IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0857

TIMOTHY J. GREGORY AND JANICE L. GREGORY,
PLAINTIFFS BELOW, PETITIONERS,

V.

JACK O. LONG AND LORA A. LONG,
DEFENDANTS BELOW, RESPONDENTS

RESPONDENTS BRIEF

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PROCEDURAL HISTORY

This is a Declaratory Judgment Action instituted by the Petitioners, Timothy J. Gregory and Janice L. Gregory, husband and wife, against the Respondents, Jack O. Long and Lora A. Long, husband and wife, filed in Upshur County, West Virginia on December 27, 2017. The original complaint alleged that the Petitioners had a right-of-way across the Respondents' real estate by deed and the original complaint recited numerous deeds in support of their contention that they had a written right-of-way. Further, the Petitioners desired to expand the width of the existing right-of-way. The Respondents denied the existence of a written right-of-way and for expansion and called for strict proof of the existence of such right-of-way and the basis for the expansion of the right-of-way in their answer. The original complaint did not allege any damages and specifically stated that the Petitioners waived any damages as being inconsequential. Paragraph II page 2 of Complaint.

The Respondents, Jack O. Long and Lora A. Long, acknowledged the existence of the roadway on their real estate by prescription and stated that the width of the roadway as being nine (9) or ten (10) foot wide depending on the existing location and the Respondents also asserted the usage of such prescriptive easement by the Petitioners was for ingress and regress, and farming purposes. The Respondents denied the existence of a prescriptive right-of-way and have never acknowledged the existence of a prescriptive right-of-way.

The Respondents filed a motion for Summary Judgment regarding whether the roadway could be widened from its current width, and a motion to strike the survey of G.A. Covey. The survey tried to establish the width of the right-of-way across the Respondents' land on the existing easement. The Petitioners' counsel labeled this survey as functional width for the use

of log trucks by the Petitioners and established the width as twenty-five (25) feet. The Court reviewed the Respondents' motion and denied both motions at that time. The Court granted Petitioners' request to file an amended complaint and the amended complaint was filed on October 2, 2018. The amended complaint contained the same theory as the original complaint alleging that a written right-of-way existed by deed and for expansion of the width of the road and added a count for tortious interference and expanded on their theory of functional width. The Petitioners' amended complaint did not allege the existence of a prescriptive easement and contained the same paragraph that the Petitioners suffered no damages. The Respondents admitted in their response that they agreed that the Petitioners suffered no damages. Both parties engaged in discovery.

On August 16, 2019, the Petitioners moved once again to amend their complaint. The amended complaint alleged that the road was now a public road. The Petitioners further plead the existence of the road by deed but did not pursue this cause of action. Respondents denied the existence of a public road on their real estate by their response.

After the filing of the amended complaint, The Respondents engaged in discovery and filed a motion for failure to join an indispensable party, i.e., Upshur County Commission. The Court granted such motion, and the Petitioners filed an amended complaint joining the Upshur County Commission. The Court conducted a hearing upon the motion of the Upshur County Commission to dismiss in that the roadway was not a public road. This motion was granted by the Circuit Court on November 12, 2019, dismissing the Upshur County Commission from this matter.

On June 3, 2020, the Court conducted a hearing on the Petitioners' Motion for Summary Judgment and on the Respondents' Motion for Judgment on the Pleadings/Motion for Summary Judgment. The Court subsequently ruled on the motions and made specific findings of fact and conclusions of law contained in its order entered on July 19, 2020. Additionally, the Court found that there was no evidence advanced by the Petitioners that the roadway through the Respondents' real estate was ever a public roadway. As such, the Court concluded that the Petitioners' claim pursuant to West Virginia Rule of Civil Procedures 12(c) did not advance a prima facie case which could be submitted to a jury regarding the issue of whether the roadway was public in nature and, as such, the Petitioners' claim that the roadway was public was dismissed. It is from this ruling of the Circuit Court that the Petitioners appealed this case.

