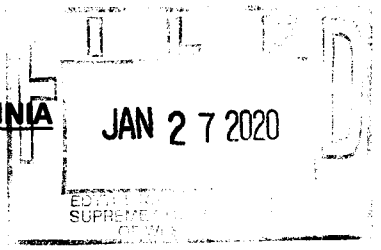

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES SCOTT KUHN,
Defendant Below, Petitioner

Vs.)

Docketing No.: 19-0805
(Mineral County Civil Action NO: 18-C-45)

ROBIN RAVENSCROFT LIVING TRUST,
Plaintiff Below, Respondent,

ROBIN L. RAVENSCROFT and
NORMAN L. RAVENSCROFT,
Third Party Defendants Below, Respondents,

RESPONDENTS' BRIEF

Jason R. Sites
Sites Law Firm, PLLC
PO Box 848
Keyser, West Virginia 26726
(304) 788-4683
jasonsites@lawyer.com
WV Bar # 8638
Counsel for Respondent

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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 a few inaccurate statements.

In the first paragraph the Petitioner states that "The Dolls then had the land surveyed by David G. Vanscoy, P.E., into six lots platted as "Claysville Heights" Subdivision, although the Plat of Subdivision of Claysville Heights was never recorded. " (Appendix 68). To be clear there was no evidence that this was a "Master Plat" for a subdivision. Mr. Vanscoy testified that nobody had access to this document and that it was a "planning document." (Appendix 64, Line 7 – 15) On Petitioner's Brief at page 6 this "planning document" is again used for reference; however, the Plat attached to the Deed for Lot six does not show the road going through the conceptional Lot 4. (Appendix 21)

The first full paragraph on page 7 of Petitioner's Brief is a contested fact and is not proper for an unbiased "Statement of the Case." This narrative is not what occurred.

SUMMARY OF ARGUMENT

This matter was brought as a "Declaratory Judgment" action with a prayer for the Court to declare the rights and interest of the parties concerning the Respondents private driveway. Petitioner then defended this matter by a making claims of equity that the Unity Doctrine applied and that the easement desired by Petitioner was appurtenant to the land as being necessary for the complete enjoyment of the Petitioner's property.

The Petitioner made various defenses. For example, Estoppel. There was no evidence at trial to support any of his defenses. Petitioner's argument on the Unity Doctrine fails. The Unity Doctrine is simply stated as when a master plat of a subdivision is recorded and reference made

to the recorded plat in the Deed of conveyance. The recording of the Master Plat is a private dedication. It is implied that all who take title to the lots of the subdivision have the right to travel upon the roadways in the subdivision shown on the master plat. In the present case there was no master plat recorded. The subdivision does not exist. The dedication would not occur until four lots were sold and then the roadways would be dedicated to the HOA. No HOA was ever formed. The developer filed bankruptcy and thus ended the venture.

Petitioner does not have an express easement in his deed. This fact was conceded by Counsel for Petitioner at the Temporary Injunction Hearing. (Appendix 171, Line 2) The law is clear that one cannot be landlocked and out of necessity he would obtain an easement along the roadway that was in existence at the time of severance, the "backroad." To be clear, since no "Master Plat" showing all intended easements for the subdivision was never recorded the "Unity Doctrine" cannot be applied. Secondly, since the Petitioner has access to his three lots along the "backroad" it cannot be shown that the second easement that is the subject of this appeal is ESSENTIAL to the use and enjoyment of his property. This lack of essential elements for the application of the doctrine makes this defense fatal.

A Declaratory Judgment action is to determine the rights of the parties to various documents such as Deeds. WV Code § 55-13-1 *et. Seq.* The documents do not contain an express easement. The facts are clear. There is no roadway in existence from Lot 6 to Route 50 and there never was. In fact, Petitioner's Expert testified that there is no way to know where the roadway ends on Route 50, he can only assume. (Appendix 165, Line 7) Mr. Vanscoy testified that he did not know where it was intended to go from Lot 6. (Appendix 170, Line 17) Mr. Vanscoy testified that there is no way to tell where the road ends from the recorded plat for Lot 6. (Appendix 215, Line 5) The law is clear. THE LAW DOES NOT PROVIDE FOR

DECLARATION OF A ROADWAY THAT DOES NOT EXIST WITHOUT AN EXPRESS GRANT OR BY THE RECORDATION OF A MASTER PLAT EVIDENCING THE INTENT AND THE LOCATION. Justice does not subscribe to the declaration of the right to an easement that did not exist. The burden of proof necessary for the Petitioner to prevail at trial was not met.

