INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
CASE NO. 23-ICA-217

Phillip D. Tice,
Defendant Below , Petitioner

v.

John S. Veach,
Plaintiff Below, Respondent.

Appeal from Order Entered
by the Circuit Court of
Randolph County
(Civil Action 17-C-125)

PETITIONER'S BRIEF

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IV. STATEMENT OF THE CASE

A. Introduction

This case involves a prior underlying suit to enforce a granted easement where the location was in dispute. The jury verdict, resulting from the corrupted theory of the law which had been provided, placed the right-of-way in a location clearly contrary to the intent of the grant. The plat adopted by the court and its jury placed the right-of-way through the area of buildings the grant intended to go around. Recognizing the "plain error" committed by the trial court that instructed the jury that the location of a granted right-of-way could be established by its use, the Supreme Court reversed the trial court's reference to a prescriptive easement. But it did not reject the plat adopted by the trial court.

The dominant owner's ruse came back to bite him in the proceedings on remand when his surveyor attempted to place the right-of-way on the ground. In so doing his surveyor ran the right-of-way through preexisting structures, some of which remained blocking his use of his chosen location. On remand, unless the parties reached an agreement, the trial court was then required to apply the principles of equity to balance the relative harms and benefits of granting

an injunction against either or both parties. The dominant owner refused to mediate. This refusal gave an opening to consider relative harms and benefits of both parties.

Instead of deliberating in accord with the law of injunctions to fix the right-of-way at a location convenient to both parties, the court summarily issued an injunction against the servient owner. Without addressing any of the required prerequisites for doing so, the trial court ordered Appellant Dan Tice to remove the obstructions that proved that the plat adopted by the court was wrong.

B. Underlying Jury Trial

Appellee Veach filed the above-mentioned underlying case on October 4, 2017. JA 00009. Veach paradoxically claimed the easement was established by both prescription and grant. Appellant Tice did not contest the existence of the granted easement but did contest the location as shown by Veach's Surveyor, Teter. Teter's plat put the easement directly in front of Tice's newly constructed garage apartment. Notably, even at the time the granted easement was recorded, other buildings existed in that location. At trial, Tice pointed out that the granted easement of record described the easement as proceeding south after entering his property (to avoid the then existing buildings) while Veach's surveyor put the easement running north through the area of the preexisting buildings which had just been replaced with Tice's garage apartment. Veach's surveyor, Teter, presented the jury with a plat which was based, in part, on what he claimed was a path evidenced by tire tracks in Tice's distant field. JA 000010. However, Teter never located that path on the ground for the court or the jury. Veach's conflicting legal theories to establish the easement's location were erroneously but successfully pursued at trial. JA 000010-11. Teter drew up a plat for Veach with the right of way shown on it based on its purported use, which would have been a *prescriptive, not a granted,* easement

claim. Teter did not review the language of the grant until after he had already prepared the plat. JA 000010.

Nonetheless, the trial court adopted Teter's plat in its order, reciting the jury verdict. JA 0000219. From the final order entered on August 30, 2019, the first appeal was filed by new counsel.

C. Appeal One.

Tice's appeal of the trial order to the West Virginia Supreme Court of Appeals was filed on December 10, 2019. In support thereof, Tice cited well established black letter law under *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010) and the inherent contradictory legal theories on which Teter's plat had been established. JA 000014. By Memorandum Decision entered on March 3, 2021, and its Mandate issued on April 5, 2021, the Supreme Court granted the appeal and reversed the trial court. The Supreme Court agreed with Tice, that Veach, his attorney, his surveyor, and the trial court had erroneously adopted mutually exclusive theories in the establishment of the right-of-way's location as depicted on surveyor Teter's plat. An easement cannot be simultaneously prescriptive and granted. JA 000018. However, the Supreme Court found that Tice's trial lawyer (Attorney Patrick Nichols) had failed to adequately object to the legal error, and, in fact, participated in it by, among other things, offering the jury a prescriptive easement instruction. JA 000012.

