IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0857

TIMOTHY J. GREGORY AND JANICE L. GREGORY,
Plaintiffs Below, Petitioners,

v.

JACK O. LONG AND LORA A. LONG,
Defendants Below, Respondents

PETITIONERS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law by failing to consider undisputed facts and law as stated in Professor John W. Fisher, II's opinions dated November 19, 2019, June 4, 2020, and July 17, 2020.

2. The Circuit Court committed plain error in denying the Plaintiffs' Motion for Summary Judgment which error precludes Plaintiffs from presenting to a jury any evidence that the subject right of way is a public way including testimony of Plaintiffs' expert John W. Fisher, II, the official 1905 Upshur County Map, AKA "The A. B. Brooks Map", State Geological Survey maps, and a concurrent historical newspaper article dated June 29, 1905 from the local newspaper The Buckhannon Delta and Knight-Errant, the newspaper of general circulation in Upshur County, all of which is unrebutted by the Defendants.

3. The Circuit Court committed plain error in granting the Defendants' Motion for Summary Judgment and concluding, as a matter of law with no findings of fact, that the subject right of way was created by prescriptive right when Defendants presented and proffered no evidence of facts supporting a claim by prescriptive right.

4. The Circuit Court erred by effectively ruling the width of the right of way is limited solely to the existing road surface when the unrebutted evidence and testimony of Plaintiffs' expert John W. Fisher, II demonstrates that it is a county road by statute with a minimum right of way of thirty (30) feet in width, "plus slopes", and if that were not the case, Plaintiffs' expert G. A. Covey that a single lane country road must have a right of way width of twenty-five (25) feet.

STATEMENT OF THE CASE

This is an action between Upshur County landowners filed on December 27, 2017, after an incident on April 28, 2017, in which Defendant Lora A. Long blocked in a gravel truck which Plaintiff Timothy Gregory had contracted to maintain and repair their shared right of way.

In their Answer and filings, the Defendants admitted the existence of the right of way, characterized it as a "right of way by prescriptive right", and strongly asserted their belief that it was limited in width to the existing vehicle tracks, at various times nine (9), ten (10), or twelve (12) feet.

On or about August 10, 2018, Defendants', through their counsel, filed a "Motion to Strike Survey and Testimony of G. A. Covey Engineering" and Defendants' "Motion for Summary Judgment and Memorandum of Law". (Appendix pg. 1)

The Plaintiffs' Motion to Leave to File Amended Complaint and proposed Amended Complaint was filed on October 2, 2018. The Plaintiffs added counts to address tortious interference and damages.

In responding to the Defendants' Motion for Summary Judgment and Memorandum of Law, which was denied by the trial court in an "Order Denying Motion for Summary Judgment" entered October 26, 2018 (Appendix pg. 147), the Plaintiffs tendered the affidavits, quoted below, of many Upshur County citizens with direct knowledge of the right of way in question and also of surveyor/engineer Gary A. Covey who stated his opinion that the minimum width for a single lane private right of way in order to be properly engineered and safely used is twenty-five (25) feet.

In light of Professor Fisher's opinion, the issue that Defendants have labeled "functional width", and therefore, Mr. Covey's opinions, are no longer relevant, but could become relevant if this matter is not remanded to the trial court with instructions to recognize the subject right of way as a "county road" thirty (30) feet in width "plus slopes".

The Trial Court granted Plaintiffs' Motion to Amend by Order entered March 26, 2019.

The Plaintiffs allege, in pertinent part, in their Complaint and (first Amended Complaint) the existence of a right of way in Upshur County, West Virginia, which runs across land of the Defendants and runs in front of their residence providing the sole ingress and egress access to real estate owned by the Plaintiffs and containing a total of approximately one hundred fifty-two (152) acres.

At the time of filing, Plaintiffs were unable to allege the exact mechanism for the creation of the right of way, which has existed longer than human memory, but alleged Plaintiffs' ownership by "various deeds" in the chain of title. That allegation is true and accurate as Plaintiffs own their land which abuts a county road, as explained below.

Plaintiffs filed their "Motion for Summary Judgment" (Appendix pg. 160) when they encountered the revelation that the right of way in question was, and continues to be, "a county road" which, by statutes, as referenced below, is no less than thirty (30) feet "plus slopes". The road is not maintained by the County or State, and Plaintiffs waived any claim that they are so obligated.

The County of Upshur, in a brief filed by David Godwin, Prosecuting Attorney, stated that the right of way was never abandoned by the county, nor was it ever transferred to the State.

In light of the additional delay, and of Defendants' intentional actions in blocking the Plaintiffs from the full use of their property, and even blocking in a truck which had brought gravel to fill in potholes and repair the road, Plaintiffs added the counts of "tortious interference" and "damages" to their original Complaint.

Plaintiffs' civil action was filed under the general jurisdiction of the Circuit Court and West Virginia's Declaratory Judgment Act, West Virginia Code §55-13-1, et seq., wherein they sought a clear declaration by the Court of the respective rights and interests of the parties relative to the subject right of way and the use of their respective properties. It sought nothing from the County or State who were not parties.

On or about December 14, 2018, Plaintiff Timothy Gregory's brother, Jesse Gregory, brought to counsel a photocopy of a portion of what appeared to be an ancient map, which clearly showed the subject right of way as a marked "road" commencing at the intersection upon which is located the church formally known as "Ebenezer M. E. Church". It is now the Laurel Fork Church.

During oral argument, Plaintiffs' counsel proffered to the Trial Court that he had begun an investigation which included a visit to the Department of Highways Regional Office, District Seven (7), south of Weston, Lewis County, West Virginia where he met with a State employee who called himself "the right-of-way guy", John Fitzsimmons, with Dustin Zickefoose, Upshur County Assessor, and with Terri Jo Bennett, Upshur County Building Permit Office, and he consulted with well-known real estate and right-of-way experts and colleagues, and Upshur County historian Noel Tenney, and that he had determined the subject right of way to be a neglected, but never abandoned, county road.

Counsel filed a true photograph of a replica of the map known as the "A. B. Brooks, Buckhannon, W.Va. 1905" which encompasses the portion of the map brought to Mr. Hunter by Jesse Gregory.

It is undisputed that there are two original 1905 "A. B. Brooks Maps" framed and mounted in the central hallway of the Upshur County Courthouse where they have been for over 100 years. These maps likewise show markings representing the road right-of-way from the above referenced corner to a house labeled as "Geo. Hamner", a predecessor in title to the Plaintiffs.

The "Geo. Hamner" house was located on real estate owned by George T. Hamner, Arminda Hamner, and Elizabeth Phillips. This was a 40-acre tract, which is now encompassed by Petitioners' property.

This tract was then conveyed to John Perry in a deed recorded in Deed Book 9 at page 63.

John Perry also acquired 24 acres from A. W. Brady by deed of record in Deed Book 9 at page 62.

Those tracts were conveyed to Arminda Hamner in 1904 by deed of record in Deed Book 46 at page 233.

Plaintiff Timothy J. Gregory acquired his property, including the Hamner property, by various deeds:

a. Deed Book 345 at page 718, Dailey Gregory, unmarried to Timothy J. Gregory, dated November 25, 1988 (64 acres, more or less);

b. Deed Book 345 at page 720, Dailey Gregory, unmarried, to Timothy J. Gregory, dated November 25, 1988 (95 acres, more or less; 1 acre coal, more or less; 1 acre, more or less; 5 acres, more or less); and

c. Deed Book 378 at page 801, Troy A. Brady, Jr., single, to Timothy Gregory, dated April 20, 1994 (2 acres, more or less) .