STATEMENT OF CASE

This action was filed under West Virginia's Uniform Declaratory Judgments Act, WV Code Section 55-13-1. The complaint states that the Petitioners are the owners of several tracts of real estate that they have acquired by various deeds totaling 152.11 surface acres, more or less. The Petitioners live part-time at a home located on one of the tracts of real estate. The Respondents own 52 acres, more or less, and live on their real estate full time. A road runs through the real estate of the Respondents in front of their house to the real estate of the Petitioners where it enters the Petitioners' real estate and dead ends. The road is not a thru road, and there are no other parties on the road from the Respondents' real estate to the Petitioners' real estate, and the road serves only the parties to this litigation once it enters the Respondents' real estate. In their answer, the Respondents denied the existence of any deeded right-of-way through their real estate, and no deeded right-of-way was proven to exist by the

Petitioners. The Respondents asserted that the roadway existed by prescription in favor of the Petitioners for ingress and regress to their home and for some farming purposes. The Petitioners deny this assertion. The Respondents also asserted the width of the roadway was its present width of nine (9) to ten (10) feet wide in places. The roadway is well defined. The Petitioners have maintained a gate on the road at the entrance of the road into their real estate for many years. The Petitioners' real estate also adjoins a county road at another point in their property.

Prior to filing suit, the Petitioners, without seeking permission from the Respondents, engaged G.A. Covey of G.A. Covey Engineering to survey the existing road on the Respondents' real estate. G. A. Covey surveyed the roadway and expanded the width of said roadway to twenty -five (25) feet on a survey and recorded the survey in the Office of the Clerk of the Upshur County Commission in Right-of-Way Book 4 at page 516. The Respondents, after suit was brought, filed a Motion to Strike such survey. The Petitioners have referred to the twenty-five (25) foot right-of-way as being the functional width throughout the lawsuit. The Petitioners were desirous of timbering their real estate but could only do so if they could expand the existing road on the Respondents' real estate to allow tractor and trailers to remove their timber. The Petitioners did not advance other ways of removing their timber.

A deposition of the Petitioner, Timothy J. Gregory, revealed that he knew he did not have a deeded right-of-way. Further, the Petitioner, Timothy J. Gregory, revealed that his real estate bordered on a county road referred to as Grand Camp Road. The Petitioner stated that he did not desire to build a road from his property to the county road due to the steepness and

the existence of a weight limit on a bridge along with the existence of a hump in the county road and therefore this option was not pursued by the Petitioners at that time.

The second amended complaint filed by the Petitioners alleged tortious interference in the usage of the roadway by the Respondents and the Respondents denied the same. Additionally, the Respondents filed a counterclaim and alleged that the Petitioners were trying to widen the roadway by running larger vehicles out of the original track on the road. The Petitioners expanded on their theory of functional width in the amended complaint.

Subsequently, the Petitioners filed another amended complaint alleging that the roadway was now public in nature based upon the existence of a map referred to as the A. B. Brooks map which hangs in the Upshur County Court House. The map is dated 1905 and appears to depict every road to every house in Upshur County at that time. There is no notation on the map that any of the roads are public. The map shows only that roads existed to houses. This map contains hundreds of roads in every section of Upshur County and does not depict width or metes or bounds of such roads.

The Court granted the Respondents' motion to add an indispensable party, the Upshur County Commission, at that time based on the assertion the road was a public roadway. The Court subsequently held a hearing and dismissed the Upshur County Commission in that there was no evidence that the road was ever public in nature. The case proceeded on at that time.

The Petitioners engaged Professor John W. Fisher II, who formed an opinion that somehow the road became public without any records showing how this occurred. Professor John W. Fisher II also asserted the road's width was thirty (30) foot wide per statute.

On June 3, 2020, the Court conducted a hearing wherein the Petitioners filed a Motion for Summary Judgment, alleging that the road was likely formed before 1863 or thereafter, and that the A. B. Brooks map of 1905 was evidence that the road was a public road. The Respondents filed a Motion for Judgment on the pleadings which the Court treated as a Motion for Summary Judgment. The Respondents argued at that hearing that the Petitioners presented no evidence that : (1) that the road was public, (2) that the Upshur County Commission had ever accepted the road by donation, (3) that the Upshur County Commission had ever expended money on the road or performed construction or maintenance of the road, (4) that the road had ever been condemned for public usage and had ever been accepted as a public road if it was ever offered for public usage and that the public did not utilize the road.