Although Tice's prior trial counsel had participated in the error, the Supreme Court found that the error was offensive to the well-established black letter law that easements by prescription are based on a trespass–it being legally impossible for one to trespass on land for which he is given a grant–and the Supreme Court remanded the case to remove from the trial court's final order any language referencing a *prescriptive easement*. The Supreme Court found that the trial court's error was "plain," and that it may cause confusion or cloud upon Mr. Tice's title and

"…may seriously affect the public reputation of the proceedings, below." JA 000017-18. Therefore, the Supreme Court reversed the trial court's judgment order as it pertained to the *prescriptive* easement language. While the Supreme Court permitted the drawing of the easement on Teter's 1992 plat to stand, it placed no specific limits on the jurisdiction and authority of the trial court on remand, except that the trial court was to remove reference to the prescriptive easement. *Id.*

D. Action on Remand.

Accordingly, by order entered on July 6, 2021, following the Remand, the trial court amended its final order to delete prescriptive easement language. JA 000020. In a second order entered the same day the court ordered Veach's surveyor Teter to place the granted easement's location on the ground. JA 000022. Surveyor Teter was to mark the center line of the right of way on the ground using his 1992 plat and Tice was permitted the opportunity to file objections thereto after Teter's work was complete. JA 000023.

However, instead of relying on his 1992 plat to mark the center line of the granted right of way, Teter produced a new plat dated September 19, 2021, with new calls. JA 0000166. The new calls were for points designated as "a," "b," and "c" on Teter's replacement plat. Those new calls were at the beginning of the right-of-way as described in the grant where the right-of-way departs from the public highway. Conspicuously, Teter did not mark these three new points on the ground as required by the Court's above-mentioned July 6, 2021 Procedural Order. On November 8, 2021, Tice filed a timely objection to Teter's "substitute version of the granted right of way." JA 000025. Among other things, Tice complained that Teter had failed to provide temporary markers for the new points shown on his replacement plat. In a response to Tice's objection, Teter conceded that points denoted as "a," "b," and "c" were not

mathematically the same as what he called the "approximate points" on his 1992 plat, but he claimed that his surveyed points were in Tice's "same existing driveway." JA 000052. This last assertion was simply wrong. As is addressed more specifically *infra*, the center point markers that Mr. Teter placed on the ground did not follow Mr. Tice's driveway and significantly veered off to the north of the driveway at the top of the hill from Route 24. JA 0000169.

Tice then supplemented his objection to Teter's Revised Survey on December 7, 2022, attaching a letter report by surveyor Dale Bennett. JA 000028. Veach responded on January 10, 2022, and again on February 10, 2022. JA 000035 and JA 000063. Tice filed a second supplemental objection on February 28, 2022, (JA 000073) in which Tice moved, under Rule 60(b), for the court to relieve Tice from the court's final judgment, apply equitable considerations and locate the right of way to the South of Tice's newly constructed garage apartment, per the deeded grant of record.

The Court ultimately scheduled a hearing on Tice's objections for March 4, 2022. Prior to the hearing, Teter marked two of the additional points (points "a" and "b") on the ground and appeared at the hearing with yet another revised plat (his third plat) that was dated March 3, 2022, the day before the hearing. Tice requested a court view so the Court could examine the location of Teter's center line points in relation to Tice's driveway and look at the conflicting structures that existed in 1992 when Teter made his drawing. Veach objected and the court did not go to look at Teter's locations for the right-of-way on the property. JA 000085.

At the March 4, 2022 hearing, Tice proposed a convenient alternate right-of-way location leading south from his driveway which would avoid the area of buildings existing in 1992 and avoid his garage apartment but allow Veach convenient access. [1] Tice also came to the hearing

[1] The grant, intended to avoid the area of the buildings then in existence, reads as follows: "The private road right of way leading from State Secondary Road No. 24 shall run from said State Secondary road in a westerly direction

to support his Rule 60(b) motion but was afforded very little opportunity to do so before being shut down. However, the photo that was introduced through Tice's surveyor (JA 000169) showed a point "D" at the top of the hill, reflecting that Teter had placed the center line of the right of way at the northern edge of Tice's gravel. This fact was acknowledged by the trial court during the hearing but omitted in its order from the hearing. JA 0000159, JA 0000219. Moreover, Tice had expanded the driveway width to the north at that location to create a turnaround after 1992 when Teter claimed he made his original plat. JA 0000182. Therefore, Teter's center line marker placed approximately one half of the 14-foot right-of-way to the north of Tice's current driveway contrary to Teter's testimony. Furthermore, it placed the entire right-of-way in what was grass in 1992 and located running through a previously existing fence line there–evidence the Court refused to permit Tice to pursue.

