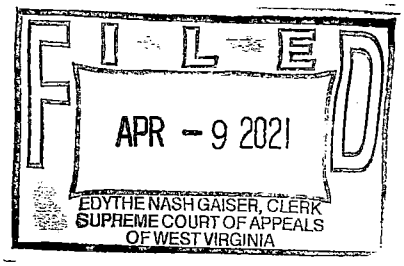
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0010

(Preston County Case No. 18-C-7)



ROBERT GOODWIN and ROBIN GOODWIN,

Defendants below, Petitioners,

v.

JAMES R. SHAFFER and IRIS M. SHAFFER,

Plaintiffs below, Respondents.

APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT OF PRESTON COUNTY

PETITIONERS' BRIEF

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STATEMENT OF THE CASE

Despite this Court's holding in *O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010) ("We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored."), this Court is once again being called upon to adjudicate neighborly accommodation disputes couched as a claim for a prescriptive easement. Erroneously below, the Circuit Court of Preston County ruled that the use of a private way between neighbors ripened into a prescriptive easement – without any evidence of repudiation of the permissive use implied by law in accordance with binding precedent of this Court. As such, this Court is being asked to reverse the Circuit Court of Preston County's ("Circuit Court") December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*" (J.A.539-560)[1] in which the Circuit Court ruled that the Respondents were entitled to partial summary judgment granting the Respondents a prescriptive easement prior to 1999.

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[1] References to the Joint Appendix Record will be noted as (J.A. ____).

The Respondents, James R. Shaffer and Iris M. Shaffer, filed their Complaint in this action on January 22, 2018 asserting five (5) counts as follows: 1. prescriptive easement, 2. private nuisance, 3. civil conspiracy, 4. trespass, and 5. injunctive relief. J.A. 3-10.

The dispute in this case centers around an alley. The alley is on property owned by the Petitioners. The Respondents assert that they have a prescriptive right to use the alley to park their vehicles on the alley – functionally blocking the alley to any other users.

Historically, the alley was created in 1900 when W.G. Brown reserved the alley along the northern boundary of a group of lots fronting Brown Avenue in Kingwood between Tunnelton Street and Price Street. J.A. 542. Long ago, a dispute arose as to various individuals using the alley. This culminated in a civil action in the Circuit Court of Preston County entitled *Robertson v. Whetsell*, Civil Action 484. J.A. 150-157. In that case, the Circuit Court of Preston County determined that the strip of land in question was a private alley. J.A. 156.

The Respondents alleged that from 1973 they utilized the private way to park their vehicles and to access the back of their home. The Goodwins obtained the real estate whereon the private alley is situated in 1999 and ultimately installed a gate and building on the alley. The Respondents allege they can no longer use the Goodwin property as a result. Importantly, the Respondents did not argue or allege that they have a deeded right to utilize the alley in question.

After written discovery, the Respondents filed a pleading entitled "*Plaintiffs' Motion for Summary Judgment*" on April 4, 2019 arguing, in pertinent part, that they acquired a prescriptive easement in the alley at issue prior to 1999 when the Goodwins moved into their home. J.A. 40-82. On April 16, 2019, Goodwin filed a pleading entitled "*Defendant's [sic] Response to Motion for Summary Judgment*". (hereinafter, "Goodwins' Response"). J.A. 83-100. In Goodwins' Response, Goodwin argued that there were genuine issues of material fact as to almost each

element required to show a prescriptive easement and that these issues needed to be determined by a jury and not by the Court. J.A. 83-100.

Respondents then filed their "*Plaintiffs' Reply in Support of Motion for Summary Judgment*" on May 7, 2019 arguing again that they established a prescriptive easement prior to when the Petitioners moved into their home in 1999. J.A. 101-120.

Instead of finding that there was a genuine issue of material fact related to the establishment of a prescriptive easement, the Circuit Court of Preston County held two (2) evidentiary hearings on August 29, 2019, and on December 16, 2019 on the Respondents' summary judgment motion. J.A. 257-468.

