user" or "person" used property). Thus, some neighbors may have a prescriptive easement over a nearby private roadway while others may not, all based on how each specific property owner used or did not use the private roadway. Other courts have recognized that granting a prescriptive easement to one neighbor does not mean every other neighbor is automatically entitled to one. *See Wheeler v. Beachcroft, LLC*, 320 Conn. 146, 168, 129 A.3d 677 (2016) ("Because some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not, depending on each lot owner's use of the lawn over a fifteen year period, all of the lot owners in the subdivision cannot be said to share the same prescriptive rights."); *Brannock v. Lotus Fund*, 2016-NMCA-030, 367 P.3d 888, ¶ 17 (denying use of collateral estoppel because "the issues in the Coombs case dealt with whether the *Coombses* had established a prescriptive easement over the disputed access road; the issues in the present case deal with whether *Plaintiffs* have established a prescriptive easement over the disputed access road.")

Thus, the previous litigation necessarily focused on how *the plaintiffs in that case* used the Lantz Roadway and this litigation necessarily focuses on how the *plaintiffs in this case*, the Dunns, used the Lantz Roadway. Their uses of the Lantz Roadway are undoubtedly different. In the previous case, the plaintiffs were a series of landowners to the east of the Lantz Property that

needed to regularly use the Lantz Roadway to access their properties; here, the Dunns do *not* own property to the east of the Lantz Property and did not need to use the Lantz Roadway to access any of the Dunn Property. The holdings of the 2004 Order make clear that the issues in that case were specific to the plaintiffs in that case, as Judge Holland found that only *the plaintiffs in that action* and not any other neighbors had a prescriptive easement over the roadway. (R. at 170, 2004 Order, Conclusions of Law ¶¶ 2–3.)

b. The legal principles surrounding prescriptive easements have changed since 2004.

The legal principles surrounding prescriptive easements have also changed since the 2004 Order. In 2010, this Court established that adverse use was required to prove a prescriptive easement and that the burden of proving adverse use is on the party asserting a prescriptive easement and it overruled a long line of cases holding otherwise. *See O'Dell*, 226 W.Va. at 615. One of the cases expressly overruled by *O'Dell* the *Post* case relied upon in the 2004 Order. *Id.* at n.28 (overruling Syl. Pt. 2, *Post v. Wallace*, 119 W.Va. 132, 192 S.E. 112 (1937)). (R. at 170, 2004 Order, Conclusions of Law ¶ 1 (applying *Post* case).) Indeed, although consistent with the law at the time, the 2004 Order does not discuss the element of adverse at all and contains no adverse use analysis and is inconsistent with current West Virginia law.

This case and the previous litigation involve different facts and different legal standards, and therefore do not present identical issues such that collateral estoppel could apply.

2. There was a final adjudication on the merits of the prior action.

Although it did not resolve the same issues or claims as presented in this case, Mr. Dosch agrees that there was a final adjudication on the merits in the previous litigation.

3. Mr. Dosch is in privity with Mr. Lantz.

As this Court explained in *Conley*, collateral estoppel originally required complete mutuality between both the plaintiff and defendant. See *Conley*, 171 W.Va. at 589. "The doctrine of mutuality has been undergoing modification," however, "as it relates to collateral estoppel." *Id.* at 590. This Court has since changed the requirements of collateral estoppel to require "the party against whom the doctrine is invoked was a party or in privity with a party to a prior action." *State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114 (1995).

Thus, although the previous litigation did not involve the same issues or claims as presented by plaintiffs in this case, and although no one had a full and fair opportunity to litigate the Dunns' claimed right to a prescriptive easement, Mr. Dosch as trustee is in privity with Mr. Lantz, the defendant in the former action, because the Dosch Trust is a subsequent owner of the Lantz property that contains the Lantz Roadway. *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938) ("Privity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the same rights of property'.")

4. No one had a full and fair opportunity to litigate Mr. Dunn's right to a prescriptive easement in the previous litigation.

