IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0803

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

Petitioner,

v.

RICHARD E. DUNN and CHERYL C. DUNN,

Respondents.

Appeal from a final order of the Circuit Court of Ritchie County (16-C-48)

REPLY BRIEF OF PETITIONERS JOHN R. DOSCH, individually and as Trustee of the John R. Dosch Revocable Trust

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I. ARGUMENT

In their brief, the Dunns make clear that they cannot establish their own right to a prescriptive easement over the Lantz Roadway. Instead, they try to establish their disfavored claim for prescriptive easement by relying entirely on a decision from a previous case (the "2004 Order") to which they were not parties and which granted prescriptive easements to parties unrelated to the Dunns. This 2004 Order contained no evidence of the Dunns' use of the property and made no legal conclusions regarding the Dunns' rights over the Lantz Roadway. The Dunns' misguided reliance on the 2004 Order flows from a misapplication of two disfavored legal principles – virtual representation and offensive collateral estoppel. And, even if some of the statements in the 2004 Order regarding the general public's use of the Lantz Roadway are accepted as true for purposes of this litigation, those facts are irrelevant to whether *the Dunns' use of the Lantz Roadway* is sufficient to give *the Dunns* a prescriptive easement.

No matter how many times the Dunns repeat in their brief the factual findings from the 2004 Order, those findings are still not applicable to the Dunns' current claim and still cannot establish that the Dunns are entitled to a prescriptive easement over the Lantz Roadway. This Court should reverse the trial court's decision and grant summary judgment to Mr. Dosch.

A. Reply Arguments in Support of the First Assignment of Error.

1. The Dunns Cannot Establish That Their Use of the Lantz Roadway Meets the Elements for a Prescriptive Easement.

The Dunns do not dispute the disfavored nature of prescriptive easement claims nor that the law holds them to a clear and convincing standard.

The Dunns ignore the case law cited by Mr. Dosch indicating that the prescriptive easement analysis is a fact-specific inquiry regarding how the *specific plaintiff* used a *specific piece of property* to determine whether *those individuals* have a prescriptive right to continue using the

property in that manner. *See generally O'Dell v. Stegal*, 226 W.Va. 590, 703 S.E.2d 561 (2010) (focusing on how a specific "user" or "person" used property). The Dunns also ignore case law providing that just because some landowners have a prescriptive easement over a piece of property, that does not mean that other landowners in the area will have a similar easement – each individual landowner must independently prove that their own use of the property gives them a right to a prescriptive easement. *See Wheeler v. Beachcroft, LLC*, 320 Conn. 146, 168, 129 A.3d 677 (2016) ("Because some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not, depending on each lot owner's use of the lawn over a fifteen year period, all of the lot owners in the subdivision cannot be said to share the same prescriptive rights."); *Brannock v. Lotus Fund*, 2016-NMCA-030, 367 P.3d 888, ¶ 17 (denying use of collateral estoppel because "the issues in the Coombs case dealt with whether the *Coombses* had established a prescriptive easement over the disputed access road; the issues in the present case deal with whether *Plaintiffs* have established a prescriptive easement over the disputed access road.")

The Dunns cannot provide evidence establishing that their use of the Lantz Roadway meets the elements for a prescriptive easement and they instead try to hitch their prescriptive easement claim onto the fact that other landowners have a prescriptive right in the property. The Dunns make almost no attempt to respond to Mr. Dosch's arguments detailing how the Dunns' lack of evidence fails to create a genuine issue of material fact for the various elements. Based on the lack of evidence supporting the Dunns' claim for prescriptive easement, the trial court erred in granting summary judgment to the Dunns and should have granted summary judgment to Mr. Dosch.

a. The Dunns failed to provide evidence to create a genuine issue of material fact that their use of the Lantz Roadway was adverse to the true owner.

The Dunns fail to create a genuine issue of material fact that *their* alleged use of the Lantz Roadway was adverse to the true owner. A plaintiff seeking a prescriptive easement must prove

that "[h]is or her use of the servient estate was 'adverse' to the rights of the true owner." *Id.* at 609. Adverse use means "a wrongful use, made without the express or implied permission of the owner of the land." *Id.* at 614.

