IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 23-ICA-217

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PHILLIP D. TICE,
DEFENDANT BELOW,
Petitioner,

vs.

Appeal from a final order of the
Circuit Court of Randolph County
(Civil Action 17-C-125)

JOHN S. VEACH,
PLAINTIFF BELOW,
Respondent.

RESPONDENT'S BRIEF

Submitted by:

/s/ Harry A. Smith, III
HARRY A. SMITH, III
W.Va. State Bar ID #3466
Counsel for Respondent John S. Veach
Jory & Smith, L.C.
Elkins, WV 26241
304-636-3553
hasmith@jorysmith.com

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I.

ASSIGNMENTS OF ERROR

As permitted by Rule 10(d), ***West Virginia Rules of Appellate Procedure***, Respondent does not restate here Petitioners' Assignments of Error.

II.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Pursuant to Rule 10(c)(4), ***West Virginia Rules of Appellate Procedure***, Petitioner's Statement of the Case is to "contain a concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error." Petitioner's Statement of the Case herein has failed to comply with Rule 10(c)(4) and is replete with factual inaccuracies:

1. Tice's Statement of the Case ("Introduction") is misleading and disingenuous. The jury's verdict did not place "the right-of-way contrary to the intent of the grant." The plat "adopted by the court and its jury" did not place "the right-of-way through the area of buildings the grant intended to go around." While the West Virginia Supreme Court of Appeals (the "Supreme Court") determined that the right-of-way was not a prescriptive right-of-way, it clearly did affirm the plat adopted by the circuit court as the location of the granted right-of-way. [1]

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[1] Although this Brief, and that of Petitioner, may refer to both a "right-of-way" and an "easement", such references are, in fact, to the "express, deeded right-of-way", as set forth in the Memorandum Decision of the West Virginia Supreme Court of Appeals (JA 7-18).

2. Tice's Statement of the Case sarcastically states that Veach's "ruse came back to bite him" when his surveyor located the right-of-way on the ground. The location of the right-of-way, as determined by the surveyor, was exactly the same as the location of the granted right-of-way (granted by an April 25, 1960, agreement) and was exactly as determined by the circuit court jury; there were no "pre-existing structures" blocking this location (the jury's location, not the surveyor's "chosen location"), only an apparent fence and fence posts.

3. Contrary to Tice's assertion, the trial court was *not* " required to apply the principles of equity to balance the relative harms and benefits of granting an injunction against either or both parties." No injunctive relief needed to be considered, nor was it sought.

4. What Tice is attempting to do, by this appeal, is to upset the jury's verdict and the circuit court's order, which, post-appeal, fixed the location of the right-of-way in accordance with the plat adopted by the jury, the circuit court, and the Supreme Court on appeal. The surveyor's task, simply put, was to put markers on the ground to show the location of the right-of-way, and that is what he did.

5. Tice's Statement of the Case ("Underlying Jury Trial") is, again, misleading. Tice continues to address the location of the right-of-way, referring to evidence and theories which were presented and considered at trial. The location of the right-of-way was decided in the trial court and affirmed on appeal; the location cannot be re-litigated post-trial and the

circuit court so ruled. The circuit court stated: ". . . the issue of the location of the right of way has been determined by the jury. I want to know whether the location of the right ofway that was determined by the jury, that Mr. Teter has prepared, is consistent with the plat that was approved - - recognized by the jury and approved by the Supreme Court" (JA 137-138).

6. Tice's Statement of the Case ("Appeal One") compounds the disingenuity of those sections of the Statement of the Case titled "Introduction" and "Underlying Jury Trial." After discussing at length the Supreme Court's decision that the only right-of-way was a granted right-of-way (and not a prescriptive easement), Tice falsely claims that the Supreme Court "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"; in fact, the Supreme Court expressly upheld the circuit court's decision as to the location of the granted right-of-way (JA 18).

