

Buddy

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

JAMES R. SHAFFER and  
IRIS M. SHAFFER,  
Plaintiffs,

v.

Case No. 18-C-7

ROBERT GOODWIN and  
ROBIN GOODWIN,  
Defendants.

**AMENDED ORDER GRANTING THE PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT IN PART AND DENYING IN PART**

This matter came before the Court, Judge Steven L. Shaffer, presiding, on December 10, 2020 pursuant to a status hearing. The Plaintiffs appeared through counsel, Alex M. Greenberg, who appeared telephonically. The Defendants appeared through counsel, W. Buddy Turner, who appeared in person. Counsel requested that additional language regarding the finality of the *Order Granting the Plaintiffs' Motion for Summary Judgment in Party and Denying in Part* be included. Thus, the Court amends the order to add the requested language.

This matter came before the Court, Judge Steven L. Shaffer, presiding, on December 16, 2019, for a hearing on the *Plaintiffs' Motion for Summary Judgment*, which was filed on or about April 8, 2019.<sup>1</sup> The Plaintiffs, James R. Shaffer and Iris M. Shaffer, appeared in person

<sup>1</sup> Previously, this Court held a hearing on the *Plaintiffs' Motion for Summary Judgment* on April 18, 2019. The Plaintiffs appeared and were represented by Kyle T. Turnbull. The Defendants appeared and were represented by Kevin T. Tipton. Following the hearing, the Court ordered further argument and presentation of evidence on June 27, 2019, and directed counsel to file copies of deeds in the chain of title, along any plants and surveys attached to the deeds. The Court further directed the Parties to be prepared to present evidence on the use of the disputed alleyway from 1973 to 2017. *Order Setting Hearing and Directing the Filing of Deeds*, entered May 16, 2019. Since that time, both the Plaintiffs and the Defendants have substituted counsel. The June 27, 2019, hearing was continued twice upon motion of counsel, ultimately resulting in the hearing being rescheduled for December 16, 2019. See *Agreed Order Continuing Hearing*, entered August 20, 2019; *Order Granting Motion to Continue*, entered September 26, 2019.

and by counsel, Alex M. Greenberg, Dinsmore & Shohl, LLP. The Defendants, Robert Goodwin and Robin Goodwin appeared in person and by counsel, Woodrow "Buddy" Turner and Mark E. Gaydos, Gaydos & Turner, PLLC. Following the presentation of witnesses and argument, as detailed more fully below, the Court took the matter under advisement. Upon further consideration of this matter, the Court hereby

**ORDERS** that the *Plaintiffs' Motion for Summary Judgment* is **GRANTED IN PART** and **DENIED IN PART**. The Court **GRANTS** the *Plaintiffs' Motion for Summary Judgment* to the extent that the Court **FINDS** that the Plaintiffs acquired a right of way by adverse prescription to use the disputed alleyway on or prior to 1999. However, the Court **DENIES** the *Plaintiffs' Motion for Summary Judgment* to the extent that there is a factual dispute regarding whether the Plaintiffs continued to possess a right of way by adverse prescription after 1999.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Many of the underlying facts of this matter are not disputed. The Parties agree that the Plaintiffs, James R. Shaffer ("Mr. Shaffer") and Iris M. Shaffer ("Mrs. Shaffer"), collectively referred to as "The Shaffers", own the real estate located at 203 Tunnelton Street, Kingwood, West Virginia. They purchased their property in 1973 and have continuously resided in this property since that time. At the time the Shaffers purchased the property, their next-door neighbors at 207 Tunnelton Street, Kingwood, West Virginia, were a couple by the last name of Fretwell, who are now deceased. In 1999, the Defendants, Robert Goodwin ("Mr. Goodwin") and Robin Goodwin ("Mrs. Goodwin"), collectively referred to as "The Goodwins," purchased the property at 207 Tunnelton Street. The Goodwins have resided at 207 Tunnelton Street continuously since 1999. When facing the front entrances of the two residences, the Shaffer

residence sits to the left of the Goodwin residence. To the left of the Shaffer residence lies High Street. The disputed alley way separates the two properties. To the right of the Goodwin residence lies Brown Avenue. The key dispute in this case involves the use of the alleyway running between the Parties' properties.

