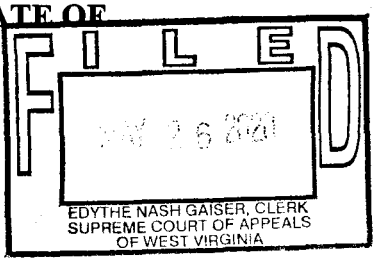
IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
CASE NO. 19-1117



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 REPLY BRIEF

Counsel for Petitioner
Braun A. Hamstead, Esquire
West Virginia State Bar ID No. 1568
HAMSTEAD & ASSOCIATES, L.C.
507 S. Fairfax Blvd.
Charles Town, WV 25414
Phone: 304-725-1468
Fax: 304-725-1321
bhamstead@hamsteadandassociates.com

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Veach's Brief fails to address the fundamental plain error committed by the trial court in ignoring a fundamental principle of easement law. In his Brief, Veach touts his ability to proceed to trial with alternative theories of recovery under Rule 8(e)(2) of the W. Va. R. Civ. P. Indeed, Veach elected to claim both a right-of-way by grant and a prescriptive easement. Nowhere in Veachs' Brief does he deny that these two theories are mutually exclusive. Yet *the right-of-way by grant was admitted to* by Tice. Its existence was never in dispute. Accordingly, the existence of a right-of-way by grant became the law of the case. Veach's "alternative theory" was therefore precluded under the well-established law of this State. *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010). Under *O'Dell,* the essential element of adversity, of hostility of ownership, was absent once the right-of-way by grant was conclusively established. Veach could not claim a prescriptive easement at the same location as the granted right-of-way because he held title to it. Veach's claim could not therefore be said to be an adverse claim or that of a trespasser on Tice's land at the time of trial. Therefore, the only remaining issue before the trial court was the location of the granted right-of-way. The location of a granted right-of-way is to be determined by the manifest intent, the purpose as set forth in the grant made between the parties. *Hoffman v. Smith*, 172 W. Va. 698, 701, 310 S. E.2d 216, 218 (1983). Still, Veach continues to ignore the manifest intent of the grant. In fact, Veach seeks to contravene the manifest intent of the grant by seeking to establish the right-of-way through Tice's buildings on Tice's land, rather than around the buildings.

Consequently, Veach's Brief does not address the detailed analysis of the intent of the granted right-of-way set forth on pages 6-9 of Tice's Brief.[1] Therein, the express language of the

[1] Veach asserts in his Brief that Teter was not engaged to determine the location of a right-of-way over Tice's property but was engaged to survey Veach's "property lines." Resp. Brief, 2-3. As is pointed out in Tice's Brief, to

grant is compared to the plat made by Veach's surveyor, Teter, demonstrating that Teter ignored the manifest intent of the grant. Despite quibbles that the parties might have over geographical directions,[2] the comparison contained in Tice's Brief demonstrates that Veach's surveyor, Teter, deliberately chose a path that headed to the right (north) up the hill and through the area of Tice's buildings instead of to the left (south) around them. In other words, the second call of Teter's plat takes the right-of-way in the opposite direction than is called for in the deed. The grant's directive around (to the left-to the south) of a structure[3] was unambiguous. This deeded directive cannot be ignored. Nonetheless, in order to justify ignoring it, Teter falsely claimed that the deed was not available to him and further claimed that the deeded intent did not matter. JA 16-17; 164.

Instead of addressing the specifics of the detailed analysis provided in Tice's Brief, (Pet. Brief, 6-9), Veach has simply objected to Tice's use of a pictorial diagram (Exhibit A) and engaged in meaningless distinctions relating to the words of the grant and Tice's analysis of those words. Resp. Brief, 4, 2. The diagram is only offered for the purpose of providing a visual of Tice's argument. It was not represented as anything more than argument. Veach simply continues to avoid addressing the manifest intent of the grant in favor of reliance on a corrupt theory of prescriptive easement use. In fact, Veach's Response Brief fails to address numerous substantive and dispositive matters that are set forth in Tice's Opening Brief.

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undertake such survey, the surveyor must first examine the records in the court house. In running those records for any information regarding Veach's boundaries, it is not reasonable for Teter to have not discovered the appurtenant easement to Veach's real estate. More importantly, Teter appeared in court as Veach's *witness for the purpose of proving the location of the right-of-way over Tice's property.* He nonetheless brazenly testified as an expert that the location of the deeded right-of-way did not matter to the testimony he offered to establish the location. JA 16-17; 164.

