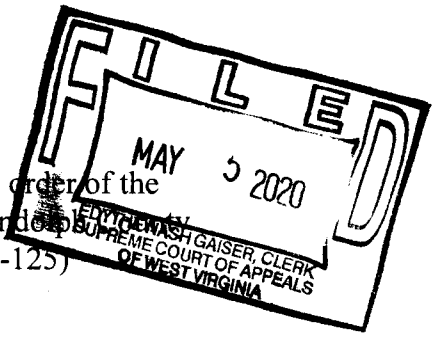
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-1117



PHILLIP D. TICE,
DEFENDANT BELOW,
Petitioner,

vs.

JOHN S. VEACH,
PLAINTIFF BELOW,
Respondent.

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

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

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

STATEMENT OF THE CASE

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

On Page 2 of Petitioner's Brief, Petitioner asserts that there existed a "deed designated southern route" that was "continuously open and available". There is no "southern route" designated in the right-of-way agreement nor has there been any evidence whatsoever that such a route ever existed or was "continuously open and available." To the contrary, the right-of-way agreement never mentions a southern route, but merely recites that the right-of-way is to go in a "southwestern direction ***around*** and to the south of a tool shed (emphasis added)" and then "in a northwesterly direction a straight line" to Respondent's fence (J.A., 387-388).

On Page 2 of Petitioner's Brief, Petitioner states that he had previously requested that Respondent "use that southern route." As noted above, there is no southern route and Petitioner, according to the evidence, just once told Respondent of an alternative route, "through the orchard" (J.A., 305-306).

On Page 2 of Petitioner's Brief, Petitioner again states that the "deeded right-of-way agreement . . . specified that the right-of-way was to . . . proceed south of a . . . 'tool shed . . . .'" Again, Petitioner's statement is very misleading; the right-of-way agreement does not say the right-of-way is to "proceed south", the right-of-way agreement stating simply that the right-of-way goes "around and to the south" of a tool shed before going in a straight line to Respondent's fence (J.A., 387-388).

On Page 2 of the Petitioner's Brief, Petitioner states that Respondent "insisted that he was entitled . . . to proceed to the northeast." In fact, Respondent' s contention is that the right-of-way travels to the northwest after rounding the tool shed (J. A., 401).

On Page 3 of Petitioner's Brief, Petitioner argues that expert surveyor Donald Teter prepared a plat of that 1960 deeded right-of-way without reviewing the right-of-way agreement. This is not what the evidence proved. Teter testified that he platted an existing road, which Respondent now claims as the right-of-way, as an adjunct to surveying Respondent's property lines, not to establish the location of the deeded right-of-way (J.A., 161-163, 187). Teter was not acting "deceptively" when he testified that he did not have

access to the 1960 agreement; he was not asked, in 1992, to do anything but plat what he saw on the ground and he was not asked then to construe the 1960 agreement. Teter was not "professionally required" to look for a right-of-way agreement because he was merely documenting the location of an existing road.

On Pages 3 and 4 of Petitioner's Brief, Petitioner states that when Teter was "challenged" regarding the bearings contained in the right-of-way agreement and what he saw on the ground, Teter "rejected the deeded right-of-way." In fact, it was on direct examination that Teter stated that he determined, after review of the right-of-way agreement, that the right-of-way was, in fact, located as he had observed (and platted) the road in 1992 (J.A., 185-183, 185).

Petitioner's Statement of Facts notes that the jury was given instructions by the Circuit Court and that two verdict forms were provided to the jury. That much is true. It is important to note, however, that Petitioner did not object to either the instructions or the verdict forms.

SUMMARY OF ARGUMENT

Initially, Respondent vehemently objects to Petitioner's including in his Summary of Argument (and attaching to his Brief) an "Exhibit A . . . which includes a rough sketch drawing depicting our argument . . . ." This "Exhibit A", and its "rough sketch" are not part of the record in this case and their inclusion in this appeal is entirely improper; they should be excluded from any consideration.

Respondent contends that he was entitled to pursue alternative theories of relief - - (1) that he had an express right-of-way over a defined location; and (2) that, notwithstanding the express right-of-way, he had an easement by prescription which was proven to track the same line as that which was contained in the express right-of-way agreement (J.A., 387-388). Petitioner enthusiastically claims that Respondent chose "to confound the theories", that Respondent was "corrupting the law of easements", and that Respondent pursued "an illicit claim that defames" Petitioner's real estate title. In fact, Respondent's pleading was in conformity with Rule 8(e)(2) of the ***West Virginia Rules of Civil Procedure,*** and was perfectly proper; it was not a "transparent scheme" with "aberrant allegations."

