IN THE CIRCUIT COURT OF RITCHIE COUNTY, WEST VIRGINIA

RICHARD E. DUNN and CHERYL C. DUNN,
Plaintiffs,

vs.

Case No. 16-C-48
Judge Sweeney

JOHN R. DOSCH, Individually and as Trustee of the John R. Dosch Revocable Trust,
Defendants.

ENTERED 1/9/19

ORDER

On the 7th day of January, 2019, came the Plaintiffs Richard and Cheryl Dunn by their counsel, John Ellem, and the Defendant John R. Dosch both individually and as trustee of the John R. Dosch Revocable Trust, through counsel George Cosenza, for hearing upon their respective Motions for Summary Judgment. Thereupon counsel proceeded to make arguments in support of their respective positions, all of which was taken down by the Court Reporter.

Whereupon, after mature consideration thereof, the Court is of the opinion to and accordingly doth issue the following:

STANDARD OF REVIEW

West Virginia Rule of Civil Procedure 56(a) provides that "[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse

party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Rule 56(c) goes on to state that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the nonmoving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

> "If the evidence favoring the nonmoving party is 'merely colorable ... or is not significantly probative' a genuine issue does not arise, and summary judgment is appropriate." *Williams* [*v. Precision Coil, Inc.*], 194 W.Va. [52,] 60-61, 459 S.E.2d [329,] 337-38 (quoting *Anderson [v. Liberty Lobby, Inc.*], 477 U.S. [242,] 249-50, 106 S. Ct. [2505,] 2511, 91 L.Ed.2d 202 (citations omitted in original)).

Jividen, 194 W.Va. at 713-14, 461 S.E.2d at 459-60.

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

"Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce

'concrete' evidence which would allow a reasonable finder of fact to return a verdict in its favor." *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 189 (1994).

Following a full and complete review of the relevant evidence, and examination of the parties' filings, motions, exhibits, and memoranda, an inspection of the court file, as well as a review of the applicable Rules of Civil Procedure and pertinent case law, arguments of counsel and a thorough evaluation of the issues presented, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This matter involves a dispute over access to a right-of-way road that starts on the Plaintiffs property in Murphy District, Ritchie County and then crosses the Defendants property on the way to an area commonly known as Bear Run.

2. That specifically, the Plaintiffs own approximately 33 acres of property in Ritchie County, Murphy District along Big Island Run, which they acquired by deed dated December 16, 1986 of record in the office of the clerk of Ritchie County in Deed Book 180, page 391-A. A copy of this deed is attached to their complaint as Exhibit A.

3. That the Defendants likewise own approximately 33 acres along Big Island Run by virtue of a deed dated November 23, 2011 of record in the office of the clerk of Ritchie County in Deed

Book 313, page 310. This property borders the Plaintiffs property and runs along with State Rd 53/1 passing near the border of the properties. A copy of this deed is attached to their complaint as Exhibit C.[1]

4. That a roadway intersecting with State Rd 53/1 passes through the Defendants property allowing access to the area of Ritchie County known as Bear Run.

5. That this is in fact the **2nd dispute over access to the right of way road involving the Defendants.** Consequently, the Court necessarily makes the following findings from the prior litigation:

A. Findings of Fact From The Prior Litigation

6. That in combined Ritchie County Civil Actions No. 99-C-45 and 00-C-27, John and Margaret Dosch, George Smith and Edward Brooks sued a one, Ronald Lantz, alleging that Mr. Lantz wrongfully prevented use of the said roadway starting over his land and crossing theirs.

7. That at that time, Mr. Lantz owned, by virtue of a deed dated November 7, 1994, an approximate 33-acre tract of property that borders the Dunn property. **This property owned by Lantz is the same property now owned by the Defendant, Dosch by virtue of the 2011 deed referenced above. (emphasis added).**

[1] As note below, this property was formerly owned by Ronald Lantz and is now formally titled in name of the Defendant, John R. Dosch Revocable Trust. Mr. Dosch acknowledged being the trustee of said trust and solely responsible for its actions.