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

Petitioner's arguments are intertwined. To respond to each assignment of error specifically, to the fullest extent possible as required by Rule 10 will become redundant. Respondent will adopt relevant portions of prior responses by reference to avoid repetition.

I. The Circuit Court erred in finding that "Defendant does not possess an express easements (sic) to access his property." (Appendix 102)

Petitioner's deed (Appendix 22) contains no express grant of any easement. No place in the document is any language to the effect of "There is hereby granted a ___ foot wide easement for all lawful purposes from US Route 50 to the property herein conveyed." There is no metes and bounds description as required by West Virginia Code § 36-3-5a or any way to determine an ending point. The Trial Court understood this at first reading and through the Petitioner's testimony at the Temporary Injunction Hearing. (Appendix 145, Line 8 – 151, Line 2) Petitioner's Counsel stated there was no express easement. (Appendix 171, Line 2.) Respondents have maintained that at best there would be an implied easement and thus asked the Court to declare the rights.

The evidence was that the Respondents walked the property prior to purchase and saw no evidence of any roadway. (Appendix 122, Line 10) In fact the Petitioner admitted that there was never a roadway from Lot 6 to Route 50. (Appendix 152, Line 20)

Petitioner is rebutting a *Bona Fide Purchaser* claim. This was raised in the pleadings in defense to the Counterclaim, but apparently was not used in the Court's ruling and should not be included in this appeal.

A. A right-of-way depicted by plat, within the legal description of the title deed, and set forth by express reservation for the benefit of a subdivision, as well as all owners "such as Petitioner and Respondents here" "whose source of title is derived from (common) Grantors" (Appendix 19) constitutes an "express easement."

The full paragraph from the original deed for Lot 6 states "The roads and rights of way constructed and to be constructed by the Grantors shall be for the use and benefit of all owners of property whose source of title is derived from the Grantors, and the Grantor shall maintain said roads and rights of way until such time as the Grantors have conveyed four (4) parcels of land in this subdivision. At that time, the owners of the various parcels of land in the subdivision shall organize a property owners association which shall then be responsible for the maintenance of said roads and rights of way. Said roads and rights of way shall be kept in good condition for the use and convenience of all such owners, and each owner agrees to contribute equally in the costs of such maintenance." (Appendix 19) What does this mean?

Petitioner argues that this creates an express easement. This argument may be possible for the original Grantees. It could be argued that Petitioner could force the original developer, the Doll's, to construct an easement from Lot 6 to Route 50. That may be possible as a remedy. The Doll's are not the current owners. In fact, the bankruptcy would have terminated their rights and obligations. It is interesting to note that the language above is in the first

conveyances to Lots 3, 5 and 6, now owned by Petitioner. More interesting is the fact that this language ceased to exist after the bankruptcy. All deeds in the chain of title for the three lots since the bankruptcy, including Petitioner's deed, do not contain this express reservation. So at best this easement would have to convey as an appurtenance pursuant to the habendum clause in the later deeds.

The fact is that the developer never created a road from Lot 6 to Route 50. Under Petitioner's argument the express reservation would only be to roads "to be constructed" by Grantor. That is the plain meaning of the language used. It could be argued that if another developer purchased the land then they would become obligated in the acquisition of the venture. The obligation to create a road ceased at bankruptcy and is not transferred from the Trustee through to the current owners. This occurrence is very illustrative of the need for laws on the creation of easements. There should have been a Master Plat recorded depicting the easement from Lot 6 clear down to Route 50. There should have been a metes and bounds description of some reasonable way to identify the location. Mr. Vanscoy testified that there is no way to tell where this road ends. (Appendix 215, Line 5)