Midway through Tice's expert surveyor's testimony regarding the preexisting fence posts, the Court stopped the presentation of evidence and sided with Veach's counsel that the only issue before the court was whether the points conformed with Teter's drawing on the 1992 plat. JA 0000113. The Court effectively accepted new evidence from Veach (Teter's third plat) from Veach but denied Tice his production of evidence opposing the validity of this new plat.

At the hearing, Tice further argued that his request for equitable relief could be afforded through an injunction tailored to the mutual needs of the parties. Moreover, that injunction was necessary because of the existing structures blocking Veach's potential use of the right of way and since the parties could not agree on a resolution. JA 000094-95. The court indicated that the

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over the driveway or lane leading to the house located on said 30.062 acre tract; thence the same shall continue in a southwesterly direction around and to the South of a tool shed now located on said premises; thence in a northwesterly direction a straight line to the line fence separating the property of the parties of the first part and the party of the second part." JA 00008. Tice's 17-acre tract lies within what was the 30.062-acre tract reference in the grant and the fence at other end of Tice's tract now borders and intervening landowner's property, Brown.

tailored injunction issue might be appropriately addressed later, but not at the subject hearing and took the matter under advisement. JA 0000161.

On September 19, 2022, Tice then filed a motion seeking to have the Court enter a tailored injunction, as had been the Court's suggestion at the conclusion of the March 4, 2022, hearing. JA 0000170. In that motion, Tice again emphasized, supported by his affidavit, that Teter's location of the right-of-way ran through preexisting structures (fence posts). JA 0000182-183. Tice again pointed out that the Court must enter an injunction order, either ordering the removal of Tice's fence posts and gate or relocating Teter's platted right-of-way. JA 0000170.

On October 18, 2022, the court entered an order titled: "Final Order Establishing Location of Granted Easement" in the form prepared by Veach's counsel. JA 0000219. The Order is devoid of any findings or reasons for denying Tice's Rule 60b Motion. Moreover, the Order made no reference to Tice's request for a tailored injunction. Tice filed a timely motion in response on October 28, 2022 to alter or amend the Final Order to correct the fundamental error therein. JA 0000225. In his October 28th Motion, Tice pointed out that it had been conclusively established that Veach could never have used the right of way at the location given by Veach and his surveyor. JA 0000225. Therefore, Tice requested that the trial court respond to the request for injunctive relief, apply the principles of equity in so doing, and locate the right of way at a location consistent with the mutual needs of the parties, consistent with the express intent of the grant, and in compliance with the purpose of the Supreme Court's remand (to avoid damage to the reputation of the trial court). On February 2, 2023, Veach filed a response to Tice's motion to alter or amend, seeking to have Teter place permanent markers on his designated right of way center line, ignoring the existence of the preexisting fence posts. JA 0000272.

On February 23, 2023, the court conducted a hearing on Tice's Motion To Alter Or Amend. Tice again attempted to present evidence at the hearing to support his claims under Rule 60(b)(5) and (6) and seek entry of a tailored injunction equitably locating the right-of-way. Tice's counsel argued that the court should reconsider the present circumstances in which Tice's grandson, who lived on the property and played in the yard, would be put at unnecessary risk with a road running through that area. JA 0000295-96. The risk and hardship were unnecessary because Tice offered Veach an additional alternative location even more convenient to Veach than he had previously offered leading from Tice's driveway. Tice had secured a highway entrance permit at his southern border, (JA0000360) and a deed to a small tract on land between the highway and Tice's real estate (JA 0000357) where Tice promised to construct a convenient entrance for Veach that would provide an easement, in a straight line, all the way through Tice's property. JA 0000294-295.

In summary, Tice sought to demonstrate to the trial court that the new plat Teter produced after the Remand was invalid because this plat:

- Changed the calls where the easement leaves the public road onto Tice's property.
- Ran the easement to the North after entering Tice's driveway instead of to the South as was called for in the granted easement of record.
- Ran the easement through an old fence line.
- Ran the easement through existing fence posts and his calls missed the gate opening that Veach testified he had passed through at trial. JA 00009-10
- Failed to comport with Teter's own aerial photography upon which he relied. JA 0000340.
- Failed to reference the granted easement of record.

