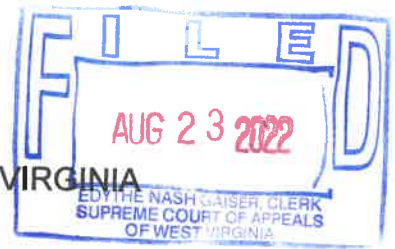


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TONY PALETTA,
Petitioner

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vs.) No. 22-0380

Appeal from Final Order of the
Circuit Court Of Harrison County
(Civil Action No. 19-C-52-1)

**NELSON PHILLIPS, III, NATHAN PHILLIPS,
ROBERT NELSON PHILLIPS, II, AND
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,**
Respondents

PETITIONER'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ASSIGNMENTS OF ERROR	2
STATEMENT OF THE CASE	2
A. Proceedings in the Court Below	2
B. Statement of Facts	3
SUMMARY OF ARGUMENT	8
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	9
ARGUMENT	9
A. Standard of Review	9
B. The Circuit Court erred in granting the Defendants and Counterclaimants Motion For Summary Judgment and entering the Order Granting Defendants/Counterclaimants/Third-Party Plaintiffs' Motion For Summary Judgment, because the Defendants and Counterclaimants did not meet their burden of proof and the ruling is not supported by the evidence.....	9
C. The Circuit Court erred by applying the wrong standard of law in regard to the nature of the road in issue and erred by ruling that West Virginia Secondary Route No. 36/5 is not a part of the State highway system	13
CONCLUSION	19
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

<u>Cases</u>	Page:
<i>Aetna Casualty & Sur. Co. v. Federal Ins. Co.</i> , 148 W.Va. 160, 171, 133 S.E.2d 770 (1963).....	10
<i>Baker v. Hamilton</i> , 144 W.Va. 575, 109 S.E.2d 27 (1959).....	12
<i>Brown v. Bluefield Community Hospital</i> , 167 W.Va. 318, 319, 280 S.E.2d 101 (1981)	10
<i>Crain v. Lightner</i> , 178 W.Va. 765, 364 S.E.2d 778 (1987)	10
<i>Masinter v. WEBCO Co.</i> , 164 W.Va. 241, 262 S.E.2d 433 (1980)	10
<i>Miller v. Hoskinson</i> , 189 W.Va. 189, 429 S.E.2d 76 (1993)	12, 17
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994).....	9, 11
<i>State ex rel. the County Court of Wood County, et al., v. The State Road Commission of West Virginia, et al.</i> , 147 W. Va. 623, 129 S.E.2d 726 (1963)	16
<i>State of West Virginia ex rel. Richard Keene v. Jordan, et als.</i> , 192 W. Va. 131, 451 S.E.2d 432, 435 (1994)	16
<i>Williams v. Precision Coil, Inc.</i> , 194 W.Va. 52, 459 S.E.2d 329 (1995)	11
<i>Wilson v. Seminole Coal, Inc.</i> , 175 W.Va. 518, 336 S.E.2d 30 (1985)	12
 <u>Statutes</u>	
W.Va. Code §17-2A-8	14
W.Va. Code §17-2A-8(12).....	8, 14, 15
W.Va. Code §17-4-1.....	8, 13
 <u>Regulations</u>	
W. Va. Code St. R. §157-1-6	8, 14
W. Va. Code St. R. §157-1-6.1	15
W. Va. Code St. R. §157-1-6.2	15

W. Va. Code St. R. §157-1-6.3	15
W. Va. Code St. R. §157-1-6.4	15
W. Va. Code St. R. §157-1-6.5	15
W. Va. Code St. R. §157-1-6.6	15

Rules of Civil Procedure

W.Va.R.Civ.P. 56 (c).....	9
---------------------------	---

Rules of Appellate Procedure

W.Va.R.App.P.10	1
W.Va.R.App.P.18(a)	9
W.Va.R.App.P.19	9

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Comes now the Petitioner herein and Plaintiff below, Tony Paletta (hereinafter "Plaintiff" and "Petitioner"), by and through counsel, West & Jones, by Norman T. Farley, and pursuant to Rule 10 of the West Virginia Rules Of Appellate Procedure and the Scheduling Order of this Court, tenders the within Petitioner's Brief in support of his appeal.