In their *Complaint*, the Shaffers allege the following causes of action (1) prescriptive easement for use of the alley; (2) private nuisance by the Defendants' alleged interference with the Plaintiffs' right to use the alley by erecting a gate and building; (3) Civil Conspiracy; (4) Trespass; and (5) injunctive relief. *Complaint*, filed January 24, 2018. The Goodwins filed their *Answer* on March 6, 2018, wherein they denied failing "to take any action to prevent the Plaintiffs' use of the alley" and admitted to installing a gate "to prevent Plaintiffs' use of the Defendant's property." *Answer*, p. 2, ¶ 5.

The Plaintiffs filed *Plaintiffs' Motion for Summary Judgment* on April 8, 2019. This Court heard arguments regarding *Plaintiffs' Motion for Summary Judgment* on April 18, 2019. The Plaintiffs appeared and were represented by Kyle T. Turnbull. The Defendants appeared and were represented by Kevin T. Tipton. Following the hearing, the Court ordered further argument and presentation of evidence for a hearing scheduled for June 27, 2019, and directed counsel to file copies of deeds in the chain of title, along any plats and surveys attached to the deeds. The Court further directed the Parties to be prepared to present evidence on the use of the disputed alleyway from 1973 to 2017. *Order Setting Hearing and Directing the Filing of Deeds*, entered May 16, 2019. Since that time, both the Plaintiffs and the Defendants have changed counsel. The June 27, 2019, hearing was continued twice upon motion of counsel, ultimately resulting in the hearing being rescheduled for December 16, 2019. *See Agreed Order Continuing Hearing*, entered August 20, 2019; *Order Granting Motion to Continue*, entered September 26, 2019.

At the August 29, 2019, hearing, the Court heard the sworn testimony of Curtis Stiles and the Plaintiff, James Richard Shaffer. At the December 16, 2019, the Court heard the sworn testimony of Catherine Ellen White, James L. Maier, Defendant Robin Goodwin, Defendant Robert Goodwin, Jr., and James G. Lobb. Counsel for the Defendants presented the Court with the Defendants' *Bench Brief in Support of Opposition to Plaintiffs' Motion for Summary Judgment*. At the conclusion of evidence, the Court took the matter under advisement.

In the Defendants' *Bench Brief*, they argue (1) that the Plaintiffs' use of the alley was with permission because the Plaintiffs' property borders the alley and thus any use would be, to put it informally, neighborly and thus permissive. The Defendants cite *MacCorkle v. City of Charleston*, 105 W.Va. 395, 142 S.E. 841 (1928) for this proposition.

#### **Alley Between 1900 and 1970**

The alleyway first appears in the records of the County Clerk of Preston County by deed dated July 6, 1900, and of record in Deed Book 88, page 438. In this Deed, W.G. Brown grants to John W. Watson a lot on Tunnelton Street in Kingwood, "except that an alley way is to be maintained the width it now is along the Northern boundary of said lot for the benefit of those who have theretofore and may hereafter buy lots of the said Grantor on Brown Avenue, and said Alley way is to be reserved from Tunnelton Street through to Price Street, through the several lots hereafter to be sold by said Grantor." This deed was attached to the letter dated August 23, 2019, from Kevin T. Tipton, Esq., former counsel for the Defendants, to the Circuit Clerk of Preston County. Due to unknown error, this letter does not appear to have been formally filed with the Office of the Circuit Clerk but courtesy copies were served upon the Court and Plaintiffs' counsel. A copy of this letter is filed contemporaneously with this Order.

This alleyway previously was the subject of a civil action instituted in 1964, *Robertson, et al. v. Whetsell, et al*, Preston Co, Civil Action No. 484.<sup>2</sup> In his *Opinion*, entered August 24, 1970, Judge Snyder gave a history of the property development on this area of Kingwood, as well as the disputed alleyway. The opinion states

William G. Brown at one time owned all of the property fronting on Brown Avenue. The Northern boundary of the lots fronting on Brown Avenue is the property line of the property owners fronting on High Street. In subdividing his property on Brown Avenue, William G. Brown, according to the Complaint, made a condition of the conveyances that there by an alley left open for the use of the properties abutting on Brown Avenue.

*Opinion*, p. 2.

In the *Robertson v. Whetsell* matter, the key issue was whether the alleyway had become a public road. The Plaintiffs alleged that use by members of the public rendered the alley a public road. Judge Snyder found

The City of Kingwood had accepted the dedication by working said alley as other alleys in the Town were worked and other streets in the Town were worked is vague and almost meaningless. A street or alley dedicated to the public and accepted as such, remains a public street or alley even if it is never worked. In this case, we have an alley or easement established as a private way.

*Id*, p. 3.