Because Teter's proposed plat was wrong, and injunctive relief was required to render the chosen path useable, Tice sought to have the court apply equitable principles available under Rule 60(b) and mandated under the law governing injunctions.

The trial court summarily ruled against Tice by order entered on April 28, 2023. JA 0000367. From that order this appeal was filed.

V. SUMMARY OF ARGUMENT

The trial court erred in refusing to permit Tice to pursue evidence demonstrating that Veach's Replacement plat was fundamentally and materially wrong and in refusing to consider Tice's Rule 60(b) motion and equitable request for a tailored injunction relocating the right of way. Even though surveyor Teter found it necessary to replace his plat and even though Teter's right of way location on the ground in his replacement plat collided with structures existing when Teter made his drawing, the court precluded consideration of Tice's Motion To Alter Or Amend the court's post appeal October 18, 2022, Final Order and adopted Teter's new defective plat.

On remand, it was apparent that Teter had not identified the location of Veach's claimed prior use of the right of way. It was clear that the right of way should be located to avoid preexisting structures that were in place in 1992 and at the time of the Remand. The right-of-way grant provided no specific defined location for the right-of-way, only a manifest intent that it avoids colliding with buildings on Tice's property. Therefore, the court should have considered Tice's right to establish a convenient location for the right-of-way consistent with the mutual needs of the parties. JA 0000184. *See,* Third Restatement (Third) of Property: Servitudes § 4.8(3) (2000). Since Veach refused to accept Tice's proposed right-of-way location, the court should have considered Tice's motion for a tailored injunction instead of

summarily granting Veach an injunction ordering Tice to remove the preexisting structures with no consideration given the prerequisite findings for same.

In so doing, the trial court committed clear reversable error by ignoring entirely the fundamental rules governing injunctions, such as prior notice, bonding requirements, and the balancing of the equities.

The plainness of the trial court's legal error on the face of its Final Judgment Order requires reversal.

VI. STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that the decisional process will be significantly aided by oral argument and that Rule 19 will be appropriate. Appellant further submits that the case may be decided by a memorandum decision.

VII. ARGUMENT

A. The Lower Court Erred In That, After The Remand, It Improperly Allowed Plaintiff Veach's Surveyor Teter To Replace The Plat Which Had Been Adopted By The Supreme Court In The First Appeal But Then Refused To Consider And Resolve The Fact That When Teter Placed, At The Court's Direction, Markers On The Ground, It Exposed The Fact That Teter's Plats Ran The ROW Through Preexisting Structures And His Plats Were Therefore Invalid.

STANDARD OF REVIEW

The lower court's decision denying Tice's Rule 60(b) motion to set aside its order adopting the invalid plat is generally subject to review by this Court under the abuse of discretion standard. Syl. Pt. 5, *Toler v Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974). However, we submit that, as a final component of the trial in this case, the proceeding before the trial judge, sitting without a jury to establish the location of the right of way was governed by Rule 52(a) of the W. Va. R. C. P. That Rule, captioned under heading "Findings by the court," in pertinent part reads as follows:

> (a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

Because the court failed to make any findings of fact or conclusions of law in denying Tice's Rule 60(b) motion, this Court has no proper basis for review and the case should be remanded for compliance with W. Va. R.C.P., Rule 52. *Prete v. Merchants Property Ins. Co.,* 159 W. Va. 508, 223 S.E.2d 441, 1976 W. Va. LEXIS 168 (1976).

Tice's Rule 60(b) motion was initially filed on February 28, 2022, accompanying his objections to surveyor Teter's revised plat and location of the right-of-way. The trial court conducted a hearing on Tice's objections to the survey and Tice's Rule 60(b) motion on March 4, 2022. In the court's resulting order from that hearing, entered on October 18, 2022, it failed to enter any findings of fact or law or reasons for denying Tice's Rule 60(b) motion and his accompanying request for equitable relief from the prior judgement approving Teter's survey plat which Teter had, himself, since revised. JA 0000219.

Thus, the gravamen of Tice's Rule 60(b) Motion was to have the trial court set aside surveyor Teter's invalid plats. Rule 60(b) of the W. Va. R. C. P. provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: … (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) is designed to have practical application to unique real-world situations in which concern for the sanctity of a final judgment becomes subordinate in unique circumstances, to a court's conscience that justice be done considering all the facts and circumstances.

