IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

DOCKET NO. _____

STATE OF WEST VIRGINIA EX REL.

ROBERT HOOFF

PETITIONER

V.

THE HONORABLE RONALD E. WILSON,

JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, and

ESTATE OF SYLVIA PEACE, By and Through TONY PEACE, EXECUTOR, and

E. PHILLIPS POLACK,

RESPONDENTS

PETITION FOR WRIT OF PROHIBITION

Filed by ROBERT HOOFF

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PETITION FOR WRIT OF PROHIBITION

Robert Hooff, (the "Defendant" in the underlying Circuit Court Action, hereinafter referred to as "Petitioner"), pursuant to Rule 16 of the Supreme Court of Appeals of West Virginia, hereby submits his Petition for a Writ of Prohibition pursuant to the original jurisdiction of this Court. In support of this Petition for relief against the actions of The Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, West Virginia, Robert Hooff submits the following verified statement of the case and the facts, pertinent argument showing why relief should be granted, and an appendix of documentary proof thereof.

III. QUESTIONS PRESENTED

1. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in assuming jurisdiction over a matter that falls under the jurisdiction of the West Virginia Bureau for Public Health and its agents and/or representatives, the Wheeling-Ohio County Health Department.
2. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in failing to hold appropriate proceedings in order to rule upon the issue of the existence of an easement, and proceeding under the assumption that an easement exists.
3. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in permitting Plaintiffs' agents and/or representatives to enter Defendant's property to survey, locate, and conduct percolation testing for the installation of a sewage disposal system, essentially expanding the claimed easement, prior to the establishment of a legal easement.

IV. STATEMENT OF THE CASE

Petitioner Robert Hooff (hereinafter "Petitioner") and the lower court Plaintiffs E. Phillips Polack and the Estate of Sylvia Peace, Deceased, by Executor Tony Peace (hereinafter "Plaintiffs") all own neighboring real estate located in Laurence Washington Farms, in Ohio County, West Virginia. App. p.1. Each of the properties came from a common parcel, with each separate parcel being conveyed to the parties or their direct progenitors by Laurence Washington Farms, Inc., at

different times throughout the 1970s and 1980s. App. pp. 72-151. In approximately 2020, Petitioner Hooff was informed by a person walking through the area that raw sewage was being dumped on his property. App. p.159. Never before this time had anyone told Petitioner that sewage was dumped on his property. App. p. 159. Petitioner Hooff investigated the area that reportedly contained the sewage and discovered underground pipes leading from the surrounding houses, owned by the Plaintiffs, dumping raw sewage into a ravine on his property. *Id.* Said ravine was overgrown with brush, hiding the discharge pipes which were dumping the sewage. *Id.*

Petitioner Hooff, by counsel, contacted Plaintiffs E. Phillips Polack and Tony Peace, as well as the Wheeling-Ohio County Health Department, on July 14, 2021 to advise them of the situation and request that it be resolved, in order the sewage would no longer be dumped on his property. Shortly thereafter, in August 2021, the Wheeling-Ohio County Health Department issued permits allowing Polack and Peace to install modern sewage systems on their *own* properties. App. pp.35-37. Despite this, E. Phillips Polack and the Estate of Sylvia Peace, by and through Tony Peace as Executor, filed a lawsuit against Petitioner Hooff on September 3, 2021, alleging Slander of Title and Conversion, Tortious Interference, and Attempted Financial Exploitation, with a request for declaratory judgment and action to quite title and injunctive relief. App. pp. 1-6. As a part of the basis for their suit, Plaintiffs alleged that an implied easement existed, giving them the right to dump sewage on Petitioner Hooff's property, and claiming that Petitioner Hooff had impeded their efforts to install a more modern sewage system on Petitioner Hooff's land. *Id.* Plaintiffs claimed that Petitioner Hooff was required to allow them to install a modern sewage system on his property, pursuant to the fictitious easement, rather than simply installing modern sewage systems on their own property, pursuant to the permits issued by the Wheeling-Ohio County Health Department in August 2021. In short, Plaintiffs dumped (and Plaintiff Polack

continues to dump) their raw sewage on Petitioner's property and when Petitioner requested the dumping cease, Plaintiffs sued *him* and demanded that *he* pay for an updated system for *their* homes, to be placed on Petitioner's property.