The Dunns' brief does not address the evidence establishing that their alleged use of the Lantz Roadway was like the impliedly permissive "neighborly accommodation" in *O'Dell* rather than a use adverse to the true owner. *See O'Dell*, 226 W. Va. at 613 ("[p]ermission may be inferred 'from the neighborly relation of the parties, or from other circumstances'") (quoting 4 *Powell on Real Estate*, § 34.10[2][a]). Mr. Dunn testified that "the person who owned the [Lantz Property] never had an issue with [the Dunns using it]." (R. at 217, Dunn Depo. 11:13-18.) Mr. Dunn testified that the Lantz Property's previous owner, Mr. Ray, knew Mr. Dunn was using the Lantz Roadway and never objected to it. (R. at 235–36, Dunn Depo. 29:24–30:12.) Mr. Dunn further testified that Mr. Lantz did not have an issue with Mr. Dunn using the Lantz Roadway and never objected to it until he later decided to put the gates up. (R. at 237, Dunn Depo. 31:1-4; *see also* R. at 318, Order, Findings of Fact ¶ 23.) Rather than meeting their "burden of proving adverse use," the Dunns' own testimony demonstrates that their alleged use of the Lantz Roadway was permissive. *O'Dell*, 226 W. Va. at 615.

The Dunns also fail to address Mr. Dunn's testimony that the previous landowner permitted the Dunns' use of the road because he understood it to be a community roadway. (Dunn Depo. 11:13-24.) As this Court has explained, such a public use theory undercuts a prescriptive easement claim and instead raises "a presumption that the use is permissive." *O'Dell*, 226 W.Va. at 621 n. 36 (citing *Town of Paden City v. Felton*, 136 W.Va. 127, 137, 66 S.E.2d 280 (1951) , Bruce & Ely, § 5:9, and *Hall v. Strawn*, 108 Idaho 111, 112-13, 697 P.2d 451, 452-53 (Ct.App. 1985)). Here,

the fact that the general public allegedly used the Lantz Roadway alongside the Dunns undermines their claim for a prescriptive easement and the Dunns do not address this issue.

The Dunns attempt to establish the adverse element by pointing to a single factual finding from the 2004 Order. The Dunns' reliance on the 2004 Order to prove adversity is especially problematic, because the 2004 Order made no findings or conclusions regarding adversity. Indeed, the 2004 Order's prescriptive easement analysis was based on a case that this court has since overruled because it did not include the adversity element. *See O'Dell*, 226 W.Va. at 615 n.28 (overruling Syl. Pt. 2, *Post v. Wallace*, 119 W.Va. 132, 192 S.E. 112 (1937)). (R. at 170, 2004 Order, Conclusions of Law, ¶¶ 1–2 (relying on *Post*).) The 2004 Order found only that the previous plaintiffs had used the Lantz Roadway "without objection," which does not meet this Court's adversity standard.[1] (*Id.*) The 2004 Order provides no aid to the Dunns in establishing they meet the adversity element, and does not alter Mr. Dunn's testimony that his alleged use was permitted by the previous landowners.

And, although it is impermissible to apply a finding from the previous case here, the identified finding *undermines the Dunns' claim*. In the 2004 Order, Judge Holland noted that Mr. Lantz[2] testified that "the public perception" was that "use of the roadway was permissible" because it had "been used by the public for 'so long without permission.'" (R. at 169, 2004 Order, Findings of Fact, ¶ 11.) In other words, according to Mr. Lantz, the public had implied permission to use

[1] The Dunns may not collaterally attack the 2004 order based on the lack of adversity findings. *See Hustead v. Ashland Oil*, 197 W. Va. 55, 60, 475 S.E.2d 55 (1996) (holding a judgment on the merits "is not amendable to collateral attack" no matter "how[] erroneous it may be.") There can be no dispute that Mr. Dosch and the other previous plaintiffs hold a prescriptive easement over the Lantz Roadway through the 2004 Order. Nor can the Dunns argue that they may evade the adversity requirement simply because it was not applied 17 years ago.

[2] Moreover, testimony from Mr. Lantz does not address Mr. Dunn's testimony about the previous owner, Mr. Ray, permitting the Dunn's alleged use of the Lantz Roadway.

the roadway because they had used it for so long without anyone stopping them, and thus the use cannot be considered adverse. This finding is consistent with Mr. Dunn's testimony that the previous owners "never had an issue" with him allegedly using the property *and* the legal presumption established in *O'Dell* that the general public's use of land over time is presumptively permissive.