The Petitioner appeals the ruling of the Circuit Court of Harrison County, West Virginia, the Honorable Christopher J. McCarthy presiding, set forth in the Order Granting Defendants/Counterclaimants/Third-Party Plaintiffs' Motion For Summary Judgment, entered on April 29, 2022, granting the Motion For Summary Judgment of the Respondents herein and Defendants and Counterclaimants below (hereinafter "Defendants" and "Phillips Respondents"), removing this case from the docket of the Circuit Court.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting the Defendants and Counterclaimants Motion For Summary Judgment and entering the Order Granting Defendants/Counterclaimants/Third-Party Plaintiffs' Motion For Summary Judgment, because the Defendants and Counterclaimants did not meet their burden of proof and the ruling is not supported by the evidence.

2. The Circuit Court erred by applying the wrong standard of law in regard to the nature of the road in issue and erred by ruling that West Virginia Secondary Route No. 36/5 is not a part of the State highway system.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURT BELOW

The original Complaint in this Civil Action was filed on February 28, 2019, by the Plaintiff, appearing pro se. On March 4, 2019, the Complaint was personally served on the Defendant, Nelson Phillips, II, aka Robert Nelson Phillips, II, whom the Plaintiff believed was the owner of the real estate which is the subject of this Civil Action. On or about March 4, 2019, the said Defendant, appearing pro se, filed an Answer to the Complaint. Thereafter, both parties retained counsel. The Plaintiff filed an Amended Complaint on or about December 11, 2019, and among other things, additional Defendants were added to the Civil Action. (Appx. pp.16-24) The Defendants filed an Answer, Affirmative Defenses And Counterclaims on or about December 31, 2019. (Appx. pp. 25-31) On July 6, 2021, the Defendants filed a Third Party Complaint For Declaratory Judgment Against The West Virginia Department Of Transportation-Division Of Highways

(hereinafter "DOH"). (Appx. pp. 45-57) The West Virginia Department Of Transportation, Division Of Highways, as Third-Party Defendant, filed the Answer Of The Third-Party Defendant, West Virginia Department Of Transportation, Division Of Highways, To The Third-Party Plaintiffs' Third-Party Complaint. (Appx. pp.58-65) By Order Granting Defendants/Counterclaimants/Third-Party Plaintiffs' Motion for Summary Judgment, entered on April 29, 2022, the Circuit Court granted the Defendants/Counterclaimants/Third-Party Plaintiffs' Motion for Summary Judgment and directed the Circuit Clerk to remove the case from the Court's docket. (Appx. pp.5-15)

B. STATEMENT OF FACTS

The Plaintiff owns an interest in three tracts or parcels of land situate in Union District, Harrison County, West Virginia, which tracts or parcels of land contain 52 acres, more or less, 7.25 acres, more or less, and 20.136 acres, more or less, and are identified on the land books in the office of the Assessor of Harrison County, West Virginia, on Tax Map No. 386, at Parcel Nos. 79, 33, and 32, respectively. (Sometimes referred to as "Paletta Parcels"). (Appx. p.16)

By deed dated July 7, 2016, of record in the office of the Clerk of the County Commission of Harrison County, West Virginia, in Deed Book No. 1578, at page 536, Charles Ozalas conveyed to the Defendants a tract or parcel of land situate in Union District, Harrison County, West Virginia, containing 5 acres, more or less, identified on said land books on Tax Map No. 386, at Parcel 31, which parcel of land adjoins said tract or parcel of land containing 20.136 acres, more or less, on the northwesterly boundary line. (Sometimes referred to as "Phillips Tract"). (Appx. pp.16-17, 18-19, 114) The Defendant, Nelson Phillips, II,

resides on or near said Phillips Tract. (Appx. p.17) The metes and bounds description of the said Phillips Tract containing 5 acres, more or less, clearly describes a road along or adjoining said tract or parcel of land, which metes and bounds description is set forth in said deed as follows:

