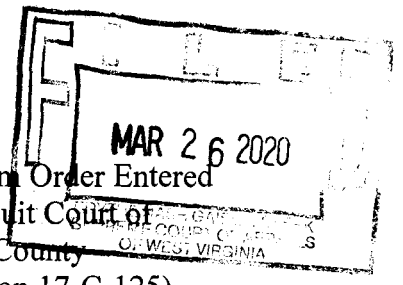
IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
CASE NO. 19-1117



Phillip D. Tice,
Defendant Below , Petitioner

v.

John S. Veach,
Plaintiff Below, Respondent.

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

PETITIONER'S OPENING BRIEF

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IV. STATEMENT OF THE CASE

The Plaintiff/Appellee John Veach, ("Veach") filed the suit below on October 4, 2017, in the circuit court seeking declaratory and injunctive relief against Defendant/ Appellant Philip Tice ("Tice"). JA 4. The case involved a dispute over *the location* of a right of way over and across Tice's 17-acre tract of adjoining real estate for the benefit of Veach's 66-acre tract. Veach's preferred location for the right of way was at a location which he claimed had "ripened into a prescriptive easement for the benefit of [Veach's] land." JA 7, ¶ 14. Paradoxically, Veach's complaint asserted that the easement had been *deeded* to Veach by virtue of recorded chain of title. JA 5, ¶ 6.

Tice wanted Veach and his employees to use the deeded right of way which calls for Veach to travel southward, after leaving the state road, avoiding the buildings on Tice's property. JA 387. Veach wanted to travel slightly north after leaving the state road, which put Veach travelling through the middle of Tice's property and through the area where Tice's buildings

[1] For clarity, the granted easement will be herein referred to as a right of way. Veach's claimed prescriptive easement will be referred to as an easement.

stood. *See* JA 305 referring to the area of an interior gate depicted on the Exhibit R photo with a pile of gravel next to Tice's garage apartment on the path that Veach chose to use. JA 406.

The matter had escalated following Mr. Veach's attempt to have Mr. Tice arrested by the local sheriff for the above-mentioned gravel pile near buildings Tice had under construction which was located where Veach wanted to use the right of way. *Id.* Tice then had Veach served with a no trespassing notice. JA 392. It is undisputed that the deed designated southern route was continuously open and available. Again, Tice had previously requested that Veach use that southern route which passes to the south, averting his buildings. JA 305. Tice's request was based on the above-mentioned deeded right of way agreement which specified that the right of way was to head to the *south west* after leaving the public road and proceed south of a then existing "tool shed" which Tice says was in the same vicinity as his existing buildings. *See* JA 387. Veach had insisted that he was entitled to continue to proceed *north east* after leaving the state road and travel through the area where the torn down tool shed had been located and Tice's garage apartment was constructed instead of going around that area and heading to the south.

Tice's answer was thereafter duly filed which, in substance, admitted the existence of the deeded right of way but denied that Veach had established the proper location of such right of way. Tice denied that Veach had a prescriptive easement over this northern route. JA 11 ¶¶ 4, 6. Written discovery was exchanged between the parties and the trial ultimately commenced on July 10, 2019, before a six-person jury and one alternate juror.

In pretrial, in court discussion the day before trial, Tice's attorney pointed out that "[e]ither the jury finds that the deed controls or you establish the roadway by prescription easement." Veach's attorney responded "True." JA 65. However, Veach thereafter deliberately befuddled the well-established law both in his direct testimony and through arguments of his

counsel by simultaneously pursuing both theories at the same geographic location. But, *see* JA 137 in which Veach testified, referring to the 1960 deeded right of way, "I think I have a right of way beyond that as well."[2] This statement conflicted with Veach's counsel's opening statement that his surveyor would testify "...that he believes that he has located that right of way both for purposes of the prescriptive easement and for the expressed easement." JA 80.

Veach then presented an expert witness, attorney Terry Reed, who simply testified that Veach was vested with a right of way by virtue of the 1960 deeded agreement--a matter to which Tice had admitted in his answer and which was never in dispute. JA 142-157. Next, Veach presented his surveyor, Donald Teter, who had prepared a plat which he dated July 1, 1992.[3] Teter claimed that he prepared the 1992 plat of the 1960 right of way without ever reviewing the recorded deeded right of way description. In fact, Mr. Teter deceptively testified that he "did not have access" to the 1960 deeded right of way despite the fact that this right of way was clearly available to the public, since the deed to same was properly indexed and recorded in the Clerk's Office in Raleigh County, West Virginia, where he was professionally required to look prior to undertaking a survey of the right of way. JA 164. Mr. Teter then provided the jury with testimony regarding his observation of "where [he concluded] the road used to be" (JA 163). Using historical aerial photography that he assembled for purposes of the trial, he testified that "...it appears there is a road, not used frequently ..." (JA 170).[4] When challenged over the

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[2] Veach was the very first witness. In response to the above testimony, Tice's counsel quipped: "On the path you have chosen." A reasonable jury would truly be misled thereafter as Veach's counsel then jumped up objecting, (in effect to his client's testimony) and stated in front of the jury: "We contend the actual right of way is set forth in the agreement [deeded right of way] in 1960."

[3] JA 401. This Exhibit M to the trial record does not contain a surveyor seal. However, it is acknowledged that Exhibit V, a large version of same which was admitted in evidence but is difficult to reproduce, does contain the surveyor's seal with a handwritten date: "July 1, 1992."

[4] Discussed below in Section C of the Argument, is the fact that, regardless of whether Teter was displaying geological formations or travel across the grass in the field, no evidence of any adverse use was presented to the jury during the period relevant to this part of Teter's trial presentation.

difference in bearings as contained on the deeded right of way and his rendition, Teter simply rejected the deeded right of way stating: "[i]t makes no difference in where I observed the right of way to be in use at that time [of the 1992 survey]." Veach's mutually exclusive theories which replaced the deeded right of way with an alleged prescriptive easement were pursued through the conclusion of the trial and ultimately adopted in the court's final judgment order. JA 16-17, ¶¶ 2-3.