Given that the prior owner of the Goodwin real estate was deceased, at the end of the Respondents' evidence, undersigned counsel presented a "*Bench Brief in Support of Opposition to Plaintiffs' Motion for Summary Judgment*" to the Court that argued that summary judgment should be entered on behalf of the Goodwins, finding that the Respondents had failed to prove a prescriptive easement by clear and convincing evidence. J.A. 145-220. As argued in the bench brief and in the December 16, 2019 transcript, Goodwin argued that since the alley had previously been ruled a private way, any use by the Respondents began as permissive use as a matter of law in accordance with *MacCorkle v. Charleston*, 105 W. Va. 395, 142 S.E. 841 (1928) and *O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010). J.A. 146-147. Moreover, Goodwin argued that the Respondents failed to present any evidence of repudiation of this permission as required under *O'Dell v. Stegall*, 226 W. Va. 590, 613, 703 S.E.2d 561, 584 (2010). J.A. 147-148.

Despite not showing any evidence of repudiation of the permissive beginnings of their use of the established way between neighboring properties, the Circuit Court of Preston County

entered an order entitled "*Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying in Part*" on October 20, 2020. (hereinafter, "Oct. 20 SJ Order"). J.A. 473-493. This order was subsequently amended to allow this appeal. J.A. at 539-560. Nowhere in the Oct. 20 SJ Order does the Court address the Respondents' lack of repudiation of the permissive use of the alley. Instead, the Court, wrote 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'". J.A. 557.

At a status hearing on December 10, 2020, counsel for Goodwin represented to the Court that they would be appealing the Oct. 20 SJ Order and advised the Court that the Oct. 20 SJ Order lacked Rule 54(b) language. The Court indicated that any appeal should be taken prior to trial of the remaining issues in this action and stated that it would enter an amended order.

On December 11, 2020, the Circuit Court of Preston County, entered an "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*" stating that "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." J.A. 559.

SUMMARY OF ARGUMENT

Petitioners Robert Goodwin and Robin Goodwin contend that prescriptive easements are not favored under West Virginia law. *See O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010) ("We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored.").

In *O'Dell v. Stegall*, the West Virginia Supreme Court of Appeals adopted the minority view that "use of another's property is deemed permissive, and the claimant must demonstrate the adverse character of the claimant's actions." *O'Dell v. Stegall*, 226 W. Va. 590, 615 n.28, 703 S.E.2d 561, 586 (2010). Even if this Court did not adopt the minority view in *O'Dell*, the alley in

question is a private way as set forth in prior litigation regarding this private way in the Circuit Court of Preston County. J.A. 156 . In accordance with *MacCorkle v. Charleston*, 105 W. Va. 395, 399, 142 S.E. 841, 842 (1928), "once the private character of a way is established, mere use by the community is ***held to be permissive and in subordination to use by the owner***". Either way, any use of the private way by the Respondents initially began as permissive use under West Virginia law. The Circuit Court of Preston County erred in applying pre-*O'Dell* law and finding adverse use based upon the testimony that the Respondents' did not seek permission to use the alley. J.A. 557. In doing so, the Circuit Court of Preston County applied a presumption of adverse use and impermissibly shifted the burden to the Petitioners to show that the Respondents' use of the private way was *not* adverse.

Moreover, in failing to recognize that any use of a private way between two neighbors initially begins as permissive use, the Circuit Court did not require, and the Respondents did not present, any evidence of repudiation of the permissive use. Use that begins by permission, either through the establishment of the private way, or by the status of the parties as neighbors, ***will never ripen*** into prescription absent repudiation of the permission by the use. *See O'Dell v. Stegall*, 226 W. Va. 590, 613, 703 S.E.2d 561, 584 (2010) ("A use that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated.") Repudiation requires more than mere silence or continued use; it requires that the disseisor unfurl his flag, assert his dominion, and engage in a decisive act showing ownership. *See, e.g., Town of Paden City v. Felton*, 136 W.Va. 127, 137-38, 66 S. E.2d 280, 287 (1951) ("An easement over land will not arise by prescription simply from permission of the owner of the servient estate, no matter how long the permissive use may continue; and when a use by permission has begun, in the absence of some decisive act by the claimant of the easement, which indicates an adverse and hostile claim, the use

will continue to be regarded as permissive, and this is especially so when the use of the land is in common with its use by others.").