"Beginning at a W.O. stump on the edge of the Old County Road leading to Mt. Clare and corner to lands now or formerly owned by J.J. Sidebottom; thence with the same and the road N. $43 \frac{3}{4}^{\circ}$ W. 66 feet; N. $14 \frac{3}{4}^{\circ}$ W. 300 feet; N. 31° W. 176 feet to R.O.; N. 16° W. 310 feet to a stake; S. $88 \frac{3}{4}^{\circ}$ W. 100 feet to a line of J. D. Helmick; thence with the same crossing the road S. $8 \frac{3}{4}^{\circ}$ E. 175 feet to a stone; thence 82° W. 105 feet to a point in the forks of the road, corner to lands of W. B. Maxwell; thence with same and the road S. $12 \frac{1}{4}^{\circ}$ E. 809 feet to a W.O. stump; thence with a new line northeasterly about 360 feet more or less, to the beginning, containing 5 acres, more or less." (Emphasis supplied.) (Appx. pp.17-18)

By deed dated October 9, 1922, of record in the aforesaid Clerk's office in Deed Book No. 333, at page 324, Rector W. Allen and Chloe B. Allen, his wife, conveyed to Domenico Paletta and Maria Paletta, his wife, predecessors in title to the Plaintiff and others, a tract or parcel of land containing 55 acres, more or less, situate on the waters of the West Fork River, in Union District, Harrison County, West Virginia, and the metes and bounds description for said tract or parcel of land and for an out-conveyance containing 2 acres both describe a "county road" on, along, or adjoining said tract or parcel land containing 55 acres, more or less, as follows:

" Beginning at a large white oak near the county road, and running thence S. $81^{\circ} 50'$ E. 2475 feet to a marked stone by a post; thence S. $35^{\circ} 57''$ W. 1260 feet to a red oak; thence N. $73^{\circ} 26''$ W. 2070 feet to a stake at a fence; thence N. $19^{\circ} 5'$ E. 832 feet to the beginning, containing 55 acres, more or less, and being the same land that was conveyed to the parties

of the first part by John H. Mars and Augusta M. Mars, his wife, by deed dated the 19th day of February, 1921, and of record in the office of the county clerk of said Harrison County in Deed Book No. 517, at page 92.

There is, however, expressly and reserved from the above boundary of 55 acres that certain tract or parcel of land containing about two (2) acres, which was conveyed by the said Rector W. Allen and wife to John D. Helmick, by deed dated March 1st, 1921, and recorded in said county clerk's office in Deed Book No. 380, at page 153, which is a small portion lying across the road from the residue of said land and is bounded as follows;

Beginning at a point in the intersection of the County road with the boundary line running between lands of Thomas Highland and lands of John D. Helmick and D. Lowther, thence with line of Thomas Highland and John D. Helmick, N. 73° 5' W. 350 feet to W. B. Maxwell thence with said Maxwell N. 18 E. 460 feet to locust post at intersection of County road and said Maxwell's line; thence in a southerly direction with the County road 560 feet to the beginning." (Emphasis supplied.) (Appx. pp.19-20)

The only means of ingress, egress, and regress to and from the Paletta Parcels to and from a public road is along and over a public road along the northwesterly boundary line of the Phillips Tract. (Appx. p.17) The public road along the northwesterly boundary line of the Phillips Tract is on the scrolls of the DOH, and is identified as West Virginia Secondary Route No. 36/5 ("Route 36/5"). Route 36/5 provides the only means of ingress, egress, and regress to and from the Paletta Parcels to and from West Virginia Secondary Route No. 36 ("Route 36"). (Appx. p.17) Route 36/5 is a part of the State highway system and is still a public road, even though the road along the Phillips Tract has been covered or removed by mining activity. (Appx. pp.16, 17, 18, 103-111, 124-136)