8. That further at the time of this prior suit, Mr. Smith then in turn, owned a tract of real estate adjacent to and east of Mr. Lantz, (Tax Map 22, parcel 11) and Mr. Brooks owned a tract of real estate adjacent to and east of Mr. Smith, (Tax Map 22, parcel 33) while Mr. Dosch then owned several tracts of property adjacent to the Brooks property (these are depicted in Tax Map 22 parcels 34, 35, 36, 41, 42, 42.1, and 46).

9. That the ruling in combined Ritchie County Civil Actions No. 99-C-45 and 00-C-27, by then Ritchie County Circuit Judge Robert L. Holland was in favor of Dosch, Smith, and Brooks. Judge Holland specifically found that there existed a roadway which intersected with State Road 53/1 and then passed through Mr. Lantz's property and then through the Smith, Brooks and Dosch properties, ultimately allowing access to what is known as the Bear Run area. A copy of Judge Holland's Order dated October 7, 2004 is attached as Exhibit B to the Plaintiffs complaint and is a final order as no appeal was taken.

10. That notably, in paragraphs 11-16 of their complaint, the Dunn's cite critical language from Judge Holland's 2004 Order all of which, except for paragraph 16, were *admitted* by the Defendant's in their answer in this case. Those findings of fact by Judge Holland as set forth in the Dunn's complaint are repeated herein as follows:

11. That a roadway intersecting with State Rd 53/1 passed through Lantz's property and then through Smith, Brooks and Dosch allowing access to the Bear Run area.

12. That the Court found a roadway was constructed in a collaborative effort by the families that resided on the properties over 70 years prior to the trial.

13. That the Court further found that although none of the parties resided on the property, the roadway was used in an uninterrupted, open and continuous manner without objection by Lantz or his predecessors.

14. That accordingly the Court found a right to use the roadway existed by prescription.

15. That notably, the Court found that:

Mr. Lantz testified that the public perception that use of the roadway was permissible was due to the road having been used by the public for "so long without permission."

16. That the Court found said roadway to start on Lantz's property.

12. That Judge Holland also found in paragraph 13 of his 2004 Order that, "There have been periods of time when the roadway has been less traveled than at other times, but the roadway has been in continuous use since its construction and has not been abandoned."

13. That, furthermore, Judge Holland found the road to have been constructed *seventy years* ago. Order paragraph #6.

14. Finally, Judge Holland found that the existence and right to use the roadway appears in the chain of title to Lantz's property. Order, paragraph #14. As noted above, the said Lantz property is now owned by the Defendants.

15. Judge Holland then made various Conclusions of Law in his 2004 Order all of which are set forth and incorporated herein and are as follows:

a. "The open, continuous and uninterrupted use of a road on the lands of another, under a bona fide claim of right, and without objection from the owner, for a period of 10 years, creates in the user of such road a right by prescription to the continued use thereof." *Post* v. *Wallace,* 119 W.Va. 132, 192 S.E. 112 (1937).

b. The Plaintiffs have established the existence of a prescriptive easement, as it has been shown that usage of subject road has been open, continuous and uninterrupted, under a bona fide claim of right, and without objection for a period in excess of ten years. See Findings of Fact ¶¶ 5, 6, 7, 11, 12, and 13.

c. The Plaintiffs have a right of way over the roadway that should not be restricted in any way. The entire roadway shall be subject to use by all the

Plaintiffs, the Defendant, their respective families, social or business invitees, their heirs, assigns, and/or successors for ingress and egress and for access to and from the public roadway.

d. Mr. Lantz, his agents, servants, and/or employees shall be, and are hereby, permanently enjoined from erecting or placing any barrier, natural or man-made, upon the subject roadway located in Murphy District, Ritchie County, West Virginia, described on Tax Map 22 as parcel 10, conveyed by deed bearing the date of November 7, 1994, and recorded in Deed Book 250 at page 749.