Instead, the Respondents presented evidence that their use was in conjunction with and subservient to the use of the private alley by other users. J.A. 545. ("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 get in"). Instead of finding that this testimony definitely showed that the Respondents' use was subordinate and in conjunction to the Petitioners and other owners of lots fronting Brown Avenue, the Circuit Court of Preston County did not address repudiation of the permissive use in finding that the Respondents had acquired a prescriptive easement.

The Circuit Court of Preston County compounded its error in finding that the Respondents' use was continuous for the statutory period. "In the context of prescriptive easements, '[f]or a use to be continuous, it is critical that there be no break in the attitude or mind of the claimant or the claimant's predecessor which would amount to a recognition of subordination to the servient owner's consent or an abandonment of the use in response to the servient owner's demand.'" *O'Dell v. Stegall*, 226 W. Va. 590, 616, 703 S.E.2d 561, 587 (2010). The law of West Virginia requires ten continuous years of ***adverse*** use. By failing to recognize that that initial use was permissive, by failing to require evidence of repudiation of the initial permissive use, and by failing to recognize that the Respondents' alleged use was co-extensive and subordinate to the other users of the private alley, the Circuit Court of Preston County once again shifted the burden to the Petitioners to prove that that the Respondents' use was not continuous.

Finally, the Circuit Court of Preston County improperly invaded the province of the jury, held two (2) evidentiary hearings on a summary judgment motion, and made credibility determinations regarding witness testimony in contravention of West Virginia Rule of Civil

Procedure 56. Frankly stated, if two evidentiary hearings were necessary, then Respondents failed to meet their burden for summary judgment that there was no genuine issue of material facts. Accordingly, the "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*" should be reversed and the Circuit Court of Preston County should be directed to enter summary judgment in favor of the Petitioners.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests that oral argument be granted in this case pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. Petitioner contends that the Circuit Court of Preston erred in the application of settled law.

ARGUMENT

A. Standard of Review

This is an appeal from a Circuit Court's order granting summary judgment in favor of the Respondents and denying summary judgment in favor of the Petitioners.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The Supreme Court of Appeals of West Virginia "appl[ies] the same standard as a circuit court." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

Rule 56 of the West Virginia Rules of Civil Procedure states, in pertinent part that

> [t]he judgment sought shall be rendered forthwith 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).

B. The Circuit Court of Preston County erred in applying a presumption of adverse use.

The Circuit Court of Preston County erred in applying a presumption of adverse use of the private alley in question.

Historically, West Virginia case law seemed to presume that the use of another's land was adverse and that no proof of adverse use is required. However, *O'Dell v. Stegall*, 226 W. Va. 590, 615, 703 S.E.2d 561, 586 (2010) affirmatively overruled and criticized this proposition writing,

> the burden of proving adverse use is upon the party who is claiming a prescriptive easement against the interests of the true owner of the land. To the extent our prior cases suggest that proof of adverse use is not required, ***or that the continuous and uninterrupted use of another's land for ten years is presumed to be adverse, they are hereby overruled.*** The landowner has no burden of proof. It is the person claiming the prescriptive easement who must prove, by clear and convincing evidence, that the use of the land was adverse to the true owner of the land.

O'Dell, 226 W. Va. at 615, 703 S.E.2d at 586 (emphasis added). After *O'Dell*, West Virginia follows the minority view that "use of another's property is deemed permissive, and the claimant must demonstrate the adverse character of the claimant's actions." *O'Dell*, 226 W. Va. at 615 n.28, 703 S.E.2d at 586. Accordingly, the party claiming the prescriptive easement bears the burden of proof by clear and convincing evidence as to each element of a prescriptive easement claim. *See O'Dell*, 226 W. Va. at 609, 703 S.E.2d at 580 ("a person claiming a prescriptive easement must establish each element of prescriptive use as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim.").