On October 4, 2021, Petitioner Robert Hooff filed a *Motion to Dismiss* in response to Plaintiffs' Complaint, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, for failure to state a claim, or, in the alternative, for summary judgement pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. App. pp. 7-37. As the basis for said *Motion*, Petitioner Hooff argued that the dumping of raw sewage was solely the fault of Plaintiffs, citing their duty to install and maintain their own sewage system, pursuant to the restrictive covenants in the Declaration of Covenants, Conditions and Restrictions for the Laurence Washington Farms Improvement Association, which was executed on October 15, 2018 and recorded in the office of the Ohio County Clerk on November 8, 2018. Specifically item seven (7), which states:

> Until a public sewage disposal facility is provided, the individual property owners are responsible for the construction, maintenance, and operation of collective or individual sewage treatment plants, septic tanks, or drain fields. In all cases these sewage systems shall be constructed and maintained in accordance with the standards established by the Ohio County Health Department and the West Virginia State Department of Health.

Id. The recorded deeds conveying the properties to Plaintiffs contain identical language, therefore providing notice to Plaintiffs of their duty to maintain their own sewage when they obtained the property, as well as a continuing duty as late as 2018. App. pp. 72-151. The *Motion to Dismiss* remains pending before the lower court.

On December 13, 2021, Plaintiffs filed a *Motion for Preliminary Injunction Permitting Testing and Access*, in order to enter Petitioner Hooff's land to conduct testing, pursuant to their claim that Petitioner Hooff's property is the servient estate in an implied easement. App. pp. 50-

53. Petitioner Hooff filed an objection to this motion on December 13, 2021. App. pp. 54-55. Petitioner Hooff followed that with *Defendant's Response to Plaintiff's Motion for Preliminary Injunction,* wherein Petitioner Hooff argued that the Plaintiffs' motion should be denied, as Plaintiffs had not established by clear and convincing evidence that an implied easement exists, and even if Plaintiff could establish such an easement, it would be unlawful under West Virginia Code of State Rules § 64-9-3.8, which does not permit implied easements for the "off-lot disposal of sewage or effluent requiring the use of or crossing of adjacent property," and requires such easements be recorded. There is no dispute that a recorded easement does not exist in this case. App. pp. 56-64.

In approximately September 2022, Plaintiff Peace had a modern, Health Department approved, sewage system installed on his own property thereby ceasing the dumping of sewage on Petitioner's property from Peace's house. Plaintiff Polack, however, allowed his permits to expire, causing the Health Department to take action to cease the dumping by notifying Plaintiff Polack that the water service to the rental properties subject to the permits would be shut-off unless an approved system was installed. App. p. 242.

Thereafter, on November 7, 2022, counsel for Plaintiffs' contacted the Honorable Judge Ronald E. Wilson, requesting an emergency hearing regarding the request for injunctive relief contained in the *Complaint* filed in September 2021. App. pp. 242-243. The basis for this request was that Petitioner had contacted the Wheeling-Ohio County Health Department, by way of the Ohio County Solicitor, regarding the ongoing sewage dumping, asking that the Department take action pursuant to its obligations and duties under West Virginia law to enforce any regulations and laws that protect the health and well-being of the public, and said Department allegedly responded by attempting to shut off the water service to Plaintiff Polack's two rental houses

involved in this litigation. App. pp. 237-239. In the letter by Plaintiffs' counsel, it was claimed that "Mr. Hooff will not honor the implied easement over his property and has not permitted access to do the perc testing and/or build the septic system. Now, Mr. Hooff, despite having created this problem by not allowing the construction, is insisting that the water be disconnected." App. pp. 242-243. At no time did Petitioner insist that water be disconnected. Additionally, it is farcical to suggest that it is Petitioner's fault that Plaintiffs' are dumping raw sewage on his property.

In response to Plaintiffs' request for an emergency hearing, Judge Ronald E. Wilson scheduled a "status conference" on November 21, 2022. App. pp. 178-179. At the status conference, the lower court advised that it would not hear legal argument regarding the existence of an easement. App. p. 189. The hearing proceeded as a general conference seeking a resolution to the dispute, and included inaccurate proffers from the Plaintiffs.[1] Without hearing legal argument regarding the existence of an implied easement and without hearing any factual evidence, the lower court ordered that the percolation tests be done on Petitioner's land, over Petitioner's objection. App. p. 211. It is unclear what authority or procedure, if any, justified or authorized the lower court's issuance of the injunctive relief, which directly undermines the authority of the Health Department, and contemplates the existence of an unproven easement. Because injunctive relief was requested in Plaintiffs' *Complaint*, and the basis for the status conference was Plaintiffs' request for injunctive relief as contained in the *Complaint*, the lower court skipped over any procedural due process that Petitioner was entitled to, and awarded the injunctive relief.

