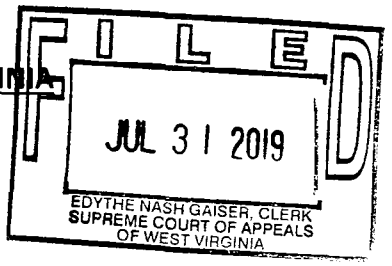
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Leonard D. Carr and Gloria J. Carr,
Plaintiffs Below, Petitioners

Vs.)

Docketing No.: 19-0216
(Grant County Civil Action NO: 16-C-1)

Lysle T. Veach, Jr., Whitney Sloane Veach,
Sydney Morgan Veach and Bailey A. Veach
Defendants Below, Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ASSIGNMENTS OF ERROR

1. The lower Court's conclusion of law that the Petitioners failed to meet their burden of proof with respect to an express easement was made in error and said finding was not supported by the evidence presented at Trail. (Appendix Page 161)
2. The lower Court's conclusion of law that the Petitioners failed to meet their burden of proof with respect to a prescriptive easement was made in error and said finding was not supported by the evidence presented at Trail. (Appendix Page 162)
3. The lower Court failed to properly apply the guidelines which must be considered when a party is attempting to establish a claim for an easement by prescription, as set forth by this Honorable Court in *O'dell v.* Stegall, 703 S.E.2d 561, 226 W.Va. 590 (2010).
4. The lower Court's "Amended Judgement," wherein it granted the Petitioners the "ability to travel the disputed right-of-way for and during their natural lifetimes, so long as they are present in a vehicle being driven on the disputed right-of-way" (Appendix 193) is an unfounded judgment with no basis upon which to find the same via pertinent West Virginia case law associated with prescriptive easements.

STATEMENT OF CASE

Pursuant to West Virginia Rules of Appellate Procedure, Rule 10(d), Respondents must only include a Statement of the case to correct any inaccuracy or omission. Petitioners' Statement of the Case contains several inaccurate statements.

Petitioners state that the M.E. Goldizen, Sr. tract is the parent tract of the real estate which is the "subject of this legal matter/Appeal. This should not be misunderstood. It is the parent tract of Petitioners' real estate but not the Respondents. The undersigned believes that

the Respondents' real estate is the subject of this legal matter/Appeal as this is the real estate in over which the easement is sought by Petitioner.

Petitioner states that there was July 1939 Decree that confirmed sale. This document is not part of the record in the underlying action and has never been seen by the undersigned.

On page 5 of Petitioners' brief it is mentioned that Mr. Geary inquired of each and every seller regarding the existence of an easement. Mr. Geary did state this but he did not contact the Respondents who were the owners of the presumed servient estate under the easement he drafted. Ms. Reel, one of the sellers, testified that there were no discussion regarding any right of way. (Appendix page 469, lines 11 – 19)

On page 7 of Petitioners' brief it is stated that Mr. Veach "began personally obstructing the right-of-way access for the Carrs." This is not true or supported by the record. The Petitioners were never prohibited from access to their property. The Circuit Court entered a temporary injunction, without taking any evidence, to preserve the status quo pending the litigation.

On page 9 at the end of the first paragraph of Petitioners' Brief there is an editorialization of what the witnesses testified to at trial. This is not accurate or supported by the transcript.

A few dates and appendix references are not correct. These issues are not material. The undersigned would apologize in advance if any pages are incorrect in the citations herein. Fastcase is not always accurate. Respondent will make a Statement of the Case to attempt to accurately reflect the relevant events.

This matter was brought by Petitioners, Plaintiffs below, seeking declaration by the Court that Petitioners possessed and easement across the real estate owned by the Respondents under theories of Express Easement, Prescriptive Easement or Easement by Necessity. (Appendix page 1) An Amended Complaint was later filed by Petitioners and the claim for Easement by Necessity was removed as there was no evidence that the tracts of real estate owned by the parties were ever part of a common parent tract. (Appendix page 37)

The issue presented was that the parcel of real estate now owned by Petitioners possessed and easement across the two tracts of real estate owned by the Respondents.

Under the theory of Express Easement, Petitioners claim that a Chancery Proceeding from 1939, in which the then current owners of the two tracts now owned by Respondents were not a party, created an Express Easement across the real estate now owned by Respondents. The April 11, 1939 Decree states that the commissioners were directed, "if **necessary**, to provide a right of way for the use of **either** of said one half undivided interests for the **benefit of either** of said tracts when they are laid off,...." (Appendix page 99) The Commissioners then answered their charge and filed a Report with the Court. The Report provides that their charge was to divide the land and "provide a right of way for the use of **either** of said one half undivided interests for the **benefit of either** of said tracts ..." The Commissioners report that they "allowed right of way for owner of remainder through G. Y. Dolly's part, said right of way to be same as now used road and to be operated as gateway." (Appendix page 102) In a May 1939 Decree the Court restated the Commissioners Report and Ordered the tract laid off by the commissioners to be sold. (Appendix page 106) The property partitioned was then sold. G. Y. Dolly, owner of the ½ undivided interest under the Will of M. E.