The trial court erroneously concluded that Mr. Dosch conceded that he fully and fairly litigated the issues in the first action for purposes of collateral estoppel. (R. at 325, Order, Conclusions of Law ¶ 27.) This is incorrect. Mr. Dosch admitted in his answer only that he "full and fairly litigated issues concerning the access to the roadway as described above" in the previous action. (R. at 5, Compl., ¶ 29; R. at 30, Answer, ¶ 9.) While Mr. Dosch full and fairly litigated issues concerning *his* access to the Lantz Roadway in the previous litigation, he never admitted that he or any predecessor in interest full and fairly litigated *all* issues related to the Lantz Roadway, including issues related to the Dunns right to access it.

Indeed, there was absolutely no incentive for any party to litigate the Dunns' alleged right to access Lantz Road. *See Conley*, 171 W.Va. at 591 n.11 (citing Section 28 of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) (explaining that collateral estoppel does not apply when "the party sought to be precluded . . . did not have an adequate opportunity or incentive to obtain a full and fair adjudication" on an issue in the initial action. (emphasis added)). The Dunns were not parties in that action. There is no evidence that any of the plaintiffs in the previous litigation had any representative or other type of relationship with the Dunns. Unlike each of the other plaintiffs in the previous litigation, the Dunns did not own property to the east of 53/1 that was accessible by use of the Lantz Roadway. Moreover, based on the change of the law, Mr. Dosch had no reason to litigate whether the Dunns' alleged use of the Lantz Roadway was adverse to the owner because it was not an element of prescriptive easements at the time. In sum, while the parties to the previous action litigated some issues related to accessing the Lantz Roadway, they did not fully and fairly litigate issues related to the Dunns' right to access the Lantz Roadway.

5. The Dunns' decision to not participate in the previous litigation should prohibit their use of offensive issue preclusion and constitutes waiver.

Because offensive claim preclusion is disfavored, courts are required to consider additional factors before applying it. *See Conley*, 171 W.Va. at 592. This Court explained that the problem with offensive collateral estoppel is that it encourages a potential party to "deliberately avoid consolidation or joinder in the earlier suit where there are common questions of law and fact in order to wait and see how a fellow plaintiff's suit is decided." *Id.* at 592. This Court has cited favorably to a United States Supreme Court decision on offensive collateral estoppel, which held the following:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other

> reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Tri-State Asphalt Prods. v. Dravo Corp., 186 W.Va. 227, 231, 412 S.E.2d 225 (1991) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. at 330-31, 58 L. Ed. 2d at 561-62, 99 S. Ct. at 651-52).

Here, the Dunns knew of the previous litigation, could have moved to intervene, but declined to participate. (R. at 220, Dunn Depo. 14:11-16 ("Q. [] And then when the gate was put up by Mr. Lantz, what did you do about it? A. I did nothing about it. Q. Why not? A. Some other folks did something about it including Mr. Dosch."); R. at 221, *id.* at 15:11-16 (Q. [] So it was during the pendency of the litigation that you became aware of it? A. Correct. Q. Did you make any effort to intervene or to join in the litigation after you became aware of it? A. No.").) The Dunns knew of the previous litigation and could have easily participated in it to assert their right to litigate the Lantz Roadway, but instead sat back and watched while other neighbors litigated their respective rights. This should preclude the use of offensive collateral estoppel here, and constitutes a waiver of the Dunns' rights. *See Potesta v. U.S. Fed. & Guar. Co.*, 202 W. Va 308, 504 S.E. 2d 135 (1998) (explaining that waiver may be established by express conduct or impliedly, through inconsistent actions.).

6. The trial court did not take the final step of analyzing how the allegedly preclusive facts would merit awarding the Dunns a prescriptive easement.

Even assuming that collateral estoppel applies to estop Mr. Dosch from challenging facts set forth in the 2004 Order—which it does not—the facts allegedly established in the 2004 Order must still be sufficient to allow the Dunns to meet all elements of a prescriptive easement in their favor. The trial court did not even attempt to tie the allegedly collaterally estopped facts and the elements of prescriptive easement, and no such connection can be made.