The Defendant, Nelson Phillips, II, put a fence and a gate across the road and blocked Route 36/5, has refused to allow the Plaintiff and others to use said road, and posted a No Trespassing sign on or near the road. As a result of the actions of the Defendant, Nelson Phillips, II, the Plaintiff and others legally entitled to use Route 36/5 have no other lawful means of access to and from the Paletta Parcels, which are now landlocked. (Appx. pp. 21-22)

The Plaintiff grew up on the Paletta Parcels and has personal knowledge that Route 36/5 was used by the Plaintiff, the Plaintiff's predecessors in title, and other persons for access to various tracts or parcels of real estate. It is also the information and belief of the Plaintiff that the Defendant, Nelson Phillips, II, has been informed by representatives of the DOH that Route 36/5 is still a part of the State highway system and is still a public road, even though the road may not be usable as a road at the present time. In fact, the Defendant, Nelson Phillips, II, allowed the Plaintiff to cross the property in or about the year 2016 or 2017 and move a trailer to the Paletta Parcels. (Appx. p.94)

The Defendant, Nelson Phillips, II, essentially admitted that Route 36/5 exists in the Answer, dated March 4, 2019, which he filed in response to the original Complaint filed by the Plaintiff. In said Answer, the said Defendant stated ". . . Tony Paletta has to have a survey of the road and a State Road Permit for any development of a road. And this road has to be built by State road specifications." (Appx. pp. 21, 101, 122) In the Counterclaim, dated July 11, 2019, filed by said Defendant, the said Defendant further stated "I Nelson Phillips are not stopping the State Road from going through." (Appx. pp. 21, 101, 102, 123)

Road maps maintained by the DOH reflect a public road identified as Route 36/5, running from West Virginia Secondary Route 36 to the area in which the Paletta Parcels are located. Route 36/5 is also identified as a public road in the State highway system on the DOH District 4 road maps. (Appx. pp. 20, 95, 103-108, 124-129)

Tax maps maintained by the Assessor of Harrison County, West Virginia, reflect a road along the northwesterly boundary line of the Phillips Tract, leading to the Paletta Parcels. (Appx. pp.20,109-110, 130-131)

The maps maintained by the WV Property Viewer, supported by the WV State Tax Department and WV GIS Technical Center, reflect the Paletta Parcels and the Phillips Tract, and the public road identified as Route 36/5. (Appx. pp. 95, 111, 132)

In its Responses To The Plaintiff's First Combined Discovery Requests, the DOH provided numerous maps, documents, and other records reflecting that Route 36/5 is and always has been a part of the State Highway System and is therefore a public right of way. The Citizen's Request For Assistance, dated February 2, 2017, and February 7, 2017, reflects that Jeff Crislip, a DOH employee (now retired) advised the Plaintiff and advised the Defendant, Nelson Philipps, that Route 36/5 is a DOH right of way with public access. (Appx. p.133) The DOH provided a map showing the "Road To Be Located 36/5". (Appx. p.134) Route 36/5 is shown on the DOH Advanced Planning Division records bearing date of 1974. (Appx. pp.135-136) Route 36/5 is also described on the DOH Highway Planning Survey Road Inventory Notes dated 1936, September 2, 1948,

May 27, 1955, October 23, 1962, October 7, 1971, May 29, 1979, March 15, 1984, December 3, 1986, and June 26, 2007.

In the Responses To The Third-Party Plaintiffs' First Set Of Requests For Admissions, Request No. 9, the DOH stated as follows:

“The Division of Highways states that when Secondary Route 36/5 came into the State Road System in approximately 1933, it came in as a pre-existing “scroll” road and as such, it did not have to conform to the State’s current standards and specifications. Accordingly, this request is denied.” (Appx. p.154)

SUMMARY OF ARGUMENT

The Circuit Court erred in finding and concluding that the Phillips Respondents satisfied all the elements required for relief by summary judgment. Numerous material facts are disputed and different inferences may be drawn from said facts by reasonable minds and the Phillips Respondents are not entitled to judgment as a matter of law. The Court should review the issue to ensure property adherence to the requirements for relief by way of summary judgment.