[1] Counsel for Plaintiffs' inaccurately stated that Petitioner obtained his land by marrying a female related to Plaintiff E. Phillips Polack. App. p. 206. Petitioner purchased the property prior to marrying a relative of Plaintiff Polack.

On December 12, 2022, Petitioner filed a Notice of Intent to File Writ of Prohibition with the lower court, requesting an order with findings of fact and conclusions of law, pursuant to *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 361, 508 S.E.2d 75, 78 (1998). App. pp. 180-185. On January 20, 2023, the lower court filed an order previously submitted by Plaintiffs', under Petitioner's objection, which contained no findings of fact and conclusions of law. App. pp. 217-219. Said order permitted Plaintiffs "to make arrangements with a contractor to investigate the suitability of the area identified in the red outline on the attached Exhibit A on the property of Mr. Hooff, for installation of the drainage field for the septic system." *Id.*

On January 23, 2023, the Petitioner filed a motion with the lower court requesting that the proceedings be stayed, pursuant to W.Va. Code § 53-1-9, as Petitioner had filed a Notice of Intent to File a Writ of Prohibition, and requested the January 20, 2023 order not be executed until said application was made to this Court. App. pp. 220-222. On that same day, Petitioner filed a Motion to Reconsider providing supplemental argument in light of the order devoid of findings of fact and conclusions of law. App. pp. 225-243. On January 24, 2023, the lower court denied the motion to suspend the proceedings and reiterated its order permitting Plaintiffs' to conduct testing on Defendant's property, as well as on Plaintiffs' property, despite the fact that testing had already occurred on Plaintiffs' land in 2021, which resulted in permits being issued to install a modern, compliant sewage system on Plaintiffs' own property. App. pp. 244-245.

At the time of the filing of this Petition for Writ of Prohibition, several motions are pending before the lower court and have been for approximately one year.

V. SUMMARY OF THE ARGUMENT

In this case the Circuit Court has exceeded its lawful authority and committed legal error by (a) assuming jurisdiction of the matter over the lawful authority of the Wheeling-Ohio County

Health Department and the Bureau of Public Health, (b) failing to conduct proper evidentiary proceedings before seemingly finding that an implied easement exists and prohibiting Petitioner's counsel from making legal argument, and (c) ordering that Plaintiffs' be permitted to have their agents and/or representatives enter the land of Petitioner, in order to conduct percolation testing to evaluate whether a sewage system can be installed on Petitioner's land, pursuant to the aforementioned unestablished implied easement. Not only does the lower court's order seemingly assume that an implied easement exists, without hearing any evidence establishing the same, it actually contemplates expanding the easement to permit the installation of a full sewage system. The order permitting the testing, pursuant to the non-established easement, is an interlocutory order and a writ of prohibition is the only remedy available to prevent the unlawful entry of Plaintiffs' upon Petitioner's land, especially given the short time frame involved.

The Circuit Court exceeds its lawful authority and commits clear legal error by assuming jurisdiction over a matter of public health. Pursuant to West Virginia Code §§ 16-2-11(a)(1)(B) and 16-1-9 the Wheeling-Ohio County Health Department and the Bureau of Public Health are tasked with providing basic public health services, administering public health laws as to sewage and wastewater, and enforcing public health laws regarding sewage and wastewater. Further enforcement powers are included in West Virginia regulatory law, namely 64 C.S.R. §9-1, which requires obtaining a permit to install a sewage system, and the requirement for any sewage system comply with the Department of Health. Because the enforcement powers laid out in the statutory and regulatory law, any opposition to enforcement would be subject to the appeals processes laid out in 64 C.S.R. §1, et seq. Here, no such procedure was followed, and the Circuit Court exceeded its authority in taking jurisdiction over the matter.

The Circuit Court has failed to follow proper procedures in determining the existence of an easement, and has exceeded its lawful authority and committed clear legal error in doing so. There is no legitimate dispute that an express written easement does not exist in this case. Additionally, 64 C.S.R. §9-3.8 states "[o]ff-lot disposal of sewage or effluent requiring the use of or crossing of adjacent property shall require a recorded easement or authorization." Despite the mandates of this regulation, Plaintiffs' claim an implied easement exists. This Court held in *Cobb v. Daugherty*, that the law does not favor the creation of implied easements, and "the burden of proving an easement rests on the party claiming such a right and must be established by clear and convincing proof. 225 W.Va. 435, 693 S.E.2d 800 (2010) at Syl. Pt. 2, citing *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976). "'Clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Brown v. Gobble*, 196 W.Va. 559, 564, 474 S.E.2d 489, 494 (1996), citing *Wheeling Dollar Sac. & Trust Co. v. Singer*, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978). The *Cobb* case also makes clear that the finder of fact in an action to establish an easement, is a jury. In this case, there has been no evidence taken, no trial has been held, and nothing has been proven by clear and convincing evidence, however the lower court has ordered that Plaintiffs and their representatives be permitted to enter the property of Petitioner to perform testing, pursuant to this unestablished easement. This is a clear legal error and an exceeding of authority by the lower court.

