NO. 20-0803

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WV

JOHN R DOSCH, individually and as TRUSTEE OF THE JOHN R. DOSCH REVOCABLE TRUST,

Petitioners/Defendants

v.

Underlying Civil Action No. 16-C-48
(Circuit Court of Ritchie County)

RICHARD E. DUNN and CHERYL C. DUNN,

Respondents/Plaintiffs

BRIEF OF THE RESPONDENTS

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I. STATEMENT OF CASE

A. PROCEDURAL POSTURE

This is as a dispute between Petitioners, John R. Dosch individually and as Trustee of the John R. Dosch Revocable Trust (*hereinafter Dosch*) and the Respondents, Rick and Cheryl Dunn (*hereinafter Dunn*) over the use and access of a dirt and gravel roadway in rural Ritchie County that connects State Rd 53/1 with an area known as Bear Run. This right of way road not only has been in existence now for approximately 90 years but also was the subject of a ***prior*** combined lawsuit in 1999 and 2000 ***brought by the Petitioners in this case*** and others, to compel access to this roadway which Dosch, now seeks to deny to Dunn. This dirt and gravel roadway has been commonly referred to as the *Lantz roadway* in both this and the earlier litigation. This dispute can be distilled down to 3 sentences:

1. Approximately 20 years ago the John Dosch (and others) sued a one Ronald Lantz to prevent him from locking a gate to a right of way road that started on and went through Lantz's property and then through their properties, and which roadway was used by the various parties and by the community.

2. Dosch and the others won (under a theory of prescriptive easement) and Lantz removed the lock from his gate allowing Dosch and others to freely travel along the right of way road.

3. Years later Dosch eventually acquires Lantz's property and then locks the gate to the road (using Lantz's existing gates no less) so that the Dunn's, whose property in fact the road starts on, cannot travel over the road.

Specifically, Dosch is appealing a Judgement Order by the Circuit Court of Ritchie County dated April 14, 2020, wherein Circuit Court Judge Timothy Sweeney, in a 25 page long ruling,

found that the Dunn's had satisfied the doctrine of collateral estoppel and therefore Ordered that the Dunn's shall have a right-of-way easement over the Lantz roadway through the Dosch property located in Murphy District, Ritchie County, West Virginia, and as described in tax map 22 parcel 10.[1] A. 308-332. The finding by Judge Sweeney is consistent with, and relies heavily on, certain prior litigation involving Dosch (as Plaintiff then) in combined Ritchie County Circuit Court civil actions Nos. 99-C-45 and 00-C-27 involving the same Lantz roadway. A. 331. Those combined cases had resulted in an Order by the late Judge Robert Holland, dated October 7, 2004, awarding Dosch and the other plaintiffs back then, a right of way over said roadway "that was not to be restricted in any way." A. 21 Ord. ¶ 3. Finally, Judge Sweeney also ruled that Dunn was also entitled to a prescriptive easement for said roadway based, among other things, on Dunn's testimony that he had been using the roadway to access Bear Run since 1985 and on the earlier findings in the Order by Judge Holland. [2] A. 327- 328 ¶¶ 14-17 and A. 330-331.

Due to its importance, and for ease of reference, it is worth setting out the full Conclusions of Law by Judge Holland from 2004, which Judge Sweeney in turn adopted in paragraph 15 of his *Findings of Fact*:

> 1. "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).

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[1] The parties informed the Circuit Court that this matter should be decided by summary judgment motions without need for trial, resulting in the Circuit Court entering an Order setting a briefing schedule. A. 115-116.

[2] Judge Sweeney's Judgment Order contains 23 numbered paragraphs of Conclusions of Law. Notably, in Conclusions of Law, paragraph 11, the Court found that, *"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."* A. 325.

2. 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.

3. 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. (emphasis added).

4. 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.

A. 314-315.

B. FACTS

The Dunns' own approximately 33 acres of land in Ritchie County, Murphy District along Big Island Run by virtue of a deed dated December 16, 1986. A. 7-15. Dosch likewise own approximately 33 acres along Big Island Run by virtue of a deed dated November 23, 2011. A. 23-25. As noted above, this case is the *2nd dispute over access to a right-of-way road* that actually starts on the Dunn's property – with the road actually intersecting along State Road 53/1 and then crossing the Dosch's property on the way to an area known as Bear Run. This is the 2nd dispute with the issue now being over the interpretation of the Order from the prior litigation by the late

Judge Robert Holland on October 8, 2004. The Dunn's were not a party to the earlier case but the Defendant, John Dosch was.[3]

Specifically, in the 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 a roadway starting over his land and crossing theirs. A. 2 ¶ 6. 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. A. 17 ¶ 1. Mr. Smith then in turn, owned a tract of real estate adjacent to Mr. Lantz, and Mr. Brooks owned a tract of real estate adjacent to Mr. Smith, while Mr. Dosch then owned several tracts of property adjacent to the Brooks property. A. 17-18 ¶¶ 2-4. Judge Holland specifically found that there existed a roadway which started on and 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. 18-19 ¶¶ 5-6. He also found that none of the parties to the lawsuit actually resided on the properties. A. 19 ¶ 8. As alluded to above, after Lantz lost the case he sold his 33-acre tract of property and after passing through two owners, *Dosch purchased the Lantz property by virtue of the 2011 deed referenced above.* A. 23-25.

Judge Holland specifically made the following critical findings of fact in his Order that were then incorporated and set forth by Dunn in paragraphs 11-16 of their Complaint (all of which, except for paragraph16, were ***admitted*** by Dosch in their answer) and which are set forth as follows for ease of reference:

[3] 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. A. 88 Dosch depo pg. 18. Mr. Dosch does not reside on any of his property in Ritchie County. A. 85 depo pg. 5.