The Dunns presented evidence that their alleged use of the Lantz Roadway was permissive. The general public's use of the Lantz Roadway raises a presumption of permissive use. The 2004 Order's factual findings reinforces the lack of adversity. The Dunns have failed to create a genuine issue of material fact regarding the adversity element of their prescriptive easement claim and the trial court should have granted summary judgment to Mr. Dosch.

b. The Dunns failed to provide evidence to create a genuine issue of material fact that their use of the Lantz Roadway was continuous and uninterrupted for at least ten years.

As set forth in Mr. Dosch's initial brief, there was no evidence that the Dunns' use of the property ever occurred continuously for ten uninterrupted years. Mr. Dunn testified that he first began using the Lantz Roadway in 1985 or 1986 and stopped using it when Mr. Lantz put up gates in the early 1990s. (*See* R. at 4, Compl., ¶ 20; Dunn Depo. 13:3–4; R. at 219–20, Dunn Depo., 13:19–14:10.) This is not ten years. In their brief, the Dunns attempt to impeach Mr. Dunn's own testimony and to cloud the timeline established by that testimony. Even if this Court were inclined to permit Mr. Dunn to change or undermine his testimony on appeal, that would—at most—create a genuine issue of material fact regarding the ten year period that would preclude the award of summary judgment to the Dunns and would still require reversal of the trial court's decision.

c. The Dunns also failed to establish "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."

The Dunns also cannot show the absence of a genuine issue of material fact regarding the identity of the land in question. West Virginia law is "clear" that "[w]hen an easement has been acquired by prescription, the extent of the right so acquired is measured and determined by the extent of the user out of which it originated" and "the precise location of an easement sought to be established should be described either by metes or in some other way." *O'Dell*, 226 W.Va. at 619 (quoting Syl Pt. 4, *Foreman v. Greenburg*, 88 W.Va. 376, 106 S.E. 876 (1921) and Syl. Pt. 1, in part, *Nutter v. Kerby*, 120 W.Va. 532, 199 S.E. 455 (1938)). Rather than identifying the precise location of the alleged easement, the trial court instead made a vague reference to the location of the right-of-way being previously established and made "no determination in this regard." (R. 328–30, Order, Conclusions of Law, ¶¶ 17–20.) Indeed, the Dunns and the trial court both fail to detail exactly what land the Dunns allegedly have a prescriptive easement over.

Beyond not complying with the elements for a prescriptive easement, this lack of detail is especially problematic here for several reasons. First, it is undisputed that the Lantz Roadway has been improved, doubled in width, and re-routed in at least one place since the 2004 Order and since any time that the Dunns allegedly used it. (R. at 158, Dosch Depo. 57:20-58:4; 55:13-54:10.) There is no evidence regarding the width or path of the roadway that the Dunns allegedly used in the 1980s, and neither the Dunns nor the trial court established metes and bounds or any other parameters of the alleged prescriptive easement. Second, it is also unclear whether the trial court's decision attempts to extend the Dunns' prescriptive easement onto the Ridge Road or the old logging road that goes to the Smith, Brooks, and RPJ Properties. As a matter of law, it appears that it could not, as those roads are located on different properties and those landowners are not

named defendants in this action. But, the Dunns lack of evidence and the trial court's lack of specificity does not make this clear.

The Dunns failed to submit evidence sufficient to create a genuine issue of material fact regarding whether they could establish each element of prescriptive easement through clear and convincing evidence and, thus, the trial court erred in granting them summary judgment and denying summary judgment to Mr. Dosch.

B. Reply Arguments in Support of the Second Assignment of Error.

Because they cannot independently establish a prescriptive easement over the Lantz Roadway, the Dunns rely on the 2004 Order to establish that alleged right. The Dunns continue to argue that because other landowners proved that their use of the Lantz Roadway established a prescriptive easement in their favor, the Dunns should automatically get a prescriptive easement as well. Neither collateral estoppel nor prescriptive easements work in such a fashion.

1. The Dunns Agree That Res Judicata Does Not Apply Here.

The Dunns acknowledge that they did not assert res judicata below and that res judicata does not apply in this case. Despite the language in the trial court's order, the Dunns explain that the trial court simply "discussed the law of res judicata and privity insofar as it aided in the understanding, and the application of the doctrine of collateral estoppel." (Dunns' Br., p. 27.) This Court should therefore clarify that res judicata has no application in this case and should reverse to the extent the trial court applied res judicata. (*See* Dosch Br., pp. 27–32 (analyzing why res judicata cannot apply in this case).)