The lower court ordered that Plaintiffs be permitted to enter Petitioner's land, in order to conduct percolation testing and assess a location to install a sewage system on Petitioner's land. The only reason such testing would occur is as a precursor to the court ordering that an easement exists and ordering that a sewage system be installed on Petitioner's property, for the use of the

Plaintiffs. This contemplates not only finding that an easement exists without the requisite proof, but also expanding said unproven easement. The court is exceeding its lawful authority by permitting this invasion of Petitioners' land, pursuant to a right that has not been established, in order to further expand that alleged right, in contravention of West Virginia statutory and case law.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument on the Petition for a Writ of Prohibition is unnecessary. This litigation is a simple dispute that does not present any complex matter for which this Court may be aided by oral argument. The facts and legal arguments are adequately presented in the papers before this Court. Requiring counsel to appear for oral argument to state what has already been submitted in writing only allows an unnecessary increase in litigation expenses.

VII. STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Honorable Court has original jurisdiction in prohibition proceedings pursuant to Article VIII, § 3, of the West Virginia Constitution. Regarding consideration of a writ of prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925) that "[t]he writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Additionally, West Virginia Code § 53-1-1 provides that a right to a writ of prohibition shall lie, in part, where a Circuit Court "exceeds its legitimate powers." W. Va. Code § 53-1-1; *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16, fn. (1995); *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. 776, 780, 760 S.E.2d 590, 594 (2014). When determining whether a lower court exceeded its legitimate powers, this Court stated in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) the five factors it examines:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id.

As this Court stated in Syl. pt. 1, *In the interest of Tiffany Marie S.* 196 W. Va. 223, 470 S.E.2d 177 (1996):

> A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely.

Id.

In this matter, the lower court exceeded its authority and committed clear and serious legal error in (1) assuming jurisdiction over a matter that was within the jurisdiction of the West Virginia Bureau of Public Health and it's representative, the Wheeling-Ohio County Health Department, (2) failing to conduct appropriate evidentiary proceedings in determining whether Plaintiffs' had an implied easement, and (3) ordering that Plaintiffs and their representatives be permitted to enter Petitioner's property to conduct testing, pursuant to, and seemingly in expansion of, the unestablished alleged implied easement.

VIII. ARGUMENT

1. **The Circuit Court exceeded its legitimate powers and committed clear legal error in assuming jurisdiction over a matter that falls under the jurisdiction of the West Virginia Bureau for Public Health and its agents and/or representatives, the Wheeling-Ohio County Health Department.**

The events that led to the status conference giving rise to this Petition are unusual. As stated before, the instant matter came before the lower court because counsel for Plaintiffs' sent a letter to Judge Ronald E. Wilson, citing a request for injunctive relief in the *Complaint* that was filed September 3, 2021, to request said relief for something that occurred approximately one year later. App. pp. 242-243. Prior to this, Petitioner, by counsel, sent a letter to Ohio County Solicitor Don Tennant, advising of the ongoing sewage dumping, the expiration of Plaintiff Polack's permit to install a proper sewage system, and requesting action on the part of the Wheeling-Ohio County Health Department, pursuant to its statutory duty to enforce the laws of this state meant to protect the public. App. pp. 237-241. The Health Department determined that to enforce said laws, it would shut off water service to Plaintiff Polack's rental properties that did not utilize the proper, lawful sewage disposal systems.

Despite no formal request for injunctive relief and no evidentiary proceedings, the lower court assumed jurisdiction over the matter, overruling the Health Department, and ordered that the water not be shut off, which allows further unlawful sewage discharge from Plaintiff Polack's rental properties, which dumps raw sewage onto the land of Petitioner. This issue raises what appears to be new or unresolved problems within the law of this state, regarding conflicts between the jurisdiction of the state's health departments and the circuit courts. In this matter, it appears that the Health Department's jurisdiction and authority to enforce laws meant to protect public health and safety, would take precedence. Therefore, the circuit court's assumption of jurisdiction

in ordering that the Health Department not be permitted to enforce the public health and safety laws as it sees fit, is exceeding its lawful authority.