In addition to Veach's experts and testimony from the parties, both sides called lay witnesses to testify regarding tire track evidence in the grass across Tice's hay field to represent Veach's occasional and seasonal use of Tice's land to access Veach's land, and the frequency and nature of that use.[5] The gist of that testimony (discussed in more detail below) was that the use was somewhat seasonal, was occasional and primarily was for agricultural purposes. The case was submitted to the jury on the second day of trial. The jury was given instructions on both the law regarding deeded easements and prescriptive easements. JA 422-429.

Parroting Veach's complaint, the jury was provided with two verdict forms and required to answer both. JA 15-16. The first was for determination of the location of the deeded easement and for its width. JA 15. The second jury form was for determination of whether Veach had proven the elements of a prescriptive easement over Tice's lands. JA 16. On the first of the two forms, the jury found that the location of the express deeded right of way was at the location "as claimed by Plaintiff John S. Veach." JA 15. The jury found the width of the express deeded right of way to be 14 feet. *Id.* On the second form, the jury found that Veach had also proven the elements of a prescriptive easement over Tice's real estate. JA 16.

[5] *See* JA 405 (photograph taken by Veach in 2016) clearly reflecting that no road exists across the field even in the area immediately beyond Tice's house and his interior fence. The specifics of the witnesses' testimony are discussed in more detail and with references to the record in Section C of the Argument, below.

In its final order, the trial court then entered judgment adopting the jury verdict. In the order, prepared by Veach's counsel, and consistent with his strange evidence and argument at trial, the court further found that *the prescriptive easement existed over the granted easement* with its center line as surveyed by Veach's surveyor. JA 17. A motion to set aside the verdict was timely filed and was heard on October 31, 2019, resulting in its denial by order entered on November 21, 2019. From that order, Tice timely filed this appeal.

V. SUMMARY OF ARGUMENT

The trial court committed plain error in determining that a prescriptive easement could exist over a deeded right of way. *See* Judgment Order JA 16-17 ¶¶ 2-3. That manifest error, originating in Veach's complaint (JA 4), was harmful. This erroneous determination by the trial court facilitated Veach's stratagem to ignore the true location of the deeded right of way in favor of Veach's preferred alternate route which was highly inconvenient and detrimental to Tice and his use of his property.[6] The resulting verdict affords Veach a "cake and eat it too" result. Veach's best evidence to support his claim for a prescriptive easement was that he used Tice's hayfield with no defined road and which he claimed was put to intermittent, seasonal and occasional use. Even if Veach had been able to prove the elements of a prescriptive easement it could never be expanded beyond the scope of use offered at trial – at best seasonal, intermittent use. *See*, for example, JA 225 and JA 185 and *see* Syl. Pt. 11, *O'Dell v. Stegall,* 226 W.Va. 590, 703 S.E.2d 561 (2010). This may explain why Veach choose to confound the two theories, illicitly placing the deeded right of way at the location he claimed had "ripened" into a prescriptive easement. By corrupting the law of easements with the mutually exclusive deeded right of way claim, interposed at the same location as the prescriptive easement, Veach is

[6] *See* JA 406 and discussion below regarding Veach's right to construct a road over the center of Tice's hayfield.

afforded an illicit claim that defames the title to Tice's real estate. Absent reversal of the trial court's Final Judgment order, Veach will now claim the right to build a permanent road (paved with gravel or macadam as he may choose) across and through Tice's hayfield and use it as often and for whatever purposes he may desire as an appurtenance to his tract of land. Syl. Pt. 1, *Davis v. Jefferson County Tel. Co.*, 82 W. Va. 357, 95 S.E. 1042 (1918). *See* express provision contained in deeded easement for maintenance (JA 388) and see trial testimony of Veach's expert, Terry Reed (JA 142-158). Veach's transparent scheme originated with aberrant allegations in his complaint.

In his complaint, Veach illegitimately asserted that "the right of way, over Defendant's 17-acre tract, has ripened into a prescriptive easement for the benefit of Plaintiff's land." JA 7. Veach promoted the error throughout the jury trial using a surveyor, Donald Teter, who falsely suggested that he could not find the deeded right of way in the courthouse records, and then sought to justify his preparation of the 1992 plat depicting a different right-of-way with smoke and mirrors. JA 180. The surveyor effectively testified that he failed to research the records for the description of the right of way before he prepared the plat depicting it. Astonishingly, surveyor Donald Teter simply testified at trial that he did not know about the 1960 deeded right of way and had not considered the metes and bounds bearings therein which called for the owner of said right of way to bear southwest after entering Tice's land and travel south of a toolshed, thus avoiding the buildings situate on the Tice real estate. *See* JA 387 and *see* 209.

However, Veach's complaint referred to above at JA 5, ¶ 7 reads:

> 7. The location of said right-of-way is specifically defined in a deed from Edith Wamsley, et al., to Eunice E. McLaughlin and Marion H. McLaughlin, dated August 18, 1959, of record in the aforesaid Clerk's Office in Deed Book 217 at page 257.[7]

[7] The described right of way is actually recorded in Deed Book 219 at page 515 in said Clerk's Office.

Through this machination, Surveyor Teter was able to present to the jury a smoke and mirrors testimony that ignored the deeded and prescribed path of the right of way.

Though conspicuously not referenced to the above quoted ¶ 7 of Veach's complaint, Teter's plat was attached to the complaint containing Veach's preferred location of Veach's proposed prescriptive easement/deeded right of way. *See* JA 10 which contains Teter's depiction of the right of way which became Exhibit M at trial. JA 401. *See* also Exhibit A attached hereto which includes a rough sketch drawing depicting our argument as to the second bearing of the deeded right of way, which Teter ignored along with a line to the Veach gate.