B. Findings of Fact In The Case at Bar

16. That prior to the institution of this litigation, the Plaintiffs' had a survey prepared of where this roadway *actually starts* on their property along 53/1 - which, of course, is also right where the Lantz property - now the Defendant's property accesses the road:

PLAT OF PARTIAL SURVEY
FOR
RICHARD DUNN

BEING A PARTIAL SURVEY OF THE SAME TRACT OR PARCEL OF LAND CONVEYED TO RICHARD E. DUNN AND CHERYL C. DUNN FROM MARGARET BELL, CHARLES WHITEHAIR, AMY WHITEHAIR, EVELYN BROOKS, ADDISON BROOKS, HAROLD JONES, MABEL JONES, GLEN D. JONES AND JOANNE JONES, ROBERT JONES AND BARBARA JONES, ROGER D. JONES AND HELEN JONES, DONALD D. JONES AND ELLEN JONES, GLEN CHESTER JONES AND JEWEL JONES, NELLIE EDGELL AND ROBERT EDGELL, SHIRLEY TODD, BY HER ATTORNEY IN FACT, MABEL JONES, JANICE JONES, MELANIE RITTER AND JOHN RITTER BY DEED DATED THE 16TH DAY OF DECEMBER 1988, OF RECORD IN THE OFFICE OF THE COUNTY CLERK OF RITCHIE COUNTY, WEST VIRGINIA IN DEED BOOK 231 AT PAGE 33.

SITUATE ON THE WATERS OF DRIFT FORK, IN MURPHY DISTRICT, RITCHIE COUNTY, WEST VIRGINIA

TAX MAP 22 PARCEL 14

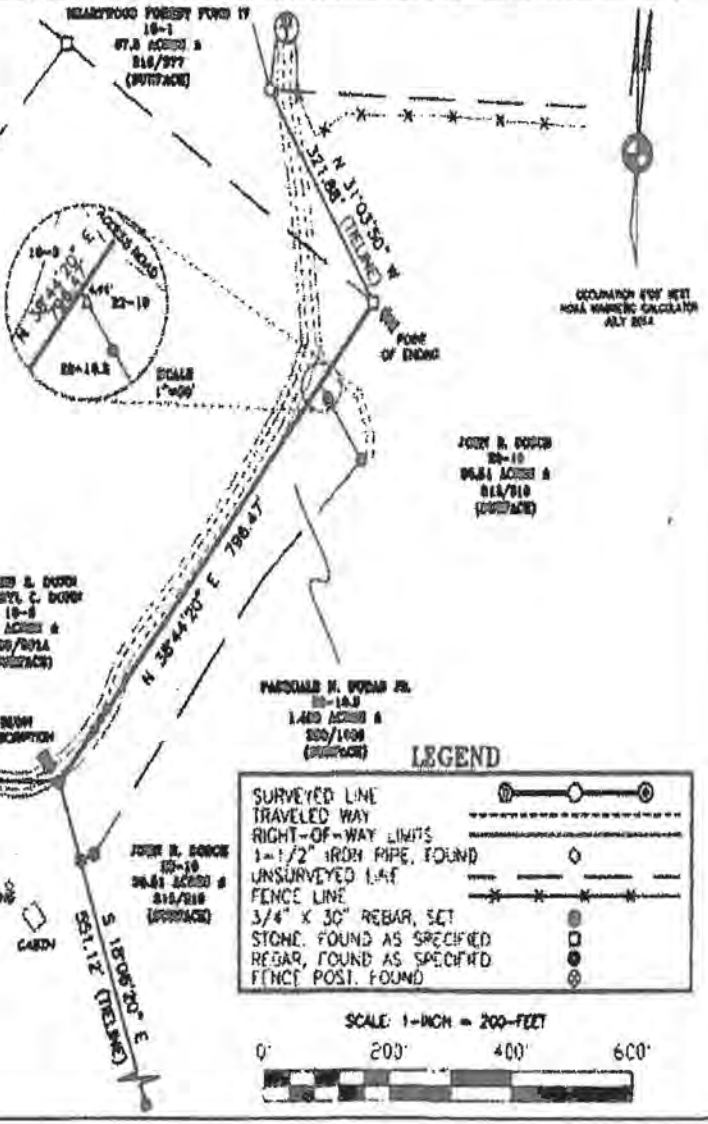
DOYLE HUPP JR. LICENSED No. 834 STATE OF WEST VIRGINIA PROFESSIONAL SURVEYOR

09/18/15 PS#834

PROJECT CREW CHIEF: CAMERON NICHOLAS SJ# 163
DRAFTED BY: CAMERON NICHOLAS 09/18/15
FIELD SURVEY: SEPTEMBER 10, 2015
HSM CADD FILE B20152418.DWG