Even if West Virginia did not follow the minority view after *O'Dell*, the Circuit Court erred in not applying long-standing West Virginia law that use of a private way is permissive. In *MacCorkle v. Charleston*, 105 W. Va. 395, 399, 142 S.E. 841, 842 (1928), the West Virginia Supreme Court of Appeals examined whether a private alley had been dedicated to public use. *MacCorkle*, 105 W. Va. at 398, 142 S.E. at 842 ("This is an express dedication to private use, and

excludes the presumption of dedication to public use, which might otherwise arise from the recordation of the plat."). In reaching the decision that the private alley was not dedicated to public use, the West Virginia Supreme Court of Appeals wrote, "once the private character of a way is established, mere use by the community is ***held to be permissive and in subordination to use by the owner***." *MacCorkle*, 105 W. Va. at 399, 142 S.E. at 842 (emphasis added). Citing a number of cases, the West Virginia Supreme Court of Appeals reasoned that,

> when a private way is open, it is open either for the convenience, or by the permission of the owner; that the public, finding the way open, uses it without any claim of right but merely because it is open; that the owner indulges the public's use rather than be captious; that such use is in common with his own; and that he is not to be penalized for accommodating the public. Therefore, they say, the vital elements of abandonment by the owner, and adverse user by the public, respectively, upon which an implied dedication or prescription must rest, are lacking, and "no length of time during which property is so used can deprive an owner of his title."

MacCorkle, 105 W. Va. at 399, 142 S.E. at 842-43 (1928).

Moreover, the Circuit Court failed to recognize that neighborly accommodation, as was shown in *Robertson, et al. v. Whetsell et al.*, Preston County Civil Action No. 484, a previous case involving this very property, is sufficient to establish permissive use. *O'Dell v. Stegall*, 226 W. Va. 590, 613 n.24, 703 S.E.2d 561, 584 (2010) (quoting *Keebler v. Harding*, 247 Mont. 518, 523, 807 P.2d 1354, 1358 (1991) ("evidence of a local custom of neighborly accommodation or courtesy, without more, is sufficient to establish permissive use."); *Reed v. Soltys*, 106 Mich. App. 341, 347-48, 308 N.W.2d 201, 204 (1981) ("Acquiescence for a long term of years between adjoining owners in mutual use of a driveway does not create title in either party for the reason that the use is not hostile or adverse."). Under Respondents' asserted testimony, when they moved in and started using the private way in 1973, it was, at most neighborly accommodation. *See O'Dell*, 226 W. Va. at 613, N. 24, 703 S.E2d at 584 (citing *Wall v. Landman*, 152 Va. 889, 895, 148 S.E. 779,

781 (1929) ("[W]here the owner of land opens a way thereon for his own use and convenience, the mere use by his neighbor under circumstances which neither injures the way nor interferes with the owner's use of it, in the absence of some other circumstance indicating a claim of right, will not be considered as adverse, and will never ripen into a prescriptive right."); *Wilfon v. Hampel 1985 Tr.*, 781 P.2d 769, 771 (Nev. 1989) ("Where a roadway is established or maintained by a landowner for his own use, the fact that his neighbor also makes use of it, under the circumstances which in no way interfere with use by the landowner himself, does not create a presumption of adverseness. The presumption is that the neighbor's use is not adverse but is permissive and the result of neighborly accommodation on the part of the landowner.").

Like *MacCorkle*, the dispute in this case centers around a private alley. The private alley is on property owned by the Petitioners. The Respondents, one of the members of the public, assert that they have a prescriptive right to use the alley to park their vehicles upon the Petitioners' land.

Historically, the alley was created in 1900 when W.G. Brown reserved the alley along the northern boundary of a group of lots fronting Brown Avenue in Kingwood between Tunnelton Street and Price Street. J.A. 542. Long ago, a dispute arose as to various individuals using the alley. This culminated in a civil action in the Circuit Court of Preston County entitled *Robertson v. Whetsell*, Civil Action 484. J.A. 150-157. In that case, the Circuit Court of Preston County determined that the strip of land in question is a private alley. J.A. 156 .

Like *MacCorkle*, any use of the private way by the public, including the Respondents – who are members of the public - begins as permissive use as a matter of law. Like *MacCorkle*, "no length of time during which property is so used can deprive an owner of his title." *MacCorkle*, 105 W. Va. at 399, 142 S.E. at 842-43 (1928). Like *Keebler v. Harding*, there was a local custom

of neighborly use of the disputed private way. Under any of these scenarios, the Respondents' use of the alley starting in 1973 began as permissive use. It cannot ripen into adverse use or a prescriptive right without a clear showing of repudiation.

In this case, the Circuit Court applied a presumption of adverse use relying on testimony that the Respondents did not ask permission from anyone. J.A. 557. At the evidentiary hearings, the Respondents testified that they thought the area at issue was for their use and did not seek permission from anyone. J.A. 294. In sum, the Circuit Court based its decision on the Respondents' testimony that they did not seek permission from anyone. However, merely not seeking permission is not enough. It is not repudiation. It is not adverse use.