Goldizen, Sr., purchased the parcel laid off that would contain the right of way across the land that he received by Will. A Deed was then executed and recorded conveying the tract ordered sold to G.Y. Dolly from Special Commissioner B. F. Mitchell. This Deed does not contain any grant of the Easement mentioned in the Decrees or Commissioners' Report. This Deed only conveys the acreage. (Appendix page 97)

The real estate now owned by Petitioners was then transferred to Lester Rohrbaugh in 1943. This Deed does not contain any grant of an express easement across land now owned by Respondents. It does not have a habendum clause or reddendum clause to catch any and all interests then owned by the Grantor to be included in the conveyance. (Appendix page 89)

There was a straw Deed executed and recorded in 1984 that does not contain any express easement or clause that would pass any easement appurtenant. (Appendix page 149) There was an out-conveyance of 80 acres in 1989 from Mother to Daughter and this Deed conveys an easement from Knobley Road to the tract being conveyed. This was the first express grant of an easement; however, the Grantor did not possess and easement and could therefore not convey the same. (Appendix page 92) The only easement that could be transferred would have been across the parent tract that the mother retained after the out-conveyance.

Corridor H was constructed along the property owned by the parties. The old roadway in question was located on the property that the State acquired for construction of the highway. (Appendix page 411, line 19 – 416, line 3) By Deed dated September 3, 2009 the prior owners of the Petitioners' real estate conveyed certain real estate "free and clear of all encumbrances an with covenants of GENERAL WARRANTY ..... together with improvements

thereon and the appurtenances there unto belonging, if any". (Appendix page 138) Later in this Deed the parties covenant that "Grantors ....., or not releases unto Grantee all easements of way over, upon, through, across or under said land herein described, specifically including but not limited to all rights of vehicular and pedestrian access; and all rights of ingress and egress from said property and the land therein described." (Appendix page 145)

The old roadway was then covered up with fill during the construction of the highway. (Appendix page 461, Line 7-13; page 405, Lines 17-19, page 408, Lines 22-24 and page 411, line 19 – 416, line 3) A new temporary road was created to aid in the construction of the highway. (Appendix page 409, line 8, pages 110, 118, and 119) Another new roadway was constructed directly from Corridor H to the property now owned by Petitioners. It is important to note that at Trial a map was used for illustration showing the tracts that the State condemned from Corridor H to the real estate now owned by Petitioners. The map illustrated the location of the road that the State constructed from Corridor H to the home of Petitioners. Mention of this was in the original Trial Order and after objection by counsel for Petitioners this mention was removed in the amended order. Counsel for Petitioner stated the maps were not relevant. (Appendix page 177, line 3) They certainly appear relevant now that Petitioners' Counsel is arguing that there is no other way into their property. The argument is simply not true nor is it supported by the testimony of several witnesses including Mrs. Reel (Appendix page 484, line 3). The fact is the State owns approximately 1/3 of a mile from Corridor H to the Petitioners' real estate and the purpose was to provide the Petitioners real estate access to a public road since the project severed their access to Eston Carr road.

Petitioners then acquired title to their real estate by deed dated December 3, 2013. This Deed contains and express easement from Knobley Road to the property acquired. The only roadway in existence at the Respondents private road and the new roadway constructed within the temporary easement conveyed to the State. These Grantors did not possess an easement to convey across the real estate owned by Respondents. (Appendix page 81)

A two day Bench Trial was held in the Grant County Circuit Court. Several Witness testified regarding the relevant evidence in this matter. The Circuit Judge had the benefit of hearing the evidence and weighing the credibility. A Trial Order was then entered on September 20, 2017 declaring that the Petitioners did not possess an express or prescriptive easement. (Appendix page 155)

The Circuit Judge made findings of fact that there was no proof offered by Petitioners that the Respondents or any predecessors in title to them ever conveyed and express easement appurtenant to the real estate now owned by the Grantor. The Circuit Judge further found that the then current owners of the tracts of real estate now owned by Respondents were not parties to the Chancery Proceeding. The Circuit Judge found that the prior owners of these tracts of real estate co-existed as good neighbors, and that when the gate was locked on occasion keys were provided to those who had permission to use the road. (Appendix page 157- 161)

Petitioners then filed a Motion for Reconsideration and a Motion for a New Trial and the matter was set for hearing on October 12, 2017. Petitioners objected to the Order and the Court offered Petitioners to more particularly describe the objections and to submit their own proposed order. No proposed Trial Order was ever submitted by Petitioners. Petitioners then

filed a renewed Motion for Reconsideration and Motion for a New Trial on December 8, 2017. A hearing was held on December 18, 2017 on these motions. At this hearing the Court did grant a few of the requests to alter amend judgment under West Virginia Rules of Civil Procedure, Rule 59(e). The Court DENIED the Motion for a New Trail. (Appendix page 185, Line 22 – page 186, Line 2) Petitioners' Counsel prepared the Order, as directed, from that hearing and included the portions form the amendments to the original Trial Order; however, he did not include the fact that the Judge had denied the Motion for a New Trial. (Appendix page 193)

Petitioners then file a Supplemental Motion for a New Trail on August 8, 2018. This was never set for hearing. The next event is that the undersigned receives and Order from the Clerk Denying the Motion for a New Trial in late February of this year.