> The purpose of the identical provisions in Fed. R. Civ. P., Rule 60(b) was to define the circumstances under which a party could obtain relief from a final judgment: the provisions of this rule had to be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts. In its present form, subdivision (b) was a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies. It was designed to remove the uncertainties and historical limitations of the ancient remedies but to preserve all of the various kinds of relief which they offered.
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> *N.C. v. W.R.C.*, 173 W. Va. 434, 437 , (1984) 317 S.E.2d 793, 1984 W. Va. LEXIS 371 (1984), quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 793 (1970).

While sanctity is to be given final judgments, the August 30, 2019 judgment entered by the court upon the jury verdict is scarcely entitled to such sanctity. That order, entered upon a faulty legal premise and subsequently reversed by the Supreme Court, did not resolve the ultimate question–the location of the right-of-way. The trial court's Final Order Establishing The Location Of The Right Of Way was not entered until October 18, 2022. Even after the entry of that final order, the trial court dismissed Tice's Rule 60(b) motion out of hand simply stating the Rule did not apply. JA 0000219.

Given the fact that surveyor Teter failed to comply with the trial court's procedural order on remand by twice revising the plat previously approved by the jury (and the Supreme Court) and conspicuously failing to place all points on the ground as ordered by the court, the trial court had more than ample reason to permit Tice to present and pursue his evidence to support his motion under the broad provisions of Rule 60(b)(6) to accomplish justice.

> "In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."
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> *Klapprott v. United States*, 335 U.S. 601, 614-15, 69 S. Ct. 384, 390 (1949), as quoted in *Kelly v. Belcher*, 155 W. Va. 757, 772, 187 S.E.2d 617, 625 (1972).

The Supreme Court's reversal and remand of the jury verdict as it pertains to the process before the trial court is critical here. The trial court was required to give full effect to the purpose and intent of the Remand. The Supreme Court's Mandate was to be read together with the opinion rendered in the case. *See Imperial Chem. Indux. V. Nat'l Distiller & Chem. Corp.*, 354 F.2d 459, 463 (2d Cir. 1965). The reversal was to prevent a cloud on Tice's title and to protect the reputation of the proceedings before the trial court. JA 000018. In refusing to consider Tice's proffer of evidence to support his Rule 60(b) motion and request for a tailored injunction relocating the right-of-way at the final hearing, the trial court failed to fully address the Supreme Court's Remand, and its concern for the reputation of the proceedings. *Id.* The trial court missed the opportunity to do justice and simply recognize that not only had Teter ignored the mandate of the grant to avoid a collision course with existing structures, but his plats were faulty. Teter's plats were faulty, because, among other things, they missed a standing interior gate that Veach testified at trial he'd passed through. JA 00009-10.

The requirements of Rule 60(b)(5) were satisfied in the proof Tice offered on remand. It was "…no longer equitable that the [August 30, 2019] judgment should have prospective application…" By the time of the proceedings on remand, Mr. Tice had finished the interior of the garage apartment and his son and grandson had moved in as was the original purpose. Presently, Mr. Tice's son and infant grandson live in the upper floor. As it stands, Veach is now permitted to travel directly through the yard where Tice's grandson plays. Further, Veach may drive any manner of vehicles and farm equipment he may choose through this area without any limitation whatsoever, an evidentiary point which counsel attempted to pursue before the trial court. JA 000098-99, 295-96. As a matter of equity, Veach is ill positioned to complain about Tice's post-trial use of the garage apartment. Veach waited until Tice had torn down old

buildings at that location and fully erected the garage apartment before informing Tice that he was in possession of a 17-year-old unrecorded plat, placing the right-or-way directly in front of Tice's garage apartment and stating he intended to use same. JA 0000192.

The "other reason justifying relief," provided for in Rule 60(b)(6) was also plainly before the court in Tice's written motions and argument at the hearings held on March 4, 2022, and February 23, 2023. Because Teter's plats were invalid and the right-of-way could not be utilized as marked on the ground, unless the parties made an agreement between them, the court needed to issue an injunction against one or both of the parties. In so doing, consideration of the equities between the parties was put before the court. Veach would not accept Tice's offers of a new, more convenient path for him that would also avoid the nuisance factor and hardship for Tice. JA 000097-98, 170-202, 225-270, 285-289, 291-296, 321, 336-338. Therefore, even if the court believed Teter's location was correct, the court was still required to consider Tice's right to relocate the right-of-way.