NOTES ON SURVEY

1. THIS DESCRIPTION OF SURVEY WAS MADE BASED UPON INFORMATION OF COURSES AND REFERENCED MONUMENTS.
2. BEARINGS AND/OR DISTANCES SHOWN BUT NOT ACTUALLY SURVEYED DURING THIS SURVEY WERE TAKEN FROM THOSE DEEDS REFERRED.
3. THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE OPINION.
4. IT APPEARS THAT THE SURVEY LINE TO PLACE THE NORTHWESTERN BOUNDARY OF THE SUBJECT TRACT AT THE N 38-44-20 E LINE AND THIS IS NOT THE CASE THE PROPERTIES IN THE EXPLOSION AS SHOWN.



LEGEND

SURVEYED LINE	
TRAVELED WAY	
RIGHT-OF-WAY LINES	
1-1/2" IRON PIPE, FOUND	◇
UNSURVEYED LINE	
FENCE LINE	
3/4" X 30" REBAR, SET	
STONE, FOUND AS SPECIFIED	□
REBAR, FOUND AS SPECIFIED	●
FENCE POST, FOUND	⊗

SCALE: 1-INCH = 200-FEET

0' 200' 400' 600'

HUPP Surveying & Mapping
P.O.BOX 647 GRANTSVILLE, WV 26147
PH:(304)354-7035 E-MAIL: hupp@frontiernet.net

B20152418

17. That the Plaintiff, Mr. Dunn was deposed by counsel for the Defendant and testified that he became aware of this earlier litigation after it had started and did not intervene or join in the litigation because he thought he did not have a right to do so as it was too late to join in at the time. Dunn depo. pg. 15: 14-20.

18. Mr. Dunn testified he was later told that Mr. Lantz lost the case; and further testified that at some point after the litigation the road was open, and he used it a couple of times after that. Dunn depo. pg. 18.

19. Mr. Dunn also testified that he first began using the roadway in 1985 when using his property that had a cabin on it. Dunn depo. pg. 13. In fact, Mr. Dunn testified that he used it through the 80's and into the 90's, until it was gated and that he used it a few times a month at the minimum but certainly more so in hunting season. Id.

20. Mr. Dunn then testified that the gates to the road were put back up when Mr. Dosch purchased the property. Dunn depo. pgs. 18-21.

21. Mr. Dunn testified that he asked Mr. Dosch if he could use the roadway one time when he was coming down the road and while Mr. Dosch and his wife were on their ATV. Dunn depo. pgs. 22-23.

22. He testified that this occurred 3 to 4 years ago and that Mr. Dosch replied that there was no reason for him to use the road. Dunn depo. pg. 23.

23. Mr. Dunn even testified that Lantz's predecessor in title, a Mr. Ray, knew he was using the road but never prevented him from doing so and that Lantz himself, for a while, didn't object. Dunn depo. pg. 30.

24. Mr. Dunn then testified that he put up a gate and lock on the portion of the roadway that actually crosses *his property* as shown on the above survey and which prevented Mr. Dosch from using the roadway from State Road 53/1, although he could still use the roadway from the top of the hill. Dunn depo. pgs. 33-34.

25. Mr. Dunn then testified that although his gate is still up - it is open because Mr. Dosch cut the locks. Dunn depo. pg. 34.