There are contained at the bottom of the A. B. Brooks 1905 Map the following words: "MADE BY A. B. BROOKS, BUCKHANNON, W. VA. 1905. THE ORIGINAL OF THIS MAP WAS MADE FOR THE COUNTY COURT UNDER THE DIRECTION OF EUGENE BROWN, CLERK".

The "Explanation", or legend, of the A. B. Brooks (Upshur County) Map shows that a double broken line indicates "a road".

The map showed the location of approximately 1,638 residential houses, but, in every case, there were no driveways shown. Thus, "the road" shown on this 1905 official County Map was a public county road in 1905, not a private driveway.

The route to the "Hamner" residence is clearly marked, on the county map, as "a road". It is in the identical spot, of the "vacation residence", former family residence of Plaintiff Timothy J. Gregory and his family.

The current structure was formerly the home of Timothy Gregory's parents, now deceased.

There were annexed to Plaintiffs' Motion for Summary Judgment and incorporated by reference affidavits of thirteen (13) people. Their names and pertinent quotations contained therein are listed below:

a. James Gregory (Age: Approx. 47);
   1. I am Dailey Gregory's grandson and Tim Gregory's nephew.
   2. The roadway in question has been there since before I was a kid. I am 47.
   3. I know that the roadway was used for logging, timbering, cattle, and other farming uses.

b. Bill Landis;

1. Old timers have told me that a road grader used to turn around at the Gregory's to maintain the road.
2. The road was in bad shape until Tim Gregory fixed it with rock.
3. There is a saw mill out on the Gregory place.
4. Logs were hauled into the saw mill.
5. I have lived in that area for approximately thirty (30) years.

c. Freddie Smith and Mary Smith (Mr. Smith Age 83; Mrs. Smith Age approx. 81);

1. Mary Smith grew up in the area where the subject properties are located.
2. Mary Smith is 81 years of age.
3. There has always been a road in and out to the farm.
4. The road was used for whatever was needed to be taken in and out to and from the farm.
5. There was a saw mill up there are one time.
6. That road was always a road that was traveled.

d. Betty Malcomb (Age: Approx. 57);

1. I used to stay with Tim Gregory's sister as a kid of about eight (8) years of age.
2. I am now 57 years of age.
3. The roadway in question was used to drive in and out to the house.
4. I know Tim Gregory's father timbered some.

e. Patty Gregory (Age: 54);

1. I am the daughter of Dailey Gregory and sister of Tim Gregory.
2. My father had a saw mill and hauled logs in and out the right of way.
3. He had a farm and raised cattle. Thus, he used the right of way for his cattle and farm related uses.
4. My recollections go back to my childhood.
5. Growing up we "rocked the road" by taking rocks from the fields and placing them in the mud holes.
6. The brush was not grown up along the roadway, it was clear on the sides of the road and at the fence lines, etc., not like it is now.

f. Mary Potts (Age: 80);

1. My property joins the old Gregory homeplace.
2. The right of way in question is the only way in and out, and has been there forever.
3. There is no road past Wares.

4. The roadway is in the same place as it has been over the years.
5. There used to be a sawmill on the Gregory property. Dailey utilized the sawmill.
6. There were cattle on the farm and farm equipment.
7. The roadway is now only wide enough for one (1) vehicle. However, trucks used to be able to access it.

g. Jesse Gregory (Age: 72);

1. I am the son of Dailey Gregory and brother of Timothy Gregory.
2. I am familiar with the real estate owned by my brother, the real estate owned by Mr. and Mrs. Long and the roadway that is the subject of their dispute.
3. I recall the roadway being utilized by my father and our family for timbering, agricultural and personal use.
4. My father had a saw mill on our property which he brought logs into and took lumber out from.
5. I know that my brother has maintained the roadway over the years until recent attempts to maintain the way were stopped by the Longs.
6. I have regularly and consistently utilized this roadway in question during my lifetime.

h. James Allen (Age: 49);

1. I have known the Gregory family for a long time.
2. The Gregory's had a mill on the property and hauled lumber/timber in and out.
3. I actually worked at the mill.
4. The roadway was always used to haul timber in and out and for farming such as hauling cattle and hay.
5. The roadway has been there many years longer than I have been alive.
6. Tim Gregory has done most of the upkeep of the road himself.

i. Janette Yakobics (Age: 67);

1. I am familiar with the road out to the "Gregory place".
2. I never knew it to just be a "right of way".
3. The roadway was always used.
4. Dailey Gregory had a sawmill there.
5. The roadway was used for timbering and access to/from the sawmill.

j. Ron Hurst (Age: Approx. 66);

1. My grandparents lived out toward the Gregory property in the 1940s.
2. There was a residence there, probably before the turn of the century.
3. The roadway, or right of way, was used for decades for accessing the home, farms, farming, and taking timber in and out.
4. My guess is that the roadway has been utilized in excess of 100 years.
5. I am 66 years old.
6. The roadway in question is the only way to physically access the property.

k. Rodney Cassidy (Age: Approx. 51); and

1. I grew up in the area around properties now owned by Tim Gregory and the Longs.
2. I am now 51 years of age and was there from the time I was three (3) or four (4) years of age.
3. I still travel to that area at least monthly.
4. I know that the right of way went to a farmhouse.
5. I am aware that the right of way was utilized by log trucks, horses, tractors, and vehicles.
6. I know that the right of way used to be rough but Tim Gregory spent time and money to make the road better.

l. Gary Strader (Age: 68).

1. I Gary Strader am familiar with the property owned by the Longs and the right-of-way in question.
2. I lived there from approximately 1951 to 1963.
3. When I lived there the right of way was clear.
4. I know the property formerly owned by Dailey Gregory now owned by Timothy Gregory.
5. Dailey Gregory was my uncle.
6. I know that Daley Gregory had cattle and a sawmill.
7. When I lived there, there was no issue with regard to the use f the right of way.

Defendants admit the existence of the road but assert, without disclosure of any factual support, affidavits, deeds, letters, other documentation, physical evidence, or evidence whatsoever, that the right-of-way, which has existed for over 100 years, was obtained by Plaintiffs' predecessors through "prescriptive right".

Therefore, Defendants single pillar in support of their contention that the subject right-of-way is no wider than 12 feet is there reliance on their belief that the right-of-way was created by "prescriptive right" and was only ten (10) to twelve (12) feet in width when created. This position ignores the evidence that it is a country road and the affidavits and the allegations of the use of this road during human memory. Defendants have submitted no evidence of when or how the right of way was created, NONE.

The creation of Upshur County maps known herein as "The 1933 Map" and "The 1937 Map", which actually were produced many years later, is a convoluted story, rife with politics. However, neither of those maps reveal the transfer by the County of Upshur to the State of West Virginia for purposes of maintenance and control; nor is there any documentary evidence of an abandonment. As the county, by its counsel, has attested, it remains a county road, albeit neglected.

West Virginia law, cited below, and referenced by Professor Fisher in his opinions above (pgs.5-8), clearly states that neglect is <u>not</u> abandonment.

Even if the right of way were private, which it is not, there is overwhelming evidence of continuous use by landowners and no evidence of non-use or abandonment. There are <u>no</u> allegations of non-use" and abandonment.