In order to easily compare the two descriptions, it is necessary that they have the same metes and bounds beginning and ending points. However, instead of describing the right of way with a beginning point at Route 24 (corresponding with the deed), Teter's plat description begins at Veach's land and runs backwards to Route 24, thus concealing the discrepancy between the two descriptions. Therefore, to compare Teter's alternative description with the accurate deed description, Teter's metes and bounds would need to be transposed. The deed description goes from Route 24 to Veach's lot. Teter's plat goes from Veach's lot back to Route 24.[8]

Starting at Route 24 and heading north to the Veach line, to conform to the deed, Teter should have had metes and bounds as follows: "N 37 W 78' (+ or -); **N 38 -45 W 162.5**; N 56-33 W 144.2; N 44-41 W 563.7"[9] (Emphasis supplied.) Thus, it can be seen that Teter's second metes and bounds call **(N 38 -45 W 162.5)** goes in the opposite direction from the description

[8] Reversing the direction of the calls to pair with the deed description simply involves changing south to north and east to west while retaining the same angular measurements and lineal distances.

[9] Although Teter does not add symbols or words to describe his calls, it will not be disputed that the first number or set of numbers constitutes the angle in degrees and seconds, and the second number constitutes the distance in feet. Thus adding text to Teter's calls to further pair with the deed description, Teter's description will read: North 37 degrees West for (approximately) 78 feet then **North 38 degrees 45 seconds** West for a distance of 162.5 feet, thence North 56 degrees 33 seconds West for a distance of 144.2 feet, thence North 44 degrees 41 seconds West for a distance of 563.7 feet.

provided for in the deed. *See* below. The effect of this discrepancy is that, instead of turning south at the top of the hill on Tice's driveway before reaching the old tool shed that was on Tice's property, Teter's plat continues to follow Tice's driveway northward through the spot where Tice tore down the tool shed and which is now immediately in front of Tice's garage apartment. *See* JA 404 looking southward down the hill on Tice's driveway toward Route 24 located at the bottom and *see* the bend in the driveway to right heading further northward (Teter's N 38 -45 W 162.5) where the deeded right of way specifies that it bends southward to the left. *See* also JA 405 also looking southward toward Route 24 but farther up the hill in the level newly graveled area where the tool shed was torn down in front of Tice's newly constructed garage apartment. Finally, *see* JA 406 also taken from the direction of Veach's property looking southerly and depicting Tice's interior gate and Tice's garage apartment with a pile of gravel in front referred to in the Section IV Statement of the Case above and for which Veach sought to have Tice arrested by the Sheriff. JA 312.

In short, Teter's description directly conflicts with the deeded description referenced in Veach's own complaint. The right of way deed agreement calls are as follows: **West** (from Route 24), then **South West** (around a tool shed) and then **North West** (in a straight line to the common boundary of the parties). The complete text of the deeded right of way reads as follows:

> ...the private road right of way leading from State Secondary Road No. 24 shall run from said State Secondary road in a westerly direction over the driveway or lane leading to the house located on said 30.0262 acre tract; thence the same shall continue in a **southwesterly** direction around and to the south of a tool shed now located on said premises; thence in a northwesterly direction a straight line to the line fence separating the property of the parties of the first part and the party of the second part. (Emphasis supplied). JA 387.

As is highlighted in the above description, Teter's plat survey discrepancy is in his second call which is **North** 30 degrees 45 minutes West instead of **South**, as called for in the deed. As can be seen from Teter's plat, due south would put the second call back toward Route 24. Therefore, Teter should have made his second call to the **South instead of to the North.** A proper description would have put the second line of the right of way nearly parallel to Route 24. It would have brought the right of way to its intended course, first leaving Route 24 for a safe distance, then sharply turning south toward Tice's southern boundary to bring it below a then existing tool shed and then running along Tice's southern boundary straight ahead to the common line of the parties. Please *See* Exh. A attached hereto as a rough depiction of the deeded right of way.

Surveyor Teter's plat simply does not conform to the very deed description which Veach claimed as the source of his deeded right of way. This explains why Veach found it necessary to adopt an "alternative prescriptive easement theory" for the right of way location, ignoring the mutual exclusivity between deeded rights of ways and prescriptive easements at the same location. *See* Veach's strange trial testimony that he has "more" than the deeded right of way. JA 137.

At best, the self-serving testimony of this surveyor was unprofessional. It cannot be said that Veach's surveyor, Donald Teter, complied with his obligation to "...use methods and equipment suitable for the purpose of the survey" where he failed to base his survey on the description of a deed of record. *See* WVSCR 23-5-7.2. c.

In any event, the judicial process before the trial court was tainted with the illegitimate use of two mutually exclusive easement law theories and the testimony of an expert willing to claim that he could locate a deeded right of way without considering prior deed description

thereof. The result is a Judgment Order that is inherently and plainly wrong which should be reversed.

Aside from Veach's hybridization of easement law to gain his strange verdict, it will be shown in this brief that Veach did not prove the elements of a prescriptive easement in the first place. Instead, there was nothing in the record to indicate any historic use that may have been made of Tice's open hayfield (the subject of Veach's prescriptive easement claim) that was "...anything more than a neighbor accommodation" by the owners of the open field. *See O'Dell v. Stegall* 226 W. Va. 590, 621, S.E.2d 561, 591 (2010). Moreover, it is undisputed that Veach's real estate was, at all times, served by alternate access to the public highway.

VI. STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument is not necessary in this case as the dispositive issue regarding the law of easements has been authoritatively decided in such opinions of this Court as *O'Dell v. Stegall, supra.* It is further submitted that there exist no facts in dispute that are material to the appeal because it is agreed that Respondent Veach is vested a title with an easement by grant. The legal arguments will be adequately presented in the briefs and the record on appeal and the decisional process would not be significantly aided by oral argument.