[2] Veach asserts in his Brief that Tice has misleadingly stated that the granted right-of-way was to "proceed south of a ..."tool shed...." Surprisingly, Veach claims Tice's statement is misleading because the deed called for the path to go "'around and to the south of a tool shed...." Resp. Brief, at 2.

[3] Clearly, it was the intention of the grant to avoid the servient estate hardship by directing the right-of-way around then existing buildings and to the south of them.

IV. RESPONDENT'S STATEMENT OF STANDARD OF REVIEW

To the extent that this appeal is grounded primarily on a question of law, the parties do not appear to disagree that a de novo standard of review applies. Veach quotes Syl. Pt. 3 of *Browning v. Hickman*, 235 W.Va. 640, 776 S.E.2d 142 (2015). Resp. Brief at 7. However, *Browning* is among a line of cases that involve a motion for a new trial based on procedural and evidentiary issues at trial. This appeal is not governed by an abuse of discretion standard of review. It is submitted that a *de novo* standard of review should be applied because the appeal is based on plain legal error committed by the trial court in superimposing a prescriptive easement over a granted right-of-way.

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.

In order to side-step the law under *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010), which requires adverse use in order to establish a prescriptive easement, Veach ducks the ruling in *O'Dell* and simply ignores it, saying it does not apply. Resp. Brief, 9. To support his "alternative theories" under Rule 8(e)(2), Veach erroneously relies on a portion of Justice Davis' opinion in *Riggs v. W. Va. Univ. Hosps., Inc.*, 221 W. Va. 646, 651(2007) reading: "'...[A] party may set out alternative legal theories in a pleading and, if the evidence supports the same, have a jury instructed on all of the alternative legal theories.'" Resp. Brief, 8.

The problem with Veach's attempt to use the above quote to support the judgment at bar, is that the evidence cannot, as a matter of law, support both "alternative theories" without overruling *O'Dell*.

Veach also cites *Sydenstricker v. Mohan*, 217 W. Va. 552, 618 S.E.2d 561 (2005) to support his alternate theory argument. Unlike the case at bar, *Sydenstricker* involved the issue of judicial estoppel. That case does not advance Veach's argument because in *Sydenstricker* a

defendant was permitted to put on a different defense at trial than he had raised during pretrial. In the case at bar, Veach attempted to maintain his conflicting prescriptive easement theory throughout the trial after it was rendered inapplicable as a matter of law by Veach's assertion that the easement was established by grant and Tice admitted to the grant.

Evidence of a prescriptive easement cannot, as a matter of law, be supported over a granted easement. Veach's dogged failure and refusal to acknowledge the applicable law under *O'Dell* is both conspicuous and fatal to his defense to this appeal. A prescriptive easement cannot exist at a location for which an express grant has been established. That is because *O'Dell* requires that to establish the easement by prescription, the use must have first been hostile, an element undeniably absent by virtue of the grant purportedly made at the same location.

B. Because of the Court's Error in Permitting Respondent/Plaintiff Veach 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.

In the eleven numbered paragraphs of Veach's Brief found on pages 9 through 11, rebuttal arguments are offered to various points made in Tice's Opening Brief. The most important rebuttal argument, however, is conspicuously missing. Missing, is any rebuttal to the fact that the granted easement expressly calls for the right-of-way to head ***south*** after entering the Tice property. Teter claimed at trial that the right-of-way heads ***north*** after entering the Tice property. The specific directional language of the grant, ignored by Teter, manifests the intended course. By taking the course to the north instead of to the south, Veach proposes a course that destroys the value of Tice's property by egregiously intruding upon his privacy, a fact which Veach does not deny. Further, Veach does not suggest that the path to the south would be unreasonable. He does not even specifically suggest that a southward path was not the intended

course. Instead, he chooses to rely on a plat made by Teter that was "...not [even] prepared for the purpose of placing a road." Resp. Brief, 17.