Initially, due to the minority view adopted in *O'Dell* and the fact that the property at issue is a private way, any use begins as implied permission. West Virginia provides that "in the context of prescriptive easements, an 'adverse use' of land is a wrongful use, made without the express or ***implied permission*** of the owner of the land." *O'Dell*, 226 W. Va. at 614, 703 S.E.2d at 585. As such, cases that examined whether merely not asking permission is enough to show adverse use generally find that not asking permission is not enough. *See Cotton v. May*, 301 So. 2d 168, 169 (Ala. 1974) ("Much of appellants' argument is based on the testimony of numerous witnesses that they never had 'to ask permission' to use the roadway. This approach fails to meet the requirements for the acquiring of a private easement by prescription in this state."); *Cuillier v. Coffin*, 358 P.2d 958, 959 (Wash. 1961) ("The fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive under the circumstances of this case."); *Wilfon v. Hampel*, 781 P.2d 769, 771 (Nev. 1989) ("*Chollar-Potosi* does not stand for the proposition, as claimed by Hampel, that the mere use of another's road without asking permission constitutes adverse use.").

Instead, the evidence presented by the Respondents shows that their use was not adverse and was in subordination to the owners of the private alley and those authorized by deed to use the private alley. The Respondents testified that they did not exclude anyone from the alley and that others used the private alley stating, "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 get in." J.A. 545.

Even in cases where permission was not sought and not given, "any use 'made in subordination to the property owner' is not adverse. 'Subordination' means that the user is acting with authorization, express or implied, from the landowner, or acting under a right that is derivative from the landowner's title." *O'Dell*, 226 W. Va. at 614, 703 S.E.2d at 585.

The reason that a use made in subordination to the property owner is not adverse

> . . . is that the property owner is not put on notice of the need to take steps to protect against the establishment of prescriptive rights. To express the idea that an adverse use cannot be in subordination to the rights of the owner, it is frequently said that the use must be made under claim of right. This does not mean that the user must claim entitlement to a servitude or show color of title, as sometimes mistakenly asserted, but merely that the user must not act in such a way as to lead the owner to believe that no adverse claim is asserted. Use under claim of right may also mean that the user acts as the owner of a servitude would act, as opposed to the way a casual trespasser would act.
>
> Restatement (Third) of Property (Servitudes), § 2.16, cmt. f.

O'Dell, 226 W. Va. at 614, 703 S.E.2d at 585.

This testimony cited by the Circuit Court at J.A. 545 is critical, decisive, and was totally ignored by the lower court. Respondents cannot be open, notorious, and adverse and neighborly and accommodating at the same time. By entirely disregarding this testimony, the Circuit Court ignored evidence showing that the Respondents' use was not adverse and applied a presumption that mere use of a neighbor's land without seeking permission is adverse.

The Circuit Court of Preston County erred when it applied established West Virginia law and ruled that continuous and uninterrupted use of the private alley without permission is presumed to be adverse. Accordingly, this Honorable Court should overrule the December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*", J.A. 539-560, and direct the Circuit Court to enter summary judgment on behalf of the Petitioners.

C. The Circuit Court of Preston County erred in granting summary judgment without evidence of repudiation.

The Circuit Court erred in granting partial summary judgment without evidence of repudiation of the permissive use of the private alley as required by law.

As shown above, after *O'Dell*, West Virginia follows the minority view that "use of another's property is deemed permissive, and the claimant must demonstrate the adverse character of the claimant's actions." *O'Dell*, 226 W. Va. at 615 n.28, 703 S.E.2d at 586. Accordingly, the party claiming the prescriptive easement bears the burden of proof by clear and convincing evidence as to each element of a prescriptive easement claim. *See id.* at 609, 703 S.E.2d at 580 ("a person claiming a prescriptive easement must establish each element of prescriptive use as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim."). Despite not recognizing this fundamental shift in the law of prescriptive easements, the Circuit Court of Preston County did correctly find that the disputed alley is a private way. This finding is critical to the proof and evidence that the Respondents needed to show and failed to present to support their claim. As shown above, "it is settled law that when once the private character of a way is established, mere use by the community is held to be permissive and in subordination to use by the owner." *MacCorkle*, 105 W. Va. at 399, 142 S.E. at 842. Importantly, the owner's indulgence of the alleged adverse use is in common with the owner

use and possession of the private way and "he is not to be penalized for accommodating the public. Therefore, they say, the vital elements of abandonment by the owner, and adverse use by the public, respectively, upon which an implied dedication or prescription must rest, are lacking, and 'no length of time during which property is so used can deprive an owner of his title'". *MacCorkle*, 105 W. Va. at 399, 142 S.E. at 843.

