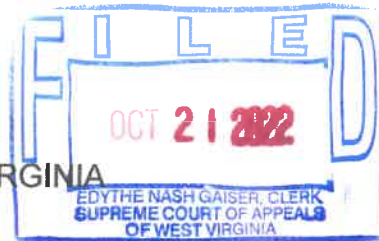


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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 Reply Brief in support of his appeal.

The Petitioner received a Summary Response Of Respondents Nelson Phillips, III, Nathan Phillips And Robert Nelson Phillips, II (hereinafter "Phillips Respondents"), and a Response Brief Of The Respondent, West Virginia Department Of Transportation, Division Of Highways (hereinafter "DOH"). The Petitioner will reply separately to the briefs filed by the Phillips Respondents and by the DOH.

SUMMARY RESPONSE OF PHILLIPS RESPONDENTS

Supplemental Facts

The Phillips Respondents, in the Summary Response, make nothing more than self-serving conclusions, assumptions, and speculation that do not consider all of the facts and documents in this case. The Phillips Respondents state that the Petitioner failed to assert a claim for a prescriptive easement or any other type of easement and fails to identify any legal instrument which would vest Petitioner with the right to travel in, across and through the real estate of the Phillips Respondents. (Summary Response, p. 3) No such claim for a prescriptive easement or any other type of easement is necessary, for, as stated in the deed to the Phillips Respondents, a road along or adjoining the real estate of the Phillips Respondents is clearly set forth in the metes and bounds description set forth in said deed. (Appx. pp. 17-18; Petitioner's Brief, pp. 3-4) Other deeds and parcels adjoining the real estate owned by the Phillips Respondents also contain a description of a road, which is the road now described as West Virginia Secondary Route 36/5. (Appx. pp. 19-20; Petitioner's Brief, pp. 4-5) Obviously, there is no reason to have an expert witness to delineate the metes and bounds description of the public road, since the metes and bounds description of the real estate owned by the Phillips Respondents clearly sets forth the description of the boundary line of the public road, namely, West Virginia Secondary Route 36/5. Although it may be currently impassable, the right of way of West Virginia Secondary Route 36/5 still exists along the boundary line of the property owned by the Phillips Respondents.

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 north westerly boundary line of the real estate owned by the Phillips Respondents. (Appx. pp. 17; Petitioner's Brief, pp. 5-6)

The Phillips Respondents alleged that the Petitioner "conducted little to no discovery". (Summary Response, p.4) However, discovery requests were served upon and responded to by the Phillips Respondents and by the DOH. The response by the DOH provided numerous maps, documents, and other records reflecting that West Virginia Secondary Route 36/5 is and always has been a part of the State Highway System and is therefore a public right of way. (Appx. pp. 133, 134, 135-136, 154; Petitioner's Brief, pp. 7-8)

The Phillips Respondents cite information from the discovery response of the DOH, which admits that West Virginia Secondary Route 36/5 has been a part of the State Highway System. (Summary Response, p. 5) The DOH admits that the road in issue is identified as "Secondary Route 36/5", the road no longer exists in an identifiable form and is represented on all Harrison County Road maps after the 1970's as impassable, the road was "previously designated as West Virginia Secondary Route 36/5", the "road previously designated as West Virginia Secondary Route 36/5", "Secondary Route 36/5", and "the existence of Route 36/5". (Summary Response, p. 5) The DOH has admitted and conceded that the road in issue, namely, West Virginia Secondary Route 36/5 was taken into the State Highway System and is still a part thereof.

Argument

The Phillips Respondents rely heavily upon the holding of the Court in

Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979) (per curiam), in support of their theory that West Virginia Secondary Route 36/5 has gone out of existence and has been abandoned by the State of West Virginia. The Circuit Court also relied to some extent upon Blamble in reaching its erroneous decision. However, Blamble, a per curiam case, only involved evidentiary issues and the resolution of conflicting testimony by a jury. The Supreme Court did not review or rule upon the underlying issue at trial of whether the subject road was a public road or a private road. Blamble, S.E.2d at pp. 273-275. As a result, the holding of the Court in Blamble has no precedential value to the present case. West Virginia Secondary Route 36/5 was brought into the West Virginia State Highway System in or about the year 1933 and is and always has been a part of the State Highway System. (Petitioner's Brief, pp. 6-8, 12, 17) The Phillips Respondents are blocking West Virginia Secondary Route 36/5 and denying the Petitioners and other parties the right to use a road within the State Highway System.

RESPONSE BRIEF OF THE DOH

In its Response Brief, the DOH states that West Virginia Secondary Route 36/5 has been identified and inventoried as a road that was brought into the State Road System, which roads are known as "scroll roads". (DOH Response Brief, pp. 2-3) The road may no longer exist in an identifiable form, but it is represented on all Harrison County Road maps dated after the 1970's. (DOH Response Brief, p. 3)

The DOH essentially concurs with the position taken by the Petitioner 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. The statutory

and regulatory authority of the Commissioner of Highways and the DOH is cited in the Petitioner's Brief and need not be repeated herein. (Petitioner's Brief, 14-15) The Circuit Court seemingly overlooked and failed to apply such statutory and regulatory authority set forth in W. Va. Code §17-2A-8, providing for the manner in which the Commissioner of Highways may discontinue, vacate and close any road or highway, and the regulatory authority set forth in W. Va. Code St. R. §157-1-6, establishing the procedure regarding the abandonment and discontinuance of state roads. Most importantly, and critical to the consideration of the Court in this case, counsel for the DOH stated: "A review of the Commissioner's Orders for Harrison County did not reveal any action by the Commissioner of Highways to abandon Secondary Route 36/5." (DOH Response Brief, p. 3) West Virginia Secondary Route 36/5 was and continues to be a part of the State Highway System and has not been discontinued, vacated, closed, or abandoned. The Circuit Court erred by applying the wrong standard of law in regard to the nature of the road in issue and failed to comply with said applicable provisions of the West Virginia Code and the West Virginia Code of State Regulations. Absent the showing of a proper abandonment or discontinuance of West Virginia Secondary Route 36/5 by the DOH, the road retains its status as a public road within the State Highway System.

CONCLUSION

For the reasons set forth above and in the Petitioner's Brief, 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,

TONY PALETTA,
By Counsel



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CERTIFICATE OF SERVICE

The undersigned, Norman T. Farley, as counsel for the Petitioner, Tony Paletta, does hereby certify that on the 20th day of October, 2022, I served the "Petitioner's Reply Brief" upon the following attorneys, by mailing a true copy thereof by United States Mail, postage prepaid, to said attorneys at the following addresses:

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