VII. ARGUMENT

Standard of Review. A de novo Standard of Review applies to the gravamen of this appeal as it is grounded on a question of law, namely, the trial court's misapplication of the law of easements. *O'Dell v. Stegall*, 226 W. Va. 590, 203 S.E.2d 561 (2010).

A. The Trial Court Committed Plain Error as A Matter of Law in Ruling That Respondent/Plaintiff Veach Could Establish the Existence of A Prescriptive Easement Over And Across His Pre-Existing Granted Right Of Way.

The trial court erred, as a matter of law, in ruling that Mr. Veach could establish a prescriptive easement over Veach's pre-existing granted easement. *See* Final Order JA 14 and

Order Denying Motion to Set Aside JA 436. It is well established that prescriptive easements are created only by the hostile and unlawful use of another's land. *See* Syl. Pt. 5, *O'Dell v. Stegall*, 226 W. Va. 590, 203 S.E.2d 561 (2010) and *see* Justice Ketchum's scholarly opinion reading in pertinent part: "The doctrine essentially rewards a trespasser, and grants the trespasser the right to use another's land without compensation." *Id*, at 599; 570. It was established in the case below that Veach was previously granted an easement over Tice's real estate. *See* Jury Verdict Forms JA 15 and Final Order JA 16. Therefore, Veach's use of the land over his granted easement could neither be hostile to the fee owner Tice nor an unlawful use of Tice's land. Accordingly, Veach's use of a granted easement could not ripen into a prescriptive easement over his granted easement as alleged in Veach's complaint (JA 4) and promoted at trial. As is more clearly addressed in the next section of this Brief, at issue was simply the location of Veach's granted easement. Extraneous to the legal issue on appeal, Veach's design manifests an intent to spitefully fix the location at a place on the lot inconvenient for Tice and which dramatically devalues his privacy, right to the use and enjoyment of his property, and to its value. *See* JA 405 depicting the path that Veach wishes to use directly in front of Tice's garage apartment.

B. Because Of The Court's Error In Permitting Plaintiff To Establish The Location Of The Granted Easement Based On His Purported Adverse Prescriptive Use, The Court And Its Jury Ignored The True Location Of The Granted Easement Of Record And Arbitrarily Placed It In A Location Contrary To The Court House Record But Where Plaintiff Deemed Convenient.

It cannot be reasonably denied that the intent of the granted easement, as set forth in Exhibit 1 admitted into evidence (JA 387), was to avoid running it through buildings situate on the servient estate. Prior to the Deed Agreement set forth in Exhibit 1, a right of way had been reserved in 1936 in the subject chain of title to Tice's servient estate for the benefit of what

became Veach's real estate. *See* JA 146.[10] However, this right of way contained no specific description. By virtue of the 1960 right of way deed agreement, the respective property owners set a more definite written location of the easement.

Significantly, the 1960 deeded right of way agreement contains only three bearings (calls), not four - as proposed by Veach and his surveyor. *See* bearings (calls) set forth on Teter's plat referenced above (JA 401). The description in this 1960 deed commences at the driveway leading from Route 24 to what is now Tice's tract. There exists no dispute that the same referenced driveway remains today, and that this driveway is at the same exact location as it was in 1960. However, the only bearing (call) from Teter's Plat which matches the 1960 deed description is the first bearing which begins at Route 24 and starts up the existing driveway toward the house. The problem arises at the point where the right of way was to depart from the driveway as the driveway comes up the hill toward the buildings and now bends to the right (more northerly). *See* JA 404 looking south down the driveway toward Route 24 at the bottom. Ascending the hill from Route 24, at the point where the driveway bends to the right (in a further northerly direction), the deed agreement calls for the right of way to depart from the driveway and head southerly to avoid the buildings (referred to as the "tool shed"). But, because Teter did not use the deed description, but followed what Veach wanted, he erroneously followed the driveway up the hill and into the buildings then existing. Although blurry on Teter's Exhibit W (JA 417), it can be seen that Teter ran the right of way directly through a building. From Route 24, Teter's second bearing should have directed the right of way to the left (south), but instead, he platted it as heading to the north. Where Teter was required to plat the road

[10] It may be noted that attorney Harry Reed, who provided this testimony from the records filed in the courthouse, curiously testified that he was engaged to determine *if* there was a right of way across Tice's property benefitting Veach and he determined that there was. JA 146. This testimony was, standing by itself, misleading and contrary to the facts and the pleadings. All evidence in the case was that Tice *wanted* Veach to use the deeded right of way.

departing the driveway in a southerly direction, he followed the driveway platting it in a northerly direction and into the buildings at the top of the hill which the 1960 deed called to avoid.

In the 1960 deed, the first bearing (call) reads: "...the private road right of way leading from State Secondary Road No. 24 shall run from said State Secondary road in a westerly direction over the driveway or lane leading to the house located on said 30.0262 acre tract." The second bearing (call) is blatantly ignored by Veach and his surveyor. With the second bearing or call, the "private road right of way" was to leave the driveway in order to "...continue in a southwesterly direction around and to the south of a tool shed [then] located on said premises...." As pointed out above, Teter's plat takes the right of way northerly instead of southerly. By so doing, Teter's plat takes the right of way directly through a pre-existing building, a "monument" expressly set forth in the deed which Teter rather brazenly admitted at trial that he ignored. Although Veach and some of his witnesses claimed they were unaware of the location of the tool shed structure, its existence, as appears in Defendant's Exhibits 2 and 3, was not denied. JA 390-391. Also not refuted was the location of the old tool shed (combination of buildings) which sat at the top of the hill in the area near where Tice's garage apartment is located. *See* JA 294. At this point, the existing driveway which Veach and his surveyor claim is part of the deeded right of way, is located directly over the spot where the toolshed structure once stood. *See* photo JA 405 gravel placed in front of Tice garage apartment. Therefore, the 1960 private right of way description requires a departure from the driveway (in a southerly direction to the left) before reaching the location of Tice's garage apartment.