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.

A. 3, ¶¶ 11-16 of complaint & A. 29, ¶¶ 1-2 of answer.

Judge Holland also critically found in paragraph 13 of the 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." A. 19-20. Dunn would emphasize the words, "since its construction" because Judge Holland found the road to have been constructed *seventy years* ago. A. 18. Finally, Judge Holland found that the existence and right to use the roadway appears in the chain of title to Lantz's property. A. 20.

Prior to the institution of this litigation, Dunn had a survey prepared showing the Lantz roadway *actually starts* on their property along 53/1 – which, of course, is also right where the

Lantz property – now Doschs' property accesses the road. A. 26. In their Petition, Dosch states there is, "a small portion of roadway that connects to the Lantz roadway." However, the survey, copied below, clearly shows this "small portion of roadway" is in fact the start of the Lantz roadway at issue:

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, OLEN 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 1986, 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

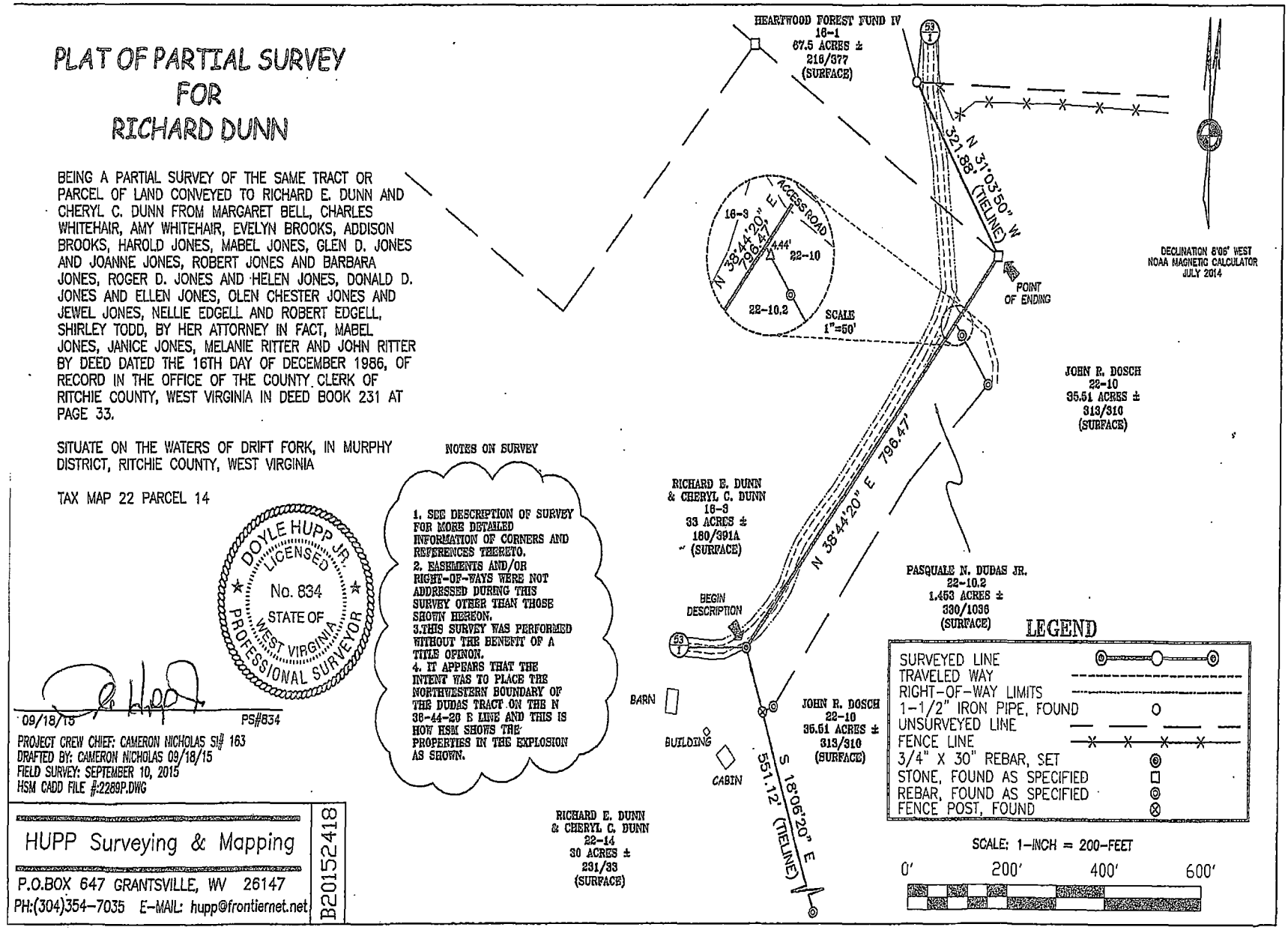
PROJECT CREW CHIEF: CAMERON NICHOLAS S# 163
DRAFTED BY: CAMERON NICHOLAS 09/18/15
FIELD SURVEY: SEPTEMBER 10, 2015
HSM CADD FILE #:2269P.DWG

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

B20152418

NOTES ON SURVEY

1. SEE DESCRIPTION OF SURVEY FOR MORE DETAILED INFORMATION OF CORNERS AND REFERENCES THERETO.
2. EASEMENTS AND/OR RIGHT-OF-WAYS WERE NOT ADDRESSED DURING THIS SURVEY OTHER THAN THOSE SHOWN HEREON.
3. THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE OPINON.
4. IT APPEARS THAT THE INTENT WAS TO PLACE THE NORTHWESTERN BOUNDARY OF THE DUDAS TRACT ON THE N 38-44-20 E LINE AND THIS IS HOW HSM SHOWS THE PROPERTIES IN THE EXPLOSION AS SHOWN.