There are multiple statutes and regulations regarding the obligations, duties, and authority of local health departments and the West Virginia Bureau of Public Health, in relation to sewage and waste water. The Wheeling-Ohio County Health Department is organized and existing under West Virginia Code § 16-2-5, which permits "county or counties and one or more municipalities within or partially within the county or counties may combine to create, establish and maintain a combined local board of health organized pursuant to and with the powers and duties prescribed by this article." West Virginia Code § 16-2-1 states that "[l]ocal boards of health, created, established and operated pursuant to the provisions of this article, are responsible for direction, supervising and carrying out matters relating to the public health of their respective counties and municipalities." Said statute goes on to further provide that the subject article establishes provisions applicable to all boards of health, to ensure consistent performance of duties related to providing basic public health service "and the enforcement of the laws of this state pertaining to public health." *Id.* More specifically, under West Virginia Code § 16-2-11(a)(1)(B), a local board of health shall provide basic public health services and programs in accordance with state public health performance based standards, including:

> [e]nvironmental health protection including the promoting and maintaining of clean and safe air, water, food, and facilities, and the administering of public health laws as specified by the commissioner as to general sanitation, the sanitation of public drinking water, *sewage and wastewater*, food and milk, and the sanitation of housing, institutions, and recreation...

W.Va. Code § 16-2-11(a)(1)(B) (emphasis added).

In addition to clear dictates of the above article, West Virginia Code § 16-1-9 lays out even more specific duties and powers regarding the Bureau of Public Health and its representatives' (i.e. the local health department) jurisdiction in sewage related matters. It states in part:

> Whenever the commissioner or his or her authorized representative finds, upon investigation, that any system or method of drainage, water supply, or sewage or excreta disposal, whether publicly or privately owned, has not been installed in accordance with plans, specifications and instructions issued by the commissioner or approved in writing by the commissioner or his or her authorized representative, the commissioner or his or her authorized representative shall issue an order requiring the owner of the system or method to make alterations necessary to correct the improper condition. The alterations shall be made within a reasonable time, which shall not exceed 30 days, unless a time extension is authorized by the commissioner or his or her authorized representative.

Id.

It goes on to include that sewage or excreta disposed in a manner not approved by the commissioner or his or her authorized representatives, constitutes prima facie evidence of the existence of a condition endangering public health. *Id.* Regulatory code also addresses sewage requirements, and similarly mandates the enforcement of such requirements by the West Virginia division of health, of which local boards of health are the representative. *See* 64 C.S.R. §9-1. That same regulatory scheme further provides:

> 3.1. The owner or his or her authorized agent shall obtain a permit for a sewer system prior to the construction or installation of any dwelling or establishment which will require a sewer system. Where subsurface discharge systems are used, there shall be sufficient area to install the initial system and a suitable replacement area.
> 3.2. Every dwelling or establishment whether publicly or privately owned, where persons reside, assemble, or are employed, shall be provided with toilet facilities, and a sewer system approved by the director.
> 3.3. It is the duty of the owner of the dwelling or establishment to provide toilet facilities and a sewer system approved by the director.
> 3.4. When, upon investigation, the director finds a person is constructing, installing, extend-ing, altering, maintaining or operating a toilet facility or sewer system which does not comply with applicable provisions of this rule, the person shall be notified of the fact in writing, and if said person shall fail to abate or correct the condition within a period of time not to exceed thirty (30) days after the receipt of the written

> notice, said person shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished according to the penalty set forth.
> 3.5. All sewer systems shall be designed, constructed, installed, maintained and operated in such a manner that excreta or sewage contained therein or effluent discharged therefrom:
> 3.5.a. Not create a health hazard affecting the public; and
> 3.5.b. Shall not violate any federal, state or local laws, rules or regulations governing water pollution or sewage disposal.

64 C.S.R. §9-3.1 to 3.5b.

This regulatory structure also provides remedy for those adversely affected by the enforcement of the rules, by way of "a contested case hearing to determine any rights, duties, interests or privileges" which can be done in a manner prescribed in this rule and in the Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64 C.S.R. 1. *See* 64 C.S.R. §9-14. This procedure to appeal or challenge the enforcement of such public health rules "apply to every person....affected by any rules, regulations or statutes enforceable by the bureau for public health." 64 C.S.R. §1-2.1. This procedure to challenge such enforcement includes a hearing, wherein evidence is taken and argument is made. *See* 64 C.S.R. §1-4.1 through 4.6j. If a party wishes to appeal the ruling that stems from the hearing, they may appeal pursuant to W.Va. Code §29A-5-4, which directs such appeals be filed with the Intermediate Court of Appeals. 64 C.S.R. §1-14.