Judge Snyder cited the case of *MacCorkle v. City of Charleston*, 105. W.Va. 395, 142 S.E. 841 (1928), where alleys were explicitly made private methods of ingress and egress, and *Degrilleau v. Frawley*, 48 La. Ann. 184, 19 S. 151 (1896), for the proposition that proof of dedication of a road for public use must "be so clear as to exclude any other reasonable hypothesis." *Id* at p. 4. Based upon this reasoning, the Court found that the alley was dedicated

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<sup>2</sup> The Defendants attached a copy of the *Opinion* as Exhibit A to their *Bench Brief in Support of Opposition to Plaintiffs' Motion for Summary Judgment*, filed December 16, 2019.



for private use. *Id* at p. 5. The Court declined to rule on the issue of whether the alley had become open to public use by adverse prescription of the general public for more than ten years because “[t]here is no claim by the Methodist Church that its members traveled on and over the alley, going to and from the various church services, over a period of ten years, and thereby obtained a right by prescription. The Church, however seeks to attach its right to go on and over said alley to the fact that the public had traveled said alley and thereby it would fall heir to the right established by John A. Crogan and others of the class traveling on and over said property.” *Id*. The opinion went on to elaborate that even had John A. Crogan obtained a prescriptive right of way to travel the alley, it could not be expanded into a class that would include the Kingwood Methodist Church because West Virginia case law limited a prescriptive right of way to the extent of the usage during the period of prescription and cannot be broadened or changed. *Id* at pp. 6-7. Thus, the Court found that in the *Robertson v. Whetsell* case that the Kingwood Methodist Church did not allege a prescriptive right to the alley and that the alley was “an easement establishing a private way.” *Id* at p. 7.

#### **Alley 1973-Present**

The Shaffers report that they moved into their home in 1973 and allege they began to use the alley at that time. They assert that since 1973, they “without permission from any owner, have continuously and openly utilized the Alley to access the back of the Plaintiffs’ residence.” *Complaint*, p. 2, ¶¶ 5 and 7. As previously stated, the Goodwins moved into their residence in 1999. The Shaffers allege that for the first seventeen years after the Goodwins moved into the house next door to theirs, that the Goodwins failed to take any action to prevent the Shaffers’ use of the alley and that it was within the year prior to the January 24, 2018, filing of the *Complaint*,

that the Goodwins had erected a gate and building which blocked the Shaffers' use of the alley. *Complaint*, p. 2, ¶¶ 9-12.

At the August 29, 2019, hearing, Mr. Shaffer testified regarding his and his wife's use of the alley from 1973 to the present. He stated he used the alley to regularly park his vehicles (specifically two personal vehicles, as well as a vehicle for his flower shop), especially in the evening. August 29, 2019, Hearing Transcript, p. 31, lines 7-20. He also stated he used the alley in the wintertime "to get our coal into the basement" for the coal furnace. *Id* at p. 31, lines 7-9. Mr. Shaffer testified that he "[f]igured it was just part of my property. Never questioned it and nobody every [sic] questioned and nobody every [sic] complained. If any of the neighbors behind wanted to get in, I'd say, 'Certainly, go ahead,' and I'd move my car and let them in." *Id* at p. 31, lines 9-13.

In the 1970s, Mr. Shaffer testified, the alley contained gravel in the area where he parked his car but was generally grass otherwise. He stated that he mowed the alley "like a yard." August 29, 2019, Hearing Transcript, p. 32, lines 6-9. He later testified he maintained the alley by keeping gravel in the area, including hiring the Defendant, Robert Goodwin, Jr., to bring in a load of gravel in sometime around the early 2000s. *Id* at pp. 32-33. Mr. Shaffer testified that he used and maintained the alley in the manner described in the 1970s, 1980s, 1990s, and 2000s. *Id* at pp. 32-37. During the August 29, 2020, hearing, Curtis Stiles recalled that during the late 1970s, the alleyway was graveled and that "[s]ometimes Mr. Shaffer's car was parked there." Mr. Stiles also recalled that sometimes Mr. Shaffer would allow other individuals to park cars in that alley and his yard during the annual Buckwheat Festival. August 29, 2019, Hearing Transcript, p. 7, lines 3-24. Mr. Stiles indicated that this use of the alley way was consistent in the 1980s and 1990s. *Id* at pp. 8-10. Mr. Stiles commented that when the property at 207 Tunnelton Street that became

the Defendants' property was for sale, he and his wife looked into buying the property and commented to the realtor that " 'Well, the Shaffers use that as their drive and, you know, that would be great because we could share that area in between.' " *Id* at p. 9, lines 3-10. Mr. Stiles testified that in the later 2000s, when he was mayor of Kingwood, that the Goodwins erected a fence and applied for building permits through the City of Kingwood for the fence.