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
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> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
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> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.
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> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.

Third Restatement (Third) of Property: Servitudes § 4.8(3) (2000).

Clearly the Supreme Court of this State will apply the principles of law set forth in Restatement (Third) of Property (Servitudes). *See* the Court's opinion in *O'Dell v. Stegall*, 226 W. Va. 590, 613 n.24, 703 S.E.2d 561, 584 (2010), relying heavily on the Restatement. The instrument creating the easement at bar is particularly vague as to the location, as made manifest by Veach's own surveyor who was unable to accurately fix its location on the ground. However, that instrument is clear regarding the intent to avoid the existing buildings, now Tice's garage apartment.

The pivotal question is whether the proposed change will impair or interfere with the dominant users rights to an undue or unreasonable degree. *See*, for example, Syl. pt. 6, *Rippetoe v. O'Dell,* 166 W. Va. 639, 639, 276 S.E.2d 793, 795 (1981) holding that the servient owner may change the character of an easement by adding successive easements to it provided that the rights of the dominant owner are preserved. Suffice it to say, Veach's rights do not include the right to choose a given location of a right-of-way which will create a nuisance for Tice on his property, unnecessarily diminishing it value, use and enjoyment.

A number of jurisdictions have expressly adopted and applied the rule that entitles the holder of a servient estate to make reasonable changes to the location of an easement, at his own expense if the changes: "…do not "(a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created." *Town of Ellettsville v. DeSpirito*, 111 N.E.3d 987, 989 (Ind. 2018). *See,* for example, *Lewis v. Young*, 92 N.Y2d 443, 452, 682, N.E.2d 649, 653-54 (1998) reversing and requiring the trial court to determine whether the relocation impairs or

diminishes the dominant owner's right of ingress and egress, and *see Bubis v. Kassin*, 353 N.J. Super. 415, 425, 803 A.2d 146, 152 (Super. Ct. App. Div. 2002) in which the appellate court concurred with the trial court's finding that, under the facts of that case, the denial of the servient owner's request for an injunction relocating the right-of-way would have a severe adverse effect on the dominant owner's use–a deliberation which the trial court at bar failed to undertake. Nebraska has followed this principle, in a case styled *R & S Invs. V. Auto Auctions, Ltd.,* 15 Neb. App. 267, 268, 725 N.W.2d 871, 874 (2006) though not expressly referring to the Restatement of Property (Servitudes).

Instead of applying the law governing the issuance of injunctions and permitting Tice to pursue the evidence supporting his prayer for a tailored injunction, the trial court summarily entered a mandatory injunction against Tice, in an order absent the required Rule 52(a) findings and conclusions and with no consideration given to the prerequisite findings for issuance of an injunction.

B. The Lower Court Erred In Refusing To Consider Tice's Motion To Amend Its Post Appeal Final Order And Grant Tice A Tailored Injunction To Equitably Locate The Right Of Way But Then Grant Respondent Veach A Mandatory Injunction To Remove Preexisting Structures Without Considering The Prerequisite Findings For Granting Veach The Injunction.

STANDARD OF REVIEW

The trial court's refusal to grant Tice's motion to amend and grant Tice a tailored injunction is subject to "…the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998). Therefore, to the extent that the trial court refused to admit and consider Tice's evidence offered to support Tice's motions, its decision is subject to an abuse of discretion standard of review before this Court. However, insofar as questions of law are presented in this appeal, including the trial court's

granting Veach a mandatory injunction without considering the prerequisite findings for granting same, the review before this Court is *de novo*. *Ringer v. John*, 230 W. Va. 687, 690, 742 S.E.2d 103, 106 (2013). Accordingly, the complete failure of the trial court to enter any findings of fact or conclusions of law to support granting Veach an injunction against Tice should summarily be remanded under W. Va. R. C. P. 52(a) which reads in pertinent part:

> (a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

Clearly Veach could not make the required showing of irreparable harm entitling him to an injunction against Tice, explaining why he did not attempt to do so. Instead, Veach ducked the issue as if Tice bore the burden of demonstrating why the injunction should not be issued. Compounding the error, the Court refused to permit Defendant to pursue evidence that Veach would suffer no harm absent issuance of a tailored injunction[2] relocating the right-of-way at Tice's expense. It is undisputed that Veach has multiple, equally convenient accesses to his property. Veach has not used Tice's property for access to his for at least four years and it is undisputed that he rarely used it before that. At the final hearing on February 23, 2023, Tice sought to present evidence of an alternative route he offered to Veach more favorable to both parties than that chosen by Veach and the court. It was a location that, unlike Veach's chosen location, comports with the language and intent of the right-of-way grant of record and avoids all preexisting structures on Tice's property. At the final hearing, Tice attended Court with a highway entrance permit at Defendant's southern line and a Deed to a tiny intervening parcel

[2] The West Virginia Supreme Court has recognized that injunctions uniquely provide the trial court with the opportunity to tailor the relief to the needs of the parties. *Wheeling Park Comm'n v. Hotel & Rest. Emples., Int'l Union,* 198 W. Va. 215, 225, 479 S.E.2d 876, 886 (1996).

from the adjoining Yoakum's tract to provide Veach with direct access to his property from Route 24. JA 0000357-366. The court simply prohibited Tice from pursuing evidence that he will suffer irreparable harm with the issuance of the injunction against him and that he could provide Veach with an alternate location more convenient than the path Veach has chosen.

With the issuance of the injunction against Tice the preexisting fence posts (approximately 7 in number) and the interior property gate which Tice has been ordered to remove will have to be replaced. Then, to use his field for grazing and farming activities, Tice will have to fence out the entire 14-foot designated right-of-way which will now run right through the middle of his field. To gain access to both sides of his field, Tice will have to install gates along both sides of the right-of-way. Veach will have the right, per the language of the Deed granting the right-of-way, to make any manner of improvement and paving of the right-of-way which would permanently destroy the center of Tice's field for farming. Tice's use of the area in front of Tice's first floor garage apartment, where Tice parks and services his farm equipment, will conflict with Veach's use of the chosen right-of-way and put the parties in conflict with each other, unnecessarily creating nuisance conditions that will bring the parties back before the court. In fact, Tice's private residential property, where his three-year-old grandson lives and plays in the yard, will suddenly be open to any manner of traffic at the whim and discretion of Veach, his guests and farm hands. Tice's property will suddenly be open to trespassers with no means of identifying them or preventing their entry.

Since the Court made no findings to support the injunction, no deference to the Court's issuance of the injunction will apply on appeal. *Robertson v. B A Mullican Lumber & Mfg. Co.*,

208 W. Va. 1, 3, 537 S.E.2d 317, 319 (2000). The trial court was required to consider all the above matters before issuing the injunction against Tice. "It [was] an equitable form of relief, however, which does not follow automatically upon establishment of a strict legal right where such a remedy would not be compatible with the equities of the case." *Peckheiser v. Tarone*, 186 Conn. 53, 61, 438 A.2d 1192, 1196 (1982). The court was required to balance those matters against any hardship Veach might attempt to claim should he not be permitted to use his chosen location of the right-or-way. Tice's property will be rendered virtually worthless for its intended use as a residence and small farm. Absent from the trial court's final order of April 28, 2023, are the following required prerequisites to issuance of the injunction against Tice.

1) No prior notice was given by Veach of an application for an injunction and the Court failed to consider whether prior notice was necessary under the circumstances. *See* W. Va. Code § 53-5-8.
2) Veach offered no evidence that he would suffer irreparable harm in the absence of issuance of the injunction and the Court made no finding in regard thereto. *See, e.g., Bloomberg L.P. v. CFTC,* 949 F. Supp. 2d 91, 95 (D.D.C. 2013).
3) The Court failed to consider the equities or apply the balance of hardship test in ordering the mandatory injunction. *See Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002).
4) The Court failed to consider whether Veach was required to post a bond as a condition to issuance of the injunction. *See* W. Va. Code § 53-5-9.

The Court's failure to consider the above requirements constitutes reversible error. With the complete failure of the trial court to render any findings reflecting the application of existing law to the issuance of the injunction, this Court is placed in the position of engaging in

speculation to determine whether the trial court properly considered the factors required for issuance of the injunction. Such speculation would be inappropriate in this appeal. *See State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 650, 713 S.E.2d 356, 365 (2011).