There is no proof of record that the land now owned by Respondent was ever part of the subdivision. The plat of record for Lot 6 (Appendix 21) is only for Lot 6. The land now owned by Respondent is outside the platted property. "When a landowner subdivides a part of a tract of land owned by him into lots, streets and alleys as shown upon a plat that he records as required by WV Code § 39-1-13, retaining the land outside that which is platted, it not being marked, bounded nor definitely located upon the plat, no easement appurtenant for the use of the streets and alleys shown upon the plat attaches to the land not thereby bounded or

located." Syl . Pt. 2 *Albert Rose, et al. v. C. F. Fisher, et al.*, 42 S.E.2d 249, 130 W.Va. 53 (1947). In the present case the plat was not recorded as required by WV Code § 39-1-13. The Rose case stands for the proposition that the land not part of the plat of record does not benefit from the rights within the subdivision to the roads. Is it not also true then that the land outside the plat is not bound by an covenants within the subdivision, maintenance fees, etc..? The Rose case offers that the land outside the plat cannot be located or identified and thus not controlled by the plat. *Rose* at 62. This is helpful in the present matter in that the easement "outside the plat" cannot be identified and would therefore be void if it ever existed.

Under the Petitioner's equitable argument that this reservation is an express grant of an easement the Court must look to "Is this second easement necessary?" Petitioner has been declared to have a 30' easement to his property on the "backroad" which was in existence at the time of severance. Contrary to Petitioner's argument that the "backroad" is not traversable is the testimony of Petitioner's witness, Mike Fitzgerald. Mr. Fitzgerald testified at trial regarding Respondent offering a key to use their road as good neighbors that he didn't need a key. Mr. Fitzgerald said "I don't need a key, the other way around is just as good." (Appendix 239, Line 11)

This Honorable Court in a more recent decision upheld the Trial Court rendering a verdict that a reservation for the benefit of other lot owners is not an express easement. *Husson v. Teays Valley Industrial Park Owners and Users Association*, Slip Opinion No. 15-0088 (2016) The Court reasoned that an appurtenance is "a thing belonging to and going with the transfer of a principal thing; used with, dependent upon the thing and essential to it." *Husson* page 7. Just like the Husson case the Petitioner does not have an appurtenant right to the

easement he requests because his land is not dependent upon the easement and the easement is not essential to the use of his land. He may desire Respondent's road as it is a $70,000.00 paved road, but desire does not equal right. Petitioner has an adequate road to provide access. For over 30 years the three lots have existed and been transferred for valuable consideration without the benefit of the Respondents private driveway.

The only evidence submitted was a "Planning Document" that illustrates the concept of 6 lots. There is no evidence that any purchaser ever saw this document. It was not recorded. None of the original deeds refer to the recorded plat. (See argument for Assignment of Error II, III. And IV.)

Petitioners claim for an express easement fails on many levels. Not express, not identifiable, not transferred unless appurtenant, not appurtenant because not essential and just not the law. Based upon the evidence submitted at trial the Circuit Court was correct in finding that there was no express easement from Lot 6 to Route 50.

B. The Circuit Court's finding that the Petitioner does not possess an express easement is clearly erroneous and deprives the Petitioner of this property rights acquired by deed by defeating Petitioner's intended use and complete enjoyment of his property.

This assignment of error has been addressed in the previous to responses and would be incorporated into this subsection. This is again an equitable argument not premised upon any existing law. There was evidence that the "backroad" was just as good and was used in the construction of Respondent's garage. The Circuit Court was correct in its ruling and the same should be affirmed by this Honorable Court.

II. The Circuit Court incorrectly applied the "Unity Doctrine."

Petitioner is incorrect in his argument on the "Unity Doctrine." It is uncontested that the a plat showing easements and the 6 lots was never recorded even though the law required that to be done. It is clear that nobody other than the developer, Mr. Doll, and the Surveyor, Mr. Vanscoy, ever saw this document. It should be noted that Mr. Doll and Mr. Vanscoy were brother-in-laws. It is clear that none of the Deeds reference any recorded "master plat" of the subdivision. The deeds of severance only contain a plat of the individual lot being conveyed. It should be noted that this case differs from the case of *Huddleston v. Deans*, 21 S.E.2d 352, 124 W.Va 313 (1942). The Huddleston case has a master plat that did exist, was later recorded, and the deeds referred to the plat. It should also be noted that the statutory requirement to file the plat pursuant to WV Code § 39-1-13 was not yet enacted at the time of the original conveyances in Huddleston.