The Circuit Court erred by applying the wrong standard of law in regard to the nature of the road in issue. The Circuit Court failed to comply with the provisions of W.Va. Code §17-4-1, W.Va. Code §17-2A-8, and W.Va. Code St. R. §157-1-6. The Court should review the issue and correctly apply the statutory provisions and applicable provisions of the West Virginia Code Of State Rules.

The Circuit Court erred by finding and concluding that a presumption of abandonment of a road within the State highway system runs against the State of West Virginia. The Court should review the issue and hold that no presumption

of abandonment of a road within the State highway system runs against the State of West Virginia.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the record and briefs in this case will provide the Court with all necessary information needed to decide the issues, and therefore oral argument under W.Va.R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

A. STANDARD OF REVIEW

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).

B. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANTS AND COUNTERCLAIMANTS MOTION FOR SUMMARY JUDGMENT AND ENTERING THE ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, BECAUSE THE DEFENDANTS AND COUNTERCLAIMANTS DID NOT MEET THEIR BURDEN OF PROOF AND THE RULING IS NOT SUPPORTED BY THE EVIDENCE.

In order to prevail under Rule 56 of West Virginia Rules of Civil Procedure, it must be shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. W.Va.R.Civ.P. 56 (c).

A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances. The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined. Aetna Casualty & Sur. Co. v. Federal Ins. Co., 148 W.Va. 160, 171, 133 S.E.2d 770 (1963). Even if the trial judge is of the opinion to grant a Motion For Summary Judgment, he should nevertheless ordinarily hear evidence at the trial and direct a verdict rather than to try the case in advance on a Motion For Summary Judgment. Brown v. Bluefield Community Hospital, 167 W.Va. 318, 319, 280 S.E.2d 101 (1981); Syt. Pt. 1, Masinter v. WEBCO Co., 164 W.Va. 241, 262 S.E.2d 433 (1980); Aetna, supra, at 172.

The West Virginia Supreme Court of Appeals in Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987), discussed the burden of proof on the party resisting a motion for summary judgment, and stated that the party does not have to show that his case is developed to the point that he would prevail at trial. In Crain, 364 S.E.2d, at pp. 781-782, the Court stated:

“The question on a motion for summary judgment is not . . . whether the plaintiff has met the burden of proof on material aspects of his claim. It is, rather, whether a material issue of fact exists on the basis of the factual record developed to that date. The burden on a motion for summary judgment is not upon the non-moving party to show that he has developed facts which would allow him to prevail if his case was submitted to a jury. The burden [of persuasion] is on the moving party to show that there is no genuine issue as to any material fact in the case.”

The Court in Crain specified what it meant by “genuine issue” as to a material fact and stated that if there is any evidence in the record from any source from

which a reasonable inference in the non-movant's favor may be drawn as to a material fact, the moving party is not entitled to a summary judgment. Id. at 782.

Summary judgment is appropriate when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 4, Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994); Syl. Pt. 2, Williams v. Precision Coil, Inc. 194 W.Va. 52, 459 S.E.2d 329 (1995). In determining whether there is a genuine issue of material fact, all facts and all inferences are viewed in a light most favorable to the party opposing the motion for summary judgment. Williams, 459 S.E.2d at 336.

The Defendants have not met the burden imposed upon them to show that no genuine issues of material fact exist as to matters pertinent to their Motion For Summary Judgment. Under applicable law, the facts must be considered most favorably to the Plaintiff. Different or conflicting inferences can certainly be drawn from the facts. In their Motion For Summary Judgment, the Defendants make nothing more than self-serving conclusions, assumptions, and speculation that do not consider all the facts and documents in this case.