SUMMARY OF ARGUMENT

This standard of review of the circuit court's final order and ultimate disposition is an abuse of discretion standard. Challenges to findings of fact are a clearly erroneous standard; conclusions of law are reviewed de novo. *Burgess v. Porterfield*, 469 S.E.2d 114, 196 W.Va. 178 (W. Va., 1996) To be clear, the Petitioner did not file a notice of intent to appeal after the Trial. In fact, even after the Circuit Court denied the motion for a New Trial, directed Petitioners' Counsel to prepare an Order and appeal it if he wants (Appendix page 185, Line 22 – page 186, Line 2) and the order (Appendix page 193) was entered by the Court on January 23, 2018, the Petitioner did not file a Notice of Intent to Appeal. Petitioner did not include the ruling of the Court that the Motion for a New Trial was denied in the Order and has effectively extended the time period in which to appeal.

Petitioner does not have a reason sufficient to grant a new trial. The Circuit Court had all information before it when the motion was denied at hearing on December 18, 2019. Had this ruling been contained in the Order from the December 18, 2017 hearing then the time to appeal has long since lapsed. The Respondents were of the opinion that this matter was final on December 18, 2017 when the Judge ruled that there would not be a new trial. Thirty days after the entry of the Order from that hearing the Respondents moved on with their lives believing that this issue was final. Then over a year later another Order is received and followed by a notice of intent to appeal. This type of circumstance is not what the rules were designed to foster. Had the Order accurately reflected the rulings of the Court on December 18, 2017 this appeal would be untimely and proper for dismissal. This begs the question of did the Circuit Court still possess jurisdiction to enter the Order in February of this year that started the timeline for the appeal?

The mysterious final order Denying Motion for New Trial and Renewed Motion for New Trial entered on February 15, 2019 is what is being appealed. Petitioners presented no good cause for a New Trial. The Circuit Judge did not abuse his discretion when denying the Motion. The action of the Circuit Judge should be affirmed by this Court.

The Trial Judge made specific findings of fact in the Trial Order. West Virginia Rules of Civil Procedure, Rule 52(a) provides in part "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Trial Judge found that No evidence of any Grant or Reservation of an express easement in a Deed within the Respondents' Chain of Title was introduced. (Appendix page 158, finding #5) This is absolutely true. Petitioners' own expert testified that there was no grant of an express easement in the Respondents' chain of title. (Appendix page 274, line 3) Respondents' expert testified that there were no express easements in the Respondents' chain of title. (Appendix page 327, Line 14 - page 338, Line 24) All Deeds introduced in Respondents' chain of title do not include any express easement or reservation serving Petitioners' real estate. (Appendix pages 109, 111, 121, 123, 129, 131, 133)

Petitioners have not argued that in 1939 the persons owning the real estate now owned by Respondents were parties to the Chancery Action. This fact is not in controversy.

The findings of fact that the Trial Judge made regarding the existence of an express easement are well supported by the evidence and should not be disturbed on appeal as the same are not clearly erroneous.

The Trial Judge made various findings of fact with respect to the claim of easement by prescription. As far as the location of the roadway the court found that the present location began in 2011. (Appendix page 159, #s 17 and 18) This fact is not in dispute. The Judge further found that the prior owners of the Petitioners' real estate and the Respondents' family were great neighbors for 70 years. (Appendix page 160, #22) This finding was supported by numerous statements in the testimony of Respondent, Lysle T. Veach, Jr., (Appendix page 381) and Witness, Pauline Reel. (Appendix page 479, line 12 – 480, line 6) Furthermore, that when the Respondents locked the gate the prior owners were provided keys so that they could

continue to use the roadway. (Appendix at page 160, # 24) Again, the two aforementioned witnesses testified to this fact. It should be noted that the Trial Judge determines the credibility of the witness and gives their testimony the proper weight. Mrs. Reel was one of the Sellers in the conveyance to the Petitioners and signed both an affidavit saying there was a right of way, although this was never produced at trial, and a general warranty deed. (Appendix page 81)

The findings of fact that the Trial Judge made regarding the existence of a prescriptive easement are well supported by the evidence and should not be disturbed on appeal as the same are not clearly erroneous.

The conclusions of law made by the Trial Judge are reviewed under the de novo standard. The Trial Judge relied upon the West Virginia Constitution, Article III, Section 10, West Virginia Code § 36-1-10, and the common law of *O'Dell v. Stegall,* 703 S.E.2d 561, 226 W.Va. 590 (2010). (Appendix page 155 -163).