Dunn was not a party to this prior litigation. A. 16. Mr. Dunn was deposed by counsel for Dosch 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. A. 67, Dunn depo. pg. 15. 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 until Dosch put the gates up. A. 68, Dunn depo. pg. 17-19. Mr. Dunn also testified that he first began using the roadway in 1985 when using his property that had a cabin on it. A. 67, 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.

In his brief on page 14, Dosch contends that Mr. Dunn testified that he stopped using the Lantz Roadway when *Mr. Lantz put up locked gates in* ***the early*** *1990's* and thus cannot meet the 10 year prescriptive easement period. A 67, Dunn depo. pgs. 13-14. Mr. Dunn's actual testimony in response to the question of when the gates were put up was "not being specific without checking records in the early 1990's." Id. Moreover, this statement, must be taken in context of the rest of the record in this matter. Specifically, what Dosch fails to note, is that Mr. Lantz received the property by deed dated November 7, 1994 as alleged in paragraph 7 of the complaint which was admitted by Dosch in paragraph 1 of his answer. A. 2 & A. 29. Likewise, per Judge Holland's Order it is noted in paragraph 1 that Lantz purchased his property by deed dated November 14, 1994. A.17. Thus, it is impossible for Mr. Lantz to have erected gates in the early 1990's. Furthermore, notwithstanding Mr. Dunn's testimony, the contention of Dosch that Lantz erected the gate in the "early 1990's" is contradicted by other objective facts in the record. The case numbers for the earlier Ritchie County litigation are 99-C-45 and 00-C-27 indicating the litigation

was not even instituted until 1999 (approximately 5 years after the Lantz deed). A. 16. Furthermore, as noted on pages 30-32 of Mr. Dunn's deposition, Mr. Lantz didn't lock people out **after he purchased it until *"a couple of years maybe at most."*** A. 71. Finally, Dunn also meets the time period requirement by virtue of the findings of facts contained in Judge Hollands Order.

Mr. Dunn then testified that the gates to the road were put back up when Mr. Dosch purchased the property. A. 68. 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. A. 69. He testified that this occurred 3 to 4 years ago (his deposition took place on June 23, 2017) and that Mr. Dosch replied that there was no reason for him to use the road. Id.

When Dosh refused to allow Dunn to use the Lantz roadway, Mr. Dunn 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. A. 72. Mr. Dunn then testified that although his gate is still up - it is open because Mr. Dosch cut the locks. Id.

Mr. Dosch testified in deposition 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. A. 85. This testimony is contradicted by Judge Holland's 2004 Order stating the roadway passed through the property of Lantz, and then Smith, Brooks and Dosch properties. Dosch attached a West Virginia property viewer map on page 3 of his petition and even though it was not introduced in evidence in this matter, it nonetheless, when taken in conjunction with Judge Holland's order shows that the Lantz roadway transgressed more than just the length of Lantz's' property.

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. A. 89-90. He testified that there are two locks on the gate at the bottom by Drift Fork – one lock by Ed Brooks and one by him. Id. 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. A. 90.

Mr. Dosch maintains that the Order by Judge Holland is limited only to the parties of that litigation and only as to Mr. Lantz's property. In fact, Mr. Dosch specifically testified that he believed that Judge Holland's order only addressed the roadway as it goes through Mr. Lantz's property and no one else. A. 88. When questioned in detail as to why Judge Holland's Order mentions the roadway in question going through the properties of the various parties, Mr. Dosch disagreed with the findings in the 2004 Order (which clearly had previously benefited him) giving the following revealing testimony on pages 18 through 20 of his deposition:

Q. Look at Paragraph No. 2 with me. This says that
Mr. Smith has property to the east of Mr. Lantz's
property, identified as Parcel 11, correct?
A. Yes.
Q. But it's your contention that this order here only addresses the roadway as it goes through Mr. Lantz's property?
A. Correct.
Q. Do you know why the judge was reflecting that
Mr. Smith has property to the east of Mr. Lantz,
identified in Parcel 11?
A. The road doesn't go through Mr. Smith's.
Q. Okay.
A. That -- that --
Q. This --
A. -- doesn't say it goes through Mr. Smith's.
Q. Does Mr. Smith still own the property?
A. Yes.
Q. He then says that Mr. Brooks is the owner of
real estate situated adjacent to the east of Mr. Smith's