7. Tice's further Statement of the Case ("Action on Remand"), once again, is misleading:

A. Surveyor Donald Teter's preparation of a "new plat" was consistent with the Supreme Court's remand. Teter was tasked with the job of locating the center line of the right-of-way on the ground, and he did just that (JA 222-223).

B. Surveyor Teter's plat was not a "substitute version of the granted right-of-way." It was a plat which located the right-of-way on the ground.

C. Tice's proposal of a "convenient alternate right-of-way location" is totally irrelevant to the circuit court's decision and the Supreme Court's remand. Veach was not required to consider an alternate route; the location was determined in the circuit court.

D. The circuit court did not accept "new evidence" from Veach. The circuit court did, however, state that the "only issue before the court was whether the points conformed with Teter's drawing on the 1992 plat"; the circuit court found that Teter's points did, in fact, conform. The court did not accept "new evidence from Veach" in finding that surveyor Teter's points did conform.

E. A post-trial, post-appeal, injunction was *not* "necessary because of the exiting structures allegedly blocking Veach's potential use of the right-of-way and since the parties could not agree on a resolution." The right-of-way's location was determined at trial, affirmed on appeal, and located on the ground by surveyor Teter. Nothing else was required or "necessary." Teter testified that the right-of-way did not interfere with any existing buildings (JA 147-148), and the circuit court ordered that any fence posts which are within the 14-foot right-of-way are to be removed by Tice (JA 369).

F. Even after a circuit court hearing (March 4, 2022), and a final Order Establishing Location of Granted Easement", Tice continued to argue about the location of the right-of-way and Veach's historical use of the right-of-way, issues that had been resolved at trial. Tice again argued that he was entitled to an injunction.

G. Tice argued that his injunction claim was "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)." That was *not* the purpose or the effect of the Supreme Court's remand; as it relates to the granted right-of-way, the Supreme Court simply agreed with the jury's verdict in the circuit court.

H. Tice's contention that the circuit court should consider "the present circumstances" and "Tice's grandson" has no merit as to the location of the right-of-way, as found by the jury and as marked by surveyor Teter.

I. Tice's apparent settlement proposal ("an additional alternative location even more convenient") is not part of the case and should be summarily ignored.

J. None of Tice's six bullet points (Page 8 of Petitioner's Appeal Brief) justify consideration by this Court. Each of those points relate to factual issues that were either considered by the jury or could have been raised at trial. The trial resulted in a verdict adopting the right-of-way's location, the Supreme Court affirmed that location, and the circuit court was satisfied with that location. Tice is attempting to re-litigate issues which have long ago been decided.

III.

SUMMARY OF ARGUMENT

The circuit court jury located, with specificity, the deeded right-of-way and the

Supreme Court affirmed the location of that right-of-way. After the Supreme Court's remand, the circuit court ordered that surveyor Teter mark, on the ground, the location of the right-of-way. Teter did so and, after a hearing, the circuit court accepted that location as being wholly consistent with the location established by the jury and affirmed by the Supreme Court. Tice then attempted to convince the circuit court to relocate the right-of-way to a position more to his liking.

Tice's Rule 60(b) motion does not permit, or require, the circuit court to disregard the right-of-way's proven location, and the circuit court's denial of that motion was not erroneous, nor was the circuit court in error in denying Tice's request for a " tailored injunction" which would also have the effect of relocating the right-of-way.

IV.

SETTLEMENT REGARDING ORAL ARGUMENT AND DECISION

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

V.

ARGUMENT

Standard of Review

A motion to vacate a judgment is addressed to the sound discretion of the trial court and that court's ruling on such motion will not be disturbed on appeal unless there is a

showing of abuse of such discretion. ***Fernandez v. Fernandez***, 218 W.Va. 340, 624 S.E.2d 772 (2005). This abuse of discretion standard of review applies to both of Petitioner's arguments; they both have one goal - - vacation of a judgment rendered in the circuit court and affirmed by the West Virginia Supreme Court of Appeals. The review is not ***de novo***; ***Ringer v. John,*** 230 W.Va. 687, 742 S.E.2d 103 (2013), cited by Petitioner, is not applicable because the issues before this Court do not involve a question of law or statutory interpretation.