Petitioner cites Syllabus Point 1 of ***Davis v. Jefferson County Telephone Company***, 82 W.Va. 357, 95 S.E.1042 (1918) in support of his proposition that, by locating the prescriptive easement at the same location as the deeded right-of-way, Respondent seeks to expand the nature of the prescriptive easement. ***Davis*** makes clear the uses which may be made of an express right-of-way:

> Generally where a right of way is granted or reserved without limitations upon its use it may be used for any purpose to which the land accommodated thereby may naturally and reasonably be devoted, and the grantee thereof is entitled to vary his mode of enjoying the same and from time to time avail himself of modern inventions, if by so doing he can more fully exercise and enjoy or carry out the object for which the easement was granted or reserved.

In Petitioner's Summary of Argument, he again makes the false assertion that surveyor Teter used "smoke and mirrors" to justify his 1992 plat and that he ignored the right-of-way agreement. Again, none of this is true. Teter platted what he saw on the ground in 1992 and was not asked then to construe a right-of-way agreement (J.A., 187, 401). Teter did not ignore the right-of-way agreement, but later, upon review of that agreement, he was of the opinion that the description in the 1960 agreement was consistent with what he observed on the ground in 1992 (J.A., 182-183).

Petitioner devotes more than two pages of his Summary of Argument to the fact that Teter, when he surveyed the road in 1992, began his deed calls starting from the north and not from the south; the 1960 deeded right-of-way agreement provides directions (not metes and bounds calls, but merely directions) starting from the south. Petitioner accuses Teter of "concealing" an alleged discrepancy because he surveyed the center of the road starting from Respondent's fence and not from Petitioner's southern line. Nothing could be more irrelevant to this case than this issue.

In a nutshell, Respondent contends that the road surveyed by Teter in 1992 was proven (by, *inter alia,* Teter's testimony, by lay testimony, and by clear exhibits [including

aerial photos, plats, and overlays]), to be consistent with the location of the right-of-way as set forth in the 1960 right-of-way agreement.

Respondent also contends that the evidence has shown, additionally and alternatively, that the use of the road surveyed by Teter has been: adverse; continuous, and uninterrupted; with knowledge of the servient estate; and reasonably identified. These elements have been established by clear and convincing proof, sufficient to establish the existence of a prescriptive easement.

Notwithstanding any other issue in this action, it is important to note that the parties agree "that Respondent Veach is vested a title with an easement by grant", as stipulated in Petitioner's Statement Regarding Oral Argument; obviously, the parties do not agree as to the location of that express right-of-way, but they do agree that an express right-of-way exists.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that oral argument, is appropriate; although the four points set forth in Rule 20(a)(1), ***West Virginia Rules of Appellate Procedure*** do not appear to apply specifically to this case. It is Respondent's contention that oral argument would be helpful to the Court's consideration of this case, particularly in view of the parties' divergent views of the facts.

ARGUMENT

Standard of Review

Petitioner appeals the Circuit Court's Order of November 21, 2019 (J.A. 436-437). While Respondent agrees that a ***de novo*** standard of review applies to questions of law, the appropriate standard of review of said Circuit Court Order is set forth in Syllabus Point 3 of ***Browning v. Hickman*** 235 W.Va. 640, 776 S.E.2d 142 (2015):

> The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

I.

The Circuit Court did not commit error in ruling that Respondent could establish a prescriptive easement at the same location where Respondent also claimed a right-of-way by express grant.

The thrust of Petitioner's argument appears to focus upon his belief that Respondent should not have pleaded alternative theories of relief. Petitioner contends that the Circuit Court erred by permitting Respondent to establish a prescriptive easement at the same location as the express right-of-way.

Obviously, Rule 8(e)(2), ***West Virginia Rules of Civil Procedure***, permits "alternative, inconsistent and mixed pleadings", ***Sydenstricker v. Mohan***, 217 W.Va. 552, 618 S.E.2d (2005). See also, Justice Davis' concurring opinion in ***Riggs v. West Virginia University Hospitals***, 221 W.Va. 645, 651 S.E.2d 91 (2007); ". . . (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."

In the instant case, Respondent alleged both an express right-of-way and a prescriptive easement (J.A., 4-10). Petitioner, in his Answer, denied the existence of a prescriptive easement and denied that the express right-of-way was located as alleged by Respondent (J.A., 11-13). Both issues, therefore, were properly before the jury. The evidence showed that both the express right-of-way and the prescriptive easement shared the same location.