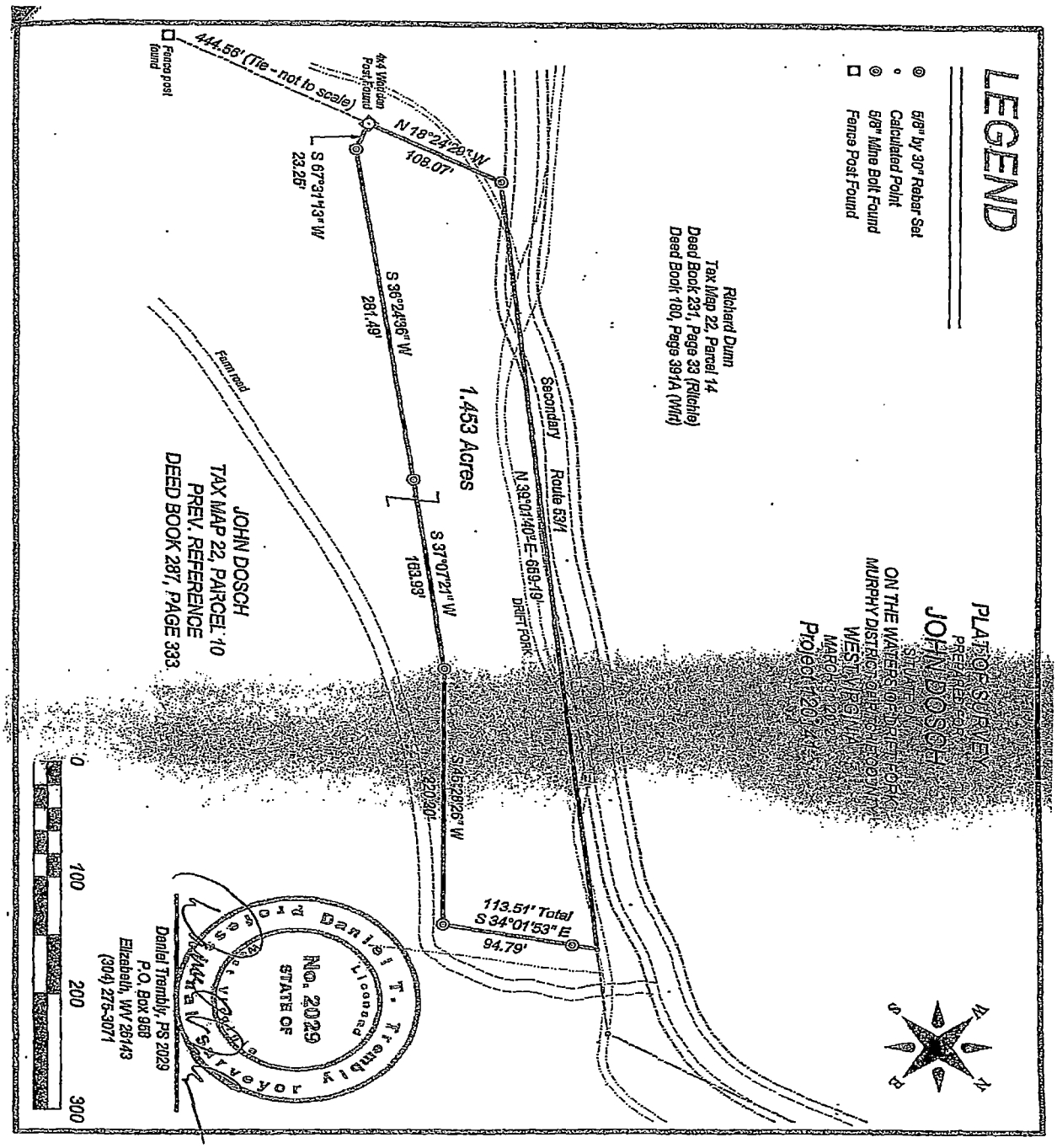
property, and it's on the same tax map, Parcel 33. Does Mr. Brooks still own that property?
A. I think he's transferred it.
Q. Do you know who he transferred it to?
A. I think his son.
Q. If you look at No. 4 of the court's order from the prior litigation, this says the Doschs own several tracts of real estate situated to the east then of Mr. Brooks, again the same tax map, 22, Parcels 34, 35, 36, 41, 42, 42.1, and 46.
Do you still own those parcels?
A. No.
Q. Are those parcels now with RPJ Enterprises?
A. Yes.
Q. If you look at No. 5 finally with me, No. 5 says, "There is a roadway present on the aforesaid properties running east to -- or excuse me, running west to east. It begins on the property owned by Mr. Lantz and passes through the property set forth above," correct?
A. No, it doesn't pass through Mr. Smith's, and it is a different road.
Q. Well, you agree with me that is the Judge's finding that he called it the --
A. Right.
Q. -- "aforesaid road"?
A. Right.
Q. Or, excuse me, the "aforesaid properties."
A. Yeah, that's what the judge wrote.
Q. Okay. Are you telling me you don't agree with the finding by the Court in Paragraph No. 5 --
A. Not -- not that part. And it's not true.

(emphasis supplied). A. 88.

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. A. 93, Dosch depo. pg. 38. 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. A. 95, Dosch depo. pg. 45. Further, he acknowledged *that he was aware* that Dunn had a portion of the roadway on his property at the time of the prior

suit but that there was no reason why he didn't notify the Dunn's of the Lantz litigation. A. 95, Dosch depo. pgs.45-46.

In addition to describing the width of the roadway, Mr. Dunn also provided various pictures of the roadway (some from the time of the Lantz litigation) which are attached to his deposition and which he generally discusses on pages 54 through 58 of his deposition. A.97-98. Finally, Mr. Dosch discussed a survey that he provided in discovery (Exh. 5 to his depo) done for him by Dan Trembly P.S. and noted that the roadway labeled "farm road" is in fact the "Lantz road" at issue both then and now. A. 96, Dosch depo. pg. 51. Below, for ease of the Courts reference, is a copy of the survey:



II. SUMMARY OF ARGUMENT

On September 15, 2020, the Circuit Court of Ritchie County, entered an Order denying the Doschs' motion to amend the courts judgment in favor of Dunn, dated April 14, 2020. The Courts judgment order of April 14, 2020 had found that Dunn had satisfied the doctrine of collateral

estoppel and prescriptive easement, and thus was entitled to a right of way over the Lantz roadway through the Doschs' property located in Murphy District, Ritchie County, West Virginia as described in Tax Map 22 Parcel 10. A. 330-331.