The trial court listed a series of findings and conclusions from the 2004 Order in discussing collateral estoppel, including:

- "Mr. Lantz, his agents, servants, and/or employees shall be, and are hereby, permanently enjoined from erecting or placing any barrier, natural or man-made, upon the subject roadway[.]
- "[t]he roadway was constructed in a collaborative effort by the families that resided on the property 70 years ago and that 'motor vehicle traffic often utilized the roadway to travel to Bear Run..."
- "Mr. Lantz testified that the public perception that use of the roadway was permissible due to the road having been used by the public for 'so long without permission."

(R. at 327, Order, Conclusions of Law, ¶ 13.) Even if one accepts all of these facts as binding in this action, none of them are relevant to or help the Dunns establish that their use of the Lantz Property entitled the Dunns to a prescriptive easement. The injunction against Mr. Lantz was provided as a remedy to the plaintiffs in that action who had established a prescriptive easement over the Lantz Roadway, and is no longer relevant because it did not even enjoin Mr. Lantz's successors-in-interest. The remedy given to other plaintiffs in 2004 cannot be used to establish the merits of a substantive claim. Further, as set forth above, the statements regarding the general public's use of the Lantz Roadway *undermines* an assertion of adverse use in modern prescriptive easement law. *O'Dell*, 226 W.Va. at 621 n. 36 (citing *Felton*, 136 W.Va. at 137, Bruce & Ely, § 5:9, and *Hall*, 108 Idaho at 112-13.)

The fundamental problem with the Dunns' argument and the trial court's decision appears to be a shared misunderstanding that the 2004 Order to create some general public or community

road for the benefit of all. Mr. Dunn repeatedly made clear in his deposition that this was his understanding: "Put down there also that the findings were that it was a community road and I believe I have a right to use it for that." (R. at 251, Dunn Depo. 45:5-7; *see also* R. at 217, 11:13-20 ("It was a roadway available to the community. . . at that time that roadway was a community roadway."; R. at 241–42, 35:17-36:3 (explaining that if you read the 2004 Order "you'll read in there where it said that they concluded that that was a community road and established that."); R. at 242, 36:9-12 ("Q. Okay. So you -- believe that the court order made that road a community road? A. I believe that they said that that was – established to be a community road in that order."); R. at 247, 41:4-24 (explaining that he and the community were surprised that the 2004 Order was made specific to the plaintiffs in that case because "once they agreed or understood that it as a community road, why did they limit it just to those plaintiffs?")

The 2004 Order did no such thing. It found only that the specific plaintiffs in that action had established and were entitled to a prescriptive easement. (R. at 170, 2004 Order, at 5.) Indeed, there is no such legal concept as a "community road" or a prescriptive easement to the public—a prescriptive easement is held by an individual and the prescriptive easement analysis must be conducted on a user-by-user basis. Nor can the 2004 Order be read to create a public road, as that is an entirely different legal concept and test. *See Moran v. Edman*, 194 W. Va. 342, 460 S.E.2d 477 (1995) ("[t]o establish a private right to use a road by prescription, as opposed to establishing a public right to use the road, different factors must be shown."); *Cramer v. West Va. Dep't of Highways*, 180 W. Va. 97, 99, 375 S.E.2d 568 (1988) ("mere use of the road by the public will not make the road a public road, even if the public uses the road continuously and adversely for the period of ten years . . . In addition to such use, public moneys or labor, duly authorized by a public agency or official empowered to maintain, repair or accept such a road, must be expended on it.").

The decision rendered in favor of the previous plaintiffs in 2004 has no impact on whether the Dunns' alleged use of the Lantz Roadway merits the Dunns having a prescriptive easement in their favor. Collateral estoppel does not apply between these two cases, and if it did, it does not change the Dunns' lack of evidence in support of their right to a prescriptive easement over the Lantz Roadway.