It cannot be argued otherwise that a person, not a party to an action, can be bound by the action. This Constitutional premise is fundamental and need not be further addressed.

West Virginia Code § 36-1-10 is clear that you cannot convey that in which you do not possess. If the fact is that you don't have an easement then you cannot grant one.

The Trial Judge properly applied the findings of fact to the law and arrived as a just decision with respect to the issue of an express easement. This decision should not be overturned upon appeal.

The Trial Judge applied the principles found in the *O'dell* case to the findings of fact. This is exactly the purpose of the *O'dell* opinion to provide guidance to the finder of fact. *O'dell* at page 607. This application of good law again arrived as a just result on the issue of prescriptive easement. The decision should not be overturned upon appeal.

With respect to Assignment of Error number 4, the undersigned is quite puzzled. The Petitioner requested this relief post-trial. Their request was granted under the Court's powers of Equity. Why would someone appeal the relief they requested when granted?

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary in this matter pursuant to the West Virginia Rules of Appellate Procedure, Rule 18(a)(4).

ARGUMENT

I. FAILURE TO MEET BURDEN OF PROOF AS TO EXPRESS EASEMENT

The facts are clear. No evidence of any Grant or Reservation of an express easement in a Deed within the Respondents' Chain of Title was introduce. (Appendix page 158, finding #5) This is absolutely true. Petitioners' own expert testified that there was no such grant of an express easement in the Respondents' chain of title. (Appendix page 274, line 3) Respondents' expert testified that there were no express easements in the Respondents' chain of title. (Appendix page 327, Line 14 - page 338, Line 24) All Deeds introduced in Respondents' chain of title do not include any express easement or reservation serving Petitioners' real estate. (Appendix pages 109, 111, 121, 123, 129, 131, 133)

Petitioners have not argued that in 1939 the persons owning the real estate now owned by Respondents were parties to the Chancery Action. This fact is not in controversy.

Express Easements are created by Grant, Reservation, Bequest, or Judicial Decree. (Appendix page 157, #2) In the event of judicial decree there should be a recording filed in the Office of the Clerk of the County Commission upon the land records to memorialize the event in the chain of title.

THERE IS NO DOCUMENT OF RECORD PROVIDING FOR THE GRANT, RESERVATION, BEQUEST, OR JUDICIAL DECREE OF AN EXPRESS EASEMENT. Therefore, absent an express grant, reservation, bequest or judicial decree an express easement cannot exist and any attempt by the attorneys for the predecessors in title to Petitioners' real estate is void pursuant to West Virginia Code § 31-1-10. To be clear, there is no Deed of record expressly granting an easement from Respondents' real estate to Petitioners' real estate. The parties' tracts were never part of a parent tract and thus there can be no reservation or implication by necessity. There is no bequest issue present.

Petitioners have been novel in their argument on this issue. This has done nothing but muddy the water. The Respondent will now to respond to the theories advanced.

Normally a Judicial Decree involves and easement by necessity. Petitioner is apparently arguing that the 1939 Chancery proceeding for the Estate of M.E. Goldizon somehow created an express easement for the benefit of the property now owned by Petitioner via Judicial Decree.

The first problem is that the then present owners of the two tracts now owned by Respondents were **not parties** to the action. Where in the law can a person, not a party to the action, be affected by the action? Advancement of this legal theory shocks the conscience and is contrary to the fundamental principles of jurisprudence.

The Trial Court clearly understood this matter. Upon review of the Chancery Documents is was clear that the Court only wanted to provide for an easement across the parcels being divided if the same was necessary. To be clear, the parcels that were the subject matter of that litigation are the parent tract of Petitioners' real estate. Respondents' real estae was never the subject matter of that Chancery Proceeding. The April 11, 1939 Decree states that the commissioners were directed, "if **necessary**, to provide a right of way for the use of **either** of said one half undivided interests for the **benefit of either** of said tracts when they are laid off,...." (Appendix page 99) The Commissioners then answered their charge and filed a Report with the Court. The Report provides that their charge was to divide the land and "provide a right of way for the use of **either** of said one half undivided interests for the **benefit of either** of said tracts ..." The Commissioners report that they "allowed right of way for owner of remainder through G. Y. Dolly's part, said right of way to be same as now used road and to be operated as gateway." (Appendix page 102) In *a* May 1939 Decree the Court restated the Commissioners Report and Ordered the tract laid off by the commissioners to be advertised and sold. (Appendix page 106) The tract partitioned was then sold. G. Y. Dolly, owner of the ½ undivided interest under the Will of M. E. Goldizon, Sr., purchased the tract, potential dominant estate, laid off that the Judge found necessary to contain the right of way across the tract, potential servient estate, he received by Will. A Deed was then executed and recorded

conveying the tract ordered sold to G.Y. Dolly from Special Commissioner B. F. Mitchell. This Deed does not contain any grant of the Easement mentioned in the Decrees or Commissioners' Report. This Deed only conveys the acreage. (Appendix page 97)