The Circuit Court noted that this finding would be consistent with prior litigation involving Dosch (then as Plaintiffs) in Ritchie County Circuit Court Civil Actions 99-C-45 and 00-C-27 involving the very same roadway. Id. The Circuit Court specifically noted this prior case involved a ruling by the late Judge Robert Holland dated October 7, 2004 that granted Dosch and others therein a roadway that was not to be restricted in any way. Consequently, the Circuit Court ruled that:

> 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 further 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 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 here in on the issues of rest 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 herein.

A. 331.

The Circuit Court's ruling properly requires Dosch to abide by the very facts that they themselves established in the earlier litigation concerning the Lantz roadway and which facts they now seek to deprive Dunn of and necessarily wish to relitigate.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Appeal should be decided under Rule 19 of the Rules of Appellate Procedure, Supreme Court of Appeals of West Virginia because the case involves application not only of

settled law concerning prescriptive easement and collateral estoppel but just as importantly the roadway right of way is now the subject of two final rulings of the Circuit Court of Ritchie County. Specifically, Judge Sweeney of the Circuit Court of Ritchie County, by Order of April 14, 2020, ruled in favor of Dunn granting them access to the right of way based on prescriptive easement and collateral estoppel. Judge Sweeney's ruling in turn by relied in large part on October 7, 2004 Order by then Ritchie County Circuit Court Judge Holland in granting a prescriptive easement over the very same roadway to Dosch who was a plaintiff in the combined case then styled as 99-C-45 and 00-C-27.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY FOUND THAT DUNNS HAD SATISFIED ALL THE ELEMENTS OF A PRESCRIPTIVE EASEMENT SINCE THESE ELEMENTS WERE ESTABLISHED FACTUALLY IN THE PRIOR LITIGATION OVER THE LANTZ ROADWAY.

There are a fair number of cases in West Virginia that discuss prescriptive easement. A more recent and seminal case is *O'Dell v. Stegall*, 703 S.E. 2d 561 (W.Va. 2010), where this 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.

Given Mr. Dunn's deposition testimony and the 2004 Order of Judge Holland with its extensive findings of facts and conclusions of law, Judge Sweeney properly found that the Dunn's have a prescriptive easement for the Lantz roadway.

In their Assignment of Error No. 1, Dosch has chosen to devote a considerable number of argument pages trying to show how the Dunn's have failed to *independently* meet the elements of prescriptive easement on their own accord. They make such a long analysis in disregard of what the Circuit Court ruled. Paragraph 20, Conclusions of Law, of the Judgment Order specifically states as follows:

> 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.

A. 330.

In paragraph 19 of his Order, Findings of Fact, Judge Sweeney noted that Dunn used the Lantz roadway to access Bear Run starting in 1985 and continued to do so until Lantz put a locked gate up. A. 317. Judge Sweeney further ruled that the Lantz roadway is not only shown and/or described in Judge Holland's Order but also by pictures from the time of the litigation and its origin is shown on the survey the Dunn's had obtained. A. 328. Judge Sweeney then went on to discuss the **doctrine of virtual representation** and held that, "the doctrine of virtual representation would prevent the Defendants from trying to relitigate any issues concerning the roadway in so far as those issues were addressed in Judge Holland's order of October 7, 2004 from the prior litigation in which they were a party." A. 329-330. Dosch does not discuss the doctrine of virtual representation in Assignment of Error No. 1 but since it was an integral part of the Circuit Court's ruling as noted above, the Dunn's will now do so.

One of the leading cases discussing virtual representation, including the conditions of mutuality, is the case of *Galanos v. National Steel Corp.*, 178 W.Va. 193, 358 S.E.2d 452 (1987). First, by way of context, it is important to note 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." 173 W.Va. at 195, 358 S.E.2d at 454. The *Galanos* court discussed that it is a matter of fundamental due process point when using collateral estoppel, that any person against whom it is asserted must have had prior opportunity to litigate the claim. Id. The court further 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 then went on to discuss that there exists the doctrine of virtual representation as originally established in the case of *Cauefield v. Fidelity & Casualty Company of New York*, 378 F. 2d 876 (5th Cir.). The *Galanos* Court noted that this case 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. The *Galanos* Court noted that this doctrine has been limited in other jurisdictions and that the mere involvement in a common accident does not create a privity of relationships. The court noted that to equate the interest of two or more persons who, by happenstance, suffer injury in a common mishap stretches due process beyond its breaking point. Id. Conversely the *Galanos* Court noted there are court decisions that offer less radical departures from privity such as where a nonparty is bound by a prior judgment where he actively participated in and excused control over the conduct of the prior litigation. Id, citing, *Montana v. United States,* 440 U.S. 147, 99 S.CT. 970, 59 L.Ed2d 210 (1979); *Gerrard v. Larsen,* 517 F. 2d 1127 (8th Cir. 1975).