It is clear that, as shown in *Robertson, et al. v. Whetsell, et al*, Preston County Civil Action No. 484, J.A. J.A. 150-157, and the Respondents' testimony, the public at large had used the disputed alley for a number of years. J.A. 545 ("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 get in."). From the outside observer's eye, there is no problem. Neighbors are being neighbors. If someone needed access, they had it. No one was denied use. These are the facts presented by the Respondents.

Since their use began as permissive use as a matter of law, the Respondents must show repudiation of the permission to use the disputed private way to establish a prescriptive easement under West Virginia law. Under West Virginia law, "[a] use that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated." *O'Dell*, 226 W. Va. at 613, 703 S.E.2d at 584 (quoting *Faulkner v. Thorn*, 122 W.Va. 323, 9 S.E.2d 140 (1940) ("The use of a way over the land of another, permissive in its inception, will not create an easement by prescription no matter how long the use may be continued, unless the licensee, to the knowledge of the licensor, renounces the permission and claims the use as his own right, and thereafter uses the way under his adverse claim openly, continuously and uninterruptedly, for the prescriptive period."); *Town of Paden City v. Felton*, 136 W.Va. 127, 137-38, 66 S. E.2d 280, 287 (1951) ("An easement over land will not arise by prescription simply from permission of the owner of the servient estate, no matter how long the permissive use may continue; and when a use by

permission has begun, in the absence of some decisive act by the claimant of the easement, which indicates an adverse and hostile claim, the use will continue to be regarded as permissive, and this is especially so when the use of the land is in common with its use by others.").

In another jurisdiction that follows the minority view, Alabama, an "easement by prescription 'is not established merely by the use of the lands of another for a period of twenty years or more.'" *Hanks v. Spann*, 33 So. 3d 1234, 1238 (Ala. Civ. App. 2009) (internal quotations omitted). Instead, like the decisive act required in *Felton*, Alabama requires "manifest and notorious" notice of the repudiation. *Id.* at 1238 ("[A] permissive occupant cannot change his possession into adverse title no matter how long possession may be continued, in the absence of a clear, positive and continuous disclaimer and disavowal of the title of the true owner brought home to the latter's knowledge; there must be either actual notice of the hostile claim or acts or declarations of hostility so manifest and notorious that actual notice will be presumed in order to change a permissive or otherwise non-hostile possession into one that is hostile.). In short, Respondents had to commit some decisive act, some notorious act, some manifest act, that would have placed the Petitioners and the other authorized users of the private way on notice that the Respondents were unfurling their flag and exercising dominion over the private way. *See, e.g.*, *Stringer v. Robinson*, 760 So. 2d 6, 9 (Miss. App. 1999) ("An adverse possessor "must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see, and if he will, that an enemy has invaded his domains, and planted the standard of conquest"); *Hibbs v. Gutschmidt*, No. 48751-5-I, 2003 Wash. App. LEXIS 2748, at *29 (Ct. App. Nov. 24, 2003) ("The disseisor 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.") (internal quotations omitted); *Wyo-Ben, Inc. v. Van Fleet*, 361 P.3d 852, 859 (Wy. 2015) ("We have said that an adverse possession

claimant must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest"); Bruce and Ely, *The Law of Easements and Licenses in Land* § 5:9 ("When use of a servient estate is initially permissive, the use will confer a prescriptive right ***only if*** the user subsequently makes a direct assertion of a claim hostile to the owner.").