Accordingly, without question, it was surveyor Teter's professional obligation to make inquiry as to the location of the tool shed in 1992. The first bearing is not an issue. However,

Teter's bearings from that point on are wrong. When testifying as to the critical second bearing (call), which was to have headed south, Teter admitted he did not "...try to address" the North/South discrepancy because he believed there were "uncertainties" relating to the position of the toolshed, saying "...[he]did not have evidence available to try to address [this discrepancy]." JA 208-209. His testimony in this regard is without credulity because, in truth, courthouse records have always been available and Teter was obligated to examine all existing easements of record prior to drawing up his new plat. Presumably, it will not be disputed that the surveyor's first step in rendering a survey is to check the courthouse records for a description of that which he or she is to survey. Teter did not try to address the tool shed's location because he conveniently failed to make himself aware of any pre-existing deeds, plats, restrictions or easements of record in favor of his client's preference and statements as to the right of way's location.[11]

Incredulously, Teter further attempted to justify his omission/error by effectively claiming that the deeded description did not matter. *See* JA 185. Teter brazenly claimed at trial that he was entitled to ignore this pre-existing monument of record (the tool shed), which is not true.[12] Instead of considering the intent of the deeded right of way, Teter speculated the use of Mr. Tice's lands and created an alternative right of way for his client, Mr. Veach. Veach knew where the buildings were if, as he claims, he passed through them when using Tice's property after purchasing his property in 1990. The unrebutted evidence at trial is that Tice did not begin to tear the buildings down until 1999. JA 291. Accordingly, the buildings were also there when Teter conducted his field survey. Yet, at trial Teter testified that he did not know where the

[11] It should not be overlooked that the detailed analysis Teter provided at trial to justify his pre-existing plat, was not part of the study he made to prepare the 1992 plat.

[12] It is unlikely that Veach had not been provided a full title exam prior to his purchase complete with the description of the right of way to his property.

buildings were located. JA 209. Yet he deliberately accommodated Veach by running the right of way on his plat directly through the area of the buildings without searching for the deeded right of way location. Tice was not provided with Veach's plat until after Tice had already invested substantial labor and money into the new construction, some 10 years after Teter's survey plat was made when Tice received a letter from Veach's attorney. JA 307.

The 1960 deed description's third and final bearing (call) is a straight line to Veach's property reading: "thence in a northwesterly direction a straight line to the line fence separating the property of the parties of the first part and the party of the second part." JA 387. Clearly the deed description does not take the right of way up through the center of Tice's property and through the middle of his hayfield. The manifest intent of the deeded right of way agreement was to avoid the buildings on Tice's property and run the right of way southerly and then northerly along the Brown boundary line until it reached Veach's gate.

Finally, and of critical importance to the rights of the parties, is the fact that the 1960 recorded deed agreement provides that: "The party of the second part covenants and agrees that he will at his own cost and expense maintain the private road right of way above described from the end of the driveway to his property line." *Id.*

Veach's arguments and evidence presented through Teter rendered it impossible for the jury to properly apply the law by permitting Veach and his surveyor to locate the right of way where Veach claimed to have used it adversely. The jury accepted Teter's illicit proposal that it did not matter what the deeded easement required, but it does matter. Veach's attorney consistently improperly argued that Veach's prescriptive easement and granted right of way were one and the same to be proven by Teter. *See* opening statement JA 80, 82. In counsel's closing he stated: "Again, if it's prescriptive easement, if you find that, that's the end of the story there.

Don't worry about the location." JA 362. This statement is untrue where the location of the right of way is specified in a deed.

As is pointed out, *supra*, both Veach's expert, Teter, and his attorney told the jury that the described location in the deed did not matter but would be overridden by its alleged actual use. In the words of Veach's counsel quoted above the simple solution for the jury was to find that the deeded right of way was a prescriptive easement. Then they would not have to worry about its placement.[13] JA 362 and see Teter's testimony at JA 185. Indeed, the jury did not worry about the deeded call to go south around the buildings. Veach succeeded in convincing the trial court to set the hybrid deeded/prescriptive easement heading north through the buildings.

The jury was misled by Veach to ignore the elements of a prescriptive easement, most notably the requirement of adversity. Suffice it to say, there was no hostile use if the use had been granted. And, if there was no hostile use, then there was no prescriptive easement. That matter is the subject of the next section.

C. The Court Committed Error in Finding That A Prescriptive Easement Existed Because the Factual Evidence Was Wholly Insufficient to Establish Same by Clear and Convincing Evidence.

This Honorable Court provided West Virginia with a landmark decision providing clear guidance on the question of prescriptive easements in *O'Dell v. Stegall*, *supra*. In *O'Dell*, this Court held:

> 1. A person claiming a prescriptive easement must prove each of the following elements: (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.

[13] It is respectfully submitted that the location of the deeded right of way should never have gone to the jury. The trial court should have appointed its own neutral surveyor, if necessary, and submitted the matter to a special commissioner.

Id., 596-597

This Court further held in *O'Dell* that: "...each element of prescriptive use as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim." *Id.*, Syl, Pt. 3. To constitute adverse use, the use must be "...without the express or implied permission of the owner of the land." *Id.* Syl. Pt. 5. In fact, to be adverse, the use must be a use that "...creates a cause of action by the owner against the person claiming the prescriptive easement." *Id.* [14] Equally important to the case at bar, this Court held 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.'" *Id.*, at 598, quoting Syl. Pt. 3, *Monk v. Gillenwater*, 141 W.Va. 27, 87 S.E.2d 537 (1955).