Dosch cites to the case of *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) to point out the U.S. Supreme Court has stated, "we disapprove the doctrine of preclusion by virtual representation.." First of all, it doesn't appear that Dosch is claiming *Cauefield* is no longer good law nor does Dunn

believe it has been overruled. Secondly, and more importantly, a review of the Syllabus from the *Taylor* decision shows that a one Greg Herrick has filed an unsuccessful FOIA lawsuit to get certain airplane records from the Federal Aviation Administration. *Taylor*, 553 U.S. at 880. Then, later a one Brent Taylor, friend of Herrick, made the same FOIA request and when forced to file suit, the U.S. District Court for the District of Columbia denied his case finding that even though he was not a party to the Herrick case he was bound by that judgment due to virtual representation. Id. The US. Supreme Court then held that a theory of preclusion by virtual representation is disapproved and instead a federal court in a federal question case should look to common law, subject to due process. *Taylor*, 553 U.S. 881, Syllabus Holding Pt. 1. The Court went on to discuss claim preclusion vs. issue preclusion and noted that, "a person who was not a party to the suit generally has not had a full and fair opportunity to litigate the claims and issues settled in that suit." *Taylor,* 553 U.S. at 892. Moreover, the Court went on to discuss various exceptions to non-party preclusion including, that, "in certain limited circumstances" a nonparty may be bound by a judgment because she was adequately represented by someone with the same interest who was a party to the suit. *Taylor*, 553 U.S. at 895.

Clearly in the instant case, Dunn is seeking to be included within the scope of the 2004 ruling by Judge Holland concerning the roadway. He is not trying to "preclude" Dosch from any claim – just to require Dosch to abide by those facts and conclusion that **it** litigated. As stated in this response repeatedly, Dunn and Dosch share the same in interest in accessing the Lantz roadway by prescriptive easement.

The record herein clearly shows that the Circuit Court not only conducted an in depth analysis of the types of claim preclusion (i.e. res judicata; collateral estoppel) but also of the doctrine of virtual representation – which the Circuit Court had asked the parties to brief. The

following discussion and legal analysis from paragraph 9 of the Circuit Court's Judgment Order is worth repeating:

> 9. This Court also **FINDS** and **CONCLUDES** that the two previous actions and the case at bar involves 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 gravity 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 rights and parties allegedly in privity so as to ensure that the interest of the party against whom preclusion is asserted have been adequately represented." It has been recognized that "privity ... is merely a word used to say 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 non-party and a party was such that the non-party 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 exist, 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 manipulations 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. 122 (S.D.N.Y 1978), qffd 603 F.2d 213 (2d. Cir. 1979).

A. 323-325

Thus, in the case at hand, the doctrine of virtual representation prevents Dosch from trying to relitigate any issues concerning the roadway insofar as those issues were addressed in Judge Holland's 2004 Order for which it, as an actual party, participated in and exercised control over. Both Dunn and Dosch have a substantial interest in being able to use the Lantz roadway and in fact both have now sought judicial relief. In fact, if Dunn, the "non-party" to the prior litigation had the opportunity to litigate in the prior case he would have shared the same interest in a prescriptive easement and relied on virtually all of the same facts as Dosch.

When Dosch discusses virtual representation in its Assignment of Error No. 2., Dosch addresses the *Galanos* case but gives little discussion of the *Cauefield* case as cited by *Galanos*. Instead, Dosch relies on *Beahm* to argue that more than a common interest between the prior and present litigants is required for privity to be established. *Id.* 223 W.Va. 269, 274, 672 S.E.2d 598, 603 (2008) Then, seemingly in reference to this statement in *Beahm*, Dosch points out that when the Circuit Court in this matter ruled on the Motion to Amend the Judgement, it simply concluded that Dunn shared a "common interest in the outcome" of the prior litigation and argues that as such this statement is fatally flawed. However, a further reading of *Beahm* reveals that the court found that the appellants therein were trying to avoid the impact of a federal district decision against them. Moreover, the Beahm court noted that privity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the same rights of property.'" *West Virginia Human Rights Comm'n v. The Esquire Group, Inc.,* 217 W.Va. 454, 460, 618 S.E.2d 463, 469 (2005) (*quoting* Syl., *Cater v. Taylor,* 120 W.Va. 93, 196 S.E. 558 (1938)

Thus, Dosch is attempting to apply the case of *Galanos* in an unduly limited way and not in accordance with the facts. The existence, scope and use of the right of way is clearly the subject of Judge Holland's prior ruling as well as the subject of the present action now by Dunn as a result of Dosch seeking to prevent their use of the road in contravention of Judge Holland's ruling. As noted in the case of *Gribben v. Kirk*, 195 W.Va. 488, 499 S.E.2d 147 (1995), one cannot avoid the effect of a legal determination simply because they were not joined as a party to the suit. Thus, Judge Sweeney was right on point in finding that, "Although it is the Plaintiffs (Dunn) who desire to avail themselves of the ruling in the prior actions, the principle likewise applies." A. 325

As stated above, Dosch does not discuss this doctrine in Assignment of Error No. 1 but instead chooses to do so more broadly in Assignment of Error No. 2 which the Dunn now respond to next.

B. THE TRIAL COURT PROPERLY FOUND THAT THE DUNN'S SATISFIED ALL OF THE ELEMENTS OF COLLATERAL ESTOPPEL WITH RESPECT TO THE LANTZ ROADWAY AND THUS DOSCH IS BOUND BY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SAID ROADWAY BY JUDGE HOLLAND IN HIS 2004 ORDER.