It is without reasonable question, that Veach knew he would apply for an injunction at the final hearing and his failure to give notice of that application is inexcusable. Had Veach been required to give proper notice of his intent to apply for an injunction, the matter could have proceeded in an orderly manner. Veach would have presumably been required to sustain his burden of proof and the Court would have presumably considered the elements for issuance of the injunction prior to its issuance. That did not occur. Instead, at the conclusion of the final hearing, Veach's counsel indicated that the obstructions must be removed and the Court assigned the preparation of the final order to Veach's counsel. JA 0000341.

It is without question that Veach was required to carry forth his burden showing irreparable harm in the absence of the issuance of the injunction against Tice.

> A party seeking injunctive relief has the burden of alleging and proving irreparable harm and a lack of an adequate remedy at law. . . . The extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm.
>
> *Steroco, Inc. v. Szymanski*, 166 Conn. App. 75, 87, 140 A.3d 1014, 1022 (2016). (Citations omitted; internal quotation marks omitted.)

Indeed, Veach's absolute failure to offer any evidence to support his request for an injunction is telling. Veach had no such evidence to offer. Veach has multiple alternative accesses to his real estate, all of which are at least as convenient as the path he chose through Tice's property. Veach has not used Tice's property for access during the past several years and only rarely prior thereto. Moreover, Tice now offers Veach access through his property over a far more

convenient route than the one Veach has chosen, running directly from Route 24 to Plaintiff's property line.

Furthermore, it is a fundamental principle of injunctive relief, grounded in equity, that a court must consider the relative harms and benefits to the parties from issuance or denial of an injunction. *See Steroco, Inc. v. Szymanski*, supra, holding that "[a] decision to grant or deny an injunction must be compatible with the equities in the case."

In the case at bar, the Court ignored its obligation to apply the equities as between the parties in issuing the injunction. In fact, as particularized elsewhere in this brief, the Court denied Tice the right to make an evidentiary showing, or even a fair proffer of evidence, regarding the respective equities and the harm that would be inflicted upon him should the injunction be issued.

Finally, the trial court was required to consider whether Veach was required to post a bond as a condition to issuance of the injunction in accord with W. Va. Code § 53-5-9.

W. Va. Code § 53-5-9 provides, in pertinent part:

> An injunction (except in the case of any personal representative, or other person from whom, in the opinion of the court or judge awarding the same, it may be improper to require bond) shall not take effect until bond be given in such penalty as the court or judge awarding it may direct, with condition to pay the judgment or decree (proceedings on which are enjoined) and all such costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved,…

Accordingly, the court was required to determine whether a bond is required as a condition to the injunction that it issued. The bond's purpose was to provide protection for Tice should the injunction ultimately be dissolved.

The trial court's complete failure to abide by the well-established black letter law governing the issuance of injunctive relief on the face of the proceedings below, requires

reversal. Compounding the hardship to Tice and damage to his property, the court's final order provided that it be recorded in the Office of the Clerk of the County Commission of Randolf County. JA 0000370. The order defames Tice and the title to his property by baldly stating that Tice refused to remove the preexisting fence posts without including a statement regarding his lawful reasons for refusing. The order disparages Tice and his property with no findings to support the court's injunction against him. The order as now recorded against Tice's small residential farm property tends to defame both Tice and the reputation of the proceedings below.

IX. CONCLUSION

This Court should reverse and remand the case back to the trial court requiring it to conduct proper proceedings under Tice's Rule 60(b) motion and the trial court's issuance of an injunction in this matter.

Respectfully submitted this 28th day of August, 2023.

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Case No. 23-ICA-217

Phillip D. Tice,
Defendant Below, Petitioner

v.

John S. Veach,
Plaintiff Below, Respondent.

Appeal from Order Entered
by the Circuit Court of
Randolph County
(Civil Action 17-C-125)

CERTIFICATE OF SERVICE

I, Braun a. Hamstead, counsel for the Petitioner, Phillip D. Tice, in this action do hereby certify that a true and correct copy of **Petitioner's Brief** and **Joint Appendix** was electronically filed with the Clerk of the Court using the Court's E-Filing system, File and ServeXpress (FSX), on this 28th day of August, 2023, which will send notification of such filing upon the below listed counsel of record:

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