Throughout the August 29, 2019, hearing, Mr. Shaffer was asked by his own counsel and opposing counsel whether he had ever requested permission from any person to use the alley way. On each of the six occasions during the August 29, 2019, hearing, when he was asked whether he ever sought permission to use the alley, Mr. Shaffer said that he did not. *See* August 29, 2019, Hearing Transcript at p. 30, line 24 to p. 31, line 2; p. 34, line 23 to p. 35, line 3; p. 37, lines 16-19; p. 38, lines 11-13; p. 48 lines 5-13; p. 50, lines 16-20.

During the December 16, 2019, hearing, the Shaffers presented the testimony of Catherine Ellen White, who testified that she regularly was around the residence since she was in her 20s, due to her parents living nearby, and has lived in the neighboring High Street since the 1980s. She also testified that she worked at the Garden Towers office building until her September 2017 retirement, which is across the street from the Shaffer residence. December 16, 2019, Hearing Transcript, pp. 8-9; 14. Ms. White testified that during the 1970s, 1980s, and 1990s, that the Shaffers regularly used the alleyway for parking and kept the alley mowed for this purpose. *Id* at p. 10, lines 10-24; pp. 12-13. She commented that "[t]he sidewalk is even designed for them to pull up in to there, so they—it was their driveway." *Id* at p. 10, lines 13-17.

Ms. White's testimony was largely supported by the testimony of James Maier, a longtime Kingwood resident, who also testified at the December 16, 2019, hearing. Mr. Maier testified that during the 1970s his mother lived across the street from the Shaffers and that he was friends with



the Shaffer children, which meant he was in or around the Shaffer household regularly during the 1970s. December 16, 2019, Hearing Transcript, p. 19, lines 12-20. Mr. Maier testified that the Shaffers used the alleyway as a driveway, to park cars, and access the back of their house. *Id* at pp. 19-20. He stated that the Shaffers mowed the alley and kept gravel in the area of the alley where they parked vehicles, and also allowed others to park in the alley during the Buckwheat Festival. *Id* at pp. 20-21. He stated he recalled “a dip” in the sidewalk that allowed vehicles to easily pull up to the alley to park. *Id* at p. 22, lines 11-13. Mr. Maier stated the Shaffers’ use of the alley was consistent through the 1970s, 1980s, and 1990s. *Id* at pp. 21-22. On cross-examination, Mr. Maier testified that he saw Mr. Shaffer in the alley performing work on the alley to maintain it. *Id* at p. 24, line 23-p. 25, line 1.

Mrs. Goodwin also testified regarding her recollection of the disputed alleyway. She testified that she has been a Kingwood resident for 55 years and regularly walked or otherwise went by the alley in the 1970s, 1980s, and 1990s. December 16, 2019, Hearing Transcript, pp. 46-48. She testified that during this time, the alley way was “completely grown over” to the point that you could hide in the bushes and growth.

Mrs. Goodwin specifically recalled an incident where she and two friends hid from the Chief of the Kingwood Police after they had jumped the fence at the pool by hiding in the bushes that were in the disputed alley close to the Shaffer residence. *Id* at p. 49, lines 1-21. Mrs. Goodwin stated this incident would have occurred in 1978 or 1979 because she was fourteen or fifteen years old at the time. *Id* at p. 51, lines 21-24. Mrs. Goodwin stated that when she bought the property at 207 Tunnelton Street in 1999 that there was no distinguishing the location of the alley because of the overgrowth. She stated that in the Spring of 2000, her husband began clearing away some of the bushes in the alley. *Id* at p. 53, lines 20-22.

Mrs. Goodwin testified that her recollection that in the years prior to her 1999, the Shaffers parked their vehicles on the street. December 16, 2019, Hearing Transcript, p. 51, lines 5-20. Mrs. Goodwin denied ever seeing anyone parked beside the Shaffers' house. *Id* at p. 51, lines 2-4. Mrs. Goodwin also testified that she never noticed anyone besides the homeowners of Brown Avenue utilizing the alley and that she had no idea Mr. Shaffer alleged he used the alley. *Id* at p. 53, lines 8-14.

Mrs. Goodwin described three occasions on which she discussed the issue of the alley with the Shaffers. Mrs. Goodwin first stated that when she put up a decorative fence around her property, Mr. Shaffer asked if the fence could be held back to allow the Shaffers to park their car so that his wife would not have to get out in the snow. Mrs. Goodwin described this occasion as Mr. Shaffer asking permission and that Mr. Shaffer did not claim to own the alley. *Id* at p. 58, lines 2-23.