Therefore, the order entered below works two significant wrongs upon Tice's property, contrary to law. In addition to the inconvenient and harmful relocation of the deeded right of way to suit Veach's purposes, it expands the use far beyond that which he allegedly established for the easement by prescriptive use. The previous limited use to which Veach claims to have put to the pathway over Tice's property, pales in comparison to the full use and enjoyment thereof which accompanies a right of way by grant which he now claims for the pathway between Tice's buildings and over his open field. Therefore, Veach's verdict and final Judgment Order cannot stand. There exists absolutely no evidence that Veach used the pathway for all purposes at all times. In fact there is no road over the field. There existed no defined courses or

[14] This point is critical to the legal analysis of the facts at bar. We could not find a case like this one in which a party claimed the same course for both a granted and prescriptive easement. But to say that Tice had granted it, is to say that he had, at the very least, a legal obligation to refrain from ousting Veach until the location of the deeded easement was resolved. Therefore, by Veach's own theory, his use was never adverse!

widths necessary to satisfy the requirements of *O'Dell v. Stegall, supra. See id.*, Syl. Pt. 13 and the failure of plaintiff O'Dell to provide a "precise line" thus failing that requirement for a prescriptive easement. *Id.*, at 620, 591. Veach only offered evidence of intermittent meandering tracks in Tice's field.

Therefore, even if Veach were to have established a prescriptive easement with a limited intermittent right to cross over the middle of Tice's hayfield, the Judgment Order is patently void. By surreptitiously combining his prescriptive easement claim with his claim by grant, Veach has acquired, under the trial court's Order, the rights of a dominant owner by grant. With this he claims the full rights of use for all purposes at any and all times together with the right to gravel or pave the center of Tice's field contrary to the limited scope of use he purported to have acquired by prescription. *See* Syl. Pt. 11, *O'Dell v. Stegall, supra*, and *see* the right of maintenance in the deed right of way, JA 388. It is uncivilized mischief that the trial court has permitted Veach to achieve.

Moreover, the jury could not have found Veach's use was adverse to Tice's title. Instead, it accepted Veach's illicit proposition, that Veach had been granted the use of the pathway from Tice's chain of title. By telling the jury that the prescriptive easement was the *granted* right of way, the jury was explicitly advised to ignore the requirement for hostile, adverse use which is essential to a prescriptive easement. *See* Veach's counsel's statement before the jury JA 137 cited *supra* also. As the Honorable Justice Menus Ketchum pointed out in *O'Dell*, to obtain a prescriptive easement one must first effectively commit a *trespass* on another's land. *O'Dell v. Stegall, supra*, 599, 570. Indeed, by Veach claiming that his use was granted, he cannot fault Tice for failing to recognize that a claim might exist for adverse use. ***In this bizarre set of facts, Veach effectively denied that his use was adverse both prior to trial and during trial.*** It must

be said that Tice acted in accord with law by attempting to resolve the actual location of the right of way with Veach and Veach should not be permitted to take inconsistent legal positions in the course of a proceeding, let alone simultaneously take legally inconsistent positions. *Riggs v. W. Va. Univ. Hosps., Inc.*, 221 W. Va. 646 (2007).

1. Absence of Adverse, Hostile Use by Trespass

Thus, the court and its jury appear to have ignored the necessity for a trespass over the land now owned by Tice that was required in order to satisfy Veach's prescriptive claim. The sole basis for placement of the right of way/prescriptive easement was Teter's 1992 plat.[15] Yet no evidence of a ten-year period of adverse use was presented to the jury for any period prior to 1992. In fact, during the period represented by Teter's plat, (assuming it does reflect a passageway through Tice's field which is believed unlikely) it cannot be assumed that such use was not gained by "implied permission." *See O'Dell v. Stegall, supra,* at 615, 586, expressly overruling all case law permitting a presumption of adverse use and adopting the principal that:

> ...even if the property owner has not given explicit permission, any use 'made in subordination to the property owner' is not adverse. 'Subordination' means that the user is acting with authorization express or implied, from the landowners, or acting under a right that is derivative from the landowner's title.

Id. at 614, 585.

Therefore, Veach had the burden to show clear and convincing evidence that Teter's plat represented use of a pathway and that it was not simply with the implied permission of the then owners. Veach offered no evidence of adversity during that period. Likewise, Teter declined to opine on the subject of a possible prescriptive easement. JA 209. Veach, in fact, provided evidence of subsequent implied permission through testimony regarding his interactions with

[15] It is not conceded that Teter's after-thought aerial photo which he used at trial to justify his survey made without a description depicts a pathway through Tice's field. The photo may just as easily depict the geology of the area. Naturally the rise along the ridge in the field would be drier and have less vegetation than the surrounding area.

Fred Tice who he said came out to greet him a couple of times when Veach passed through. JA 111. It is true that Tice repudiated such implied permission but once that occurred, Veach's use was interrupted. The evidence is not disputed that in the year 2014, Tice interrupted the use of his field through an interaction with Rosencrantz, Veach's farm hand, when Rosencrantz went back the other way. JA 309. Any interruption, no matter how brief, and even if temporary, stops the running of the 10-year statute of limitations for a prescriptive easement. *O'Dell v. Stegall, supra.*, at 617, 588. For the period subsequent to Teter's 1992 survey, the jury appears to have also erroneously concluded that intermittent meanderings, which allegedly created tire tracks in a general direction across the center of Tice's hayfield, could constitute open, notorious, continuous and interrupted use at a "precise line" as required for a prescriptive easement. *See O'Dell v. Stegall, supra*, at 620, 591. Teter testified that between 1992 when he prepared his survey plat and 2017 when the suit was filed, he had no involvement in Veach's property or the right of way through Tice to Veach's property. JA 166. Regarding his 1992 plat (for which course there was no proof of adverse possession) he testified that, on his plat, he has shown "...varying distances where [he] observed the center of where the roadway used to be." JA 163.