A. Petitioner is entitled to use of the Right-of-Way under the Unity Doctrine.

Petitioner is incorrect in his interpretation of the cases cited. In Syllabus Point 1 of both *Cook v. Totten,* 38 S.E. 491, 49 W.Va. 177 (1901) and *Deitz v. Johnson,* 6 S.E.2d 231, 121 W.Va. 711 (1939) it clearly states that the plat must be recorded. In both of those cases the plat was recorded providing notice to the public of the private or public dedication. In both of those cases the deed of conveyance made reference to the recorded plat. In the present case no master plat showing all easements was recorded and the deeds make no reference to the recorded plat. In the *Huddleston* case the deed made reference to the map that did exist.

The Unity Doctrine requires that a plat be recorded. This is now the law and also serves the purpose of putting the public on notice of the existence of the roadways. The recording of the plat also serves as a private dedication to the owners of the lots in the subdivision of the

easements platted. The reference to the recorded plat incorporates the plat into the deed which is in essence the contract between the parties.

In the present case the evidence presented was that the plat was only a planning document. (Appendix 164, Line 15) There is no evidence that the plat was incorporated into the original Deeds. (Appendix 10, 14 and 18) Furthermore, all of the facts relevant to the Assignment of Error I. A. and B. are incorporated.

It does not square with the law on real property and easements to enforce a document that is not of public record and not incorporated into the Deed itself. This slippery slope could lead to lot owners being bound by restrictions that were conceptual plans seen only by the developer.

The Circuit Court was correct in holding that the Unity Doctrine did not apply to the evidence presented.

B. Respondents had record notice of the Petitioner's front Right-of-Way

Petitioner is not correct in his averment that the Respondent had record notice of the front right-of-way. Petitioner's deed is found at Appendix 22-24, does not have the language found in prior deeds regarding the reserved easement (only the language regarding the Utility Easement), and does not have a plat attached. Petitioner incorrectly references the original deed to lot 6 as his in Petitioner's Brief.

Petitioner is playing a little fast with the evidence presented at trial. The "backroad" easement is clearly shown on the respective plats. The reservation clause clearly refers to the "backroad" as being used in common with others. The fact is at least two other property owners possess and express easement along the entire "backroad" and at one time the three

lots were owned by three different families. Conversely, the "frontroad" as the Petitioner now calls it was never constructed by the Grantor, never existed in reality, and was obviously never used. The curious point is that even the Plat for Lot 6 (Appendix 21) terminates the easement at the boundary line for Lot 6. This begs the question of how could it be used with others when it serves no other properties and connects to nothing.

As far as record notice of the front right-of-way the evidence presented in this matter was clear. Petitioner's expert testified at both the hearings that he "assumed" the place where the planned easement would intersect with Route 50. Mr. Vanscoy admitted at trial that from the recorded plat there was "no way to tell where this right-of-way goes." (Appendix 215, Line 5) As previously mentioned the Respondent walked the property before purchase and saw no signs of any roads other than the "backroad." (Appendix 122, Line 10) Not to be forgotten is the fact there did exist, at the time of severance, a roadway from Route 50, up through the trailer park, up the hill to the well near the contested easement now called the "frontroad." (Appendix 82) Mr. Vanscoy began by saying the only place the road could come out was on the 30' entrance where Respondents private driveway enters Route 50. Eventually Mr. Vanscoy remembered another potential road that was in existence at time of severance. (Appendix 165, Line 5 – 170, Line 18) (Appendix 215, Line 5 – 219, Line 13) This roadway went through the trailer park that was being leased by Mr. Doll, Developer, at the time of severance. To be clear, this other roadway does not go completely to Lot 6 but is very close.