A. The Circuit Court Did Not Err in Denying Tice's Rule 60(b) Motion for Relief From Judgment or Order, Which Motion Sought to Alter the Location of the Deeded Right-of-Way.

As a point of departure, Tice's claim that Veach's surveyor ("Teter") *replaced* the plat which had been adopted by the Supreme Court is simply incorrect. As noted above, Teter simply marked on the ground the location of the right-of-way, the plat of which had been adopted by the Supreme Court. The allegation that the right-of-way went through a fence line is irrelevant.

Tice argues that the circuit court's August 30, 2019, judgment, entered by the circuit court upon the jury's verdict, was "subsequently reversed" by the Supreme Court. Again, this statement, is patently incorrect. The Supreme Court, while finding the jury's prescriptive easement verdict reversible, clearly affirmed the verdict finding that there was a granted right-of-way and the specific location of that right-of-way.

Tice argues that Teter "failed to comply with the trial court's procedural order . . . by

twice revising the plat previously approved by the jury (and the Supreme Court). . . ." Once again, this statement is untrue. Teter prepared a plat representing, on-the-ground, the location of the markers he placed on the right-of-way, and he then revised the plat by adding points where he intended to place additional markers (which Tice refused to allow Teter to do).

While Tice argues that the circuit court did not "give full effect to the purpose and intent of the remand", that is not the case. Tice argues that the Supreme Court's reversal "was to prevent a cloud on Tice's title and to protect the reputation of the proceedings before the trial court." The Supreme Court did *not* reverse the circuit court's order as to the granted right-of-way; the reversal, as it relates to the prescriptive easement, is not part of this case.

The circuit court determined, by its Orders of October 18, 2022 (JA 219-224), and April 28, 2023 (JA 367-370), that Teter correctly located the deeded right-of-way on the ground. Moveover, Tice has conceded that Teter has accurately marked the location of the deeded right-of-way:

> MR. HAMSTEAD (Tice's attorney): Mr. Teter has placed on the land his markers according to this jury's verdict that you obtained (JA 306).

Tice's surveyor ("Bennett") also agrees with Teter's marked location of the easement:

> A. [MR. BENNETT]: That is the actually center line of Mr. Teter's survey on which I agree on.
> Q. [MR. HAMSTEAD]: Okay.
> A. The 1992 survey as to what is on that sketch, I agree with Mr Teter's work upon the . . .
> Q. He put it where it was on the 1992 plat?

A. That is correct.
Q. No dispute?
A. There's no dispute. (JA 309)

In essence, Tice has asked the circuit court to choose a new location for the easement, one more to his liking. Tice asked the circuit court to set aside the jury's verdict, returned on July 19, 2019 (JA 2) and, further, to set aside the Supreme Court's decision affirming that verdict, its Memorandum Decision having been filed on March 3, 2021 (JA7-18). As Tice's counsel conceded in the proceedings below: ". . . [W]e are asking the Court to move it [the easement] from that location that was picked - - chosen by Doctor Veach and assigned by Mr. Teter, his surveyor." (JA 306) [2]

Petitioner appears to rely upon Rule 60(b), ***West Virginia Rules of Civil Procedure***, and its interplay with Rule 52(a), ***West Virginia Rules of Civil Procedure***. Specifically, Petitioner invokes that portion of Rule 60(b)(5), which provides that a court may relieve a party from a judgment if a judgment is no longer equitable, or Rule 60(b)(6), which provides that a court may relieve a party from a judgment for any other reason justifying such relief.[3]

Tice relies upon Rule 52, in demanding a remand, claiming that the circuit court "failed to make any findings of fact or conclusions of law in denying Tice's Rule 60(b) motion. . . ." Rule 52 does not, however, require that a circuit court make findings or

[2] The location was obviously not *chosen* by Veach nor was it *assigned* by Teter. The location was found by the circuit court jury and accurately marked on the ground by Teter in accordance with that location.