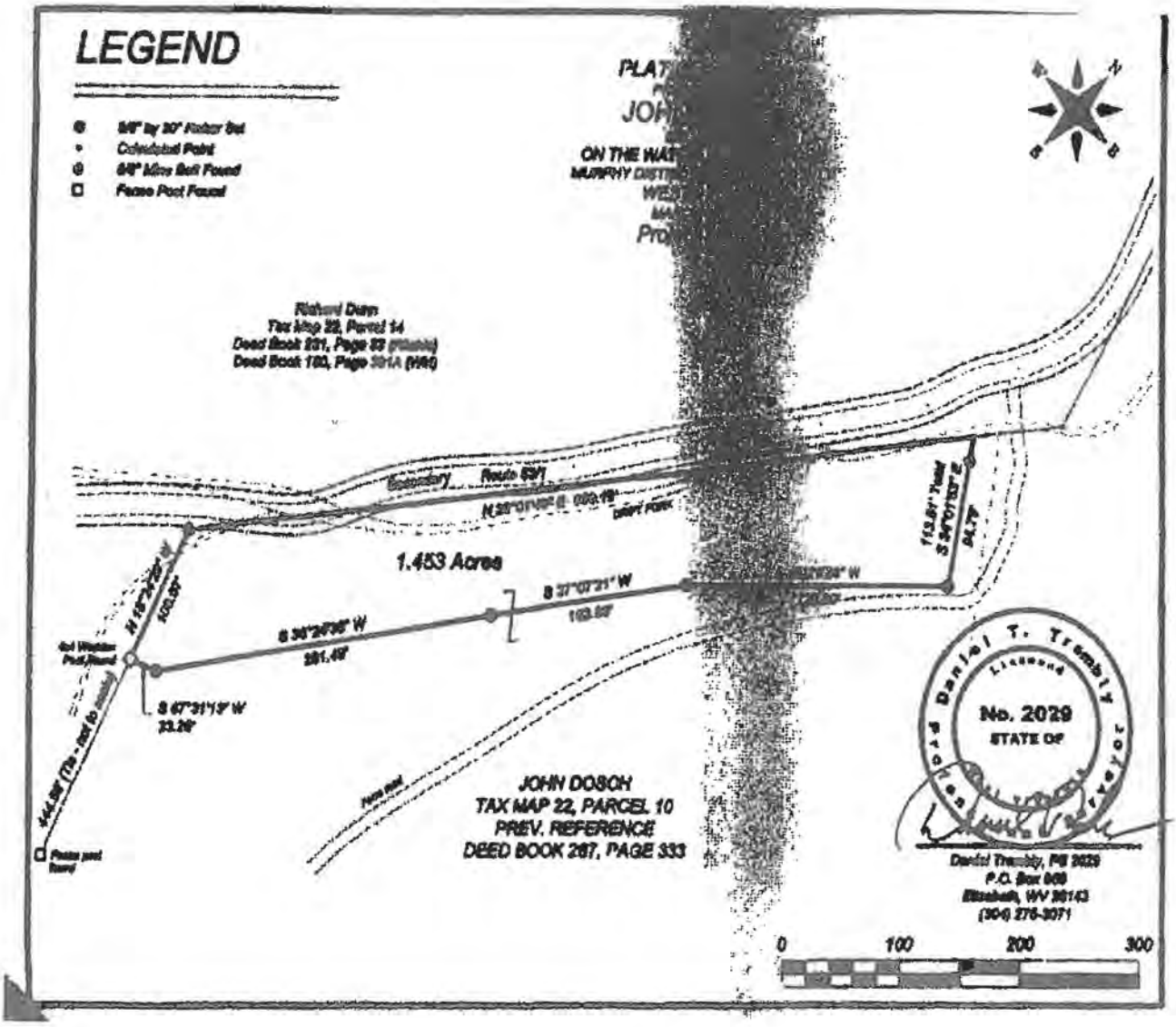
26. That despite the survey above, Mr. Dosch testified that the roadway in question only went through Mr. Lantz's property and then hooked up with another road - Strickland Rd and then a logging road that incorporated his property (now owned by his company - RPJ) as well as the Smiths and Brooks. Dosch depo. pg. 7.

27. Mr. Dosch testified that the gates currently on the Lantz property that his Trust now owns are the **same** gates that Mr. Lantz put up - one at the bottom of the hill and one at the top of the hill. Dosch depo. pgs. 24-25.

28. Mr. Dosch further testified that there are two locks on the gate at the bottom by Drift Fork – one lock by Ed Brooks and one by him. Dosch depo. pg 26: 19-24. He testified that he has a key to the Brooks lock and Brooks has the combination to his lock and that others such as George Smith and the Hardbargers have access. Dosch depo. pg. 27.

29. Mr. Dosch testified that the road through his property (aka the Lantz property) is about 16 to 18 feet wide – wide enough to get a dump truck through. Dosch depo. pg. 38: 7-10. He acknowledged while looking at the Dunn survey that Mr. Dunn had put up a gate on the small portion of roadway that is on his property. Dosch depo. pg. 45:8-9. Further, he acknowledged *that he was aware* that Dunn had a portion of the roadway on his property but that there was no reason why he didn't notify the Dunn's of the Lantz litigation. Dosch depo. pgs. 45-46.