The Chancery Proceeding clearly illustrates the Court was insuring that the real estate, only the real estate subject to that action, would not become landlocked by the partition. The Court decrees the "right of way for the use of **either** of said one half undivided interests for the **benefit of the other**" in the original decree in April. (Appendix page 99) The Commissioners acted as directed. The May Decree then directs to sell the property and allow for the right of way. (Appendix page 106) Had someone other than G.Y. Dolly purchased the tract ordered sold then the right of way across G.Y. Dolly's tract would have **continued** to be **necessary.** At this time of severance a dominant and servient estate would have been created and the express grant should have been contained in the Deed of conveyance to the purchaser. The property was purchased by G.Y. Dolly, owner of the remainder parcel by bequest. Upon recordation of this Deed from the Special Commissioner the tracts were once again owned by a common individual. Therefore, the concern of the Court that the division could result in a landlocked parcel was no longer valid and the creation of the right of way was no longer **necessary**. The Deed from the Special Commissioner to the purchaser did not contain the right of way. It only stands to reason that it was no longer **necessary** because of the common ownership. Regardless, the land records do not contain this right of way discussed in court. Most importantly, this occurrence cannot and did not create a dominant/servient estate situation with the property now owned by Respondents. Respondents' property was never mentioned by the Court when stating "for the benefit of the other," was not the subject matter

of the litigation, and the owners were not parties to the action. The undersigned would not be able to sleep at night if he was constantly worried that a Court may grant and express easement across his family farm in an action in which he was not a party and had no opportunity to be heard. Mr. Tucker knew nothing about this case and the speculation advanced by Petitioner as to Mr. Babb being present is just that, speculation. The Commissioners' Report, dated May 23, 1939 only shows two trips to Petersburg by the Commissioners and this report is prior to the hearing on May 25, 1939. (Appendix page 104)

The evidence at Trial was clear. Respondents' expert, who contrary to Petitioners' expert had no interest in the outcome of the litigation, clearly testified that there are no documents of record in the Respondents' chain of title creating an express easement. (Appendix page 327, Line 14 - page 338, Line 24) All Deeds introduced in Respondents' chain of title do not include any express easement or reservation serving Petitioners' real estate. (Appendix pages 109, 111, 121, 123, 129, 131, 133) Petitioners' expert also testified that there is no Deed in the Respondents' chain of title creating an express easement. (Appendix page 274, line 3)

Petitioners argues that based upon their expert's testimony there is clearly an express easement. It must be noted his expert was the attorney who placed the express easement in the Petitioners' Deed. It must be noted that his title opinion only certifies back to 1943 and the Chancery proceeding was in 1939. It must be noted that he testified that he questioned the "Sellers" about the existence of the easement but he **did not** question the Respondents. It must be noted that he was named as a Defendant in the Amended Complaint (Appendix page

37) It must be noted that he was dismissed as the claim against him would not be ripe unless the Petitioners lost the law suit. It must be remembered that the Trial Judge gets to determine the credibility of the witnesses and give it proper weight.

Petitioners' argument also overlooks the fact that the parties' respective real estate was never part of a parent tract with common ownership. Petitioners overlook the existence of an easement that existed from the Petitioners' tract to Eston Carr Road, which is a public road. Petitioners' easement to Eston Carr Road was basically destroyed with the Corridor H project which resulted in the construction of the entrance from Corridor H to their home.

What is relevant is that the State of West Virginia expended money building a roadway beginning on Corridor H and extending to the home of the Rohrbaugh family." (Appendix page 195, #5, page 484 , line 3 – 485, line 24) Does this not beg the question, Why would the State condemn property across various landowners up to the property owned by Petitioners and spend all this money building a road not just to Petitioners' property but on further to their home if they had another means of access? The fact is a very nice road was constructed, graded, culverts installed, and gravel placed. The Trial Judge heard this evidence at trial from witnesses whose testimony was not included in the appendix. This road was much better than the previous road. Mrs. Reel testified that she drove over the road a couple weeks ago on direct (Appendix page 466, line 23) but later testified on cross that she hadn't been on this road recently (Appendix page 484, line 20) Again the Trial Judge gets to determine the credibility of the witnesses and give their testimony the appropriate weight. The Trial Judge heard this evidence at trial from witnesses whose testimony was not included in the appendix. This road

was never called a "pig path" at trial. The only person who has called this road a "pig path" is Petitioners' Counsel. If the Petitioners do not wish to use and maintain this road that is their choice. It does not give them cause to force a roadway across the land owned by Respondents because that is what they would prefer. Want or desire of a party has never been the test for a judicially created easement.

Even if there was an express easement the same was conveyed to the State of West Virginia by Deed in 2009. (Appendix page 138) By Deed dated September 3, 2009 the prior owners of the Petitioners' real estate conveyed certain real estate "free and clear of all encumbrances an with covenants of GENERAL WARRANTY ..... together with improvements thereon and the appurtenances there unto belonging, if any". (Appendix page 138) Later in this Deed the parties covenant that "Grantors ....., or not releases unto Grantee all easements of way over, upon, through, across or under said land herein described, specifically including but not limited to all rights of vehicular and pedestrian access; and all rights of ingress and egress from said property and the land therein described." (Appendix page 145) To be clear, even if the predecessors in title possessed an easement the same was conveyed away in 2009 and could not be re-conveyed in 2013 when the Petitioners acquired title.