Accordingly, as the only evidence before the Circuit Court was that there was an established private way between neighbors, used by anyone who wanted through, the Circuit Court erred in finding that the Respondents' use was adverse and not permissive. The Circuit Court compounded this error by failing to require the Respondents to present clear and convincing evidence of repudiation of the permissive use they were making of the private way. To establish their claim for a prescriptive easement, the Respondents must show some "decisive act by the claimant of the easement, which indicates an adverse and hostile claim" *Felton*, 136 W.Va. at 137-38, 66 S.E.2d at 287.

There was no evidence of a "decisive act", no evidence of repudiation, no evidence that the Respondents excluded anyone from the private way. Nothing was done to put the Petitioners, or the other authorized users of the private way, on notice that the Respondents' claimed the land as their own. Accordingly, the Circuit Court erred in granting the Respondents partial summary judgment and erred in not granting Petitioners summary judgment.

D. The Circuit Court of Preston County erred in finding that the Respondents' alleged use of the disputed way was continuous.

The Circuit Court erroneously found that the Respondents' use of the disputed private way was continuous in juxtaposition to the Respondents' own evidence.

The December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*" states, "[t]he testimony of the Plaintiffs' witnesses

demonstrates 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." J.A. at 557. However, the Circuit Court of Preston County had already found that the disputed alley was a private way for the benefit of the owners of real property which fronted Brown Ave. *Robertson, et al. v. Whetsell, et al.*, Preston County Civil Action No. 484. J.A. at 156. Mr. Shaffer testified that they did not exclude anyone from the alley and that others used the private alley stating, "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 get in.." J.A. 545.

"In the context of prescriptive easements, '[f]or a use to be continuous, it is critical that there be no break in the attitude of mind of the claimant or the claimant's predecessor which would amount to a recognition of subordination to the servient owner's consent or an abandonment of the use in response to the servient owner's demand.'" *O'Dell v. Stegall*, 226 W. Va. 590, 616, 703 S.E.2d 561, 587 (2010). Further, for "use to be 'continuous,' the person claiming a prescriptive easement must show that there was no abandonment of the adverse use during the ten-year prescriptive period, or recognition by the person that he or she was using the land with the owner's permission." *O'Dell*, 226 W. Va. at 618, 703 S.E.2d at 589.

For the Respondents to succeed on their claim of a prescriptive easement, it was necessary that the Respondents show ten (10) years of continuous adverse use of the private way ***after*** repudiation of the permissive use implied by law. *See Parsons v. Hubbard*, 226 S.W. 441, 442 (Tex. Civ. App. 1920) (stating that continuous possession and use was required to be shown after she or they had repudiated the cotenancy in the land, and after appellee or those under whom he claimed had notice of such repudiation."). As shown above, in that the Respondents' use began

as permissive use, and Respondents never undertook a "decisive act" to repudiate the permission granted to them as a matter of law, the Respondents failed to show ***any continuous adverse*** use.

Moreover, if any of the "neighbors" whose lot fronted Brown Avenue used the disputed private way from 1973 to 1999, then the Respondents' alleged adverse use was not continuous but subordinate and not continuous.

It was the Respondents' burden to prove by clear and convincing evidence that their alleged use was adverse and continuous for a period of time in excess of ten (10) years. The Respondents failed to present any evidence of repudiation and meet this burden. Moreover, by affirmatively testifying that any neighbors that wanted to use the alley used the alley, the Respondents expressly recognized that their use was subordinate to and coextensive with the use by other authorized users of the private way and not continuous or adverse. As such, the Circuit Court erred in entering partial summary judgment and the Circuit Court of Preston County's partial summary judgment order should be vacated.

E. The Circuit Court of Preston County erred in failing to find a genuine issue of material fact and invaded the province of the jury.

The Circuit Court erred by taking evidence at two hearings and not submitting this case to a jury.

While couched as a prescriptive easement case, this case is actually the Respondents' attempt to destroy the private way through adverse possession without having other owners who front Brown Avenue named parties in the action.

Importantly, the Respondents seek a "prescriptive easement" to park their vehicle on the disputed area. However, this is not a case about ingress and egress.

When confronted with the Respondents' motion for summary judgment, the Court sidestepped these issues and determined that two (2) evidentiary hearings were required. After

hours of testimony, the Court then stepped into the shoes of the jury and issued partial summary judgment for the Respondents. The Circuit Court committed error when it failed to find a genuine issue of material fact and invaded the province of the jury.