Dunn would point out that Dosch begins his argument under Assignment of Error No. 2 in *manner inconsistent with their own prior arguments earlier in this litigation.* In Assignment of Error No. 2 Dosch takes issue with the Circuit Court granting summary judgement to Dunn for a prescriptive easement, "through the application of res judicata, collateral estoppel, or virtual representation." Dosch complains that inter alia that: 1) the trial court used all three doctrines to rule in Dunn's favor; 2) Dunn never raised offensive res judicata; 3) in any event "offensive issue preclusion" and virtual representation are disfavored; and 4) the trial court used all of this to "backfill Dunns' lack of evidence." To the contrary, on page 3 of their Memorandum in support of "Response to Plaintiffs' Motion for Summary Judgment and Defendants' Motion For Summary

Judgment" Dosch states, "to address the issue of collateral estoppel, it is necessary to consider its similarity to the doctrine of res judicata" and further that, "The same policy considerations also support the doctrine of collateral estoppel, which is in some degree related to res judicata." A. 119-120. Therefore, Dosch should not be allowed to find fault with the Circuit Courts discussion of this doctrine to the extent it is closely related to and aids in understanding collateral estoppel as well as the doctrine of virtual representation as discussed in Argument A above.

1. THE TRIAL COURT PROPERLY APPLIED THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL IN THIS MATTER.

Dosch argues that the trial court misapplied offensive collateral estoppel and claim that Dunn is incorrectly arguing that because other landowners proved their use of the Lantz roadway established a prescriptive easement in the prior litigation Dunn is entitled to one as well. Furthermore, Dosch argues in any event that offensive collateral estoppel is disfavored.

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 Co.,* 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).

Elements 2, 3, and 4 are most easily dealt with as Dunn strongly argues that they are *not in issue* as Dosch admitted these in their answer. Specifically, Dosch admitted paragraphs 27, 28 and 29 of the complaint which are set forth herein for ease of this Court's 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.

A. 4-5 & 30. In their Petition, Dosch doesn't seem to dispute element 2 (final adjudication on the merits) being met in this matter nor element 3 (privity or being the same party in the prior action). Instead, Dosch focuses its argument on elements 1 and 4, arguing that the issues in this and the prior case are not the same and that there was no opportunity to litigate the issue involved previously.

Dunn would point out that Dosch is improperly attempting to limit the scope of Judge Holland's 2004 Order to only how the plaintiffs back then used the Lantz Roadway. However, such a narrow reading disregards Judge Holland's rulings regarding the roadway itself as well the use of the roadway by others. Specifically, ¶ 6, 11 and 13 of Judge Holland's findings of fact, states as follows:

6. The roadway was constructed in a collaborative effort by the families that resided on the aforesaid properties. The construction was performed approximately 70 years before trial of this action and done with horses and plows. Thereafter, motor vehicle traffic often utilized the roadway to travel over land to the Bear Run area of Ritchie County, West Virginia.

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

13. 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.

A. 18-20.

Therefore, Judge Holland absolutely did make findings of fact regarding not only neighboring landowners, but the public in general. Judge Holland's findings of fact regarding the roadway were not simply limited to the specified parties in the action as asserted by Dosch. This point was not lost on the Circuit Court in this case as it found in paragraph 11 of the Conclusions of Law ruled that, "the claims and issues in the case at bar are identical to the cause of action identified in the previous cases…". A. 325

The finding that the road was used "so long without permission" clearly also means the Dunn's meet the requisite element of adversity which refutes the argument in (B)(1)(b) of the Petitioners brief wherein it argues that the law has changed with the inception of the *O'Dell* case and now adversity use must be proven for a prescriptive easement. However, Dunn would also argue that, just like Dosch, they are entitled to the benefit of the state of the law at the time of the prior litigation. This would be consistent with the Circuit Court's finding in paragraph 20 of the Judgment Order holding that the existence and location of the right of way easement has been previously established and found dispositive herein and thus necessitated no finding on whether the Dunn's *independently* established the same. A. 330. Moreover, following Dosch's, reasoning in light of the Judgement Order – if the change in law brought about by O'Dell works to deprive Dunn of rights to the Lantz roadway then it necessarily deprives Dosch as well. Clearly such an illogical outcome is unnecessary because the doctrines of virtual representation and collateral

estoppel place Dunn in the position of being effectively a party to the prior lawsuits at the time they were litigated.

2. THE ADDITIONAL MISCELLANEOUS CONTENTIONS RAISED BY DOSCH IN ASSIGNMENT OF ERROR NO. 2 ARE LIKEWISE WITHOUT MERIT.

a) DOSCH'S CONTENTION THAT NO ONE HAD FULL AND FAIR OPPORTUNITY TO LITIGATE DUNN'S RIGHT TO A PRESCRIPTIVE EASEMENT IS AN ATTEMPT TO SPLIT HAIRS

In paragraph 29 of the complaint which appears under Count II, the cause of action for collateral estoppel, the Dunn's alleged that, "the Defendant herein fully and fairly litigated issues concerning the access to the roadway described above." A. 5. Dosch then admitted this allegation in paragraph 9 of his answer but now would contend this only meant Dosch litigated only issues concerning his access. A. 29. This argument is clearly a repeat of the various arguments made by Dosch that are discussed above and which flies in the face of paragraph 20 of the Circuit Courts finding as just discussed. Likewise, as noted in the procedural posture section above, the following findings of fact Judge Holland's 2004 Order are incorporated and set forth by the Dunn's in paragraphs 11-16 of their Complaint (all of which, except for 16), were ***admitted*** by Dosch in their answer:

> *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.

Dosch is not entitled to ignore these facts he used and established that benefited him but now deny they exist with respect to anyone else. This argument would raise another interesting point that shows the inconsistency of Dosch's position. The earlier combined Ritchie civil actions are numbered 99-C-45 and 00-C-27 indicating filing dates in 1999 and 2000. In paragraph 4 of the 2004 Order, Judge Holland noted that Dosch owns 7 tracts of property depicted on Tax Map 22 which were conveyed to them by deed dated November 4, 1998. Given this fact, Dosch certainly could not have independently met the 10 year prescriptive easement requirement but instead relied on the status of the roadway - in particular those findings the Dunn's repeated in their complaint as noted just above.

b) THE DUNNS' DID NOT WAIVE THEIR RIGHT TO ASSERT COLLATERAL ESTOPPEL BY NOT PARTICIPATING IN THE PREVIOUS LITIGATION.