Plaintiffs also aver, as supported by the "A. B. Brooks Map" and the above referenced verified affidavits, that the right-of-way in question, while not maintained by the County in recent years, has been used continuously for residential, farm, **and timbering** purposes since its inception. (emphasis added.)

As do prior statutes cited herein, the 1918 West Virginia Code §1940-68, ROADS, BRIDGES, LANDINGS, ETC., stated, in pertinent part:**"...a right-of-way should be not less than thirty feet wide and the necessary slopes."**

The A. B. Brooks Map, being the County's official declaration of all roads existing in the County and properties therein, designates the subject right of way as a "(County) Road" as of 1905, and is, as Professor Fisher opined, authoritative.

Professor Fisher explained that the road was created and recognized long before county roads, somewhere between 1930 and 1950, were transferred to control by the State, but this road was retained, albeit neglected, by the County. It is not shown on the map of roads transferred to the State.

Dean Fisher affirmed that some roads, never abandoned but considered "orphaned" or simply neglected by the County, were not transferred as shown by the map misnamed "1937 Map". They remained with the counties, albeit sometimes maintained only by the landowners.

Until Plaintiffs discovered the official, 1905, "A. B. Brooks Upshur County Map", the primary factual disputed issue was the width of the right-of-way which is the subject of this action. But that can no longer be considered a disputed issue. The width of the right of way was established by State Law in 1868, 1870, 1918, and 1931.

It is significant that there has never been a dispute prior to April 28, 2017, when Lora A. Long blocked the gravel truck, about the existence of the right-of-way or the right of the Plaintiffs to use it for ingress and egress, for residential use, for farm use, or for timbering. Defendants objection is pragmatic, solely for the purpose of keeping Plaintiffs from removing over $250,000 worth of their timber.

Defendants have repeatedly asserted, without citing one witness or source, that the right-of-way in question was created by "prescriptive right".

This assertion bears review. What Plaintiffs are saying, because it is true, is that there is no letter, no journal entry, no official County or State record, no newspaper article, no witness, child of a witness, or grandchild of a witness who can tell this Court or a jury the circumstances of the creation of the subject right-of-way.

What is known is that when the County commissioned Mr. A. B. Brooks, and when his supervisor, Eugene Brown, Upshur County Clerk, directed him to complete the map which was made "under the direction of Mr. Brown", in 1905, the road already existed and was recognized as a "County Road". It is uncontroverted that the Brooks Map is the Official County Map.

The map, according to its legend, contained the following salient features: "county lines, churches and school houses, district lines, post offices, roads, streams, houses, points of interest, and post offices outside the county".

The A. B. Brooks Map contains the following language regarding how it was commissioned:

> MADE BY
> A. B. BROOKS, BUCKHANNON, W. VA.
> 1905.
> THE ORIGINAL OF THIS MAP WAS MADE FOR THE COUNTY COURT UNDER THE DIRECTION OF EUGENE BROWN, CLERK.

The title of the A. B. Brooks Map shows it included everything including "County Roads", that title is:

> MAP OF
> UPSHUR COUNTY,
> WEST VA.
> SHOWING ALL DISTRICTS, POST OFFICES
> STREAMS, COUNTY ROADS, THE

LOCATION OF FARM
HOUSES, ETC.

This is the map that attorneys in Upshur County and hundreds of others have regularly referenced the A. B. Brooks Map in their efforts to verify and certify titles in Upshur County as have countless surveyors. With it, Plaintiffs do not simply establish the width of the right of way "by a preponderance of the evidence", but, according to Professor Fisher, beyond all doubt.

There was an affidavit by the Upshur County Clerk, Carol Smith, who states in pertinent part:

> I am aware the A. B. Brooks Map has been hanging in the central hallway of the Upshur County Courthouse for many years. To my knowledge, there is no present equivalent or updated version.
>
> I regularly refer to the Map for County features, many of which have changed, but many which remain, and I have assisted many visitors to the county clerk's office to the hallway to review such features.

The Virginia Code of 1860 and the West Virginia Codes of 1868, 1870, 1878, 1906, 1918, and 1931 all referenced "every road shall be thirty feet wide".

In 1918, just thirteen (13) years after the A. B. Brooks Map was published, the State of West Virginia, no doubt relying upon the identical principles of physics and engineering relied upon by Gary Covey, reaffirmed by statutory law that existed prior to West Virginia becoming a state, and declared:

> No bridge unless it be exclusively for footmen, shall be less than fourteen feet wide. **All public roads which are now established in any of the counties of this state as public roads shall occupy a right-of-way not less than thirty feet wide,** unless the county court shall have made a special order for a different width, which order shall be a matter of record in the office of the county clerk. All public roads which may hereafter be established in any of the counties of this state, except main county roads, shall occupy a right-of-way not less than thirty feet wide and the necessary slopes. (emphasis added)

It simply existed, and its existence was recognized as a county road in 1905. Its width was established by the statutes of 1868, 1870, 1878, 1906, 1918, and 1931.

Thus, in 2017, the year this action was filed, the statutory width of this "established" county road had been thirty (30) feet for since at least 1860 under Virginia Law which was adopted by West Virginia, one hundred fifty-seven (157) years, and its existence had been officially recognized by the County one hundred twelve (112) years prior.

There is an argument that logging equipment has grown larger and that the use of modern equipment is not available to the Plaintiffs because the Longs' tree is in the way and that more modern equipment might take a foot or two more of width than the older logging trucks. Defendants would use this argument to make Plaintiffs' timber unmarketable. The growth of a tree, easily removed, cannot change the width of a county road.

That argument is fallacious. A width of twenty-five (25) to thirty (30) feet, including berms, ditches, slopes, and culverts, has been essential for a safe single lane rural ingress egress right-of-way much longer than human memory can say, but the essential width is revealed by the statutory width declared in 1868, 1870, 1878, 1906, 1918, and 1931.

There can be no doubt that a properly constructed ingress and egress road will materially benefit Defendants and increase the value of their land by the construction of the road proposed by the Plaintiffs.

Defendants' counsel has admitted that Plaintiffs are entitled to have a graveled surface running along the front of their residence property of at least ten (10) to twelve (12) feet in width.

The true motives of Defendants are transparent. They wish the Court to place such limitations on Plaintiffs' road that Plaintiffs will be prevented, entirely, from harvesting their timber and earning, for their retirement, a substantial "profit". Defendants prefer, regarding the timber harvest, that Plaintiffs be landlocked.

Defendants counsel has asserted that there is alternative access for the harvesting of the timber, but the Defendant Jack Long, in his deposition conducted on July 18, 2018, could provide nothing but bare assertions to support this assertion. Likewise, Defendant Lora Long. But, Plaintiffs and Gary Covey have stated there is no alternative.

Plaintiff Timothy Gregory testified that he lived on the property as a child, that he is familiar with the entirety of the property, and that there is no other access to public road.

Plaintiffs' expert, Gary Covey, opined that no access to the harvesting of timber exists which will be economically feasible. That is likewise the opinion of the timber company and its owner, Walter K. Depoy, a disclosed fact witness.

Plaintiffs are facing the considerable expense of a two day trial when no witness, no document, no photograph, no evidence of any kind, no expert, no case, no statute, no article, and no fact has been cited or disclosed by Defendants in support of their claim of prescriptive right.