The evidence is clear that there is no express easement that lawfully grants the Petitioners the right to use the Respondents' private roadway. *In Arguendo*, if there once was the same was conveyed away without reservation prior to the conveyance to Petitioners. Under no theory of law can the Petitioners claim they possess an express easement across the lands owned by the Respondents. This Honorable Court should affirm the Circuit Courts ruling on the issue of express easement.

II. FALURE TO MEET BURDEN OF PROOF AS TO PRESCRIPTIVE EASEMENT and TRIAL COURTS IMPROPER APPLICATION OF THE LAW

Prescriptive Easement are largely based on issues of fact. The Trier of fact must hear the evidence, weigh the credibility of the witnesses, and render a verdict. Petitioners' Assignments of Error #2 and #3 are closely intertwined and argued together in Petitioners' Brief. Respondents will likewise argue these together to avoid even further redundancy than that which is already present.

This Court offered a wonderful opinion in 2010 that provides excellent guidance in what was a "tangled mess of weeds" that should result in an improvement as to how this issue is litigated.

The Judgment of the Trial Court that the Petitioners failed to meet their burden of proof is entirely correct. Petitioner had to prove by **clear and convincing** evidence each of the following (1) the adverse use of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used." Syllabus Point 1, *O'dell v. Stegall*, 226 W.Va. 590, (2010). Each element must be proven independently or the claim is fatal. Syllabus Point 3. *O'dell.*

This case turns on was the use adverse, the location, and was the use for the statutory period. Adverse use is a wrongful use made without the express or implied permission of the

owner of the land. Syllabus Point 5. *O'Dell*. If the use began as permissive, it will not become adverse unless the license is repudiated. Syllabus Point 6, O'Dell.

The doctrine unjustly rewards trespass and discourages neighbors from being peaceful. *O'Dell* at page 609. *O'Dell* opined that there is nothing more vicious than a fight over land between neighbors. *O'dell* opined that this doctrine is not favored by the courts because it rewards a trespass and takes property rights without compensation. This doctrine borders on theft. *O'dell* opined that this doctrine does little to encourage civility between neighbors.

It is understood that the rationale for prescriptive easements or adverse possession was to get use out of the land. If one uses it as his own and the true owner does not stop the use then the land is at least being utilized and the person so doing has acquired the right to use it.

The Trial Court heard the testimony of the one Respondent, the same is quoted in Petitioners' Brief at page 21, that the Rohrbaugh family, predecessors in title to Petitioners, were always permitted to use the roadway at issue. (Appendix page 394). The Trial Judge heard testimony regarding the neighborly relations between the Veach and Rohrbaugh families, the business dealings, the courtesy they extended to one another. The Rohrbaughs had permission to use the roadway. (Appendix page 395, line 5 – page 396, line 6) Petitioners' witness, Mrs. Reel, testified about how they would stop and speak or wave. (Appendix page 476, line 24 – 477, line 1) The Rohrbaugh family did not believe they were trespassing and the Veach family gave them permission to use the road. In general the Trial Judge was of the opinion that these families were "great neighbors for 70 years." (Appendix page 160, # 22) This was supported by the testimony of Mrs. Reel that she considered them good neighbors. (Appendix479, line 12 – 18) They engaged in business dealings with one another, and

considered each other friends. The Rohrbaugh family did not believe that they were trespassing when they used the roadway." (Appendix page 160, #22)

The two times that the gate was locked by Respondents a key was given to the Rohrbaughs so that they could continue their permissive use. (Appendix page 486, line 1 – page 488, line 17) (Appendix page 417, line 2 – page 422, line 6) Petitioners offered no proof that the use was not permissive.

Two questions must be answered to determine if this situation meets the burden of clear and convincing proof that the use was adverse. The questions are (1) was there an implied permission or consent from the Veach family, then landowner of Respondents' real estate, to permit the uses of the roadway O'dell, at 614 and (2) did the Rohrbaugh family disregard the Veach family's claim to ownership entirely as if they owned it the easement. *O'dell*, at 611.