C. The trial court erred in applying, *sua sponte*, the doctrine of offensive res judicata in this case.

Although the Dunns rightfully did not allege that claim preclusion applied in this case, the trial court appears to have raised the issue *sua sponte* and applied the doctrine against Mr. Dosch in addition to offensive collateral estoppel. The trial court erred in doing so.

1. Res judicata is a defense used to bar relitigation of the same cause of action.

Res judicata typically serves as a defense to bar a plaintiff from relitigating the same cause of action. *Blake v. Charleston Area Med. Ctr.*, 201 W.Va. 469, 476, 498 S.E.2d 41 (1997) ("a man should not be twice vexed for the same cause"). Three elements must be met for res judicata to apply: (1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; (2) the two actions must involve either the same parties or persons in privity with those same parties; (3) the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. *Id.* at 477.

Although, as set forth above, West Virginia case law contemplates a plaintiff asserting offensive issue preclusion/collateral estoppel (although such a doctrine is disfavored), neither the trial court nor the Dunns have identified a case that similarly permits a plaintiff—especially a plaintiff who was not a party to the previous action—to assert offensive res judicata/claim

preclusion. The Court should not recognize such a doctrine here, as it makes no sense. Essentially, the trial court's application of offensive res judicata here bars Mr. Dosch from ever denying anyone a prescriptive easement over the Lantz Roadway simply because three plaintiffs were successful in demonstrating that their use created a prescriptive easement for them. Nonetheless, even if the Court considers such a doctrine, it is clear that the Dunns do not meet the requirements to apply it.

2. The requirements to apply res judicata are not met in this case.

a. There was a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

Although the claims and issues presented in it were not the same, Mr. Dosch does not dispute that there was a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

b. The two actions did not involve the same parties or persons in privity with the same parties.

For purposes of res judicata, and unlike collateral estoppel, both the party asserting the doctrine and the party against whom it is asserted must have been parties (or be in privity to a party) in the previous action. *See Blake*, 201 W.Va. at 477. The trial court recognized that the Dunns were not parties to the previous litigation but found that they were in privity with the previous parties through operation of the doctrine of virtual representation. (R. at 323-24, Order, Conclusions of Law ¶ 9.) The doctrine of virtual representation is greatly disfavored and, if still recognized in West Virginia, applies only in a discrete set of circumstances not present here. Thus, the trial court erred in granting summary judgment to the Dunns based on virtual representation.

i. The doctrine of virtual representation has been rejected by the Supreme Court of the United States and should be rejected by this Court too.

The doctrine of virtual representation was first utilized by a federal circuit court applying it under federal law. (*See* R. at 329, Order, Conclusions of Law ¶ 18 ("virtual representation [w]as originally established in the case of *Cauefield vs Fidelity & Casualty Company of New York*, 378 F. 2d 876 (5th Cir.)")). However, the United States Supreme Court has since rejected and disapproved of virtual representation. *See Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) ("[w]e disapprove the doctrine of preclusion by 'virtual representation[.]'".

Following *Taylor*, West Virginia federal courts have determined that this court would similarly also disapprove and decline to apply the doctrine of virtual representation moving forward:

> This Court believes that in applying West Virginia's rules of preclusion to a nonparty, the West Virginia Supreme Court of Appeals would be guided by the principles set forth in *Taylor. See Conley v. Spillers,* 171 W. Va. 584, 301 S.E.2d 216 (W. Va. 1983) (relying upon federal case law in developing state collateral estoppel rules). Accordingly, this Court believes that analysis of nonparty preclusion under *Taylor* is appropriate in this action.