Under Rule 56 of the West Virginia Rules of Civil Procedure, a party is entitled to summary judgment:

> ...if the pleadings, depositions, answers to interrogatories and admissions on file; together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." W. Va. R. Civ. P. 56(c) (2015). For the purposes of deciding a motion for summary judgment, all facts and inferences of evidence must be viewed in the light most favorable to the nonmoving party. *Cavender v. Fouty*, 195 W.Va. 94, 464S.E.2d 736 (1995). The party who moves for summary judgment has the burden of establishing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for the purpose of such judgment. Aetna Casualty and Surety Company v. Federated Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). If there are disputed material facts, summary judgment should be denied.

Frankly stated, if it was necessary to have two (2) evidentiary hearings, then the Respondents failed to meet their burden for summary judgment.

Moreover, the Circuit Court of Preston County made credibility determinations of witnesses and this evidence was taken against the nonmoving party instead of being viewed in the light most favorable to the nonmoving party. *See Cavender v. Fouty*, 195 W.Va. 94, 464S.E.2d 736 (1995). *See Greene v. Dalton*, 334 U.S. App. D.C. 92, 164 F.3d 671, 674 (D.C. Cir. 1999) (holding that district court's grant of summary judgment for defendant invaded jury's province, because plaintiff's sworn affidavit was sufficient to support verdict against defendant, and credibility determinations are within "exclusive domain" of fact finder); *Snyder v. Kohl's Dep't Stores, Inc.*, 580 Fed. Appx. 458, 461 (6th Cir. 2014) (citation omitted) (on summary judgment "[a] court impermissibly invades the province of the jury it if it attempts to resolve issues of credibility and other conflicting evidence"); *Rogers v. Lilly*, 292 Fed. Appx. 423, 426 (6th Cir.

2008) (citation omitted) ("In ruling on a motion for summary judgment, the judge may not make credibility determinations or weigh the evidence"); *Wesley v. Arlington Cnty.*, 354 F. App'x 775, 782 n.9 (4th Cir. 2009) ("we must similarly not invade the province of the jury and weigh the credibility of witnesses and evidence on contested issues of fact"); *Nunez v. Heere*, 438 F. Supp. 3d 321, 324 (E.D. Pa. 2020) ("The law is clear that when resolving a motion for summary judgment, the court must not invade the province of the jury, which includes credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts."); *Maly v. Trs. of Local 309 Wireman's Pension Tr., No. 4,* 2013 U.S. Dist. LEXIS 45392, at *11-12 (E.D. Mo. Mar. 29, 2013) ("in ruling on a motion for summary judgment, a court may not invade the province of the jury. Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") (internal quotations omitted).

Specifically, the Circuit Court of Preston County made credibility determinations, taking that function out of the hands of a jury. *See* J.A. 557. The Circuit Court discounted and ignored testimony by Robin Goodwin and James Lobb that created a genuine issue of material fact regarding the Respondents' use of the alley. J.A. 363, 393, 409, 414-415. The Court did not view the facts and evidence in the light most favorable to the non-moving party. As such, the Circuit Court committed error, and the order granting partial summary judgment to the Respondents should be overturned.

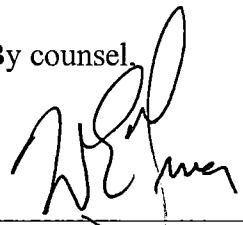
CONCLUSION

WHEREFORE, Petitioners, Robert Goodwin and Robin Goodwin, respectfully request that this Court reverse the Circuit Court of Preston County's December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*", direct that the Circuit Court of Preston County enter summary judgment in favor of the Petitioners, and such other relief as the Court deems just and appropriate.

Respectfully submitted,

ROBERT GOODWIN and
ROBIN GOODWIN,

By counsel,



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CERTIFICATE OF SERVICE

I, Buddy Turner, do hereby certify that I served the foregoing "**PETITIONER's BRIEF**" and "**APPENDIX**" upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 8th day of April, 2021.

By U.S. Mail
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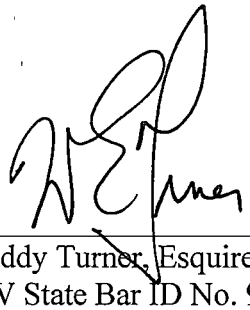

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