The burden of proving "adverse" use was on Petitioner by clear and convincing evidence and when in doubt it will be resolved in favor of landowner. *O'dell,* at page 608. Petitioners offered no proof that they relationship between the Rohrbaughs and Veachs was not neighborly. Petitioners offered no proof that the Rohrbaugh family held this roadway out to be their own such as providing maintenance on the roadway or restricting the use of the roadway by others. All witnesses testified that they did not know if permission had been granted in the past. Petitioners' Brief tries to shift the burden of proving permission back to the Respondents and argues that the Respondents failed to prove that permission was expressly given. (See Petitioners' Brief, page 22, first line of first full paragraph.) This is NOT THE LAW under *O'dell.*

Prior law did presume adversity if the statutory period was met. *O'dell* opined that this was an improper burden shifting to require the landowner to prove that the use was NOT adverse. The holding in *O'dell* is "that the burden of proving adverse use is upon the party who is claiming the prescriptive easement against the interest of the true owner of the land. To the extent our prior cases suggest that proof of adverse use is not required, or that the continuous and uninterrupted use of another's land for ten years is presumed to be adverse, they are hereby overruled. The landowner has no burden of proof. It is the person claiming the prescriptive easement that must prove, by clear and convincing evidence, that the use of the land was adverse to the true owner of the land." *O'dell* at page 615.

Permissive use is not adverse. *O'dell* held that "in the context of prescriptive easements, and 'adverse use' of land is the wrongful use, made without the express or implied permission of the owner of the land." *O'dell* at page 614. Respondent not have to prove the permission and the permission does not have to be express. The permission can be implied or inferred. Permission "may be inferred from NEIGHBORLY RELATION of the parties, or from other circumstances." *O'dell* at page 613. *O'dell* footnote #24 provides further assistance in what may be considered in determining if the neighborly relations imply permission. This footnote provides such things as "Evidence of courtesy, without more, is sufficient to imply permissive use" and "Mutual use of a driveway for a long term of years" will not give rise to prescription.

The granting of the keys was questioned by both sides. Petitioners' Counsel questioned Mrs. Reel about Respondent asking her "to lock the gate." The response was not that he was asking her "permission" to lock the gate but only asking if she would be allright with him locking

his gate. (Appendix page 467, line 7 – 468, line 20) During cross-examination Mrs. Reel was much clearer in that Mr. Veach was locking his gate and wanted to inform her to make sure it wouldn't be too much trouble for her. (Appendix page 486, line 1 – page 488, line 17)

Under *O'dell* to be adverse there must be no permission or use must be without consent. The permission or consent can be express or implied. Syllabus point 5 of *O'dell*. Thus, if the use began with implied consent then adverse does not present until the permission is repudiated. Syllabus point 6 of *O'dell*.

The answer to question one is that based upon the neighborly relations between the Rohrbaugh family and Veach family and providing a key when the true owner decided to lock the gate there was an implied permission to use the roadway. *O'dell* at page 613. Once the use begins as permissive it will not become adverse unless repudiated. *O'dell* at page 613.

It is clear that the Trial Judge, after hearing all of the evidence, was of the opinion that given these good neighborly relations there was an implied permission for the Rohrbaugh family to use the Respondents' private roadway. The Petitioners failed to prove adversity by clear and convincing evidence it is quite possible that the Respondent proved permission even though not required to do so under the law. This in and of itself makes the claim of prescription fatal.

The answer to question two is that the Rohrbaugh family never acted as the true owner of the road and disregarded the rights of the Veach family. The Rohrbaugh family did not lock the gate. This is significant as to the case offered by Petitioner on the granting of keys. He did not disregard the lawful owner and sought her permission. This is a significant determination that is offered only by admission of Respondent. Petitioner cites *Lowe v. Hegyi*, No. 15-0718,

Memorandum Decision (2016), as controlling on this issue. In the *Lowe* case it was the person claiming the easement that locked the gate, as a true and lawful owner would, and provided a key to the true owner. This is exactly the behavior that could be defined as adverse. In the present case the true owner locked the gates and gave a key to the individuals he had given permission to use his road. The *Lowe* case is not on point for this fact pattern.

Petitioners asked for permission to bring trucks up the road when they were constructing their home. (Appendix page 424, line 4) Petitioners asked for permission regarding the dozer. (Appendix page 432, line 18) Petitioners asked for permission to install a wider gate and culvert. (Appendix page 433, line 7) This is not holding yourself out to be the true owner and disregarding the lawful owner. This is not adverse.

After reviewing both significant questions regarding was the use by the Rohrbaugh family permissive it is clear that it was. The use does not appear adverse by a preponderance of the evidence and definitely not by clear and convincing evidence. If this element of prescription is not proven by independent fact then the claim is fatal.

The second problem with the Petitioners' claim for prescription is the 10 year statutory period. This is combined with the location issue. Under the claim of prescription the use must be "continuous and uninterrupted for at least 10 years;" Syllabus point 1 of *O'dell.*

In the *O'dell* case this Honorable Court concluded that churchgoers using the gravel lane twice a week to access a parking lot was not reasonably similar to the Plaintiff seeking to use the gravel lane daily. *O'dell* at page 622. This is relevant in that in the present case the evidence was that the Rohrbaugh family used the old roadway maybe twice a week to get mail (Appendix 396, line 3) and Mrs. Reel testified that she may have used the old road once a week

unless the weather was bad. (Appendix page 462, line 24) The difference in the Petitioners use is that it is daily, multiple times, and damage has been done to the roadway. (Appendix page 430, line 8 – 431, line 24) "Our law is clear that a right of way acquired by prescription for one purpose cannot be broadened or diverted, and its character and extent are determined by the use made of it during the period of prescription." *O'dell* at page 619. The increase in travel is not similar to the original use and creates and increased burden on the servient estate. Petitioners failed to prove daily use for the prescriptive period.