Clearly, there are numerous genuine issues as to material facts. In discovery, the Plaintiff provided to the Defendants numerous documents, most of which are public records, including deeds, property tax information, maps, and plats showing the existence and location of Route 36/5. Contrary to the statement of the Court (Appx. pp. 13-14), Route 36/5 is and always has been the only means of ingress, egress, and regress to and from the Paletta Parcels to

and from Route 36, a public road. In the Answer, Affirmative Defenses And Counterclaims, the Defendant, Nelson Phillips, II, admitted that he built a residence and other facilities on the Phillips Tract and posted a No Trespassing sign. The Defendants have unlawfully blocked the access road to and from the Paletta Parcels to and from Route 36. The Defendants were also put on notice of the existence of a road, namely, Route 36/5, in the metes and bounds call in the deed by which the Defendants acquired title to the Phillips Tract. The location of Route 36/5 can be determined by the metes and bounds description of the Phillips Tract itself. (Appx. pp.18-19)

The entire legal argument presented by the Defendants does not apply to the facts and issues in the present case. The Defendants cite the cases of Baker v. Hamilton 144 W.Va. 575, 109 S.E.2d 27 (1959); Wilson v. Seminole Coal, Inc., 175 W.Va. 518, 336 S.E.2d 30 (1985); and Miller v. Hoskinson, 189 W.Va. 189, 429 S.E.2d 76 (1993). The three cases refer to a totally distinct legal issue, namely, a determination of whether a road is a private road or a public road. Route 36/5 is and always has been a part of the State highway system. Route 36/5 is shown on the scrolls or list of roads of the DOH and was incorporated within statewide control of roads and highways in 1933. Route 36/5 is shown on the road maps of the DOH, the Advanced Planning Division records of the DOH, and the Road Inventory Notes of the DOH. Route 36/5 is shown on the property tax records for Harrison County. The Court seemingly ignored these documents, records, and facts which clearly are evidence that Route 36/5 is still a road which is part of the State highway system, regardless of its condition.

The Plaintiff has personal knowledge that Route 36/5 has been in existence for many years and was used by his family and other families for access to and from Route 36. Route 36/5 has never been abandoned by the DOH and remains a part of the State highway system, regardless of its present condition. There is no presumption of abandonment against the State of West Virginia as alleged by the Defendants for Route 36/5. It is and always has been a part of the State highway system, within the jurisdiction of the DOH. A representative of the DOH has stated that "THERE IS A ROW THERE" but if a road is constructed, it must be constructed to "CURRENT DOH SPECS with A PERMIT. THE DOH WOULD THEN MAINTAIN..." (Appx. p.133). Why would construction to DOH specs with a permit from the DOH be required if the road were not a public road that is part of the State highway system? Without the use of Route 36/5, the Paletta Parcels are landlocked and the Plaintiff has no other means of access to the property.

The three cases cited by the Defendants only concern the issue of whether a road is a private road or a public road, which can be used by persons other than the owner of the property over which the road crosses. The three cases do not involve in any manner a road which is a part of the State highway system.

C. THE CIRCUIT COURT ERRED BY APPLYING THE WRONG STANDARD OF LAW IN REGARD TO THE NATURE OF THE ROAD IN ISSUE AND ERRED BY RULING THAT WEST VIRGINIA SECONDARY ROUTE NO. 36/5 IS NOT A PART OF THE STATE HIGHWAY SYSTEM.

W.Va. Code §17-4-1 states, in relevant part, as follows:

“The authority and control over the state roads shall be vested in the commissioner of highways.”

W.Va. Code §17-2A-8 provides, in relevant part, as follows:

“In addition to all other duties, powers, and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

- (1) Exercise general supervision over the state road program and the construction, reconstruction, repair, and maintenance of state roads and highways. . . .”
- (12) Discontinue, vacate, and close any road or highway, or any part of any road or highway, the continuance and maintenance of which are found unnecessary and improper, upon petition and hearing or upon investigation initiated by the commissioner. Any petition, motion, notice, decision, and order related to the discontinuance, vacating, or closing of any road or highway or part thereof shall be posted by the commissioner on the division’s website available for review by the public. The division shall make virtual participation available to any person interested in participating in or attending any hearing related to such discontinuance, vacating, or closing;”

The Commissioner of the West Virginia Department of Transportation, Division of Highways (“DOH”) has exclusive jurisdiction over the roads and highways in West Virginia. The Commissioner of the DOH also has exclusive authority regarding the discontinuance, vacating, or closing of any state road or highway or any part thereof, but only after completion of a specific process required by statute.