Since the discovery of the A. B. Brooks Map, published in the year 1905, and the subsequent discovery of the "The Buckhannon Delta and Knight-Errant" newspaper article dated June 29, 1905, and of the "Base Map from U. S. Geological Survey Sheets Field Operations Bureau of Soils 1917" and of the 1918 "Map III of Upshur County and Western Portion of Randolph County Showing Topography West Virginia Geological Survey", and obtaining the unequivocal opinion of their expert, John W. Fisher, II, Plaintiffs have no need and therefore

have not asserted what the Defendants have labeled "Plaintiffs' Functional Width Theory". However, that theory is fully consistent with the testimony of Dean Fisher and the records referenced above in that the surveyor engineer expert, Gary Covey, firmly stated his opinion that a right-of-way of this nature must be at least 25 feet in width in order to comply with the standards of his profession.

Defendants failed to disclose their expert, Michael Green, in a timely manner and have failed to disclose any opinion that "expert" will render, have failed to provide his credentials, and have stated, simply, "Discussion as to existing width".

Plaintiffs' expert, John W. Fisher, II, was described in the West Virginia Supreme Court of Appeals, in the case of McClung Investments, Inc., v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), "the foremost authority in this field (real estate contract law) in the State", by the Honorable Justice Menis Ketchem. He is the author of numerous West Virginia University College of Law, Law Review articles and, particularly, *"A Survey of the Law of Easement in West Virginia"*, 112 W.Va.L.Rev. 637 (2010) as "a comprehensive article explaining the law of easements".

Professor Fisher served as interim Dean of the West Virginia University College of Law, and he testified that he took over from Professor Londo Brown as professor of real estate law, teaching at the West Virginia University College of Law from 1973 until his retirement in 2014, a period of 41 years.

Dean Fisher testified that he graduated number one in his law school class and that he has never seen a more compelling case for an opinion he rendered considering the evidence and law in this case.

Defense counsel, as stated in paragraph one (1) above, presented to Dean Fisher no fact in support of his theory of "prescriptive right". In response to the relevant question, Dean Fisher testified, "I don't see this particular easement as a prescriptive easement." P. 11 of summary.

The following exchange occurred:

> Q. "Why don't you see it as a prescriptive easement?"
> A. "Because I think it's very clear from the information that has been provided that this was part of the county road system."

Referencing sources from "The West Virginia Encyclopedia", and based on his own research, Dean Fisher testified at considerable length how the county road system evolved from paths and trails that were originally created by West Virginia wildlife, adapted by Native Americans, utilized by early settlers, and eventually formed into a system that the county administered by conscripting men between the age of 21 and 50 for a period of 2 days per year as forced labor to maintain the county road system.

He describes the Upshur County Court as being rather progressive in that it created its official County map before such maps became mandatory by state law.

He testified that it was significant that the map had been prepared by and researched by A. B. Brooks, a deputy County Clerk, that the map was certified by Eugene Brown, County Clerk, that the map's legend stated "roads", the map's title was "MAP OF UPSHUR COUNTY, WEST VA. SHOWING ALL DISTRICTS, POST OFFICES STREAMS, COUNTY ROADS, THE LOCATION OF FARM HOUSES, ETC.", and that the local newspaper, "The Buckhannon Delta and Knight-Errant", of general jurisdiction in Upshur County at the time reported, concurrent with its publication as follows:

Making Map of County

> A. B. Brooks, of the county clerk's office, is making a fine and accurate map of Upshur county. Every stream and road, with its windings, is placed exactly , and the location of each farm house, with the name of the occupant, is neatly marked on the map. The work will be completed in a few more weeks, and will be a great convenience to the people of the county. Mr. Brooks has worked hard for several months, and the map is one of the best we have ever seen. He intends to have it printed, so that those wanting copies can secure them.

While these sources were the most compelling bases for his opinion, he cited favorably the "Base Map from U. S. Geological Survey Sheets Field Operations Bureau of Soils 1917" and of the 1918 "Map III of Upshur County and Western Portion of Randolph County Showing Topography West Virginia Geological Survey" which showed the right-of-way which appears to be in the identical position as the County map as a "road".

Dean Fisher confirmed that a county road is a right-of-way and easement.

Plaintiffs alleged in the Complaint as follows:

> ...9. The subject right-of-way is listed on the tax map as "Grand Camp Run Road". It is likewise so listed in the Google Map aerial photo of the subject property
>
> 10. The purpose of this litigation is to affirm the existence of the subject right-of-way, which Defendants' counsel has admitted in writing, to clarify its location, as is more particularly set out in that certain Plat of Right-Of-Way Survey, prepared by Gary A. Covey dated April 4, 2006 for Timothy Gregory of record in the Office of the Clerk of the County Commission of Upshur County in Plat Book 4 at page 516, and to determine its width, including its "functional width" and to insure and assure the ability of the Plaintiffs to utilize this right-of-way for any purpose "to which the land accommodated thereby may naturally and reasonably be devoted", which in this case is residential use, farm use, and removal of timber and minerals, and other purposes, as Upshur County, West Virginia rural land...

Plaintiffs did not know, nor did their counsel, at the time of filing that the county road had been recognized as a part of the county road system no later than 1905 which is why he did

not allege the mechanism for its creation. That was part of his duty as an officer of this court, not to allege a theory not supported by fact, as the defense has.

On or about August 16, 2019, by filing the Second Amended Complaint, Plaintiffs disclosed the theory upon which they now rely that the right-of-way in question has a statutory width of 30 feet "plus slopes" and is a "road" and has been at least since it was recognized by the Upshur County Court in 1905, and, no doubt, much earlier.

Defense counsel inquired, and Dean Fisher confirmed, that was not unusual, and probably was to be expected, that there would be no record of the work or the input of the Upshur County surveyor.

This Court accepted, and the defense did not challenge, the written and oral presentation of the County's attorney, David Godwin, who assured this Court that the road in question has never been abandoned.

The only issues where there exist "genuine issues of material fact" pertain to the damages sustained by the Plaintiffs by the militant and persistent efforts of Defendants to prohibit Plaintiffs from using the road and particularly from using their road for equipment to enter, harvest, and remove Plaintiffs' timber, and Plaintiffs' prayer for attorneys' fees, especially attorneys' fees incurred after Plaintiffs disclosed to Defendants the existence of the A. B. Brooks map.

As this case stands now, since the only evidence of the existence of the right of way is that it is a county road that evolved out of the original county road system. Considering the overwhelming evidence that it is a county road, the position of the Defendants referred to as "functional width" and the testimony of Plaintiffs' expert G. A. Covey became moot.

SUMMARY OF ARGUMENT

The Virginia Code of 1860, Chapter LII, 5, states, in pertinent part:

> ...5. Every road shall be thirty feet wide unless the county court order it to be less...

The West Virginia Code of 1868, Chapter XLIII, 34, states, in pertinent part:

> ...34...Every road shall be thirty feet wide, unless the county court order it to be of a different width...

The West Virginia Code of 1870 states, in pertinent part:

> Section 34 of chapter 43 provided:
>
> No bridge, unless it be exclusively for footmen, shall be less than twelve feet wide. Every road shall be thirty feet wide, unless the supervisor of the county order it to be a different width. The grade of any road to be hereafter established shall not exceed five degrees, unless authorized by the supervisor of the county.

The West Virginia Code of 1878, §34, states, in pertinent part:

> ...§34... Every road shall be thirty feet wide, unless the county court order it to be of a different width...

The West Virginia Code of 1906, Sec. 1423, 34, states, in pertinent part:

> ...34...Every road shall be thirty feet wide, unless the county court order it to be of a different width...