30. That in fact, Mr. Dosch discussed a survey that he provided in discovery (Exh. 5 to his depo) done for him by Dan Trembly P.S. and which notes that the roadway labeled "farm road" is in fact the "Lantz road" at issue both then and now. Dosch depo. pg. 51. Below, for ease of the reference, is a copy of the survey:



CONCLUSIONS OF LAW

1. "The Circuit Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be

tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "The definition which would seem to embrace most fully and accurately the meaning of the term 'res judicata' is: A legal or equitable issue, necessarily involved in a former suit, on which there has been a final judgment or decree, obtained without fraud and collusion, and rendered by a court of competent jurisdiction necessarily affirming the existence of that fact, is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them [footnote omitted]." *Michies' Jurisprudence*, Volume 8B, Former Adjudication or Res Judicata, §2, page 172.

4. *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 672 S.E.2d 598 (2008), provides as follows:

> Res judicata or claim preclusion "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." *State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995). We recognized in *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 219 (1983), that "the underlying purpose of the doctrine of res judicata was initially to prevent a person from being twice vexed for one and the same cause." In Conley, we also observed the following additional rationale underlying the doctrine of res judicata:

"To preclude parties from contesting matters that have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, claim preclusion serves to conserve judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Id. (quoting *Montana v. United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973-74, 59 L.E.2d 210, 217 (1979)).

5. *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 672 S.E.2d 598 (2008), also provides as follows:

"For a second action to be a second vexation which the law will forbid, the two actions must have (1) substantially the same parties who sue and defend in each case in the same respective character, (2) the same cause of action, and (3) the same object." *Hannah v. Heasiey*, 132 W.Va. 814, 821, 53 S.E.2d 729, 733 (1949). Accordingly, we held in *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997):

Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third,
the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Id. at Syl. Pt. 4, 498 S.E.2d 41. The third prong of this test is most often the focal point, since "the central inquiry on a plea of res judicata is whether the cause of action in the second suit is the same as the first suit."
Conley, 171 W. Va. at 588, 301 S.E.2d at 220.

6. Each of the opposing sides in this litigation agree that there has been a final adjudication on the merits in combined cases 99-C-45 and 00-C-27.

7. This Court too **FINDS** and **CONCLUDES** that there has been a final adjudication on the merits of combined cases 99-C-45 and 00-C-27, the prior actions. The Court finds that the Ritchie County Circuit Court did have jurisdiction over the prior actions pursuant to West Virginia Code, §51-2-2, inasmuch as the right-of-way easement, the location and existence of which, respectively, the suit sought, among other things, to determine each were appurtenant to or affect the real estate solely located in Ritchie County, West Virginia.

8. Each of the opposing sides in this litigation largely agree that the two previous actions and the case a bar involve either the same parties or persons in privity or successors in interest with those same parties.

9. This Court also **FINDS** and **CONCLUDES** that the two previous actions and the case at bar involve the same parties and persons in privity with those parties or their successors in interest. Specifically the Plaintiffs are in privity by operation of the doctrine of virtual representation and the trust defendant is in privity by virtue of being a successor in interest to a party to the previous actions. With respect to whether the trust defendant and the Plaintiffs are in sufficient privity for the ruling in the

previous actions to be held determinative of the parties rights in this action as well, this court notes that *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 672 S.E.2d 598 (2008), provides as follows:

> As we previously explained in *West Virginia Human Rights Comm'n v. Esquire Group, Inc.*, 217 W.Va. 454, 460-461, 618 S.E.2d 463, "the concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party against whom preclusion is asserted have been adequately represented." It has been recognized that "[p]rivity . . . `is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata*.'" *Rmve v. Grapevine Corp.*, 206 W.Va. 703, 715, 527 S.E.2d 814 (1999). In other words, "preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party." *Gribben*, 195 W.Va. at 498 n. 21, 466 S.E.2d at 157 n. 21.
>
> In determining whether privity exists, we have previously utilized the doctrine of "virtual representation." Virtual representation, a variety of privity, "precludes relitigation of any issue that [has] once been adequately tried by a person sharing a substantial identity of interests with a nonparty." *Galanos v. National Steel Corp.*, 178 W.Va. 193, 195, 358 S.E.2d 452, 454 (1987). In *Galanos*, we offered various examples of circumstances of when the doctrine of virtual representation can be applied in accord with due process principles. One such example was when a nonparty's actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment, he may be deemed to be bound by such judgment. *Id.* at 455, 196, 358 S.E.2d 452 *(citing Crane v. Comm'r*, 602 F.Supp. 280 (D.Me. 1985); *Katz v. Blum*, 460 F.Supp.122 (S.D.N.Y. 1978), *qffd* 603 F.2d 213 (2d. Cir. 1979)).