Mrs. Goodwin stated the alley did not contain any gravel until approximately 2004 or 2005, when she her husband placed a load of gravel in the alley to facilitate construction of a pool on the Goodwin property. *Id* at p. 66, lines 15-23. Mrs. Goodwin stated after her husband placed gravel in the alley, the Shaffers asked permission to park in the alley. *Id*.

Mrs. Goodwin described another occasion in approximately 2015 or 2016 when a different neighbor had constructed an in-ground pool, resulting in the dumping of dirt on the Goodwin property. When the Goodwins were attempting to discuss the removal of dirt with this neighbor, Mr. Shaffer informed the Goodwins that he owned the alley. *Id* at pp. 60-61.

Plaintiff Robert Goodwin's testimony mirrored his wife's. He stated that between 1999 and 2000, Mr. Shaffer asked him for permission to drive to the back of the Shaffer residence through the alley, which Mr. Goodwin stated he granted. December 16, 2019, Hearing Transcript,

p. 83, lines 7-17. Mr. Goodwin stated that after a separate neighbor had constructed a pool on her property, Mr. Shaffer told him that he would continue to use the alley until the Goodwins had obtained a survey stating the property was theirs. *Id* at p. 84, lines 15-18. Mr. Goodwin also stated that at an unspecified time that Mr. Shaffer directed his son not to go over to the alley because it belonged to the Goodwins. *Id.* At p. 6, lines 2-3.

During the December 16, 2019, hearing, the Goodwins presented the testimony of lifelong Kingwood resident, James G. Lobb. Mr. Lobb testified that he could not particularly recall the state of the disputed alley when he was a child because he was more focused on playing than noticing the state of the alley. December 16, 2019, Hearing Transcript, p. 95, lines 2-23. Mr. Lobb stated that as an adult he did not pay enough attention to the disputed alley and could not state whether the Shaffers put gravel in the alley or parked in the alley. *Id* at p. 100, lines 16-19; p. 101, lines 3-11. Mr. Lobb stated that in his memory “you could never go straight through the whole alley.” *Id* at p. 101, lines 10-11.

Mr. Lobb also testified that when he was mayor of Kingwood from 2007 to 2013, Mr. Shaffer requested that the Kingwood City Council decide on the use of the alley and that the city attorney informed the council that a court case begun by the Methodist Church had determined that the alley was owned by the Brown Avenue property owners. *Id* at p. 98, lines 2-23. Mr. Lobb recollected that there was “always a dispute going on” about the alley “no matter how many times the City told [Mr. Shaffer] that the alley was deemed private property from that court case.” *Id* at p. 99, lines 17-19. When asked about a dispute between the Shaffers and Goodwins over a fence the Goodwins planned to erect, Mr. Lobb stated he could not recall the particulars of the matter that came before City Council but he believed that the Goodwins moved the fence to allow the Shaffers to use the alley. *Id* at pp. 99-100.

## STANDARD OF REVIEW

A motion for summary judgment should only be granted “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. R. Civ. P. 56(c).

[I]n light of the jury’s role in resolving questions of conflict and credibility, we have admonished that this rule should be applied with great caution. In cases of substantial doubt, the safer course of action[] is to deny the motion and proceed to trial. Thus, if the evidence would allow a reasonable jury to return a verdict for the nonmoving party, then summary judgment will not lie.

*Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W.Va. 692, 698, 474 S.E.2d 872, 878 (1996) (citations omitted).

For purposes of Rule 56(c), a genuine issue of material fact is simply one half of a trialworthy 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 trialworthy issue is present where the non-moving party can point to one or more disputed “material” facts.

Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).



“A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). After the moving party has made a motion for summary judgment and has shown by affirmative evidence that there is no genuine issue of a material fact, then

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).

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 268-69, 700 S.E.2d 317, 327-28 (2010) (quoting Syl. pt. 3, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

## LEGAL BACKGROUND

An easement is a right that one person has to use the land of another person, for a specific purpose, such as travel. *O'Dell v. Stegall*, 226 W.Va. 590, 605, 703 S.E.2d 561, 576 (2010) (citing *Cobb v. Daugherty*, 25 W.Va. 435, 441, 693 S.E.2d 800, 806 (2010)).