The West Virginia Code of 1918, Chapter 43, §1940-68, states, in pertinent part:

> ... 68... All public roads which are now established in any of the counties of this state as public roads shall occupy a right-of-way not less than thirty feet wide, unless the county court shall have made a special order for a different width, which order shall be a matter of record in the office of the county clerk...

The statutory provisions contained in West Virginia Code expanded over the successive codes, the above quoted sections continued to appear in the code revisions including the West Virginia Code of 1931.

By West Virginia Code §1940-68, ROADS, BRIDGES, LANDINGS, ETC., "Width of bridges and public roads" it was established as follows:

> 68. No bridge unless it be exclusively for footmen, shall be less than fourteen feet wide. All public roads which are now established in any of the counties of this state as public roads shall occupy a right-of-way not less than thirty feet wide, unless the county court shall have made a special order for a different width, which order shall be a matter of record in the office of the county clerk. All public roads which may hereafter be established in any of the counties of this state, except main county roads, **shall occupy a right-of-way not less than thirty feet wide and the necessary slopes**. (Acts 1909, c. 52; 1917, Reg. Sess., c. 66, §68.) (emphasis added)

Plaintiff have located no "special order" specifying a different width.

It is well established in West Virginia, per the below referenced case, that non-use of the (public) road and failure to maintain the road will not act as an abandonment of the road, nor, in this case, could there be an abandonment of the road, even if private, because of its continuous use.

The case of McClellan v. Town of Weston, 49 W.Va. 669 (1901), is a case regarding the opening and use of public streets and alleys, and according to Professor Fisher is not applicable to this case.

The official County map of 1905 "The A. B. Brooks Map" revealed the subject right-of-way to be "a (County) road". Clearly the county did not transfer this road to the state through reference thereto in either of the misnamed "the 1933 map" or "the 1937 map", so it remained a (little traveled) "dead – ended" county road to the present.

NOTE: And this is very important. Even if the law were different, and even if "non-use" or "failure to maintain" could cause an abandonment, AND EVEN IF someone were to locate documentary evidence of abandonment by the county, such "abandonment" would have no effect

on the statutory width of thirty (30) feet "plus slopes" because of the subject right of way has been continuously used by adjoining owners for over 100 years and to date.

Respondents, being on constructive notice of this public record and being well aware that the road had existed for many years prior to their acquisition of their property, unlawfully, knowingly, as a public nuisance, and maliciously, blocked in the vehicle that Petitioner Timothy Gregory had retained for the maintenance and repair of the road.

There is no doubt, from the affidavits and representations and documentations contained herein, that the property now known as "The Gregory Property", is rural farm and timber property which has been regularly used for residential, farming, and timbering beyond the period of human memory.

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, when a moving party presents depositions, affidavits, interrogatories, or exhibits that establish that there is no genuine issue as to any material facts, the moving party is entitled to a judgment as a matter of law. Smith v. Buege, 182 W.Va. 204, 387 S.E.2d 109 (1989).

The purpose of the rule is to allow a prompt disposition of controversies on their merits without resort to trial where there is no genuine dispute regarding the salient facts or where only a question of law is involved. Oakes v. Monongahela Power Co., 158 W. Va. 18, 207 S.E.2d 191 (1974).

The law is well settled in West Virginia that in order to resist a motion for summary judgment, the party against whom it is made must present evidence of a valid dispute. Bronz v. St. Jude's Hospital Clinic, 184 W. Va. 594, 402 S.E.2d 263, 268 (1991); Petros v. Kella, 146 W. Va. 619, 122 S.E.2d 177 (1961). The mere condition that an issue is disputable, however, is not

sufficient to deter the trial court from the award of summary judgment. Haddox v. Suburban Lanes, Inc., 176 W. Va. 744, 349 S.E.2d 910 (1986).

In addition, summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for the judgment. Guthrie v. Northwestern Mutual Life Insurance Co., 158 W. Va. 1, 208 S.E.2d 60 (1974).

The burden rests on the Defendants to produce evidence that the Plaintiffs are not entitled to summary judgment. Bronz 402 S.E.2d at 268 (1991). "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, **the burden of production shifts to the nonmoving party** who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). (Emphasis added) If the Defendants are unable to do any of the above, this Court should grant the Plaintiffs' Motion for Summary Judgment.

The West Virginia Supreme Court of Appeals has defined "genuine issue" when used in the context of Rule 56(c). In Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (1995), the Court stated:

> ...a "genuine issue" for the purpose of West Virginia Rule 56(c) is simply one half of a trial worthy issue, and 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. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Id. at 15.

Factual disputes that are irrelevant or unnecessary will not be counted. Id. at 16, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The dispute, then, lies in the application of law to the undisputed facts of this case. As a matter of law, based upon the facts here presented, Plaintiffs are entitled to summary judgment. Not only do there exist no genuine issues as to any material fact, but the Defendants have failed to establish any facts that would indicate that the Plaintiffs are not entitled to judgment at all. The Defendants mere contentions are insufficient to defeat summary judgment. Thus, it is incumbent upon this Court to apply the law to the salient facts and grant the Plaintiffs' Motion for Summary Judgment.

Plaintiffs are entitled, per West Virginia Code §1940-68 to a right of way thirty (30) feet in width "plus slopes", or, in the alternative, per Gary A. Covey's uncontested opinion, of twenty-five (25) feet.

In the case of Town of Weston v. Ralston, 48 W.Va. 170, 36 S.E. 446 (1900), Syllabus Point 2 states, as follows:

> ...2. When a public easement has once been lawfully established over land for a public highway, either by dedication to the use of the general public by individuals, and acceptance by the proper authorities, or by the exercise of the right of eminent domain, such easement is good against any and all titles.

The case of William Grant Walls and Ruby M. Walls, Husband and Wife, and Jennings Watts, Jr. and Deborah L. Watts, Husband and Wife v. Chester DeNoone and Patricia DeNoone, 550 S.E.2d 653, 209 W.Va. 675 (2001) is a per curiam opinion.

This case states, in pertinent part:

> In the same case, the Court indicated that evidence of non-use of an easement, without more, is insufficient to establish the extinguishment of an

easement by abandonment requires a clear showing of an intention by the holder of the easement to abandon his rights. The Court said: "This rule is keeping with public policy considerations which revere vested property rights. Courts should not interfere with the rights of an owner of a prescriptive easement absent a clear showing that the owner does not intend to exercise his rights in the future."

The case of County Court of Jefferson County v. Sarah Hopkins, et als., 80 W.Va. 393 (1917) involves a dispute between an "old" road and a "new road".

Syllabus Point 1 Highways County Road Discontinuance

A county road established and opened pursuant to law, continues as such until vacated or discontinued in the manner prescribed by law.

In the case at bar, the Plaintiffs believe that the subject road has not been vacated or discontinued and has been in continuous use since the 1800s.

The case of State ex rel. Lola M. Woods v. State Road Commission of West Virginia, et. al., 136 S.E.2d 314, 148 W.Va. 555 (1964) is a mandamus proceeding wherein the petition sought to require the State Road Commission to institute a proceeding for eminent domain.

he Court in Woods v. State Road Commission states, in pertinent part:

...One whose real estate abuts on a public street or highway has two distinct kinds of rights. one is a public right which he enjoys in common with all other citizens. He also has certain private rights which arise from his ownership of property contiguous to the street or highway, and which are not common to the public generally. These include rights of access, view, light, air and lateral support. Such rights are not absolute, but are subject to the power of the state or municipality to control and regulate them reasonably in the public interest...