10. Additionally, one cannot avoid the effect of a legal determination simply because they were not joined as a party to the suit. *Gribben v. Kirk*, 195 W.Va. 488, 499 S.E.2d 147 (1995). Although it is the Plaintiffs who desire to avail themselves of the ruling in the prior actions, the principle likewise applies.

11. This Court also **FINDS** that, in fact, the claims and issues in the case at bar are identical to the cause of action identified in the previous cases and were resolved or could have been resolved, had they been presented, in the prior actions.

12. The Plaintiffs allege in their complaint that they are entitled to use the road right of way under the doctrine of collateral estoppel given the rulings made by the late Ritchie County Circuit Court Judge Robert L. Holland in the combined Ritchie County Civil Actions No. 99-C-45 and 00-C-27. There are four elements that must be met before the doctrine of collateral estoppel will apply: 1) the issue previously decided is identical to the one presented in the action in question; 2) there is a final adjudication on the merits of the prior action; 3) the party whom the doctrine is invoked was a party or in privity with a party to a prior action; and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the

prior action. Syllabus Pt. 3, *Holloman v. Nationwide Mutual Insurance Company*, 217 S.E.2d 269, 617 S.E.2d 816 (2005) citing Syllabus Pt. 1 *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). That elements 2, 3, and 4 are most easily dealt with as they are *not in issue* as the Defendants have admitted these in their answer. Specifically, the Defendants admitted paragraphs 27, 28 and 29 of the complaint which are set forth herein as follows for ease of reference:

> *27. That Ritchie County Civil Actions Nos. 99-C-45 and 00-C-27 received a full and final adjudication on the merits.*
>
> *28. That the Defendant, Dosch, was a party in the prior combined litigation and the Defendant Dosch is at all times hereto in privity with and directs the actions of the Defendant, John R. Dosch Revocable Trust.*
>
> *29. That the Defendants herein full and fairly litigated issues concerning the access to the roadway as described above.*

13. That this Court does hereby find that based on the evidence set forth above, element 1 of the doctrine of collateral estoppel is also satisfied. This Court would first note that Conclusion of Law number 4 by Judge Holland could not be clearer in its directive:

> Mr. Lantz, his agents, servants, and/or employees shall be, and are hereby, **permanently enjoined** from erecting or placing any barrier, natural or man-made, **upon the subject roadway** located in Murphy District, Ritchie County, West Virginia, described on Tax Map 22 as parcel 10, conveyed by deed bearing the date of November 7, 1994, and recorded in Deed Book 250 at page 749. (emphasis added).

This paragraph of the Order is consistent with the Judge Holland's finding in paragraph 6 that the roadway was constructed in a collaborative effort by the families that resided on the property 70 years ago and that "motor vehicle traffic often utilized the roadway to travel to Bear Run…" This finding is further consistent with the finding in paragraph 11 that, "Mr. Lantz testified that the public perception that use of the roadway was permissible was due to the road having been used by the *public* for "so long without permission." (emphasis added). The Defendants in this litigation cannot now change these findings of fact and conclusions of law. The Defendants have no more right to obstruct the use of the roadway (through a locked gate or otherwise) than Mr. Lantz did.

14. The Plaintiffs have also alleged a cause of action in their complaint for a right of way by prescription.

15. That in the case of *O'Dell v. Stegall*, 703 S.E. 2d 561 (W.Va. 2010), the Court in Syllabus Pt. 1 set forth the elements of a prescriptive easement as follows:

> 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.