“The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof.” Syl. Pt. 1, *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976) (overruled in part on other grounds, *O'Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561 (2010)); *O'Dell v. Stegall*, 226 W.Va. 590, 608, 703 S.E.2d 561, 579 (2010); Syl. Pt. 3, *Newman v. Michel*, 224 W.Va. 735, 688 S.E.2d 610 (2009).

In 2010, the West Virginia Supreme Court of Appeals rendered the landmark opinion of *O'Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561 (2010). This opinion consolidated and clarified the doctrine of prescriptive easements in West Virginia. In order to prove an easement by prescription, the party claiming the easement must prove:

1. The adverse use of another's land;
2. That the adverse use was continuous and uninterrupted for at least ten (10) 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.

Syl. Pt. 1, *O'Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561 (2010).

In discussing the meaning of “adverse use” in a prescriptive easement context, adverse use generally means that wrongful use of the property without the permission of the owners. Syl. Pt. 4, *O’Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561 (2010). “ ‘Adverse use’ generally means the ‘use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one[.]’ ” *Id* at 611, 582 (quoting *Malnati v. Ramstead*, 50 Wash.2d 105, 108, 309 P.2d 754 (1957)).

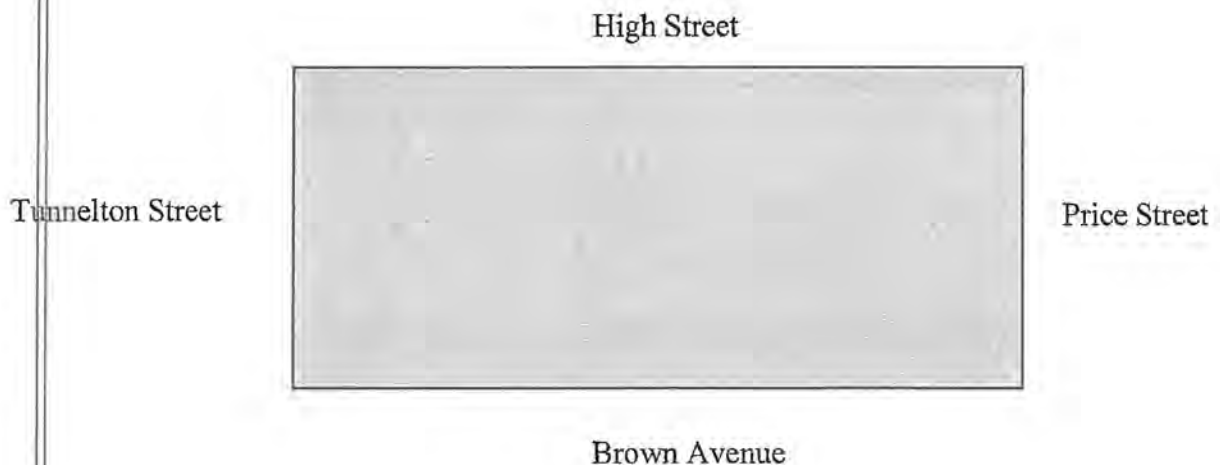
While a party may gain the right to an easement by prescription, the same party may also lose the right to an easement by either abandonment or adverse possession. *Walls v. DeNoone*, 209 W.Va. 675, 657, 550 S.E.2d 653, 679 (W.Va. 2001). The burden of proof is clear and convincing evidence by the party claiming the easement has been terminated or extinguished. *Id* (citing *Strahin v. Lantz*, 193 W.Va. 285, 456 S.E.2d 12 (1995)). The abandonment of a prescriptive easement is a “question of intention that may be proved by nonuse combined with circumstances which evidence an intent to abandon the right.” *Walls v. DeNoone*, *supra* (quoting Syl. Pt. 2, *Strahin v. Lantz*, *supra*).

Eighty-two years prior to *O’Dell*, the West Virginia Supreme Court considered whether alleged use of a private alley by individuals other than for whom the alley had been dedicated rendered the alley a public road. In *MacCorkle v. City of Charleston*, 105 W.Va. 395, 142 S.E. 841 (1928), the City of Charleston sought to have an alley declared a public road and also acquired that public use of the alley rendered it a public road by adverse prescription. The West Virginia Supreme Court found that to become a public road, the alley must have been dedicated by the landowner to public use, which was not proven, and affirmatively rebutted by deed dedicating the alley to private use. *Id* at \_\_\_, 841. Regarding the adverse prescription argument, the Court found that “mere use by the community is held to be permissive and in subordination

to use by the owner” and commented that the identity of the individuals using the alley was unknown and it was uncertain whether the individuals “hucksters, icemen, or others having business with the owners of the lots or their tenants.” *Id.*