[3] ***Kelly v. Belcher***, 155 W.Va. 757, 187 S.E.2d 617 (1972), cited by Petitioner in support of his Rule 60(b)(6) argument, is factually distinguishable from the instant case. ***Kelly*** involved an attorney's misunderstanding, an unauthorized compromise, and a dismissal confirming the unauthorized compromise.

conclusions except in cases tried without a jury or with an advisory jury, or in granting or refusing a preliminary injunction. No findings or conclusions are required for Rule 60(b) decisions.

Nonetheless, the circuit court's Final Order Establishing Location of Granted Easement (JA 219-224) is replete with findings:

> "The Court finds the testimony of Mr. Teter to be credible as to the location of the right-of-way . . . ."
>
> ". . .[T]he plats [Mr. Teter's] . . . are, in the Court's opinion, consistent with said Exhibit M and do represent the location of the right-of-way."
>
> "The Court . . . finds . . . that the location of the express deeded right-of-way is as set forth in the September 19, 2021, plat, and as also set forth in the March 3, 2022 plat [Mr. Teter's plat]...."
>
> "The Court expressly denies the relief sought by Defendant in his Second Supplement to Objection to Survey and Plat Prepared by Donald Teter", the said Second Supplement (JA 73-78) being the pleading wherein Petition sought to have the circuit court modify, "in accordance with Rule 60(b)" the location of the right-of-way.

Obviously, although it did not have to do so, the circuit court, as noted, made clear findings as to the basis for its decision.

Importantly, the Supreme Court clearly affirmed the circuit court's Judgment Order of August 30, 2019, as to Veach's express, deeded right-of-way and remanded for an order consistent with that decision (JA 18). The circuit court's Procedural Order Establishinng Location of Granted Easement, following the remand, ordered that Teter "survey the center

line of the entire granted right-of-way in accord to Mr. Teter's plat of same which appears on Page 4 as Figure 1 of the Memorandum Decision of the West Virginia Supreme Court of Appeals. . . ." There was no jury trial, no advisory jury, and no preliminary injunction; hence, there was no requirement of findings or conclusions.

Petitioner has cited, in support of his demand for remand based upon Rule 52, the case of ***Prete v. Merchants Property Ins. Co.***, 159 W.Va. 508, 223 S.E.2d 441 (1976). ***Prete***, however, has no application to the instant case; it is not a Rule 60(b) case (being a non-jury trial case) and, additionally, it holds that when "findings of fact and conclusions of law are contained in the judgment order" with no "separate designations", there is "no reason . . . to remand the case for compliance with the rule."

Petitioner contends that the circuit court's jury verdict is "scarcely entitled to . . . sanctity", arguing that the verdict "did not resolve the ultimate question - - the location of the right-of-way" (Page 12 of Petitioner's Appeal Brief). This contention is simply *not true*; the right-of-way was found, by the jury, and confirmed by the circuit court's Judgment Order (JA 12), to have "a width of 14 feet, the centerline of which is as surveyed and platted by Donald L. Teter, licensed land surveyor, and as described as 'R/W' (being approximately 1,032.4 feet in length) on a plat of survey, entitled Plat of Survey for John S. Veach, admitted as evidence (Exhibit M) in the trial herein. . . ." That Judgment Order (incorporating Exhibit M) was affirmed by the Supreme Court, and, upon remand, as noted above, the circuit court found that Teter accurately marked, on the ground, the location of the right-of-way (as shown on

Exhibit M) (JA 219-223, 367-371).