Based upon the fact that the "frontroad" was never constructed there would be no notice from a visual inspection. Based upon the fact that the plat for lot 6 does not show a complete road, the road would be outside the platted property and not essential or otherwise

appurtenant. Respondent would incorporate the argument from Assignment of Error I. that relates to the *Rose and Husson* cases. Based upon the testimony of Petitioners own expert that there is no way to tell where this easement goes from the recorded plat. There is no record notice sufficient to show the existence of a non-existent road. The Petitioner did not come close to meeting their burden on the existence of an easement. The Circuit Court was correct in its ruling that the Petitioner did not possess an easement from Lot 6 to Route 50.

III. The Circuit Court misapplied the law in requiring that Petitioner's right-of-way must first be "opened" to exist.

Petitioner's argument is not in concert with the occurrence at the lower proceeding. Respondent's Counsel conceded at the first hearing a roadway could be conveyed that did not yet exist by one of two ways. A recorded master plat would serve as a private dedication and if properly referenced in the deeds for the subdivision the law is clear that all owners acquire an implied easement to use the roadways on the recorded plat. The second way would be an express grant with a sufficient description for the location, preferably metes and bounds. Neither of these two methods occurred. Again, Petitioner is citing cases that are factually different in that a Master Plat was recorded in the cases cited.

The word "opened" is not used in the Trial Order. The Court found that the easement from Lot 6 to Route 50 was never created, did not exist and there was nothing of record sufficient to determine the location. These findings are all based upon the evidence in this matter.

The Circuit Court was correct in his ruling and should be affirmed.

A. The Circuit Court's emphasis on the fact that "no actual road was ever constructed or came into existence" (Appendix 103) goes against the long standing legal precedent that an existing right-of-way is not defeated by mere non-user.

Petitioner's argument is misplaced. Only the Trial Court can interpret its own orders but there is no suggestion in the order that the decision was based upon non-use. A more logical interpretation of the order is that if there was a reservation it applied to roads "constructed by Grantor." Grantor did not construct any more roads, filed bankruptcy and thus the roadway could never spring into existence. A simple interpretation is that the Court could not find any evidence for the location of this "frontroad" sufficient to declare the easement.

In a declaratory judgment action, the Court reviews the evidence and declares the rights and interests of the parties. The Circuit Court was correct in declaring that the easement was not possessed by the Petitioner for several reasons. Respondent incorporates all proceeding arguments.

B. Petitioner's right-of way is an easement created by express grant and therefore cannot be extinguished by nonuser.

Petitioner's argument relies upon the fact that this Court will reverse the Trial Court ruling that the Petitioner does not have an express easement. Respondent would incorporate the entire argument from Assignment of Error I. A. and B..

Respondents have never conceded that Petitioner has an easement from Lot 6 to Route 50. There is no inference from the Trial Order to believe that the Circuit Judge relied upon the Affidavit in making his determination.

In Arguendo, should this Court reverse the Circuit Court and rule that Petitioner has an express easement, then the testimony of Mr. Shrout would become necessary to prove abandonment. Non-use would be evident. The intent to abandon would be from the mouth of Mr. Shrout. This issue is not ripe at this time.

the mention in the description. This theory is premised upon the intent to pass all that you have and that which is necessary for the land. Once again, see Husson on was this essential since there is other access that actually does exist and did and the time of conveyance. See Rose on that which is outside the platted area.

The Circuit Court did not err and was correct in the ruling.

V. The Circuit Court erred in finding that the right-of-way in question did not enter U.S. Route 50 at the location proffered by Petitioner, which goes against the clear weight of the testimony.

Petitioner is incorrect regarding the survey markers found. They had nothing to do with a right-of-way but were merely the boundary markers. Petitioners expert testified at both hearings that he assumed this would be the only place it could exit onto Route 50. It cannot be overlooked that he also testified that there was another road and that there was no way to tell where the easement went from the plat of record. (Appendix 215) Even the plat he prepared as a "planning document" does not show the intersection with Route 50. (Appendix 68) Petitioner's expert when cross examined about where the easement was intended to be located plainly stated that "Where was the right-of-way intended, I DON'T KNOW." (emphasis added) (Appendix 170, Line 17)

Does it not stand to reason that the roadway in existence, used by Developer to access a well near the corner of Lot 6 would be the plan; not the creation of an entirely new road. Perhaps there was a backup plan to use the 30' if the developer could not acquire the land he was leasing. But these are assumptions, just like the Petitioner's theory. Simply stated, verdicts must be based on fact, not assumptions.