Accordingly, Veach's suggestion that the deeded *agreement* made by the predecessors in title was not intended to avoid the buildings located at the top of the hill is farcical. *See* Resp. Brief, 9, ¶ 1. Veach's claim that the pathway was not intended to "depart" from the existing driveway is likewise specious since, for the path to head south, it must depart from the driveway that leads to the north. *See id.*, ¶ 2, ¶ 5. And, despite Veach's protestation, it can hardly be disputed that Veach procured the sought-after outcome he obtained with Teter's assistance. *See id.*, 10, ¶ 3. Contrary to Veach's argument regarding the tool shed, (*id.*, ¶ 4) it is known that one existed because the shed is specifically referred to in the grant. The location of the tool shed, along with other structures at the top of the hill, was a critical component of the deed to establish the location of the granted right-of-way. Veach personally knew where the buildings were because he claims he passed through them when using Tice's property after purchasing his property in 1990. Therefore, it was Teter's duty to exercise due diligence to identify the location of the tool shed and the buildings that had existed at the top of the hill before coming to court with expert testimony as to the location of the granted easement. Teter's lack of integrity explains why Veach's Brief waffles between alternative theories regarding Teter's role.

On one hand, Veach claims that Teter was not commissioned "for the purpose of placing a road..." Resp. Brief, 17. In the same breath, Veach offers an alternative reality and claims that Teter was surveying and placing a "road" on the ground. *Id.* 10, ¶6. Veach concludes that Teter cannot be held accountable for failing to comply with the standards governing surveyors. *Id.* Yet, undeniably, Teter testified before the Court and jury as a licensed professional surveyor suggesting he would fix the location of Veach's hybrid "prescriptive easement/granted right-of-

way." Yet Veach ignores Teter's obligation to exercise due diligence regarding existing monuments and structures and makes up an excuse in an attempt to render Tice's testimony false, stating Teter did "not recall" seeing the tool shed in 1992 (the tool shed which Tice testified was not torn down until seven years later in 1999). *See id.*, 10-11, ¶ 8

Veach presumes that he has a right to improve the center of Tice's hayfield, without considering the outcome and the implications of such action. This action surely was not the outcome intended in the right-of-way agreement. *See id.*, 11, ¶ 10 in which Veach claims that his right of maintenance has nothing to do with his chosen path through a grassy hayfield where no road has ever existed. Finally, Veach argues that his attorney's closing argument statement was harmless, "don't worry about the location [of the easement]," but this statement was not "harmless." Veach's attorney argued throughout trial the "prescriptive easement" and the "granted right-of-way" were one and the same. *See id.,* 11, ¶ 11.

At page 12 of his Brief, Veach unfairly attacks Tice because Tice's trial attorney made a mistake in preparing an interrogatory response. Tice's interrogatory responses correctly stated that the right-of-way was not at the location claimed by Veach. However, in one of Tice's responses, his trial counsel confused the location of the granted right-of-way as it was originally established by deed (along Files Creek), with the 1960 deed that relocated it to the south of the buildings then situate on the Tice real estate. It is clear from Tice's trial testimony that he did not become aware of the mistake until confronted at trial by Veach's counsel. Nonetheless, though bantered over the mistake by Veach's counsel, Tice simply explained: "I did not write that, sir." "My attorney did." "Perhaps I did not correctly read it." JA 329, L. 16-17. Not satisfied with that response, Veach's counsel continued to banter Tice who continued to admit that a mistake had been made. *Id.,* 18-23.

Conceding that the original deed put the right-of-way along Files Creek to the "right" instead of to the "left," Tice explained at trial that "[t]he old right-or-way, the original right -of-way is along the creek, yes. But that's not where the deed of 1950 or 1960 puts it at." JA 330, L. 5-7.

The above colloquy highlights the fact that the intention of the 1960 Deed was made for the purpose of moving the right-of-way to a location mutually acceptable and agreeable to both the dominant and servient estates. It also demonstrates an intent that the relocation, as expressed in the grant, would avoid the buildings then situate on the Tice property.

As set forth above, Veach argues that Teter did not have an obligation to comply with the professional standards of a surveyor and that Teter was not employed to establish the location of a right-of-way. Further, he argues that Teter did not establish a right-of-way. But now Veach speciously claims that Teter's testimony constitutes the conclusive unrebutted opinion of an expert and that Tice must suffer the consequences of failing to spend money on an expert to debunk him. Resp. Brief, 12. In the context of Veach's convoluted theories and arguments, Tice respectfully disagrees that he was required to employ an expert to protect his property rights. It is simply not credible that Teter, with his many years' surveying experience, did not have a basic understanding of the law of easements. Moreover, contrary to Veach's claim, the amount of use of a granted right-of-way is irrelevant to the inquiry.