Dosch claims in argument section (B)(5) of its 2nd Assignment of Error that Dunn should have participated in the prior litigation and thus waived their rights to now use collateral estoppel.

This argument was previously addressed by the parties and is without merit. Dosch selectively cites to the testimony of Mr. Dunn to support his argument while in turn ignoring his own relevant testimony on this issue. Mr. Dunn was deposed by counsel for Dosch 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. A. 67. 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. A.68. Moreover, Mr. Dosch in his deposition 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. A. 95. He apparently did this all the while maintaining to the court that the roadway started on Lantz's property. Of course, the survey Mr. Dunn later obtained prior to this litigation confirmed what Mr. Dosch was aware of during the previous litigation but now cannot explain why he didn't notify Dunn of case he was filing against Lantz.

c) DOSCH INCORRECTLY ATTEMPTS TO ARGUE THAT THE TRIAL COURT, SUA SPONTE, APPLIED THE DOCTRINE OF RES JUDICATA, WHEN IN FACT THE TRIAL COURT ALSO APPLIED AND RULED ON THE DOCTRINE OF COLLATERL ESTOPPEL.

As noted by Dosch, res judicata is typically a defense that would bar a plaintiff from relitigating the same cause of action. *Blake v. Charleston Area Medical Center,* 201 W.Va. 469, 476 S.E.2d 41 (1997). The Circuit Court in this case discussed the law of res judicata and privity insofar as it aided in the understanding, and application of the doctrine of collateral estoppel. A review of the paragraph 12 of the Judgment Order in this matter makes it clear that the trial court applied collateral estoppel as it states, "The Plaintiffs allege in their complaint that they are entitled to use the right of way under the doctrine of collateral estoppel ...." Then in the remaining

sentences of said paragraph the trial court sets forth the elements of the doctrine and devotes almost two pages (pgs. 19-20) applying the facts of the case, including those of the prior litigation, to these elements.

The elements of collateral estoppel and res judicata are very similar. This in fact is undoubtedly why Dosch, on page 3 of their Memorandum in support of "Response to Plaintiffs' Motion for Summary Judgment and Defendants' Motion For Summary Judgment" Dosch states, "to address the issue of collateral estoppel, it is necessary to consider its similarity to the doctrine of res judicata" and then on page 4 goes on to even argue that "the same policy considerations also support the doctrine of collateral estoppel which is in some degree related to res judicata."

The elements of collateral estoppel set forth herein again for ease of reference are:

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 Co.,* 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).

The elements of res judicata are:

1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction.

2). The two actions must have involved either the same parties or persons in privity with those same parties.

3). 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.

See, *Blake v. Charleston Area Medical Center,* 201 W.Va. 469, 498 S.E.2d 41 (1997).

Thus, clearly the elements of these two doctrines are very similar and simply involve types of claim preclusion so as to prevent parties or those in privity with them from needlessly rehashing via litigation, the issues that were decided or could have been decided earlier. See generally, *Miller* at 194 W.Va. 3, 9, 459, S.E.2d 114, 120 (1995).

C. THE TRIAL COURT PROPERLY DENIED THE MOTION TO AMEND THE JUDGMENT AND GRANT SUMMARY JUDGMENT IN FAVOR OF DOSCH.

In their final Assignment of Error No. 3, Dosch in a little less than a page argues that the trial court should have amended the Judgment Order and instead have granted them summary judgment. Dunn understands this assignment of error relies on the same arguments made by Dosch in arguing that the trial court erred in granting their motion for summary judgment.

Accordingly, for the same reasons Dunn argues the trial courts grant of summary judgment in their favor was appropriate as set forth herein, likewise the denial of Dosch's opposing motion for summary judgment was entirely proper.

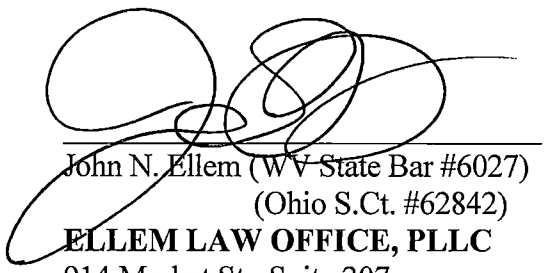
V. CONCLUSION

WHEREFORE, based on the foregoing analysis of facts and application of law, the Dunn's respectfully request that this Court uphold the Judgement Order entered April 14, 2020 by the

Circuit Court of Ritchie County granting them summary judgment in this matter and deny this appeal.

Respectfully submitted this 4th day of March 2021.

RICHARD AND CHERYL DUNN
By Counsel



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CERTIFICATE OF SERVICE

The counsel for the undersigned hereby certifies that on March 4, 2021 he served the foregoing, BRIEF OF THE RESPONDENTS, upon the following named party, by Hand Delivery and by email addressed as follows:

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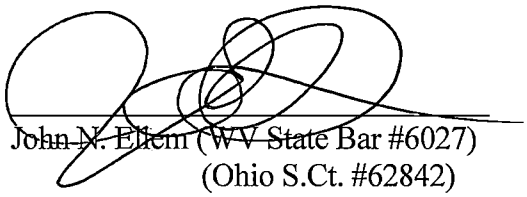

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