Here, permits were issued to Plaintiff Polack in August 2021. App. pp. 240-241. These permits approved the installation of sewage systems on Plaintiff Polack's own land. Rather than have the approved system installed, Plaintiff Polack let the permits expire and to this date has not installed a compliant system, meaning that his rental houses are continuing to dump raw sewage on Petitioner's property, which is prima facie evidence of a condition endangering public health. Plaintiff Polack did not contest the issuance of the permit or appeal the placement of the proper system, rather, he just let it expire while continuing to dump raw sewage. He has continued to

neglect his duty to install his own compliant system, and continued dumping raw sewage on Petitioner's property.

Rather than appeal the decision by the Health Department pursuant to the regulatory appeal process laid out above, Plaintiffs, by counsel, contacted the circuit court, by letter, requesting immediate injunctive relief, citing a request for injunctive relief in the *Complaint* filed over a year ago, as their basis. The Complaint and the later occurring actions of the Health Department, are two wholly separate things. A request for injunctive relief in a Complaint cannot be tied to any and every occurrence going forward and permit the circuit court to exercise its power in areas outside of its jurisdiction. A formal petition or motion for injunctive relief with a legal basis and factual allegations was not filed, in relation to the specific water shut-off issue. The only thing precipitating the lower court's decision was a letter from Plaintiffs' counsel. This is insufficient.

The circuit court has, without taking any evidence or following any procedure to determine the impact of the ongoing dumping of raw sewage on Petitioner's property, granted injunctive relief and barred the Health Department from carrying out its statutory and regulatory duties to enforce public health law. The hearing that gave rise to this order was not even intended to be an evidentiary hearing, rather it was scheduled as a status hearing, with the injunction regarding the water shut-off, being temporary until further proceedings could be held. At the subject hearing, the lower court made clear that no legal argument would be heard, and that a decision would essentially be made to resolve the entire matter, thereby skipping over the administrative appeal process and overriding the lawful authority and jurisdiction of the Health Department. App. p. 189. Meanwhile, despite Plaintiff Polack not complying with the dictates of the Health Department, it is Petitioner Hooff who must suffer the continued dumping of raw sewage on his property and/or permit Plaintiffs to intrude upon his land to have percolation testing done to install a sewage system

on his property, despite no right to such an easement being established, nor will it be in the future, as implied easements for sewage disposal are illegal since there is no express easement.

To apply this situation to the five-part standard laid out in *State ex rel. Hoover v. Berger*: first, there is no other adequate means to appeal this ruling, in part due to the time frame of this issue. 199 W.Va. 12, 483 S.E.2d 12 (1996). If the matter is not brought before this Court now, the Health Department will continue to be impeded from doing its duty, the waste will continue to be dumped on Petitioner's property, and Plaintiffs will be allowed to invade Petitioner's property to have testing done, furthering the lower court's leaning to finding or ordering the existence of an easement, without the necessary proof. 199 W.Va. 12, 483 S.E.2d 12 (1996). This also touches upon the second factor contemplated by *SER Hoover*, in that awaiting an appeal at the very end of this matter will provide no remedy to these damages.

Third, as explained throughout this Petition, the lower court's order is clearly erroneous as a matter of law. The lower court has exceeded its authority and assumed jurisdiction over a matter clearly delegated to the Health Department, by both statute and regulation. Fourth, the lower court is following no clear procedure, and in fact has assumed jurisdiction and ordered the cessation of enforcement activity by the Health Department, without taking evidence, without hearing legal argument, and without any formal pleadings requesting such relief. Lastly, and as mentioned above, this is an issue of first impression. While the statutory and regulatory law seems clear that the Health Department has jurisdiction over the enforcement of laws protecting public health, there is no settled case law that counsel could identify that more clearly defines the outcome of a clash between the Health Department's authority, and the Circuit Court's.

2. **The Circuit Court exceeded its legitimate powers and committed clear legal error in failing to conduct appropriate evidentiary proceedings with the appropriate burden of proof and finder of fact, prior to seemingly finding that an implied easement exists.**