The Court, by order dated July 10, 2020, denied the Petitioners' Motion to declare the road public and granted the Respondents' motion to dismiss. The Court Order contained numerous finding of fact and noted in the order that the Petitioners have access to a public road by which they could extract their timber, albeit not as easily. Furthermore, the Court noted that in 1994 the Petitioners had their real estate surveyed, and the roadway was marked on their survey as a farm road. The Court also noted that the Petitioners had placed a gate upon the road at their property line thus contradicting the theory that the road was public in nature and subject to public usage.

ASSIGNMENT OF ERROR

As permitted by West Virginia Rule of Appellate Procedure 10(d), the Respondents do not restate the Petitioners' assignment of errors.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners requested oral argument in this case primarily as a result of several errors asserted. The errors assigned by the Petitioners can be simply addressed by the Court, and the Court can make a decision from the briefs of the parties and from the record in this case. The Respondents assert that oral argument is not necessary to make a decision in this case. The Respondents have no opinion as to the type of opinion that the court may issue in this case.

STANDARD OF REVIEW

An appeal to review the entry of a Summary Judgment by this court is reviewed De Novo. Painter v. Peavy 192 W.VA. 189, 451 S.E. 2nd 755 (1994). The Court has further held that a Motion for Summary Judgment should be granted only when it is clear that there are not genuine issues of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. SYL. Pt.3 Aetna Cas Sur Co. v. Federal Ins. Co. of New York, 148 W. VA. 160, 133 S.E. 2d 770 (1963); Williams v Precision Coil, Inc. 194 W. VA. 52, 459 S.E. 2d 329 (1995)

SUMMARY OF THE ARGUMENT

After full and fair arguments of the pleadings, the trial Court properly granted the Respondents' Motion for Summary Judgment because the Petitioners had no evidence to establish a prima facie case that the roadway located on the Respondents' real estate was a public road. There was no evidence of a deeded right-of-way presented to the Court. The lower Court made extensive Findings of Fact and Conclusions of Law and the lower Court further found pursuant to West Virginia Rule of Civil Procedure 56(b) that there was no genuine

issue as to any material fact regarding the claims of the Petitioners against the Respondents and that the Petitioners' claim for a declaration of a public road on the road traversing the Respondents' real estate was dismissed.

ARGUMENTS REGARDING PETITIONERS' ASSIGNMENT OF ERROR

I. THE CIRCUIT COURT PROPERLY GRANTED THE RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS/SUMMARY JUDGMENT.

This case was thoroughly presented to the Circuit Court of Upshur County. The Petitioners initially began this case pleading that they had a written right-of-way over the Respondents' real estate by deed. This theory was never proven, and this theory was subsequently abandoned by the Petitioners as no evidence was presented to substantiate the existence of a deeded right-of-way.

The Petitioners became entrenched in their belief that the road on the Respondents' property had always been a public road and employed Professor John W. Fisher II to advance a theory that somewhere in the early history of the State of West Virginia or Commonwealth of Virginia that the road in litigation became a public road. Professor John W. Fisher II was unable to produce any evidence except conjecture how the road may have become public in his opinion.

The Circuit Court of Upshur County properly cited Ryan et. al. v. Monongalia County Court 86 W.VA. 40 (1920) that allows for three (3) ways by which privately owned land may become public or dedicated to public use. The three (3) elements are as follows:

1. The land or road must be taken by the State through an eminent domain process with compensation to the owner. The Petitioners failed to produce any deed or

writing to show that the land had ever been condemned for any public use. There were no minutes from the Upshur County Court or Commission or any recorded document reflecting a condemnation by any public entity.