The roadway at issue on parts of the Babb Tract and all of the Tucker Tract owned by Respondents has only been in this location for approximately five years at the time of the filing of the law suit. It is not possible for the use of the easement prayed for to have been "continuous and uninterrupted for at least 10 years."

Reviewing the map that Mr. Veach testified to it is clear that the new road is not in the same location as the old road. (Appendix page 411, line 22 – 416 , line 3) The new temporary road is not similar to the old road. The pictures illustrate this. (Appendix pages 115 – 119) The testimony of the witnesses supports this assertion. (Appendix page 400, line 21 – 401, line 4 and page 482, line 6 – 484, line 2) To be clear, there is no possible way that the Petitioner can satisfy the continuous for 10 year requirement in the location in which they have prayed for the Court to award a prescriptive easement. This problem would make the claim fatal.

The use would have been interrupted during the time period in which the temporary construction easement road was being constructed and the old roadway was being buried. This in and of itself would make the claim fatal.

Once again, if any element is not proven by clear and convincing proof then the claim is fatal.

In Arguendo, that the predecessors in title acquired an easement by prescription by periodically driving over the old roadway to access their property, then the same was conveyed to the State in 2009. (Appendix page 138) By Deed dated September 3, 2009 the prior owners of the Petitioners' real estate conveyed certain real estate "free and clear of all encumbrances an with covenants of GENERAL WARRANTY ..... together with improvements thereon and the appurtenances there unto belonging, if any". (Appendix page 138) Later in this Deed the parties covenant that "Grantors ....., or not releases unto Grantee all easements of way over, upon, through, across or under said land herein described, specifically including but not limited to all rights of vehicular and pedestrian access; and all rights of ingress and egress from said property and the land therein described." (Appendix page 145) To be clear, even if the predecessors in title possessed an easement the same was conveyed away in 2009 and could not be re-conveyed in 2013 when the Petitioners acquired title.

The predecessors in title conveyed any easements they had in exchange for valuable consideration over the property acquired by the State. They cannot convey them again. The State spent money to provide access to the Petitioners' property directly from Corridor H by condemning property only for that purpose and constructing a new roadway. The roadway that Petitioners desire was only a temporary construction easement and never intended to be a permanent easement as the same is way to steep with a 1/1 grade and will be susceptible to slides and closure.

The evidence is clear that elements necessary for proof of prescription were not proven. There is no prescriptive easement that permits the Petitioners the right to use the Respondents' private roadway. *In Arguendo*, if there once was the same was conveyed away without reservation prior to the conveyance to Petitioners. This Honorable Court should affirm the Circuit Courts ruling on the issue of express easement.

III. Lower Court's "Amended Judgment" granting equitable relief

Petitioners' Brief makes no argument on this assignment of error. This award can best be described as an "Easement in Gross" for the benefit of the Petitioners. This relief is what the Petitioner requested be placed in the Trial Order in their Motion to Alter or Amend Judgment. (Appendix page 168, line 21 – page 174, line 6) It was apparent to the Court that neither party to the action was at fault. It was by the grace of the Respondents offering to permit the use of the private roadway during Petitioners lifetime that the Court adopted this post-trial offer and incorporated the same into the Trial Order.

The undersigned does agree that this equitable award by the Court may not be proper under the matter of law for easement by prescription. In the event that prescriptive easements are matters of equity then the relief may be proper. If this Honorable Court is to overturn any action by the Trial Court it may be this portion of the case. It seems curious that the Petitioners would raise this issue and run the risk of losing this award of an equitable easement.

It can only be presumed that the Petitioners have abandoned this assignment of error as the brief contains no argument on the issue. It would be difficult to reply absent an argument.

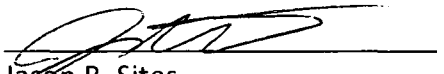
CONCLUSION

When applying the findings of fact made by the Trail Judge to the Conclusions of law the verdict was proper and just. If the Petitioners have a cause of action it would be against the parties who sold them the real estate under general warranty with an express easement. Those parties may have been untruthful in the alleged owners' affidavit. Those parties may have been double dealers if they tried to convey an easement to the Petitioners that they had already conveyed and been compensated for by the State. The Respondents have done nothing wrong.

Respondents request this Honorable Court afford the following relief;

1. Find that the Trial Judge did not abuse his discretion when denying the Motion for a New Trial;
2. Find that the Trail Judge's "findings of fact" were not clearly erroneous;
3. Find that he Trial Judge's "Conclusions of law" were proper;
4. Find that when applying the findings of fact to the conclusions of law the Trial Judge properly arrived at a just verdict;

Respectfully Submitted,



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