Petitioner further misleads this Court when he argues that the Supreme Court's reversal was "to prevent a cloud on Tice's title and to protect the reputation of the proceedings before the trial court," contending that the circuit court "failed to fully address the Supreme Court's remand and its concern for the reputation of the proceedings." None of Petitioner's argument relates to the Supreme Court's clear affirmance of the right-of-way as found by the jury, as confirmed by the circuit court, and as depicted by Teter on Exhibit M.

Much of Petitioner's argument in favor of re-locating this 63-year old right-of-way is related to alleged inconvenience to Tice, who acquired his property in 1994, 34 years after the 1960 grant of the right-of-way (JA 9). In his Brief herein, Petitioner argues that, long after the grant of the right-of-way, he built a garage apartment, admittedly "recently constructed" (JA 75), which is near the right-of-way and that he now has a grandson living in that apartment. He argues about the "manner of vehicles and farm equipment" that Veach may use upon the right-of-way. He argues that there is now (in Tice's opinion only) a "new, more convenient path." None of this, in the circuit court's opinion, justified vacating the 2019 judgment, as affirmed by the Supreme Court.

Petitioner cites The Third Restatement of Property; Servitudes §4.8(3) (2000) as support for "Tice's right to relocate the right-of-way." This citation, however, is, by its own terms, inapplicable. The Restatement citation provides some guidance for the owner of a servient estate to "specify" a location or to make "reasonable changes" in the location of an

right-of-way, but such specification or change does not (by the clear language of the Restatement) apply in situations (such as in the instant case) "where the location and dimensions are determined by the instrument or circumstances surrounding the creating of a servitude." Here, the location and dimensions have been determined by the instrument - - the 1960 grant and the jury's verdict which confirmed it.

B. The Circuit Court Did Not Err in Denying Tice's Motion to Grant Tice a Tailored Injunction, Nor Did the Circuit Court Err in Ordering Tice To Remove Obstructions, Providing Veach Unimpeded Used of the Granted Right-of-Way.

Petitioner contends that he is entitled to a "tailored injunction", yet another effort to alter the location of the easement as found at the circuit court level and affirmed by the Supreme Court.[4] While citing case law standing for general injunction law principles ***(Wheeling Park Com'n v. Hotel & Rest. Employees, Int'l Union***, 198 W.Va. 215, 478 S.E.2d 876 [1996]), Tice has offered no support for the injunction he seeks; the "tailored injunction" argument is not supported in law or in fact. Although Petitioner's second argument herein (styled "VII. B." in Petitioner's Appeal Brief) specifically alleges that "The Lower Court Erred In Refusing To Amend Its Post Appeal Final Order And Grant Tice a Tailored Injunction To Equitably Locate The Right of Way. . .", neither the text nor the

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[4] The concept of a tailored injunction was first pled by Petitioner in his Renewed Motion and Memorandum in Support of Tailored Injunction (JA 110-179), filed on September 19, 2022, six months after the circuit court's evidentiary hearing held on March 4, 2022, and just prior to the circuit court's Final Order Establishing Location of Granted Easement (JA 219-224), entered on October 18, 2022.

substance of that argument supports the tailoring of an injunction. At the second evidentiary hearing below, held on February 13, 2023, Petitioner argued for a tailored injunction, but Petitioner's counsel, at that hearing, candidly acknowledged what the Petitioner was really seeking:

> "We are asking you [the Court] to change the location. That is admittedly exactly what we are asking for. I am not going to beat around the bush" (JA 335).

Petitioner has simply re-hashed his arguments in support of Rule 60(b) relief, contentions that were raised and considered in the underlying circuit court trial - - inconvenience, historical use of the right-of-way, an alterative offered by Tice, the need for fencing and gates, the proximity to the garage apartment, etc.