Lexington Ins. Co. v. Thrasher Eng'g, Inc., Civil Action No. 1:06CV21, 2008 U.S. Dist. LEXIS 77564, at *15 (N.D.W.Va. Sep. 30, 2008); See *Larosa v. Pecora*, N.D.W.Va. Civil Action No. 1:07CV78, 2009 U.S. Dist. LEXIS 43027, at *9 (May 21, 2009) ("this Court believes that the West Virginia Supreme Court of Appeals would be guided by the principles set forth in Taylor.") *Thrasher* makes clear post-*Taylor*, virtual representation should have no place in West Virginia jurisprudence. Even if it has some limited place, it does not here in this action.

ii. Even if this Court continues to recognize the doctrine of virtual representation, the doctrine does not apply here.

In *Galanos v. Nat'l Steel Corp.*, 178 W. Va. 193, 195-96 (1987), this Court recognized the doctrine of virtual representation. **This Court has never, however, applied the doctrine of virtual representation to a case of *offensive* claim preclusion.** In *Galanos*, several similar personal injury lawsuits were filed against National Steel Corp., all arising out of the same

explosion at a coke facility. *Id.* at 194. After National obtained a jury verdict on the issue of liability against one plaintiff, it filed motions for summary judgment against the plaintiffs in the other cases claiming that defensive collateral estoppel barred plaintiffs' claims and that the plaintiffs were in privity with the similarly situated plaintiff that had lost his case. *Id.*

This Court rejected National's argument, warning that the doctrine of virtual representation must be limited lest it "stretch[] due process beyond its breaking point." *Id.* at 195 (rejecting application of doctrine to individuals who simply "derive injury from a single wrongful act."); *see also Beahm v. 7-Eleven, Inc.*, 223 W. Va. 269, 274, 672 S.E.2d 598, 603 (2008) ("We acknowledge that something more than a common interest between the prior and present litigants is required for privity to be established."). This Court then set forth specific, discrete, classes where virtual representation might apply:

- "a nonparty is bound by a prior judgment where he actively participated in and exercised control over the conduct of the prior litigation.";
- "where a nonparty impliedly consents to abide by a prior judgment.";
- "if a nonparty's actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment, he may be deemed to be bound by such judgment."

Id. at *195-96. The *Galanos* court found that the plaintiffs did not come within any of the recognized classes, that virtual representation therefore did not apply, and that collateral estoppel therefore did not apply.

The Dunns similarly do not fall into any of these recognized categories. Instead, the trial court eventually stated that the Dunns simply shared a "common interest in the outcome" of the prior litigation. (R. at 354, Order on Motion to Amend, at 4.) This statement is flawed as a matter

of law and fact. As a matter of law, this Court has found on multiple instances that "something more than a common interest between the prior and present litigants is required for privity to be established." *Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 274, 672 S.E.2d 598 (2008) (citing *Gribben v. Kirk*, 195 W. Va. 488, 498 n. 21, 466 S.E.2d 147, 157 n. 21.)

As a matter of fact, the plaintiffs in the prior action had no common interest, no relationship, and no duty with/to the Dunns related to the outcome of the prior case, they were only interested in obtaining their own prescriptive easements based on their own use of the Lantz Roadway. If anything, the former plaintiffs who obtained a prescriptive easement would be adverse to additional landowners gaining access as it would devalue their right and would provide additional burdens on the property over which they now hold a prescriptive easement. At the very least, there is no evidence that the former plaintiffs litigated their action on behalf of anyone but themselves such that the doctrine of virtual representation would apply. And, therefore, Plaintiffs did not have privity with any party in the previous action and res judicata cannot apply here.

3. The Dunns' claim for prescriptive easement is not the same cause of action determined by the 2004 Order and could not have been determined in the prior action.