To deflect from the importance of the express purpose and intent of the grant, Veach infers that "intent" is absent from the grant, and therefore, the Court must look to extrinsic evidence. *See id.,* 11, footnote 2 citing *Hoffman v. Smith*, 172 W. Va. 698, 310 S. E.2d 216 (1983) quoting, in part, Syl Pt. 3 of *Rhodes Cemetery Ass'n v. Miller,* 122 W. Va. 139, 7 S.E.2d 659 (1940). In the case at bar, unlike the cases cited by Veach, "intent" exists within the granted

right-of-way recorded in the deed. An express "intent" of that granted right-of-way was to avoid then existing buildings on Tice's property.

No authority supports Veach's proposition that the court should ignore plain intent set forth within the four corners of a contract and jump first to extrinsic evidence. Yet that is precisely what Veach proposes to this Honorable Court. Veach fails to address the fundamental plain error committed by the trial court. The law is clear that where the intent is set forth in the deed, that intent cannot be overridden by a claim of actual use at another location.

Accordingly, Veach has ignored the overarching plain error committed by the trial court. The trial court erred in its placing of a purported prescriptive easement (requiring adverse use) over a granted easement (in which the use has been expressly permitted).

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.

As is pointed out in Tice's Opening Brief, the scant evidence Veach offered of a prescriptive easement arising during the period of his ownership, fell far short of the "clear and convincing evidence" required to sustain his claim. Veach relies heavily on the uncertain testimony of his farm helper, Rosencrantz, who clearly stated that there never was a defined path over the field.

Rosencrantz simply testified that he attempted to follow the same path "...as best he could." JA 236. Contrary to the characterization given it in Veach's brief, Rosencrantz's testimony was that he "probably" crossed Tice's property to do winter work on Veach's property, but not if the ground was soft. JA 225, L.7-8. In this regard, Veach presents a misleading assertion on page 14 of his Brief. He states therein that Rosencrantz "...used this

right-of-way, at this same location, from 1990[4] until 1998, approximately three to five times per week while tending Respondent's cattle." However, the cited testimony on this page clearly shows that Rosencrantz's cattle tending testimony applied only to the winter months and then only when the "weather wasn't bad." JA 221, L. 4-18. Rosencrantz also testified that he had to do brush hogging twice a year and that he guessed "maybe" he crossed over Tice a couple times a month doing trees, cleaning up debris from the floods and cleaning up trash along the road. JA 224, L. 14-17.

To the extent that Rosencrantz's testimony is believable, it does not evidence adverse possession as required by *O'Dell v. Stegall.* Instead, Rosencrantz provided evidence of implied permission, originating with a prior occupant of the Tice real estate, Fred Tice, who Rosencrantz testified was a "nice guy" who waived at Rosencrantz. JA 225, L. 20-23. Therefore, Veach found it necessary to bring his surveyor, Teter, into court to bolster his aberrant prescriptive easement/right-of-way by grant claim. Teter's testimony not only failed to offer evidence of adversity, but Veach disavows that Teter was commissioned to locate the right of way in the first place.

One of the most telling aspects of Veach's Brief is his repeated assertion that Teter did not attempt to locate a right-of-way on the plat that he prepared and later brought to court for the purpose of proving the location of the right-of-way. As is pointed out *supra*, Veach writes: "...Teter's plat was not prepared for the purpose of placing a road...." Resp. Brief, 17. Conspicuously, Veach then finds it necessary to defend the integrity of his expert with the

[4] Rosencrantz was asked about a period from the "early 90s" not 1990 as suggested in VEach's Brief. It is a matter of public record that Veach did not acquire his property until 1993.

argument that Teter's plat was never intended to resolve the location of the "road."[5] Veach and his expert cannot have it both ways. Teter cannot properly (or even ethically) disclaim the validity of his plat as a tool for establishing the location of the right-of-way and then use it to establish the location of the right-of-way.[6] No court of law should permit such abuse of the privilege of an expert to influence a judicial outcome. Veach does not dispute that the first duty of a surveyor is to examine the records in the courthouse. Veach does not deny that he waited for approximately 10 years to show Teter's plat to his affected neighbor, Mr. Tice. Veach does not deny that, in fact, he waited until after Tice had invested substantial monies and labor in building the garage apartment to disclose this plat and reveal the basis of his scheme to invade Tice's privacy with a road directly through the area of Tice's new garage apartment.

Yet, Teter relied upon ancient history, before any of the parties or their witnesses were around, for placement of his "road." No evidence was offered to show that Tice's predecessors did not give actual or implied permission [for use of the "road"]. *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.