2. The Trial Court Should Not Have Applied the Disfavored Doctrine of Offensive Collateral Estoppel.

The Dunns do not dispute that, like prescriptive easements, the offensive use of collateral estoppel is "generally disfavored" in West Virginia. *Holloman v. Nationwide Mut. Ins. Co.*, 217

W.Va. 269, 274-275, 617 S.E.2d 816 (2005). The parties also agree on the four elements of collateral estoppel: "(1) The issue previously decided is identical to the one presented in the action in question; (2) there is final adjudication on the merits of the prior action; (3) the party against 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." *Id.* (quoting Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

The trial court erred in finding that collateral estoppel applied here because (1) the Dunns waived such an argument by purposefully not participating in the previous suit and (2) the Dunns cannot establish the first and fourth elements of collateral estoppel.

a. The Dunns' decision not to participate in the previous litigation precludes them from now asserting offensive issue preclusion based on that litigation.

The Dunns waived the right to assert offensive collateral estoppel when they knew of the previous litigation and chose to sit back and watch rather than assert their own rights. The Dunns do not dispute the general rule that:

> in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Tri-State Asphalt Prods. v. Dravo Corp., 186 W.Va. 227, 231, 412 S.E.2d 225 (1991) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979)). The Dunns similarly do not dispute that Mr. Dunn knew of the previous litigation, did nothing about it, and made no move to intervene in the action when he easily could have done so. (R. at 220, Dunn Depo. 14:11-16; R. at 221, *id.* at 15:11-16.) Thus, the Dunns are precluded from asserting offensive collateral estoppel here.

The Dunns' only response is that Mr. Dosch also knew of Mr. Dunn's alleged interest in part of the Lantz Roadway and failed to notify the Dunns of the litigation. (Dunn Br. at 27.) This

response is not relevant to the waiver analysis. The Dunns cite to no case law establishing that Mr. Dosch had any duty to notify area landowners of his complaint or that his failure to do so would excuse the Dunns from affirmatively deciding to not intervene in the action after they found out about it. Thus, the Dunns have waived any right to claim the benefit of a judgment from a case in which they chose not to participate.

b. The Dunns do not create a genuine issue of material fact for the first and fourth elements of collateral estoppel.

i. The issues previously decided in the 2004 Order are not identical to the issues presented in this action.

The use of collateral estoppel was improper here because the issues decided in the 2004 Order are not identical to the issues presented in this case. As this Court has explained, issues presented in two cases are not identical "if the second action involves different facts, legal standards or procedures." *Holloman*, 217 W.Va. at 274; *see Conley v. Spillers*, 171 W. Va. 584, 591, 301 S.E.2d 216 (1983) (collateral estoppel will not apply where "the controlling facts or legal principles have changed substantially since the earlier case.") Here, both the key facts and the legal standards are different than those applied in the previous litigation.

Factually, the earlier litigation was necessarily predicated on whether the previous plaintiffs' use of the Lantz Roadway was sufficient to meet the elements of prescriptive easement. This current litigation must necessarily focus on whether the Dunns' use of the Lantz Roadway was sufficient to meet the elements of prescriptive easement. Again, the Dunns fail to recognize that when one landowner proves that he or she holds a prescriptive easement, it does not mean that other landowners also hold an identical easement – each individual must prove their own rights based on their own use of the relevant property. That is why the 2004 Order determined that only the specific plaintiffs in that action had established and were entitled to a prescriptive easement and did not make a similar determination for other landowners or the public at large. (R. at 171,

2004 Order, Conclusions of Law ¶ 3 ("The Plaintiffs have a right of way over the roadway. . .").) The Dunns also fail to address the key factual differences between the plaintiffs in the two cases and their alleged use of the Lantz Roadway – namely that the previous plaintiffs all used the Lantz Roadway to access their properties from SR 53/1 and the Dunns did not.