The procedure regarding the abandonment and discontinuance of state roads is set forth in W. Va. Code St. R. §157-1-6, which is titled Abandonment and Discontinuance of State Roads. A copy of the Rule was provided to the Court by counsel for the DOH. The procedure to abandon or discontinue a state

road is clearly set forth and requires a detailed procedure to be completed by the Commissioner of Highways. Pursuant to the provisions of W. Va. Code §17-2A-8(12), the Commissioner of Highways may discontinue, vacate and close any road or highway, or any part thereof, where he finds the continuance and maintenance of such road unnecessary and improper. (§157-1-6.1.) The procedure requires the filing of a petition by any person whose property or property interests are affected by any road or highway (§157-1-6.2.); and, Notice and a Hearing and a determination by the Commissioner that the road or a portion of the road should be abandoned, and an opportunity by any person having objections to the proposed abandonment to be heard (§157-1-6.3.) In the alternative, the Commissioner of Highways may on his own motion, cause an investigation to be made of any road or highway, and upon the basis of the information so produced, determine whether it is in the best interests of the state for a road, or a part of a road, to be abandoned and discontinued. (§157-1-6.4.) In every case where the Commissioner of Highways determines that it is in the best interests of the state to abandon and discontinue a road or portion of a road, he shall abandon, discontinue, vacate or close the same by a formal Commissioner's Order, duly entered in the permanent Commissioner's Order Book. (§157-1-6.5.) Copies of the Commissioner's Order of Abandonment wherein a road or a part of a road is abandoned, discontinued, vacated or closed, must be provided to certain officials and to any persons who have notified the Commissioner that his personal or property interests may be affected by the abandonment, discontinuance, vacating or closing of the road in question. (§157-1-6.6.)

In State ex rel. the County Court of Wood County, et al., v. The State Road Commission of West Virginia, et al., 147 W. Va. 623, 129 S.E.2d 726 (1963), the Supreme Court considered the authority and control of the State Road Commissioner, now the Commissioner of Highways. In Pt. 3, Syllabus, the Court stated:

“3. Under the provisions of Section 4, Article 4, Chapter 40, Acts of the Legislature, First Extraordinary Session 1933, the State Road Commissioner has power ‘upon petition and hearing, or after due investigation, upon his own initiative, (to) discontinue any road no longer necessary’ and such power is not subject to the control of the courts, except where its exercise is capricious, arbitrary or fraudulent.” (Citation omitted).

In Pt. 4, Syllabus, the Court held:

“4. Mandamus will lie to compel the State Road Commissioner to comply with the mandatory provisions of the statute requiring him to assume control over certain roads and bridges, but the awarding of such writ will not in any way interfere with the proper use of his discretion in connection with the repairing, maintenance, supervision or discontinuance of such roads and bridges, as provided by the statute.”

The Supreme Court clearly held that the State Road Commissioner/Commissioner of Highways has control over roads and bridges within the state highway system and may discontinue any such road that is no longer necessary, which power is not subject to the control of the Courts.

Pursuant to W. Va. Code §17-4-1, the State Commissioner of Highways has exclusive authority and control over state roads. State of West Virginia ex rel. Richard Keene v. Jordan, et als., 192 W. Va. 131, 451 S.E.2d 432, 435 (1994). The case involved a road which was a part of the state local service system and the closing of a railroad crossing. The Court further stated:

“W.Va. Code §17-4-1 [1972] states, in relevant part, “[t]he authority and control over the state roads shall be vested in the commissioner of highways.” Additionally, this Court has stated it appears that it was the policy of the Legislature in the enactment of the aforesaid statutes [Chapter 17 of the W. Va. Code] to provide a comprehensive and all-embracing system of statutory law, establishing a general state road system . . . and providing for and investing in the commission and the commissioner the exclusive power over the construction, maintenance and control of said system[.]” (Keene, at p. 434).