For many of the same reasons that the issues were not identical for purposes of collateral estoppel, the Dunns' claim for prescriptive easement similarly was not determined by the 2004 Order, and could not have been determined because the Dunns were not parties to it. As this Court has explained, in order for res judicata to apply "the claims in both suits must essentially be identical." *In re B.C.*, 233 W.Va. 130, 135, 755 S.E.2d 664 (2014); *Blake*, 201 W.Va. at 476 ("A cause of action between persons who were parties to a former adjudication, set up in a subsequent action between them, is not res judicata by the former decision, unless it is identical with the one actually or constructively heard and determined in the former suit" (quoting *Hannah v. Beasley*, 132 W. Va. 814, 821-22, 53 S.E.2d 729, 733 (1949)). In the previous litigation, no one brought a

claim on behalf of the Dunns or any claims based on the Dunns' use of the Lantz Roadway. Judge Holland made no findings of fact or conclusions of law related to the Dunns' use of the Lantz Roadway or the rights of the Dunns. In fact, Judge Holland limited his ruling specifically to the parties in that action, ruling that "[*t]he Plaintiffs* [in the previous litigation] have established the existence of a prescriptive easement" and that "[t]he Plaintiffs [in the previous litigation] have a right of way over the roadway." (R. at 139-40, 2004 Order, Conclusions of Law ¶¶ 2-3 (emphasis added).)

Neither the disfavored doctrine of offensive collateral estoppel nor the novel concept of offensive res judicata (buttressed by the disfavored and limited doctrine of virtual representation) apply in this case regarding the previous litigation. And, even if collateral estoppel were to apply, it would do nothing to establish a prescriptive easement in favor of the Dunns. The trial court's decision must be reversed and this Court should grant summary judgment to Mr. Dosch.

Assignment of Error No. 3 - The trial court erred by denying Mr. Dosch's motion to amend the judgment to correct clear errors and grant summary judgment in favor of Mr. Dosch.

As set forth above, the trial court erred in granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion for summary judgment. Mr. Dosch filed a Rule 59(e) motion to amend the judgment in order to remedy the clear errors of law and to prevent obvious injustice. *Otto v. Catrow Law PLLC*, 850 S.E.2d 708 (W.Va.2020) (holding that a 59(e) motion "should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.") In that motion, Mr. Dosch argued that the trial court's conclusions regarding res judicata, collateral estoppel, virtual representation, and finding a prescriptive easement in favor of the Dunns were not supported by the cases or evidence cited and asked the trial court to amend the judgment and grant Mr. Dosch summary judgment instead. (*See*

Motion to Amend.) The trial court denied that request and repeated the same mistakes in doing so. For the same reasons why it erred in granting the Dunns' motion for summary judgment and in denying Mr. Dosch's motion for summary judgment, the trial court similarly erred in denying Mr. Dosch's motion to amend the judgment.

VI. CONCLUSION

Based on the foregoing, the trial court erred in granting summary judgment to the Dunns and denying summary judgment to Mr. Dosch. The trial court compounded its errors by denying Mr. Dosch's motion to amend the judgment. This Court should reverse the trial court and hold that Mr. Dosch is entitled to summary judgment on all of the Dunns' claims.

Respectfully submitted this 15 day of January, 2021.

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CERTIFICATE OF SERVICE

The undersigned counsels for Petitioners, **JOHN R. DOSCH, INDIVIDUALLY AND AS TRUSTEE OF THE JOHN R. DOSCH REVOCABLE TRUST,** hereby certifies that they served the foregoing, **BRIEF OF PETITIONERS JOHN R. DOSCH, individually and as Trustee of the John R. Dosch Revocable Trust,** upon the Respondents, **RICHARD E. DUNN and CHERYL C. DUNN**, by depositing a true copy thereof in the United States Mail, postage prepaid, on this 15 day of January, 2021, addressed to:

John N. Ellem, Esquire
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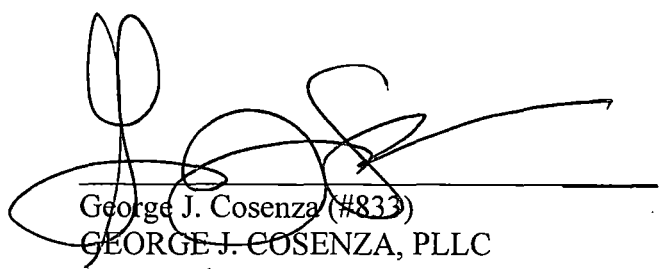

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