There are two general forms an easement can take: implied or express. In this matter, Plaintiffs' claimed an implied easement exists, however implied easements for the disposal of sewage are barred by West Virginia regulatory law: "Off-lot disposal of sewage or effluent requiring the use of or crossing of adjacent property *shall* require a recorded easement or authorization. This recorded document shall be binding to the heirs and assigns of the properties involved." 64 C.S.R. § 9-3.8. (Emphasis added). The inclusion of the word "shall" in the law is significant, as this Court has repeatedly held that the word "shall" in a statute "should be afforded a mandatory connotation." Syl. Pt. 1, *State ex rel. Coats v. Means*, 423 S.E.2d 636, 188 W.Va. 233 (1992), citing Syl. Pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969); Syl. Pt. 5, *Rogers v. Hechler*, 348 S.E.2d 299, 176 W.Va. 713 (1986); and Syl. Pt. 2, *Peyton v. City Counsel*, 387 S.E.2d 532, 182 W.Va. 297 (1989). Here, there is no recorded easement or authorization that explicitly permits Plaintiffs to dump sewage onto Petitioner's property. There is no recorded easement or authorization that permits Plaintiffs to establish a modern sewage system on Petitioner's property. There is no express easement. That cannot be reasonably disputed. Despite the clear mandate of 64 C.S.R. § 9-3.8, Plaintiffs still claim that they have an implied easement to dump sewage on Petitioner's property.

First and foremost, it should be noted that "[t]he law does not favor the creation of easements by implied grant or reservation." Syl. Pt. 1, *Cobb v. Daugherty*, 225 W.Va. 435, 693 S.E.2d 800 (2010). This Court explained in *Cobb* that "[c]ourts must be very careful before decreeing upon one man's land in favor of another without compensation such an encumbrance as a way, permanently impairing that man's dominion and ownership, which *next to life and liberty, is the most valuable of rights inhering in the citizen.*" *Id.* at 807, citing *Crosier v. Brown*, 66 W.Va. 273, 275, 22 S.E. 326 (1909) (emphasis added). See also *Cantrell v. Cantrell*, 242 W.Va. 116, 829

S.E.2d 24 (2019). This Court in *Cobb* further explained that "a grantor should only rarely be allowed to derogate from his or her explicit deed, and by implication, take back from the grantee." *Cobb* at 810. Most importantly for the purposes of this Petition, this Court in *Cobb* held that "the burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof." *Cobb* at Syl. Pt. 2, citing *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976). It should also be noted that in the lower court proceedings of *Cobb*, the issue of whether an easement existed was tried by a jury.

Here, the Code of State Rules section barring implied easements for sewage disposal was ignored. The necessary disfavor of granting implied easements was ignored. The required evidentiary procedure, i.e. proving the elements of an implied easement by clear and convincing evidence, was ignored. The lower court's order ignores these profoundly important issues and appears to just *assume* the existence of an easement. This Court has unmistakably declared that implied easements are not easily granted due to the extreme importance and value of a citizen's right to their own property. While it's true the lower court has not expressly ruled that there is an easement, statements during the November 21, 2022 status conference regarding whether an easement existed, and the fact that the entry upon Petitioner's land was permitted to conduct testing, pursuant to the claimed easement, clearly shows that the court has essentially already found that an easement exists or at least will allow the Plaintiffs to act as if an easement exists, without *any* evidence of the same. As noted by the lower court in the status conference, upon Petitioner's counsel's assertion that Plaintiffs' have no easement: "I'm not buying into that argument. We got to solve the problem." App. p. 196. The lower court came to this conclusion without hearing evidence and without allowing legal argument. This is clear legal error and disregard for both substantive and procedural law. Not only that, the lower court appeared to essentially forego

requiring the Plaintiffs to bear their burden of proof at all, stating to Petitioner's counsel: "Well, to the extent there is a legal argument that they have a right that has continued to be on his property for this sole purpose, that's something you might have to win in the supreme court." App. p. 202.

The lower court's order has overridden Petitioner's right to his own property, which the law strongly disfavors, by allowing Plaintiffs' to enter Petitioner's property. All it took was a letter from Plaintiffs' counsel and the lower court decided that it would hear no legal argument, and the issue would be "resolved" by way of a free-flowing conference. This is not the proper procedure, as it directly contradicts the clearly settled law regarding the establishment of easements, as explained in the *Cobb* case. The lower court exceeded its powers by coming to a conclusion, one that in itself is clearly erroneous as a matter of law, which can only be reached after evidence has been taken and a finder of fact has made findings, which has yet to occur in this matter.

3. **The lower court has exceeded its legitimate powers and committed clear legal error in permitting Plaintiffs' agents and/or representatives to enter Defendant's property to survey, locate, and conduct percolation testing for the installation of a sewage disposal system, essentially expanding the claimed easement and prior to any establishment of a legal easement.**

In addition to ignoring the procedural law and process regarding easements, the lower court also ignored the substantive law surrounding easements. Even if an implied easement were permissible, and if the lower court followed the appropriate procedures to determine whether an implied easement existed, Plaintiffs could not meet the burden of establishing the same. As set forth above, the burden of proving the existence of an implied easement is firmly planted on the shoulders of the party claiming such easement. *Cobb* at Syl. Pt. 2, citing *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976).