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[5] As is pointed out, *supra*, other than the beginnings of the granted right-of-way on Tice's driveway, there exists no "road." Veach's farm hand, Rosencrantz, could only state that "...there were tracks there when we first started going through there." JA 225, L. 24 – 226, L. 1 and that, thereafter he tried to follow them as best he could. JA 236.

[6] Teter's refusal to testify regarding whether a prescriptive easement existed (JA 209) is reminiscent of the expert, Fred Gates, who Plaintiff called to prove that his claim to prescriptive existed in *O'Dell.* In *O'Dell,* Mr. Gates likewise contrarily testified that he was not sure that a prescriptive easement existed, but the jury nonetheless erroneously found that one did exist! *See O'Dell*, at 604, 515. This anomaly underscores the confusion typically experienced by juries in right-of-way cases. It underscores the importance of the court in applying the law—a failure that led to the error in *O'Dell* and the error in the case now before this Court.

Veach does not deny that there exists no current evidence whatsoever of a "road" through Tice's hayfield. No evidence existed at trial, let alone clear and convincing evidence, to demonstrate that the purported historic use of Teter's purported "road" was adverse and not simply use "made in subordination to the property owner."

Veach does not deny that, once Tice repudiated any and all permission for Veach to use the pathway through his hayfield, Veach's use discontinued. But Veach pushes *prescription* so he can change the location of the right-of-way. Then he pushes *right-of-way by grant* so he can expand the use beyond what his prescriptive use would afford him. *See* Resp. Brief, 4. citing *Davis v. Jefferson County Tel. Co.*, 82 W. Va. 357, 95 S.E. 1042 (1918), a case based on the original intent of a granted easement, not on the transformation of a prescriptive easement into one by grant. Veach's contrived reliance on *Davis v. Jefferson County Tel. Co.,* is but a means to contravene the rule of law that a right-of-way acquired by a prescriptive easement cannot be broadened, diverted or moved; its purpose and location are determined solely by the adverse use made of the land during the ten-year prescriptive period. Syl. Pt. 3, *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010).

V. CONCLUSION

Veach has used the litigation below to relocate the course of a granted right-of-way. In doing so, the manifest intent of the grant–to avoid hardship to the servient owner–has been ignored in favor of a course that deliberately imposes hardship on the servient owner. Veach wishes to direct the path of the right-of-way through the area of Tice's buildings in direct contradiction of the express intent of the grant as set forth in the deed agreement of the parties in their chain of title. The result in the case below flies in the face of the now well-established law set forth in *O'Dell, supra*. In his scholarly opinion, Justice Ketchum wrote:

> "...in today's world, our law on the doctrine of prescriptive easements is a tangled mass of weeds. The doctrine essentially rewards a trespasser and grants the trespasser the right to use another's land without compensation. Such a significant imposition on the rights of modern landowners discourages neighborly conduct and does not square with the modern ideal that we live in a congested but sophisticated, peaceful society.
>
> *Id.*, 599, 570.

In underscoring the intended purposes and precedent to be established through *O'Dell*, Justice Ketchum further wrote in this Court's unanimous decision:

> We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored.
>
> *Id.*

The case below demonstrates the very unneighborly conduct *O'Dell* sought to eliminate. The judgment below was a result of plain legal error committed by the trial court in contravention of both the spirit and the plain mandate established by this Honorable Court in *O'Dell*. The trial court committed plain legal error in placing a purported prescriptive easement over a granted right-of-way in direct contravention of *O'Dell*.

The final Judgment Order of the circuit court should be reversed with a finding that the trial court erred in finding that Veach established a prescriptive easement and failed to properly identify the location for the granted right-of-way.

Respectfully submitted this 22nd day of May, 2020.

Braun A. Hamstead, Esquire
West Virginia State Bar ID No. 1568
HAMSTEAD & ASSOCIATES, L.C.
507 S. Fairfax Blvd.
Charles Town, WV 25414
Phone: 304-725-1468
Fax: 304-725-1321
bhamstead@hamsteadandassociates.com

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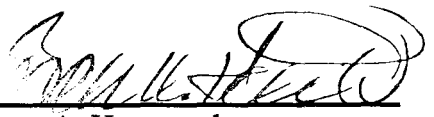
Appeal from Order Entered by the Circuit Court of Randolph County (Civil Action 17-C-125)

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 Reply Brief** to counsel of record in this matter via first class mail on this 22nd day of May, 2020:

Harry A. Smith, III
Jory & Smith LC
Counsel for Respondent
PO Box 1909
Elkins, WV 26241
hasmith@jorysmith.com



Braun A. Hamstead