Respondent thus has an express right-of-way at a location consistent with Teter's survey; perhaps a prescriptive easement is now superfluous, given the jury's finding as to the express right-of-way, but the jury's location of the prescriptive easement cannot be considered erroneous.

Petitioner argues, as to his first assignment of error, the application of ***O'Dell v. Stegall***, 226 W.Va. 590, 203 S.E.2d 561 (2010). However, whether the Court erred in allowing alternative issues to be pleaded, argued, and sent to the jury, is not an ***O'Dell*** issue.

II.

The Circuit Court and the jury properly located the express easement at a location which is consistent with the terms of the express grant.

Petitioner's argument regarding his second assignment of error is filled with factual misstatements:

1. Petitioner contends that "(it) cannot be reasonably denied that the intent of the granted easement was to avoid running it through buildings." In fact, the express right-of-way simply states that it is to go "around" one building - - a tool shed (J.A., 387-388).

2. Petitioner contends that "the deed agreement calls for the right-of-way to depart from the driveway and heard southerly to avoid the buildings . . . ." In fact, the deed does not call for the right-of-way to "depart" from the driveway and "head southerly"; again, the

express right-of-way just goes "around" the tool shed, before going in a "straight line" to Respondent's property (J.A., 387-388).

3. Petitioner contends that Teter, in his survey, "followed what Veach wanted." In fact, Teter surveyed not what Respondent wanted, but what he observed on the ground. (J.A., 401).

4. Petitioner contends that neither Respondent nor his witnesses "denied" the location of the tool shed. In fact, Petitioner cites an undated, unidentified photographs, which did not prove anything and hardly required a denial (J.A., 390-391).

5. Petitioner states that the right-of-way agreement requires a departing from the driveway in a southerly direction, to the "left . . . before reaching the location of Tice's garage apartment." In fact, the right-of-way agreement never gives a "left" direction additionally, the garage apartment did not exist in 1990.

6. Petitioner states that Teter "was obligated to examine all existing easements of record prior to drawing up his new [1992] plat." In fact, Teter had no such obligation as he was merely surveying a road, on the ground, as he observed it.

7. Petitioner states, "Incredulously Teter further attempted to justify his omission /error by effectively claiming that the deeded description did not matter." In fact, Teter stated that the deeded description did not affect "where I observed the right-of-way to be in use at that time", the date of his 1992 survey (J.A., 185).

8. Petitioner contends that the evidence was "unrebutted . . . that Tice did not begin to tear the buildings down until 1999." In fact, this testimony was rebutted by Teter who did

not discern a tool shed in a 1965 photo and who did not recall seeing a tool shed affecting the right-of-way in 1992 (J.A., 180-181, 183).

9. Petitioner contends that the "manifest intent of the deeded right of way agreement was to . . . run the right of way southerly and then northerly along the Brown property line until it reached Veach's gate." In fact, there is nothing in the right-of-way agreement to support his alleged southerly/northerly route; the Brown property line does not even reach Petitioner's gate. The right-of-way agreement states that the right-of-way is to go in a southwesterly direction around the tool shed and then ***northwesterly*** in a straight line to Respondent's fence (J.A., 387-388).

10. Petitioner states that it is of "critical importance" that the 1960 right-of-way agreement imposes on the dominant (Respondent's) estate the obligation to "maintain the private road right of way." Nothing could be more irrelevant than the fact that if maintenance is to be done, Respondent is to do it; maintenance has nothing has nothing to do with location.

11. Petitioner has questioned Respondent's counsel's closing argument: "Don't worry about the location." In context, however, counsel's statement was that if the jury found a prescriptive easement, the construction of the right-of-way agreement was not important as to that very issue (and only that issue) [J.A., 262].

The mischaracterizations of the evidence aside, Petitioner's argument is that the location of the express right-of-way has not been proven. Respondent presented the testimony of Teter, an unchallenged expert, who construed the 1960 agreement and found

the location of that right-of-way to be as he observed it in 1992 (J.A., 182-185). Teter observed a roadway, wheel tracks, and a difference in vegetation at the time of his survey (J.A., 164). Petitioner had no expert to rebut Teter's testimony. There has been no evidence, on the ground or otherwise, to support Petitioner's theory that the right-of-way traveled to the ***left*** through an orchard, to an adjoining property line and then followed that line to Respondent's line. (J.A., 327). In fact, Petitioner admitted at trial that in sworn answers to interrogatories, he had alleged that the right-of-way traveled an ***entirely different*** route, veering to the ***right*** (along Files Creek and not through an orchard), on Petitioner's land and not to the ***left***. (J.A., 329-330).