16. That based on the Plaintiff, Mr. Dunn's deposition testimony and the 2004 Order of Judge Holland with its extensive findings of facts and conclusions of law, the Plaintiffs are also entitled to a finding they have a prescriptive easement for the roadway. Mr. Dunn testified that he used first began using the roadway over Lantz's property and accessing Bear Run in 1985. He testified that Mr. Lantz was aware of this use and that it continued until Mr. Lantz placed a locked gate on the roadway.

17. Likewise, the roadway is described and/or shown not only in Judge Holland's Order but also in the pictures from the time of the litigation; the survey the Defendant's commissioned as shown above and further its origin is clearly shown in the survey obtained by Mr. Dunn.

18. This Court also asked the parties to brief the doctrine of virtual representation. A notable case discussing virtual representation, including the conditions of mutuality, is the case

of *Galanos vs National Steel Corp*, 178 W.Va. 193, 358 S.E.2d 452 (1987). The Court held in Syllabus Pt. 1 that, "In this jurisdiction under certain conditions mutuality of parties is no longer necessary in order to enforce a judgment against a party or his privy." The Galanos court first started by discussing offensive collateral estoppel by noting that, "where a plaintiff contends that a defendant is precluded by issues litigated by him in a prior trial the estoppel is deemed to be offensive." 178 W.Va. at 195, 358 S.E.2d at 454. The Court further stated, that "A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim." Id.

They also noted that a judgment may, consistent with due process, be applied to someone who is not a party to the original action if the person is in privity with the party to the original action. Id. The Court in Galanos then went on to discuss that there exists the doctrine of virtual representation as originally established in the case of *Cauefield vs Fidelity & Casualty Company of New York*, 378 F. 2d 876 (5th Cir.). The Court noted that Caufield held that the doctrine of virtual representation precludes the relitigation of any issue that has once been adequately tried by a person sharing a substantial identity of interest with a non-party. *Galanos*, 178 W.Va. at 195, 358 S.E.2d at 454. Thus, in the

case at bar, the doctrine of virtual representation would prevent the Defendants from trying to relitigate any issues concerning the roadway insofar as those issues were addressed in Judge Holland's Order of October 7, 2004 from the prior litigation in which they were a party.

19. Judge Holland's resolution of the previous actions necessarily has the effect of an affirmative judgment in favor of the Plaintiffs with respect to the issues relevant in this case to-wit: the existence and location of the right-of-way easement.

20. Inasmuch as the issue of the existence and location of a right-of-way easement has been previously established and found to be dispositive of that issue now before the Court as above set forth, the issue of whether the plaintiffs have independently established the same is moot. Therefore, the Court makes no determination in this regard.

RULING

It is therefore **ORDERED** that consistent with paragraph 3 of Judge Holland's conclusion of law set forth in his October 7, 2004 Order, that the Plaintiffs herein have a right of way over the roadway that should not be restricted in any way and that the entire roadway shall be subject to use by the Plaintiffs, the Defendant's and their respective families, social or business

invitees, their heirs, assigns, and/or successors all for ingress and ingress and for access to and from the public roadway

It is further **ORDERED** that consistent with paragraph 4 of Judge Holland's conclusion of law set forth in his October 7, 2004 Order, that the Defendants herein, their agents, successors, assigns, and employees are hereby to be permanently enjoined from erecting or placing any barrier, natural or man-made upon the subject roadway located in Murphy District, Ritchie County, West Virginia as described on Tax Map 22 as parcel 10 and conveyed to them by deed dated November 23, 2011.

The Court **FINDS** and **ORDERS** there is no waiver of the benefit of the ruling in the previous suits, 99-C-45 and 00-C-27, due to the Court's ruling herein on the issues of res judicata, virtual representation, and collateral estoppel. The rights and interests of the parties to this proceeding shall be the same as those determined among the parties to the previous cases (99-C-45 and 00-C-27) as set forth in the final order therein.

For the reasons set forth above, the Court **GRANTS** the Motion for Summary Judgment of the Plaintiffs Richard and Cheryl Dunn and further **DENIES** Defendants', John R. Dosch and John R. Dosch Revocable Trust, Motion for Summary Judgment the for reasons set forth more specifically above and incorporated herein.

The Defendants' objections and exceptions to any rulings adverse to their interests herein are preserved.

The Clerk shall mail attested copies of this Order to all parties of record.

Entered this 14th day of April, 2020.

JUDGE TIMOTHY L. SWEENEY