Tice first observed tracks in his field in the fall of 2008 and 2009 and then that use became yearly, causing him obvious concern. JA 303-304; 309-310. Subsequently he saw Veach crossing and he asked Veach what he was doing. JA 305. As is referenced, *supra*, in the year 2014 Tice saw Veach's farm helper on his property. JA 308-309. He had seen Rosencrantz come through the prior year, but this time Tice stopped him and told him where the right of way was located. Rosencrantz then said he was not going to get in the middle of a battle between the parties. He took the road back and Tice never saw him again. *Id.* Following Veach's threat to have Tice arrested for his pile of gravel (*see* JA 406), and Veach's attempt to do so, Tice had

Veach served with a no trespass notice on July 4, 2016, and neither Veach nor his farm hand ever returned to Tice's property after July, 2016. JA 312. Therefore, Veach failed to present clear and convincing evidence of adverse use that was open, obvious and notorious without interruption for a period of 10 years.

Accordingly, once Tice became aware of Veach's clandestine use and apparent purpose to deviate from the deeded right of way course, he took action to keep Veach from continuing such use. There simply existed no basis upon which a reasonable jury could find clear and convincing evidence of adverse use without interruption for a period of 10 years.

Moreover, as is suggested *infra*, the evidence presented subsequent to Veach's acquisition of his property did not constitute the basis for continuous, uninterrupted, open and notorious use of a definable roadway through Tice's hayfield for a period of 10 years.

2. Lack of Evidence of Continuous, Uninterrupted Use Over a "Precise Line"

In order to prove a prescriptive easement, the use must be continuous and uninterrupted, *but only in the context of adverse possession. O'Dell v. Stegall, supra*, at 615, 586. The easement must be defined by a "precise line." *Id.*, at 620, 591. Each of the elements must be proven "...as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim." Syl. Pt. 3 *Id.*

At the time of Veach's closing on his property in 1990, he had no idea where the "right of way" was located. JA 98. If there had existed evidence of it in Tice's hayfield he would have known where it was. Veach presumably knew that a right of way existed because it was set forth in his chain of title, namely, the 1960 deed agreement which he chose not to share with Mr. Tice. Since there existed no evidence of a right of way on the land, Veach testified that his grantor had to walk him across Tice's land to tell where it was. JA 99. Richard Rosencrantz, Veach's farm

helper, made it crystal clear that there never was a defined path over the field. He testified that he attempted to follow the same path "...as best he could." JA 236. Clearly, there existed no road in 1990 when Veach acquired his land nor at any time thereafter over the center of Tice's hayfield, not even from the end of Tice's driveway to his interim gate on the path now claimed by Veach. *See* JA 406 photo taken by Veach in 2016, showing only grass even from Tice's garage apartment to Tice's interim gate, the path that Veach claims constitutes the granted right of way/easement.

Clearly, the path Veach claims through the center of the hayfield was, at best, used only as a matter of convenience. JA 234-235. There was never any maintenance of any kind performed on it, not even snow removal for use in the winter. *See* JA 102. Veach's helper testified that their use was intermittent and depended on weather conditions. If the ground was soft, they would not use the short cut through the center of Tice's field (JA 225) so clearly, there existed no "precise line" as required for a prescriptive easement. *O'Dell v. Stegall, supra*, at 620, 591.

VIII. CONCLUSION

Through the illicit hybridization of the two mutually exclusive theories of prescriptive easement law and rights of ways by grant, Veach has befuddled the court and its jury into adopting a road that does not exist over the center of Tice's hayfield. And, to reach Tice's open field, Veach has illicitly claimed a dominant easement by grant, with the right to use for any and all purposes the area directly in front of Tice's residential dwelling.[16] As can clearly be seen from Veach's Exhibit "P" photo (JA 404), Teter's plat ignores the 1960 deed directive to, instead

[16] It requires little imagination to determine Veach's objective given his judicially acquired license to run all manner of vehicles, recreational 4wheelers and the like, over Tice's property and have his friends and family do the same over a virtual private highway. With this trial court ruling, Veach will be entitled to construct and pave through the middle of Tice's small farm and residence.

of bearing right in a northerly direction, to bear south to avoid the buildings at the top of the hill. The confusing, contradictory and speculative testimony in the case below has effectively condemned Tice's land for Veach's private use. The result has defiled Tice's constitutional right to his ownership and free use and enjoyment of his land defiant of the very concerns scholarly articulated by this Court and contrary to the principals established by it in *O'Dell v. Stegall, supra.*

Veach has an easement by grant (per the 1960 deed description) and should be ordered to adhere to the terms and express intent of that easement as described in the Office of the Clerk of the County Commission of Raleigh County in Deed Book 219 at Page 215. JA 387. Teter's self-serving plat should be disregarded as it did not take into consideration all deeds, covenants, restrictions and/or easements of record. Veach cannot be allowed to make up a different easement location because he is unhappy with the expressed intent as set forth in the right of way location of record. The confusing, contradictory and speculative testimony in the case below effectively condemned Tice's land for Veach's private use.

The final Judgment Order of the circuit court should be reversed with a finding that Veach has not established a prescriptive easement and remanded for a determination as to the location of Veach's granted right of way.

Respectfully submitted this 19th day of March, 2020.