In addition to explaining his 1992 survey of the right-of-way which he physically observed and its consistency with the 1960 right-of-way agreement, Teter testified that his research showed "clear evidence." of a road (consistent with his survey) in a 1965 aerial photo (J.A., 168, 170), that there was no evidence of any other road in the 1965 aerial photo (J.A., 170), and that, specifically, there was no evidence in any aerial photo, (including a 1996 aerial photo and 1998 infrared photo) of a southern road through an orchard, as claimed by Petitioner (J.A., 173).

In effect, Petitioner is simply challenging the sufficiency of the evidence presented in support of Petitioner's contention that the location of the express right-of-way is as found by the jury.[1] As noted above, Teter presented aerial photos (including infrared photos),

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[1] See discussion, ***infra***, regarding the issue of sufficiency of the evidence on appeal.

dated 1965, 1996, and 1998, showing the location of the road at various times, all being consistent with his 1992 survey (J.A., 165, 173-174). Respondent testified that he walked the road with Owen Lutz, a signatory to the 1960 agreement, and rode across the road with Mr. Lutz in his van (J.A., 99-100).[2] Teter was told by Fred Tice (Petitioner's father) that the road that Teter surveyed was, in fact, the location of the right-of-way (J.A., 182). As recited in detail in the next section of this Brief, Respondent presented overwhelming evidence of use of the right-of-way, at this very location, by Respondent personally and by his employee, Richard Rosencrantz (J.A., 96, 102, 221-226).

Petitioner presented insufficient evidence to rebut Respondent's clear proof of the location of the right-of-way and simply mischaracterizing evidence is no substitute for presenting evidence in support of Petitioner's position.

III.

The evidence was sufficient to establish, clear and convincingly, the existence of a prescriptive easement.

Respondent contends that the evidence was clearly sufficient to support the jury's verdict as to the existence of a prescriptive easement. Petitioner has failed to meet the heavy burden of proving that the evidence was insufficient to sustain the verdict, considering the volume of Respondent's evidence and the fact that the jury was correctly (and without objection) instructed by the Circuit Court. Petitioner's burden is clear, as set forth in this

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[2] See ***Hoffman v. Smith***, 177 W.Va. 698, 310 S.E.2d 216 (1983): ". . .(W)e recognized in Syllabus Point 2 of ***Rhodes Cemetery Ass'n v. Miller*** [122 W.Va. 139, 7 S.E.2d 659 (1940)] . . . that the practical use of the right-of-way by the parties would fix the location."

Court's holding in Syllabus Point 1 of ***Graham v. Wallace***, 208 W.Va. 139, 538 S.E.2d 730 (2000):

> In determining whether there is sufficient evidence to support a jury verdict, the court should: (1) Consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Each of the elements of ***O'Dell v. Stegall, supra***, have been met in the case. Petitioner argues that Respondent "only offered evidence of intermittent meandering tracks in [Petitioner] Tice's field," but that is not what the evidence showed. Richard Rosencrantz, Respondent's employee, testified that he used this right-of-way, at this same location, from 1990 until 1998, approximately three to five times per week while tending Respondent's cattle (J.A., 221-222). Rosencrantz testified that he traveled the right-of-way, from 1990 until 2016, for access to another of Respondent's tracts, for brush hogging, fence maintenance, planting trees, weed eating, gathering firewood, and cleaning up flood debris; Rosencrantz used the right-of-way "a couple of times a month" (J.A., 223-224). The right-of-way location has never changed since Rosencrantz began working for Respondent in 1990 (J.A., 224-226), nor has the location of Respondent's gate (J.A., 230). Respondent acquired this real estate in 1990 (J.A., 96) and he testified that he used the right-of-way in addition to

agricultural use, for access to his residence at least "once or twice a month" thereafter, unless there was "two feet of snow"; Respondent traveled the easement using a dump truck, a pickup truck, his car, and a bicycle (J.A., 102). Neither the location of the road nor the location of Respondent's gate have changed since 1990 (J.A., 112), there being no evidence on the grounds of any other easement or right-of-way (J.A., 117). Respondent and Rosencrantz thus regularly used the right-of-way from 1990 to 2016 (J.A., 124); on July 26, 2016, Petitioner served a "no trespassing notice" upon Respondent (J.A., 392-393) and Respondent, rather than risk a non-judicial confrontation, filed the instant action (J.A., 4 - 10).

Prior to addressing the ***O'Dell*** elements, Petitioner posits that ***Riggs v. West Virginia University Hospitals***, 221 W.Va. 646, 656 S.E.2d 91 (2007), stands for the proposition that Respondent "should not be permitted to take inconsistent legal positions in the course of a proceeding." This is not what ***Riggs*** says. ***Riggs*** holds that appellants cannot re-define, post-verdict, their claims where the jury had not been instructed on those re-defined claims: "This Court will not sanction a charge in liability theories to avoid application of clear statutory provisions." Obviously, ***Riggs*** has no application to the instant case.