...The right of access to and from a public street or highway is a property right of which the owner may not be deprived without just compensation...

The case of McClellan v. Town of Weston, 49 W.Va. 669 (1901), is a case regarding the opening and use of public streets and alleys.

That case states, in pertinent part:

> ...In *commonwealth v. McDonald*, 16 Ser. & R. 395, Justice Duncan says that "public rights cannot be destroyed, by long continued encroachment," and in *Barter v. Commonwealth*, 3 Penn. & W. 253, Gibson, C. J., said "That the government of any incorporated town has a right to improve the streets for public purposes, is a proposition about which there can be little dispute," and "*No* private occupancy, for whatever time and whether adverse or by permission can vest a title inconsistent with it."...
>
> ...Any continuous obstruction of a public highway or street, not authorized by competent legal authority is a public nuisance...

Thus, if it the Long's purpose to limit the thirty (30) feet right of way to ten (10) feet, they are acting as a "public nuisance".

The case of Watts v. Norfolk & W. R. Co., 39 W.Va. 196 (1894), involves an action of trespass and recovery of damages.

That case states, in pertinent part:

> ...Neither a condemnation by law nor a grant of a right of way will justify destruction of a public highway in the construction of a railroad. The statute on the subject (clause 6, §50, c. 54, Code) provides that, when the work, interferes with a highway, it shall be restored to its former condition...

This case pertains to a railroad trespass but speaks to the destruction of a highway and restoring it to its former condition. In the case at bar, the Defendants have placed obstructions along the roadway, which are a public nuisance and a trespass into the roadway.

The case of Geoffrey S. Miller and Paula A. Miller v. David Hoskinson and Delores Weekley, 429 S.E.2d 76, 189 W.Va. 189 (1993), is a per curiam opinion. It is an "outlier" and is contrary to statutory and prevailing case law.

This is a Doddridge County case wherein a portion of a road on appellants' property was declared to be a public road. The West Virginia Supreme Court reversed the decision of the Circuit Court of Doddridge County.

The context of this case must be that the State of West Virginia was concerned that it might be stuck restoring and maintaining old roads which had diminished in their use and become largely private lanes without fulfilling the clearly stated requirements of West Virginia law for an abandonment.

Such a ruling, if followed, would deny West Virginia citizens the right to due process and equal protection and potentially leave landowners landlocked, as it would be here if there had not already been a stipulation that the right-of-way exists. Plaintiffs here seek no maintenance or repair by the County or State. They seek the use of this thirty (30) feet right of way for their private right of way.

The case of Holland, et. al., v. Flanagan, 81 S.E.2d 908, 139 W. Va. 884 (1954), was an action brought in the Circuit Court of Fayette County to enjoin Defendant from further use of a private way over the lands of the Plaintiffs.

The Syllabus by the Court in this case was:

> The requisites for the acquisition of a private way by prescription are: "The open, continuous and uninterrupted use of a road over the lands of another, under bona fide claim of right, for a period of ten years, ..."

The case of Marshall and Lorena Norman v. Benjamin Brooks Belcher, 378 WS.E.2d 446, 180 W. Va. 581 (1989), is an appeal from a final order of the Circuit Court of Kanawha County wherein the Court determined that Benjamin Brooks Belcher had failed to prove by clear and convincing evidence that he was entitled to a prescriptive easement over the lands owned by Marshall and Lorena Norman.

Syllabus Point 2 of this case states:

> The open, continuous and uninterrupted use of a road over the land of another, under bona fide claim of right, and without objection from the owner, for

a period of ten years, creates in the user of such road a right by prescription to the continued use thereof. In the absence of any one or all of such requisites, the claimant of a private way does not acquire such way by prescription over the land of another.

Syllabus Point 3 of this case states:

The burden of proving an easement rests on the party claiming such right and must be established by **clear and convincing evidence**. (emphasis added)

There is no question, as evidenced by the many affidavits annexed hereto, that the Plaintiffs and others have used the subject roadway for many decades but there is no evidence of a claim by prescriptive right.

The case of Bauer Enterprises, Inc. c. City of Elkins, 317 S.E.2d 798, 173 W.Va. 438 (1984), is a per curiam opinion arising from a declaratory judgment action and appeal of the order therefrom.

This case states, in pertinent part:

...In addition, there can be no adverse possession of a public way, Huddleston v. Deans, supra, but if the elements of adverse possession are present a private easement may be extinguished...

STATEMENT REGARDING ORAL ARGUMENT

Petitioner contends that oral argument in this case is essential pursuant to the criteria in Rule 18(a).

Petitioner believes this case, even more properly, can be set for a Rule 20 argument because it involves issues of "fundamental public importance", since nullification of the official county map of Upshur County, as the trial court has attempted to do could create chaos for the titles of hundreds of Upshur County properties.

Oral argument in this case is essential in light of the entry of an erroneous order of the Circuit Court denying Plaintiffs' Motion for Summary Judgment and granting the Defendants' summary motion to the Plaintiffs' severe prejudice.

ARGUMENT

Petitioners reiterate, but will not repeat here, the "Summary of Argument".

In summary, this is a simple case which can be made to appear complicated. Timothy Gregory owns several tracts of real estate in Meade District, Upshur County, West Virginia, totaling 152 acres, acquired by three (3) deeds.

On or about April 28, 2017, Mr. Gregory attempted to repair his ingress and egress right of way which had been neglected both because the defendants neglected it and he and his wife resided primarily in the State of Colorado since 1972.

As Mr. Gregory attempted to fill some potholes with gravel, Mrs. Lora Long blocked the road and would not let Mr. Gregory's contractor's truck out of the property until the deputy sheriff arrived.

Mr. Gregory and Janice Gregory, his wife, retained J. Burton Hunter, III, Petitioners' counsel herein, who attempted through various letters to Mr. and Mrs. Long, and later to their attorney, Mr. Pat A. Nichols, to arrange a meeting on the property, even with a mediator, to see if the parties' differences could be resolved amicably so that the Gregory's could remove what is estimated to be at least $250,000 worth of timber. Those requests were rejected.

Petitioners' filed their civil complaint on December 27, 2017 and three (3) subsequent Amended Complaints. They alleged ownership of the right of way "by various deeds". That

allegation, while true, was necessarily vague because, after a careful investigation at the time of filing, counsel could not ascertain exactly how the right of way had been created.

The "Amended Complaint" added counts for tortious interference and damages.

"Second Amended Complaint" - In December, 2018, Petitioner Timothy Gregory's brother, Jesse Gregory, brought to counsel a photocopy of what appeared to be an ancient map. Further investigation revealed that it was the official "Upshur County Map", also known as the "A. B. Brooks Map", which was prepared in the year 1905 by Assistant County Clerk, and surveyor, A. B. Brooks, as commissioned by the Upshur County Court. It was only then that counsel realized that the right of way is a public easement.

The Third Amended Complaint (Appendix pg. 609) was mandated by the Court to add the Upshur County Commission as an essential party. The Commission was then properly dismissed as a party.

1. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER UNDISPUTED FACTS AND LAW AS STATED IN PROFESSOR JOHN W. FISHER, II'S OPINIONS DATED NOVEMBER 19, 2019, JUNE 4, 2020, AND JULY 17, 2020.**

The entirety of the argument is encompassed by the authoritative and scholarly opinions rendered by Petitioners' expert Professor Emeritus John W. Fisher, II, who stated as follows:

Professor Fisher Letter Opinion November 19, 2019:

> Pursuant to your request, I have reviewed the pleadings, with attachments, motions and briefs that you provided to me in the above case. My conclusions as to the law in West Virginia as applied to the facts of this case as presented in the materials I have reviewed are set forth below.
>
> In the years following statehood in West Virginia, most of the roads in our state were "county roads". These roads connected various parts of the county with the county seats and provided access to the citizens of the county. (A brief overview of highway development in West Virginia is found in The West Virginia Encyclopedia and is attached as Appendix A.) Basic statutory provisions for these

county roads are found in the West Virginia Code of 1870 Chapter 43. After providing for the organization and supervision of the county roads in Chapter 43, Section 12 provided, in part:

Every male person in any road precinct, and is not a pauper, having had at least three days notice, shall, between the first day of April and the first day of November in each year, attend in person or by a sufficient substitute, with proper tools, and work on the on the county roads in such precinct, under the direction of the surveyor thereof, at such places and on such days during the said period as the said surveyor may appoint, at least two days, of the number as be necessary...."

Section 12 continues to provide for the contingency of how to complete the road work if the two days of work is not sufficient.

Section 34 of chapter 43 provided:

No bridge, unless it be exclusively for footmen, shall be less than twelve feet wide. Every road shall be thirty feet wide, unless the supervisor of the county order it to be a different width. The grade of any road to be hereafter established shall not exceed five degrees, unless authorized by the supervisor of the county". While the statutory provisions contained in chapter 43 of the code expanded over the successive codes, the above quoted section continued to appear in each of the code revisions including the West Virginia Code of 1931. In 1933, the West Virginia legislature brought the county road system under the direct control of the State. While it is not always easy to know which roads were part of the county road system, in this case there is very reliable documentary evidence as to the county road system in Upshur County. I specifically note the A.B. Brook's map of 1905 which is and has been on public display in the Upshur County Court House and is described in The Buckhannon Delta and Knight-Errant Newspaper of June 29,1905. The news article states A. B. Brooks is an employee of the county clerk's office. In addition, the West Virginia Geological survey maps of 1917 and 1918 show the roadway at issue in this case as a county road.

Given that my opinion, that based on the records I have reviewed clearly establishes that the roadway at issue was a part of the county road system of Upshur County, the question becomes what has happened to that roadway since the county road system was ended by the legislature in 1933.

Again, the early West Virginia Code provides for a specific procedure to "close" a public road (See West Virginia Code of 1870 chapter 43 section 30 and the Code of 1931 chapter 43 section 9) This procedure requires notice and a hearing with an appropriate record maintained. I note that in the brief filed by the prosecuting attorney of Upshur County in support of its motion to dismiss the Upshur County Commission, it is specifically stated there is no record of an abandonment of that

county road, (see page 5 of the brief.) That statement is consistent with my review of the file in this case. As the West Virginia Supreme Court of Appeals noted in syllabus 1 in County Court of Jefferson County v Sarah Hopkins et al (80 W.Va. 393 (1917) "A county road established and open pursuant to law, continues as such until vacated or discontinued in the manner prescribed by law".

It appears to me that a concern of the County Commission is whether there is a duty on the county to expend public funds to maintain "old county roads" not being maintained by the state. I understand from the Third Amended Complaint (see paragraphs 29 and 32) that you are not seeking public funds to maintain the road involved in this case. In my opinion, as the law in this area has evolved the duty for the expenditure of public funds to maintain roads occurs when there has been an expressed statement of acceptance or when there is an implied acceptance created by the expenditure of public funds on the road. (See generally Bauer Enterprises, Inc. v City of Elkins 173 W.Va.438, 317 SE 2d. 798 (1984) There is nothing in this case to suggest either of those conditions have occurred. Equally important is the fact ' that the right of ingress and egress (i.e. access) is NOT lost by the property owner because of a lack of public funds to maintain such a road.

I note that all parties, either in the pleadings or their briefs, have conceded that there is a right of way. The issue is the width of the right of way. It is contended by those opposing the Plaintiffs that the width of the right of way is to be determined by "usage". In an article published in 112 W.Va. Law Review 637 (2010) entitled "A Survey of the Law of Easements in West Virginia" I discussed the courts looking at " usage to determine the width of the right of way. The establishment of the width of a right of way by usage is in effect a "default" method to determine the width used by the court when there is a right of way but not an expressed way to determine the width of the right of way. In this case there is a specific statutory provision to establish the width. Therefore, to try to determine the width by usage would not be appropriate.

As requested, I enclose a copy of my resume and note that prior to my retirement I taught courses in property law for over forty years.

Professor Fisher E-mail Opinion June 4, 2020:

You have asked whether the Ryan case and the Scites case relied on by Mr. Nicholas in the arguments on your motion for summary judgment changes my opinion concerning the Gregory v Long case. The answer is they do not. In fact, as explained below, the Ryan case gives credence to the opinion I expressed.

Public roads are a special category of right of way or easement law. Whereas "easement" law was largely developed via case law, public roads are essentially created by statutory provisions. An early example of the importance of statutory

provisions are those originally adopted by Virginia and which became part of the laws of West Virginia upon statehood which established the width of county roads as well as other provisions. (see Chapter 43 section of the West Virginia code of 1863) A companion section34 which establishes the width of County Roads is section 35 which established a procedure to petition the County Court to alter or relocate an existing road. It is this particular code section(35) that was involved in the Ryan case. In Ryan, one of the members of the county court authorized the relocation of a portion of the Sand Spring road without the required approval of the Count Court as required by the statute. The court held that since the alteration of the road was not in compliance with the statute, they closed the altered portion of the road and reestablished the "original" road. In the Ryan case the portion of the opinion concerning the "three methods by which the public may obtain a valid right to use land owned by another as and for a public road or highway" was in reference to the "altered or relocated" portion of the Sand Spring road and not the original Sand Spring road which was the county road and therefore covered by the provisions of Chapter 43 of the West Virginia Code. Implicit in the Court's decision is its recognition of the provisions of Chapter 43 of the code to the county road system.

The Scites case is essentially a procedural decision in which the West Virginia Supreme Court of Appeals held the granting of summary judgment was reversible error because there were material questions of fact. It is further noted by both parties agreed that no public right of way existed in the Scites case.

As I said in my deposition, and the above discussed cases do not in any way change my opinion. I believe the evidence in this case clearly establishes that the A.B. Brooks map of 1905 reflects the County Roads of Upshur County and that the applicable provisions of the West Virginia code establishes the width as 30 Feet.

Professor Fisher Letter Opinion July17, 2020:

In your letter to me dated July 15, 2020, you asked me several questions concerning the Court's order of July 10, 2020 in the above case. Since my answer to the several questions are intertwined, I believe the following is responsive to your several questions. This letter opinion is intended to supplement my opinion letter to you of November 19, 2019.

At the time of my depositions, my considered opinion was that the evidence clearly established that the road or right of way in question was a part of the county road system and, therefore, there was no legal issue as to whether a prescriptive easement was involved. I note the following exchange in my deposition when Mr. Nichols was asking questions relevant to prescriptive easements.

A. "Let me just make one thing sort of clear. I don't see this particular easement as a prescriptive easement.

Q. Why don't you see it as a prescriptive easement?

A. Because I think it is very clear from the information that's been provided that this was a part of the county road system."