### DISCUSSION

If one looks at a map of the area at question, the streets surrounding the properties form a rough triangle, with the streets arranged as shown below<sup>3</sup>:



The disputed alley way lies between the homes that front on Brown Avenue and the homes that front on High Street. The Shaffer home is located at 203 Tunnelton Street. The Goodwin home is located at 207 Tunnelton Street, which borders Tunnelton Street and Brown Avenue. From the language of the deed dated July 6, 1900, and of record in Deed Book 88, page 438, of William G. Brown, William G. Brown clearly designed the alley connect between Tunnelton Street and Price Street. It is also clear from the deeds presented in this case and the

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<sup>3</sup> The Parties submitted various surveys and plats showing the locations of the subject properties, the alleged property lines, as well as ownership of the alley. Because each item differs and often does not show all the streets surrounding the properties, the Court elected to present a simple rough diagram to illustrate the general layout.



opinion in *Robertson, et al. v. Whetsell, et al*, Preston Co. Civil Action No. 484, that the disputed alley was created to benefit the property owners who bought lots developed by William G. Brown in the early 1900s. Thus, it is clear that the disputed alley was created as a private alley.

Although the testimony presented by the Parties has not been explicitly centered on the subject, it is clear from witness testimony that in the approximately 120 years since its designation the alley has not always been meticulously maintained by the property owners of Brown Avenue. Photographs presented by the parties show trees, bushes, and other foliage has grown at least around, if not in the middle, of various parts of the alley. The Court must note here that it need not be concerned that the entire length alley be completely unobstructed because the Shaffers appear to be alleging they have acquired a right-of-way over the portion of the alley that they have historically used, not that they acquired ownership of the entire alley way. While the testimony has not been specific regarding the exact area the Shaffers claim they have obtained by adverse prescription, from the testimony and argument given, the Shaffers claim they have a right to park vehicles on the portion of the alley that is located beside their home. Plaintiff James R. Shaffer testified that when he and his wife bought and began using the property, they believed the area of the alley bordering their property was for their own use and treated the alley for years in accordance with this belief. As discussed above, adverse use in the context of prescriptive easements generally means that wrongful use of the property without the permission of the owners. Mr. Shaffer testified that he did not ask for permission before using the alley way and did not ask permission in subsequent years.

The Plaintiffs have moved for summary judgment in this case. The Plaintiffs have presented clear and convincing evidence through their witnesses for this Court to find that

between 1973 and 1999 the Plaintiffs acquired a right of way over a portion of the disputed alley for the parking of vehicles and accessing the rear of Plaintiffs' property.

It is clear from witness testimony that the Plaintiff Shaffers have been using a portion of the disputed alley for parking vehicles and accessing the rear of the Shaffer property from at least 1973 to 1999. Plaintiff James Shaffer, Curtis Stiles, Catherine Ellen White, and James Maier all presented testimony to this effect. The Court finds the testimony of Catherine Ellen White, James Maier, and Curtis Stiles, three independent witnesses compelling. The Court found the testimony of Catherine Ellen White, who lived and worked in close proximity to the disputed alley from her 20s, particularly compelling.<sup>4</sup> She testified that the Shaffers regularly used to park their vehicles in the alley from the 1970s through the 1990s, as well as that the sidewalk immediately in front of the alley is designed to facilitate parking. Witness James Maier also noted this in his testimony.

To rebut this testimony, the Defendants presented the testimony of two witnesses: James Lobb and Defendant Robin Goodwin.<sup>5</sup> Mr. Lobb testified he did not recall whether the Shaffers' use of the property when he was a child and growing up because it was less important to him than other activities (such as playing). Thus, Mr. Lobb's testimony does not rebut the testimony from Plaintiffs' witnesses.

The Court finds Defendant Robin Goodwin's testimony regarding her recollection of the Shaffers' (non) use of the alley in years prior to the Goodwins' purchase of their home not credible. While Mrs. Goodwin testified she had clear recollections of the Shaffers not using the alley, it would be unusual for an individual as a child and young person to have such a clear

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<sup>4</sup> Although Ms. White did not testify as to her current age, she did note that she retired in 2017.