IV. The Circuit Court erred in finding that no right-of-way existed, notwithstanding a finding that the Plat to Lot 6 "illustrated an easement exstending from the southwestern corner" and that "the original developer may have intended to construct an easement." (A.R. 103).

The clear reading of the Trial Order says "Although the original developer MAY (emphasis added) have intended to construct an easement leading from Lot 6 to US Route 50, this was never done." (Appendix 103, No: 10) It appears that the Circuit Court opined that this MAY have been his intent, but that was not sufficient to establish the existence of the easement. Respondent repeats, the reservation was for roads that may be constructed by Grantor. Until the Grantor constructs the road then the easement has not come into existence. Again, a non-existent easement may be created two ways, neither of which occurred in the present case.

Any cause of action from original Grantee would have been against the Developer. That possibility was extinguished via bankruptcy. Furthermore, post-bankruptcy the reserved easement language disappears from the chain of title. Thus we are left with appurtenant rights passing by habendum and this easement is not essential and therefore not appurtenant. *Hussen* page 7.

Better proof of intent would have been to follow the law and record a master plat clearly showing all easements and then incorporate the master plat by reference into each deed.

Petitioner is mixing theories. There is no express grant or reservation for this non-existent easement. Again, Respondent points out this was stated by Petitioner's Counsel. (Appendix 171, Line 2) At best there is an implied easement based upon the Plat for Lot 6 and

The location of the easement is only an assumption. There was another road nearby in existence at the time of conveyance crossing land leased by developer. After hearing all of the evidence at the Temporary Injunction Hearing and the Bench Trial, the Circuit Court opined correctly that "The testimony was that it was assumed to enter US Route 50 at the location of Plaintiff's driveway. There is also evidence of another roadway that entered US Route 50 at a different location. The other roadway was in existence at the time of severance and the Plaintiff's driveway was not in existence at that time." (Appendix 103, No 9)

The Circuit Court was correct in ruling that the Petitioner failed to meet their burden on the location of the easement and the ruling should be affirmed.

VI. The Circuit Court erred in denying Petitioner damages in his Counterclaim.

Respondent has been unable to understand this claim. Petitioner made some allegation regarding his loss due to the inability to remove logs he timbered. He estimated $40,000.00. He testified that he had timbered maybe 2 acres and the worth was seven to ten thousand. However, that would be 1/3 of the land and the math doesn't work. Interesting is that the pictures showed that the timber had been removed. Petitioner then said he cut it up for firewood. Regardless of if the Circuit Court found any credibility in this witness the problem is causation.

Petitioners theory is that the Respondents are liable for resorting to aid of law, filing a law suit and seeking an injunction. The Circuit Court granted the Temporary Injunction after Petitioner had notice and an opportunity to contest the Respondent's Motion. The Circuit Judge granted the temporary injunction. The Order of the Court prevented the use of the

Respondent's private driveway. Petitioner did request a bond to cover the damages, the Circuit Court set bond and the Respondent posted the bond. However, the Petitioner did not prevail at trial and the bond was returned to the Respondents. Clearly no liability for loss was ever established. Nothing on the record mentions this and no evidence of liability was ever introduced.

Where in the law is an individual liable for the Order of the Court? The Circuit Court was correct ruling against the Petitioner on the issue of damages as no liability was proven. The order of the Circuit Court should be affirmed.

VII. The Circuit Court erred in entering two orders for the same hearing

Respondent can only say that the Court admitted to entering Petitioner's proposed order (Appendix 31) in error. The Circuit Court stated that Respondent's proposed Order (Appendix 34) was more appropriate. (Appendix 186, Line 16) This can only be harmless error. The Trial Order is the final order. The Trial Order is the order being appealed. Petitioner's brief deals with the rulings from the Trial Order.

CONCLUSION

When applying the findings of fact made by the Trail Judge to the Conclusions of law the verdict was proper and just. The Circuit Court heard the evidence and declared the rights of the parties.

Respondents request this Honorable Court afford the following relief;

1. Affirm the rulings of the Circuit Court;
2. Find that the Trail Judge's "findings of fact" were not clearly erroneous;