The Dunns only response is that the 2004 Order made references to how the general public used the Lantz Roadway. By making this statement, the Dunns continue to perpetuate their mistaken belief that the previous litigation sought to create a general public prescriptive easement—which is not a thing that exists under the law—or that the 2004 Order somehow created a community road for the benefit of all. Factual findings regarding the general public's use of the roadway do not prove whether the *Dunns' use of the Lantz Roadway* is sufficient to create a prescriptive easement *for the Dunns*. If anything, as stated above, statements regarding the general public's use of the Lantz Roadway undermines an assertion of adverse use in modern prescriptive easement law. *O'Dell*, 226 W.Va. at 621 n. 36 (citing *Felton*, 136 W.Va. at 137, Bruce & Ely, § 5:9, and *Hall*, 108 Idaho at 112-13.)

Legally, the earlier court did not apply the same elements that the trial court was required to apply here. In 2010, this Court clarified that a party asserting a prescriptive easement had to prove that their use was adverse, and it overruled any cases suggesting otherwise, including the *Post* case relied upon in the 2004 Order. *See O'Dell*, 226 W.Va. at 615 n.28 (overruling Syl. Pt. 2, *Post v. Wallace*, 119 W.Va. 132, 192 S.E. 112 (1937)). Thus, because the 2004 Order applied a different legal standard than the one required to be applied here, the 2004 Order should not be given preclusive effect here. The Dunns argue in response that they would like to have the old now-incorrect case law applied to their current claim as well, but they cite to no legal support for that argument.

This case and the previous litigation involve different facts, issues, and legal standards. They therefore do not present identical issues such that collateral estoppel could apply.

ii. No one had a full and fair opportunity to litigate Mr. Dunn's right to a prescriptive easement in the previous litigation.

In his brief, Mr. Dosch identified the various reasons why he did not have a full and fair opportunity in the previous litigation to litigate the Dunns' rights over the Lantz Roadway when they were not parties to that litigation. (Dosch Br., p. 23.)

The Dunns do not address the merits of whether Mr. Dosch had a full and fair opportunity to litigate the Dunns' rights over the Lantz Roadway. Instead, they incorrectly argue that Mr. Dosch admitted that he did have a full and fair opportunity in his answer. Yet, Mr. Dosch admitted in his answer only that he "full and fairly litigated issues concerning the access to the roadway as described above" in the previous action. (R. at 5, Compl., ¶ 29; R. at 30, Answer, ¶ 9.) While Mr. Dosch full and fairly litigated issues concerning *his* access to the Lantz Roadway in the previous litigation, he never admitted that he or any predecessor in interest full and fairly litigated *all* issues related to the Lantz Roadway, including issues related to the Dunns right to access it. This difference is not an "attempt to split hairs" as alleged by the Dunns, but a recognition of the fundamentally individualized and fact-specific nature of prescriptive easements and the fundamental differences between the current and previous actions.

In summary, the Dunns waived their right to assert offensive collateral estoppel when they knew of but decided not to participate in the earlier litigation. Moreover, collateral estoppel does not apply here because the facts and legal principles raised in the two cases are different and Mr. Dosch never had a full and fair opportunity to litigate the Dunns' alleged rights over the Lantz Roadway in the first action. Finally, even if some of the factual findings regarding the general

public were considered to be preclusive here, none of those findings are relevant to determining whether *the Dunns' use of the Lantz roadway* was sufficient to grant them a prescriptive easement.

3. Virtual Representation Has no Application in This Case.

The application of virtual representation addresses a question of whether the privity prong of collateral estoppel or res judicata has been met. *See Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 274, 672 S.E.2d 598 (2008) (using doctrine of virtual representation to determine whether privity element of res judicata was met). Because the parties agree that res judicata (claim preclusion) does not apply here, and because the privity prong of collateral estoppel (issue preclusion) is not disputed in this appeal, virtual representation has no meaningful application in this case. Regarding collateral estoppel, the application of virtual representation cannot change the fact that the Dunns have waived their right to assert offensive collateral estoppel, that issues and claims decided in the 2004 Order were not the same as those raised in this litigation, and that Mr. Dosch had no reason or opportunity to litigate the Dunns' rights in the first action.