West Virginia Secondary Route No. 36/5 (“Route 36/5”) has been a part of the State highway system since in or about 1933. DOH road maps show Route 36/5 as part of the State highway system on numerous maps as early as 1937 and as late as 2014, and on the DOH map showing all of the roads in District Four. Tax maps maintained by the Assessor of Harrison County, West Virginia, reflect a road identified as Route 36/5. The maps maintained by the WV Property Viewer reflect the public road identified as Route 36/5. The DOH has provided numerous maps, documents, and other records reflecting that Route 36/5 is and always has been a part of the State highway system. Route 36/5 is included on the DOH scrolls, or the list of roads within the State highway system, since Route 36/5 came into the State road system in approximately 1933. There is no presumption of abandonment against the State of West Virginia of Route 36/5, for any procedure to abandon or discontinue a public road is within the exclusive jurisdiction of the Commissioner of Highways.

In the Supplemental Authority In Support of Motion For Summary Judgment, the Defendants cite the case of Miller v. Hoskinson, 189 W. Va. 189, 429 S.E.2d 76 (1993) as authority for the Court to declare that Route 36/5 has been abandoned. However, the case is clearly distinguished on the facts and the

law from the present case. In Miller, the road in issue, known as the Stagecoach Road, was not a part of the State highway system. The Stagecoach Road had never been brought into the State highway system and was not shown on any topographical maps, county maps, or tax maps. Miller, at p. 193. The Supreme Court held:

“The road in question, by uncontroverted evidence, was established as a public road by an act of the Circuit Court of Doddridge County in 1892. We conclude that its status as a public road was vacated, however, when the state failed to incorporate the road within statewide control subsequent to the 1933 adoption of a state road system. Such failure to incorporate is evidenced by the state’s lack of expenditure of funds and the absence of reference to the road on recent maps or plats. The ancient maxim of “once a highway always a highway” is subject to an exception; if the state abandons the road, or, as in this case, fails to incorporate it within its authority, the road ceases to be a public road.

From the evidence presented to this Court, we find that the Stagecoach Road was not adopted as part of the state highway system of 1933. The sporadic use of the road by the Appellees or other members of the general public is insufficient to perpetuate the road’s status as a public road in the glaring absence of public acceptance of the road since 1933.” (Emphasis supplied.) (Miller, at p. 193). (Emphasis supplied.)

It is clear that the Commissioner of Highways has exclusive power to abandon or discontinue any road or highway which is a part of the State highway system. A Circuit Court does not have the jurisdiction to cause or declare the abandonment of Route 36/5, which is and has always been a part of the State highway system, even though it is not currently usable. The DOH and the Commissioner of Highways has the exclusive power over the construction, maintenance, and control of the State road system, including Route 36/5.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests the Court to reverse the Order Granting Defendants/Counterclaimants/Third-Plaintiffs' Motion For Summary Judgment, entered below, and remand the case to the Circuit Court of Harrison County, West Virginia, for trial, and for any and all other relief this Court deems appropriate.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TONY PALETTA,
Petitioner

vs.) No. 22-0380

**NELSON PHILLIPS, III, NATHAN PHILLIPS,
ROBERT NELSON PHILLIPS, II, AND
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,**
Respondents

CERTIFICATE OF SERVICE

The undersigned, Norman T. Farley, as counsel for the Petitioner, Tony Paletta, does hereby certify that on the 22nd day of August, 2022, I served the "Petitioner's Brief" and the "Appendix" upon the following attorneys, by hand delivering or by mailing a true copy thereof by United States Mail, postage prepaid, to said attorneys at the following addresses:

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