There are two forms of implied easements – those implied by necessity and those implied by prior use. *Cobb* at Syl. Pt. 3. Both forms of implied easement require prior common ownership

of the dominant and servient estates, and a conveyance of either of those estates. To prove an easement implied by necessity, the claimant of said easement must prove four elements. In addition to the aforementioned common ownership and severance of the dominant and servient estate, claimant must prove by clear and convincing evidence that "at the time of the severance, the easement was strictly necessary for the benefit of either the parcel transferred or the parcel retained" and there must be "a continuing necessity for an easement." *Cobb* at Syl. Pt. 4. The *Cobb* court expounded upon the strictness requirement, stating that to qualify as such, "the easement is strictly necessary to the productive, beneficial, economical or physical use of the dominant estate." *Cobb* at 811. "Strict" necessity, not mere convenience or reasonable necessity, is required. "If there is an alternate route, even if more difficult or more expensive to use, then no easement is implied by necessity." *Id.* "If one has a reasonable outlet over his own property, he cannot exact a more convenient way as of necessity over the premises of another." *Cobb* at Syl. Pt. 5, citing *Dorsey v. Dorsey*, 109 W.Va. 111, 153 S.E.146 (1930). The strict necessity standard requires "only the most compelling circumstances" to imply or infer an easement. *Cobb* at 810. The classic example of such a compelling circumstance is a property that is completely inaccessible without access to the servient estate. It's not simply difficult to access the property without encroaching on another's land, but impossible.

This Court has clearly stated that not only must a necessity exist at some point in order to establish an implied easement of necessity, but it must continue. "[O]nce the necessity ceases to exist, the way of necessity likewise ceases to exist." *Cobb* at 811. In this matter, during the subject status conference, or even in the prior pleadings, Plaintiffs have not shown any prior or ongoing necessity. In fact, by Plaintiffs' counsels own admission, another sewage system on Plaintiff Polack's property is possible, just more expensive. App. pp. 199-205. Not only is there no

necessity, but there are multiple sources of confirmation that it is Plaintiffs' duty to establish and maintain their own system, on their own land. The Washington Farms By-Laws, as discussed throughout the briefing of this matter in the lower court, places the responsibility upon the property owners for their own sewage disposal systems. App. p. 29. Additionally, the deeds for each of the subject properties includes the same language, providing additional notice that such responsibility falls on the individual land owners. App. pp. 72-151. The Health Department has even inspected Plaintiffs' properties, conducted testing, and issued permits finding the areas appropriate for a sewage system, restricted to their own properties.

Despite all of this, the lower court's order explicitly contemplates finding an easement, and permits Plaintiffs to enter Petitioner's property to conduct testing, in order to install a sewage system, without an easement ever being established. App. pp. 244-245. The Circuit Court's order states, "Counsel for the Plaintiffs is instructed to make arrangements with a contractor to investigate the sustainability of the area identified in the red outline on the attached Exhibit A on the property of Mr. Hooff, for installation of the drainage field for the septic system." App. p. 244. It appears that an easement has already been found by the Circuit Court, without any evidence to prove the same. This is clear legal error and exceeds the Circuit Court's authority.

VIII. CONCLUSION

For all of the foregoing reasons, Petitioner Hooff respectfully requests that this Court enter a rule to show cause and issue a writ of prohibition vacating the Circuit Court's Order, mandating the appropriate application of law, therefore disallowing Plaintiffs from entering Petitioner's property to conduct testing pursuant to an unestablished easement.

Robert Hooff, Petitioner,

By Counsel

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IX. VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF OHIO, TO WIT:

On this 26th day of January, 2023, Robert Hooff, appearing personally before the undersigned Notary in Ohio County, West Virginia, and after being duly sworn, upon oath, stated that he has read his Petition for Writ of Prohibition and that the statement, allegations, and averments therein are true and correct, except so far as they are there in stated to be on information then he believes them to be true.

Robert Hooff

Taken, subscribed and sworn before me, MELISSA J. THORN a notary public for the State of West Virginia, County of Ohio, this 26th day of January, 2023.

My Commission expires: 10-20-26

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
MELISSA J THORN
38 Fifth Street
McMechen, West Virginia 26040
My Commission Expires Oct. 20, 2026

X. CERTIFICATE OF SERVICE

I hereby certify that on this 26TH day of January, 2023, I caused the foregoing Petition for Writ of Prohibition to be served on counsel of record via email and U.S. mail in a postage pre-paid envelope addressed to:

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