That was my considered opinion at the time of my deposition and it continues to be my considered opinion even after the Court's Order entered on July 10, 2020. I believe that to understand the county road system, one must also understand the history of land titles in West Virginia. During the time I was actively teaching I wrote two articles concerning the constitutional aspects of West Virginia's forfeited and delinquent land procedures. (see Forfeited and Delinquent Lands- The Unresolved Constitutional Issue 89 W.Va.961 (1987) and Delinquent and Non-Entered Lands and Due Process 115 W.Va. 43 (2012). The first article provided the judicial basis for the Court holding the existing procedure unconstitutional in Lilly v Duke 376 S.E. 2d 122 (W.Va. 1988) Those two articles discussed the state of the land titles in western Virginia as set forth by Judge Snyder in the case of McClure v. Maitland, 24 W.Va. 561 (1884). As Judge Snyder explained, the land titles in western Virginia were "a most wretched and embarrassed condition". One authority estimated that by the early 1800s absentee landowners owned up to 93% of West Virginia. The important thing to understand is that as the settlement of what became the state of West Virginia, the title to much of the land was in a "mess". The early roads tended to follow Indian trails and wild animal paths. As communities developed, the settlers would establish their road to get to towns and to their neighbors. In effect, these local roads were established and maintained by the local citizens in a collaborative effort for their mutual benefit. In order to establish a road system the legislature of Virginia incorporated some earlier provision into Chapter LII. The fifth paragraph set the width of every road as thirty feet unless the county court ordered it to be less. These code provisions were carried forward into the first West Virginia code as chapter 43 of the code of 1868. Important aspects of chapter 43 were the county surveyor would be responsible for the field or "engineering" type of work, the board of supervisors "managed" the road maintenance work required of most adult males, and the clerk of the county court was responsible for the administrative/record keeping. Over time the statutory provisions of the county road system evolved until the State took over the county roads in 1933.

An important aspect of this case is the A.B. Brooks map. I think it is important to note that the A.B. Brooks map was commissioned by the Upsher County Court, was prepared by an assistant County Clerk and posted by the Clerk's office and has been publicly displayed until this day. Given the "record keeping

responsibilities" placed on the County Clerk's office, I believe the A.B. Brooks map is compelling evidence as to what were the county roads in Upsher county. I also note that there were other state maps in the exhibits in this case that included the road in question (1917 &1918 Geographical survery maps). I also believe that the affidavit of Courtney R. Eskew contains important evidence as to the A.B. Brooks map. I do not claim any expertise as to the law of evidence but I have looked at Professor Frank Cleckley's Handbook on Evidence for West Virginia 5th edition, Chapter 9 section 901.02[3] [h &i] entitled Public Records and Ancient Documents and it would appear that the A.B. Brooks map meets the criteria.

As I have said before, it is difficult to imagine a case with better, more reliable information as to what constituted the county roads in a particular county than what exists in this case. Since I believe the road in question is a county road, then the Ryan case the court has relied upon has no relevance. The right of way exists under the statutory provisions. I also note that the attorney representing the county has stated there has not been any abandonment of the road in question as required by statute. Therefore, the county road right of way continues to exist.

The opinion I have expressed in this letter is based upon my teaching of property law for over four decades and my research for a number of law review articles dealing with property law issues and the application of the relevant concepts of property law to the facts of this case.

2. **The Circuit Court committed plain error in denying the Plaintiffs' Motion for Summary Judgment which error precludes Plaintiffs from presenting to a jury any evidence that the subject right of way is a public way including testimony of Plaintiffs' expert John W. Fisher, II, the official 1905 Upshur County Map, AKA "The A. B. Brooks Map", State Geological Survey maps, and a concurrent historical newspaper article dated June 29, 1905 from the local newspaper The Buckhannon Delta and Knight-Errant, the newspaper of general circulation in Upshur County, all of which is unrebutted by the Defendants.**

3. **The Circuit Court committed plain error in granting the Defendants' Motion for Summary Judgment and concluding, as a matter of law with no findings of fact, that the subject right of way was created by prescriptive right when Defendants presented and proffered no evidence of facts supporting a claim by prescriptive right.**

4. **The Circuit Court erred by effectively ruling the width of the right of way is limited solely to the existing road surface when the unrebutted evidence and testimony of Plaintiffs' expert John W. Fisher, II demonstrates that it is a county road by statute with a minimum right of way of thirty (30) feet in width, "plus slopes", and if that**

were not the case, Plaintiffs' expert G. A. Covey that a single lane country road must have a right of way width of twenty-five (25) feet.

In October, 2019, Petitioners' counsel retained, as an expert, John W. Fisher, II, Professor Emeritus at the WVU College of Law and former acting dean, who this Court in the case of McClung Investments, Inc., v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), recognized as the "preeminent expert" in his field of West Virginia real estate and right of way law. Professor Fisher's research included various maps as well as extensive readings and research in the WV Encyclopedia and his own near encyclopedic knowledge of WV real estate and right of way law. Professor Fisher's written opinions dated November 19, 2019. June 4, 2020, and July 17. 2020, stated the subject right of way is a long neglected (but never abandoned) county road and, therefore, is a right of way with a width of 30 feet "plus slopes" as required by statute. Professor Fisher testified at his deposition in support of these opinions and was not impeached. In fact, no single fact has been cited by the defense in response to Plaintiffs Motion for Summary Judgment or in support of its own Motion for Summary Judgment to support the factual finding that the subject right of way was created by "prescriptive right".

The trial court ruled, in effect, as a matter of law that Professor Fisher's testimony can be wholly disregarded and that it has no merit even as a fact to be weighed and considered by the jury, that the official Upshur County Map of 1905 is of no consequence, nor are the 1917 and 1918 WV Geological Survey Maps, and that the newspaper article, from a newspaper of general circulation, published in June 1905 is also inadmissible, contrary to Rule 803 "Exceptions to the Rule Against Hearsay" and Rule 902 "Self-Authentication" of the West Virginia Rules of Evidence.

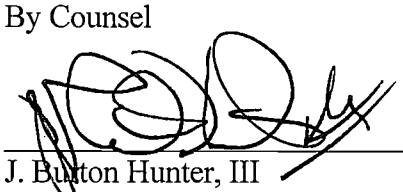
This ruling effectively prevents Plaintiffs from pursuing the only legal theory upon which they can obtain relief, that the right of way is a county road. The Upshur County Map of 1905 clearly and unambiguously identified the subject right of way as a county road, which, by statute, has a right of way of thirty feet "plus necessary slopes".

CONCLUSION

In light of the foregoing, Petitioner believes that this matter should be remanded to the Circuit Court of Upshur County, West Virginia for an order to be entered stating that the subject right of way is thirty (30) feet in width "plus slopes" in accordance with WV Code of 1918.

Timothy J. Gregory and Janice L. Gregory also move for attorneys' fees and such sanctions as this Court deems appropriate.

Respectfully Submitted,
TIMOTHY J. GREGORY and
JANICE L. GREGORY, Petitioners
By Counsel



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CERTIFICATE OF SERVICE

I, J. Burton Hunter, III, attorney for Timothy J. Gregory and Janice L. Gregory, do hereby certify that I served the foregoing ***Petitioners' Brief*** upon the following counsel by depositing a true copy thereof in the United States Mail, with postage prepaid in envelopes addressed as follows:

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Dated this 17th day of December, 2020.

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