Petitioner also contends that the circuit court erred in ordering Tice to remove all obstructions from the right-of-way, to provide Veach unimpeded use of the right-of-way. Petitioner characterizes this as a mandatory injunction "without considering the prerequisite findings for granting the same." The circuit court, in its Final Order Following Hearing of February 13, 2023 (JA 367-371), noted that Petitioner's counsel, at the hearing of February 13, 2023, "advised the Court that Defendant would not remove any fence posts or fencing that interfered with the granted right-of-way without a court order compelling him to do so." The circuit court then ordered that Petitioner shall, within 30 days of Teter marking the location of fence posts, "remove those obstructions", providing Veach the "unimpeded use of the granted right-of-way. . . ." At the hearing of February 13, 2023, Respondent's counsel

urged the circuit court to enter an order which "would reflect that Dr. Veach has the right to use that right-of-way without interference posts or gates or whatever." Respondent's counsel stated further that "we've got a right-of-way and a right to use it. Now we've located it, we would like permission to use it. It's that simple." (JA 342, 344). Respondent did not seek an injunction - - only a marked location of the right-of-way and the right to use it without obstructions.

Although Respondent did not seek an injunction, Petitioner again relies upon the inapplicable provisions of Rule 52(a) in support of his argument, contending that the circuit court failed "to enter any findings of fact or conclusions of law to support granting Veach an injunction against Tice...", arguing that the case should "summarily be remanded" by this Court. As noted above, although not required, the circuit court made its findings clear in the Final Order Establishing Location of Granted Easement (JA 219-224), and in the Final Order Following Hearing of February 13, 2023 (JA 367-371). ***Robertson v. B.A. Mullican Lumber & Mfg. Co.***, 208 W.Va. 1, 537, S.E.2d 317 (2000), cited by Petitioner, is inapplicable because findings are not required in this case.

Although Petitioner has set forth a laundry list of alleged "required prerequisites to issuance" of an injunction (Page 19 of Petitioner's Appeal Brief), they have no application here as no injunction was sought or ordered. In fact, Petitioner acknowledges the absence of an injunction when he states, in his Appeal Brief, that "no prior notice was given by Veach of an application for an injunction" (Page 10 of Petitioner's Appeal Brief), Veach never

sought an injunction, but only wanted clarity from the circuit court that the location of the right-of-way having now been confirmed, that right-of-way can now be used without inference or obstruction.

VI.

CONCLUSION

For the reasons set forth herein, Respondent urges the Court to affirm the decision of the Circuit Court of Randolph County. The Circuit Court did not abuse its discretion in denying Petitioner's motion under Rule 60(b), ***West Virginia Rules of Civil Procedure***, it did not abuse its discretion in denying Petitioner's motion for a tailored injunction, and it did not abuse its discretion in ordering that Respondent is entitled to the unimpeded use of his deeded right-of-way.

Respectfully submitted,

JOHN S. VEACH,
PLAINTIFF BELOW,
Respondent

/s/ Harry A. Smith, III
HARRY A. SMITH, III
W.Va. State Bar ID #3466
Counsel for Respondent John S. Veach
Jory & Smith, L.C.
Elkins, WV 26241
304-636-3553
hasmith@jorysmith.com

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JOHN S. VEACH,
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Respondent.

CERTIFICATE OF SERVICE

I, Harry A. Smith, III, counsel for Respondent, John S. Veach, in this action do hereby certify that a true and correct copy of Respondent's Brief was electronically filed with the Clerk of the Court using the Court's E-Filing system, File and ServeXpress (FSX) on this the 6th day of October, 2023, which will send notification of such filing upon the below listed counsel of record.

Braun A. Hamstead, Esquire
Hamstead & Associates, L.C.
507 S. Fairfax Boulevard
Charles Town, WV 25414
bhamstead@hamsteadandassociates.com

/s/ Harry A. Smith, III
HARRY A. SMITH, III
W.Va. State Bar ID #3466
Counsel for Respondent John S. Veach
Jory & Smith, L.C.
Elkins, WV 26241
304-636-3553
hasmith@jorysmith.com