Even if virtual representation did have any impact on this case, it is a doctrine that has been developed in federal courts and that since has been rejected by the U.S. Supreme Court. *See Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) ("[w]e disapprove the doctrine of preclusion by 'virtual representation[.]'") Instead of adopting the doctrine of virtual representation, the Supreme Court identified six recognized exceptions to the rule against nonparty preclusion. *Id.* at 893–896. While the Dunns are correct that this Court has not itself formally repudiated virtual representation, it should follow the United States Supreme Court and do so here (as several federal courts have already presumed this Court will do). *Lexington Ins. Co. v. Thrasher Eng'g, Inc.*, Civil Action No. 1:06CV21, 2008 U.S. Dist. LEXIS 77564, at *15 (N.D.W.Va. Sep. 30, 2008); *Larosa v. Pecora*, N.D.W.Va. Civil Action No. 1:07CV78, 2009 U.S. Dist. LEXIS 43027, at *9 (May 21,

2009) ("this Court believes that the West Virginia Supreme Court of Appeals would be guided by the principles set forth in *Taylor*.")

Further, the Dunns fail to address Mr. Dosch's argument that no court has ever applied the doctrine of virtual representation in an offensive manner. Each of the cases cited by the Dunns applied the doctrine of virtual representation as a defense to bar a plaintiff from bringing a previously litigated claim or issue. (*See* Dosch Br., p. 30.) The Dunns cite to no case where the doctrine of virtual representation has been used offensively to give a party the benefit of a judgment to which he was not a party. This Court should not expand this disfavored doctrine to do so here.

The Dunns make clear that their virtual representation argument boils down to an assertion that "Dunn and Dosch share the same interest in accessing the Lantz Roadway by prescriptive easement." (Dunn Br. at 18 ("As stated in this response repeatedly, Dunn and Dosch share the same interest in accessing the Lantz roadway by prescriptive easement.") The Dunns fail to address this Court's holding that "something more than a common interest between the prior and present litigants is required for privity to be established." *Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 274, 672 S.E.2d 598 (2008) (citing *Gribben v. Kirk*, 195 W. Va. 488, 498 n. 21, 466 S.E.2d 147, 157 n. 21 (1995).) Moreover, the Dunns' assertion of a common interest is flawed. The Dunns fail to address the multiple reasons set forth in Mr. Dosch's brief as to why the plaintiffs in the first action did not share an interest with the Dunns. (Dosch Br., p. 31.) First, Mr. Dosch and the other previous plaintiffs all sought a prescriptive easement to use the Lantz roadway to access their property from SR 53/1; by way of contrast, the Dunns' property is on the other side of the SR 53/1 and is not accessed from SR 53/1 by the Lantz Roadway. Second, Mr. Dosch had no relationship or duty to the Dunns, he only litigated the first action to obtain his own prescriptive easement. Third, it is in Mr. Dosch's interest for the Dunns to not hold a prescriptive easement

over the Lantz Roadway because it would devalue his right and provide additional burdens on the property.

The Dunns fail to establish that virtual representation has any application in this case. To the extent it could apply, the Court should follow U.S. Supreme Court precedent and reject this disfavored doctrine. To the extent the Court engages in the virtual representation analysis, it should find that it may not be applied offensively and that the facts of this case do not meet any of the accepted uses of the doctrine.

C. Reply Arguments in Support of the Third Assignment of Error.

As set forth above, the trial court erred in granting the Dunns' motion for summary judgment and denying Mr. Dosch's motion for summary judgment. The trial court then erred in denying Mr. Dosch's Rule 59(e) motion to amend the judgment. For the same reasons why it erred in granting the Dunns' motion for summary judgment and in denying Mr. Dosch's motion for summary judgment, the trial court similarly erred in denying Mr. Dosch's motion to amend the judgment. As above, the Dunns' arguments in response are similarly unpersuasive under this assignment of error.

II. CONCLUSION

Based on the foregoing, the trial court erred in granting summary judgment to the Dunns and denying summary judgment to Mr. Dosch. The trial court compounded its errors by denying Mr. Dosch's motion to amend the judgment. This Court should reverse the trial court and hold that Mr. Dosch is entitled to summary judgment on the Dunns' claims.

Respectfully submitted this 23 day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant, **JOHN R. DOSCH, Individually and as Trustee of the John R. Dosch Revocable Trust,** hereby certifies that he served the foregoing **REP[LY BRIEF OF PETITIONERS JOHN R. DOSCH, individually and as Trustee of the John R. Dosch Revocable Trust** on the Plaintiffs, **RICHARD E. DUNN and CHERYL C. DUNN,** on this 23 day of March, 2021 by depositing a true copy thereof by First Class Mail addressed to:

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