<sup>5</sup> Defendant Robert Goodwin also testified regarding the alley. However, his testimony was regarding the Shaffers' use of the alley after the Goodwins purchased their home in 1999, not the Shaffers' use of the alley prior to 1999.

recollection regarding a situation in which one has no stake or close affiliation at that time. Mrs. Goodwin's credibility is also diminished by a glaring discrepancy between two statements she made during her testimony. These statements were that Mrs. Goodwin recalled that (1) the alley way was "completely grown over" and (2) that only property owners of Brown Avenue utilized the alley. These statements cannot both be true at the same time. Because Mrs. Goodwin's testimony is not credible on its face, the Defendants have not presented sufficient evidence to show a genuine issue of material fact regarding whether the Plaintiffs acquired a right of way over a portion of the disputed alley for the parking of vehicles and accessing the rear of Plaintiffs' property.

Due to the 1970 decision in *Robertson, et al. v. Whetsell, et al*, Preston Co. Civil Action No. 484, the alley is clearly private property not belonging to the Plaintiffs. Mr. Shaffer testified that he did not ask or seek permission for the use of the alley, which satisfies the element of "adverse use of another's land." The testimony of the Plaintiffs' witnesses demonstrate that the Plaintiffs' use of a portion of the alley was adverse use that was continuous and uninterrupted from 1973 to 1999, a period in excess of ten years. The Plaintiffs' use was also "open, notorious, and visible" because witnesses testified regarding the Plaintiffs' clearly noticeable use of the alley—namely parking vehicles in the alley, using the alley for ingress and egress to the rear of the property, and being physically present in the alley in order to maintain it. These activities over the course of three decades were sufficient to place a reasonable owner of the land on notice regarding the adverse use. In addition, the Plaintiffs have identified the area of the alley that was used such to reasonably identify the portion of the alley they used.

While the Defendants cite *MacCorkle v. City of Charleston*, 105 W.Va. 395, 142 S.E. 841 (1928), the situation in that case is distinguishable from the case at hand. In *MacCorkle*, the

plaintiffs claimed the alley had become a public road; the individuals using the alley were not identified; and there were no allegations that the use of the alley was adverse or without permission.

However, while the Court can grant the Plaintiffs' summary judgment on their acquisition of a right of way on or prior to 1999, questions of fact remain regarding the use of the alley after the Defendants acquired their home in 1999. Clearly a dispute arose at some point between the Plaintiffs and the Defendant regarding both sides' use of the alley and remained for a period of years.<sup>6</sup> The Plaintiffs assert they never requested permission to use the alley. The Defendants assert the Plaintiffs did on occasion request permission. There has also been testimony regarding the construction of a gate and/or fence that prohibited the Plaintiffs from using the alley. As discussed above, West Virginia law permits a party to gain an easement by adverse prescription but also that the easement can be extinguished, particularly by abandonment or adverse possession. Due to the factual disputes in the evidence presented by the Plaintiffs and Defendants, at this time the Court cannot render summary judgment on whether the Plaintiffs continued to possess an easement by adverse prescription after 1999.

### CONCLUSION

Due to the findings of the Court discussed above, the Court hereby **ORDERS** that the *Plaintiffs' Motion for Summary Judgment* is **GRANTED IN PART** and **DENIED IN PART**. The Court **GRANTS** the *Plaintiffs' Motion for Summary Judgment* to the extent that the Plaintiffs acquired a right of way by adverse prescription to use the disputed alleyway on or prior to 1999. However, the Court **DENIES** the *Plaintiffs' Motion for Summary Judgment* to the

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<sup>6</sup> Witness James Lobb testified this issue was presented to the City of Kingwood at some point during his tenure as mayor, which spanned from 2007 to 2013.



extent that there is a factual dispute regarding whether the Plaintiffs continued to have a right of way by adverse prescription after 1999. It is further

**ORDERED** that this matter shall come before the Court for a status hearing on **December 10, 2020, at 11:00 a.m.** in the Circuit Courtroom of Preston County, located on the third floor of the Preston County Courthouse, Kingwood, West Virginia. This Order shall serve as notice to all Parties and Counsel.


**This is a Final Order.** This decision may be appealed to the West Virginia Supreme Court of Appeals in the manner set forth in the Rules of Appellate Procedure.

It is further **ORDERED** that the Clerk of the Court personally deliver or send via first-class mail a certified copy of this Order to (1) Alex M. Greenberg; and (2) W. "Buddy" Turner.


ENTER this 11<sup>th</sup> day of December, 2020.

  
Steven L. Shaffer, JUDGE

ENTERED this 11 day of December 2020. 2- Copies  
SD  
12/11/20

  
Lisa Leishman, CLERK

A TRUE COPY:

ATTEST:   
S/LISA LEISHMAN  
CLERK OF THE CIRCUIT COURT