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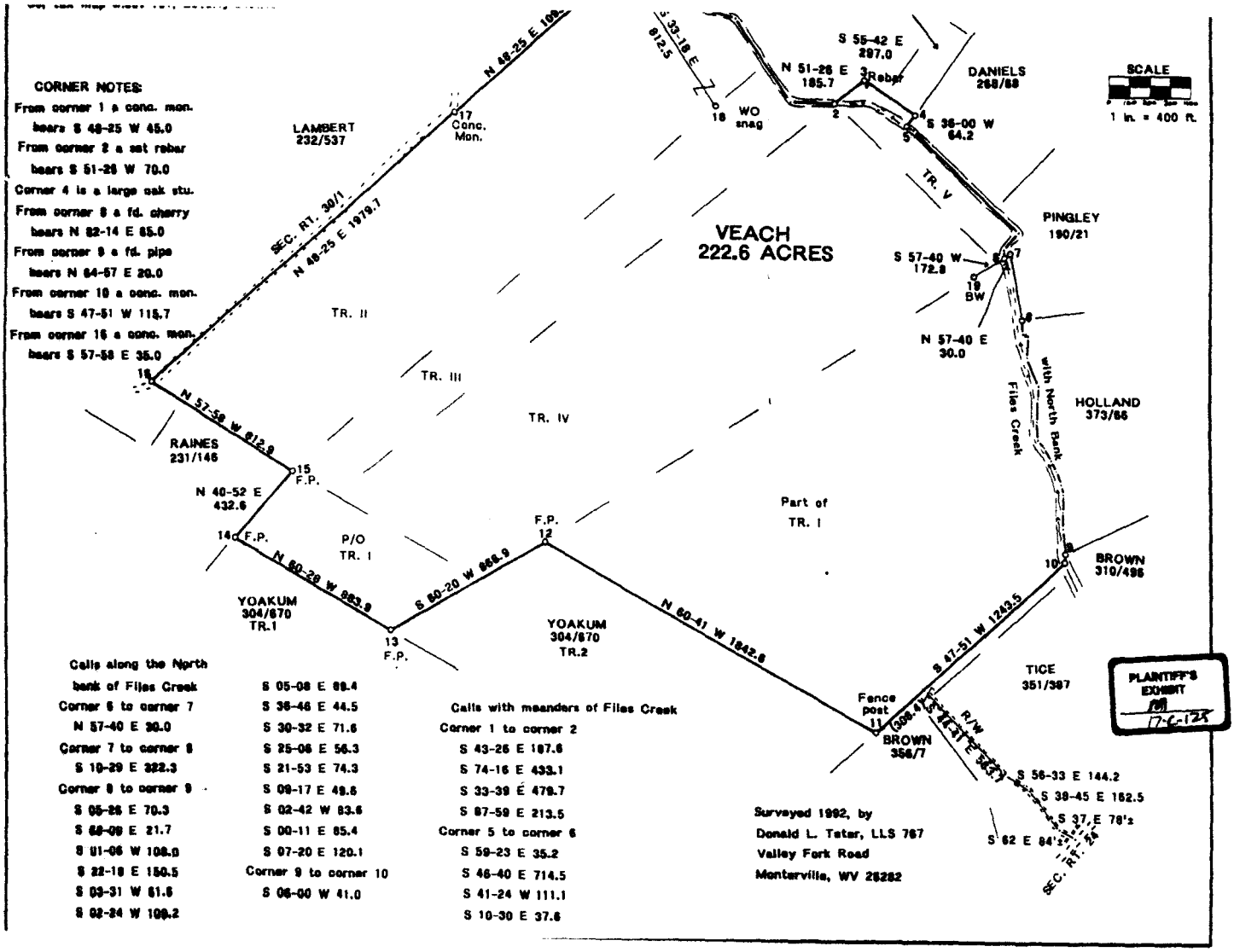

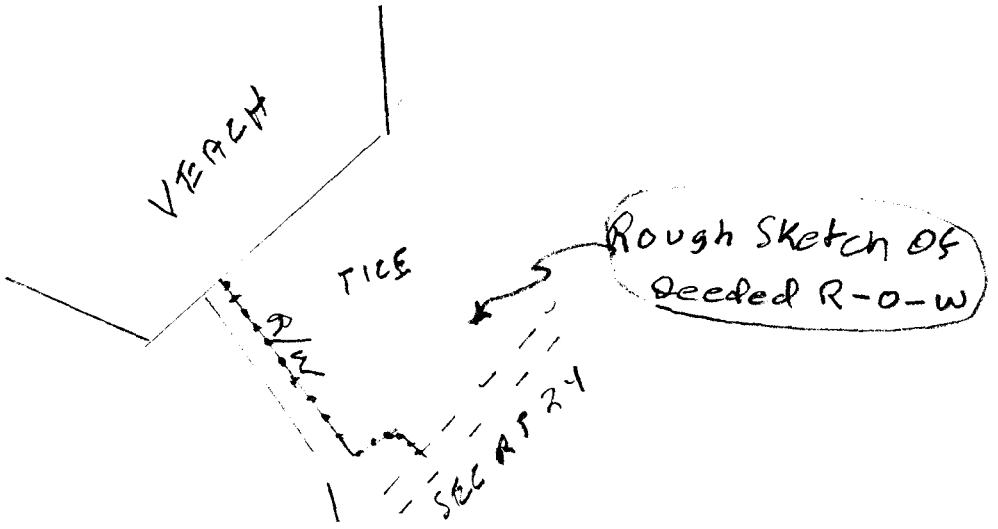

PREPARED BY COUNSEL
TO DEPICT ARGUMENT IN TICE BRIEF
1960 R/W AGREEMENT DATED
ERRONEOUSLY 4/25/50 (60) @ OB 219/515

EXHIBIT A

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
CASE NO. 19-1117

Phillip D. Tice,
Defendant Below , Petitioner

v.

John S. Veach,
Plaintiff Below, Respondent.

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

CERTIFICATE OF SERVICE

I, Braun a. Hamstead, counsel for the Petitioner, Phillip D. Tice, in this action do hereby certify that I have served a true copy of the enclosed **Petitioner's Opening Brief** and **Joint Appendix** to counsel of record in this matter via first class mail on this 19th day of March, 2020:

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