It is important to acknowledge that the jury was correctly, and fully, instructed as to the elements required to prove a prescriptive easement, in accordance with the ***O'Dell v. Stegall*** standards (J.A., 348-351); the jury was also properly instructed as to the "clear and consuming" standard of proof for prescriptive easements (J.A., 347). Petitioner did not

object to any jury instruction or to the forms of verdict (J.A., 342-343).

Petitioner argues that Respondent's evidence failed to meet the "adverse use" standard of ***O'Dell***.[3] ***O'Dell*** defines "adverse use" as a "wrongful use, made without the express or implied permission of the owner of the land", a use being one that "creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to the law."

Clearly, Petitioner, or his predecessors, could have resorted to the law to stop the adverse use of the easement. The fact that Respondent had several brief conversations with Fred Tice, Petitioner's father (and not the owner of the servient estate) does not constitute evidence of "implied permission", as contended by Petitioner (J.A., 111).

The extent of Respondent's use of the right-of-way, proven by the testimony of Respondent, and by Rosencrantz, makes it clear that the owner of the servient estate (Petitioner and his predecessors) could have prevented "wrongful" use by resorting to legal action. The jury so found. As detailed above, Respondent used the right-of-way regularly for more than 25 years, for all purposes, and with all types of vehicles. In absolute contrast to the record in this case, Petitioner claims (Page 17 of his Brief), that "(t)here exists absolutely no evidence that Veach used the pathway for all purposes at all times."[4]

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[3] Although Petitioner titles this portion of his argument "Absence of Adverse, Hostile Use by Trespass", ***O'Dell*** does not use the word "hostile" in defining "adverse use."

[4] Petitioner's Brief introduces, for the first time in this case, the term "pathway."

Petitioner contends that "(t)he sole basis for placement of the right of way/prescriptive easement was Teter's 1992 plat"; contrary to Petitioner's contention, however, Teter's plat was not prepared for the purpose of placing a road, but it was simply for the purpose of documenting what existed on the ground.

Petitioner argues that the use or the easement was "interrupted" because, on ***one*** occasion, Rosencrantz did not use the easement to cross Petitioner's land on the day of a Tice family reunion (J.A., 308-309). Rosencrantz's clear evidence, however, was that he used the easement regularly up to and including 2016 (J.A., 223-224, 232). This one-time diversion did not amount to an interruption and the jury so concluded.

Petitioner briefly agues that Respondent did not prove that the use of th easement was continuous nor that the easement was defined by a precise line. This contradicts Respondent's overwhelming evidence. Indicative of Petitioner's mangling of the facts, he contends (Page 22 of his Brief) that Rosencrantz "testified that he attempted to follow the same path '. . . as best he could.' " [5] What Rosencrantz ***did*** testify to, however, was that "when there was snow" on the ground he would try to follow the right path (J.A., 235-236); Petitioner's cavalier misrepresentation of the facts is totally inappropriate.

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[5] The Transcript (J.A., 236) states "the best I could" not "as best he could." Petitioner should be held to a ***verbatim*** recitation of the transcript when he purports to quote it.

CONCLUSION

For the reasons set forth herein, Respondent urges the Court to affirm the decision of the Circuit Court.

Respondent's alternative claims of a deeded right-of-way and prescriptive easement are clearly appropriate under Rule 8(e)(2), ***West Virginia Rules of Civil Procedure*** and the cases cited ***supra***.

The jury was properly instructed, with no objection by Petitioner, and the verdict forms were also presented to the jury without objection.

The location of the express, deeded, right-of-way was proven by a preponderance of the evidence, including, ***inter alia***, the clear, unrebutted, testimony of surveyor Donald Teter.

Respondent established, by clear and convincing evidence, both the existence, and the location, of a prescriptive easement, satisfying each of the necessary elements.

Aside from the Rule 8(e)(2) legal issue, the sole issues in this case are simply factual questions regarding the sufficiency of the evidence. As discussed, ***supra***, Petitioner has failed to satisfy the ***Graham v. Wallace*** standard (giving the prevailing party the benefit of

all assumptions and inferences) justifying upsetting the considered verdict of an impartial and properly instructed jury.

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true copy of the foregoing upon all other parties to this action by:

_____ Hand delivering a copy hereof to the parties listed below:

or by

__X__ Depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 4th day of May, 2020.

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