2. That the land was donated by the Respondents or their predecessor in title to a public body or government agency and was accepted by the public body. Rose v. Fisher 130 W.Va. 53 (1947) Michele L. Ford et.al. v. Gary Dickerson et al 662 S.E. 2d 503.
3. That the land or road became public by continuous and adverse use by the public for a statutory period of time or by some official act of acceptance by a public entity which would have been proved by the expending of public funds for the maintenance of such road. Town of Bancroft v. Turley 170 W. VA. 1 287 S.E. 2d 161 (1981)

The Petitioners assert that the 1905 A. B. Brooks Map is definitive proof that the road is a public road, and the Court should have granted the Petitioners' motion merely because the map hangs in the Upshur County Court House and depicts the road. The Petitioners were unable to substantiate any of the data or information that went into making the A. B. Brooks Map. There are no Upshur County Commission minutes regarding the road, nor any documents showing acceptance by the Upshur County Commission that the A. B. Brooks Map was drawn to depict public roads in existence at that time. The map shows hundreds of roads that existed in Upshur County in 1905 or earlier. The Circuit Court found by a specific finding of fact that the A. B. Brooks Map was not a public document and the Court could attribute no weight to the map or any other map, including any State Geological Survey Maps.

Professor John W. Fisher II did not cite any evidence that may have been supplied to him by the Petitioners or that he possessed that would satisfy any of these requirements. The opinion rendered by Professor John W. Fisher II is based upon a map referred to as the A. B. Brooks Map, which hangs in the Upshur County Court House. The Circuit Court of Upshur County made a specific finding in Paragraph 8 of its Final Order that the map is not a public record. The Court ruled in Michelle Ford v. Gary Dickerson et. al. 662 S.E. 2d 503 that the mere existence of a plat of record attempting to depict a public street does not make a street public, unless a public entity accepts the street as public. Syllabus Point 1 City of Point Pleasant v. Caldwell 87 W.VA. 277 104 S.E. 610 (1920). The existence of maps, plats, or other drawings does not confer upon a road public status short of being accepted. There was no evidence of acceptance of the road even if the road is on any map, be it the A.B. Brooks Map or an article in the paper about the map.

The Upshur County Circuit Court also made specific findings that there was no evidence of an eminent domain condemnation proceedings regarding the road and also made a finding there was no evidence of a private donation to a public entity and acceptance of the road by a public entity.

The Court also found that there was no evidence of continuous use of the road by the public or any expenditure of money for maintenance or construction on the road by any public entity. Town of Bancroft v. Turley 170 W. Va. 1 287 S.E. 2d 161 (1982).

The Court also found no evidence that the Upshur County Commission ever conscripted its citizens to perform work on the road. Further, the road was never traveled by the public as it was not a thru road. The road only served the Petitioners' real estate and was gated.

The opinion expressed by Professor John W. Fisher II is a great story with no evidence to support the bright line of Ryan et. al. v. Monongalia County Court.

The Petitioners' brief did not address the Ryan case and appeared to disregard the case. The Petitioners have totally failed to address the basis of the Court's reliance on Ryan and how a road may become pubic in West Virginia.

The granting of the Respondents' Motion for Summary Judgment by the Circuit Court was clear, and there are no genuine issues of any facts. The conclusions of law as articulated in the Final Order are clear and concise. Syllabus Point 3 Fayette County National Bank v. Lilly 199 W. VA. 349 484 S.E. 2d 232 (1997). Michelle L. Ford et. al. v. Gary Dickerson et. al. 662 S.E. 2d 503.

The Petitioners have failed to introduce any evidence to comply with the well settled law in West Virginia, as to how the private road became a public road as they allege. The road serves only the Petitioners' house and there is no public outlet.

II. THE CIRCUIT COURT DID NOT COMMIT PLAIN ERROR IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY AND FINDING THAT RIGHT-OF-WAY WAS CREATED BY PRESCIPTION

The Petitioners have consistently refused to accept the idea that the roadway through the Respondents' real estate to their real estate was established by prescription and by no other means.

In their initial pleading, the Respondents recognized the roadway on their land as being acquired by prescription by the Petitioners. The historical usages alleged by the Respondents were for ingress and regress to the Petitioners' home and occasionally farming use by the Petitioners. The Petitioners have consistently denied the existence of a prescriptive easement by pleading.

The third assignment of error states that the Circuit Court committed plain error in granting the Respondents' Motion for Summary Judgment with no findings of fact as to prescription. The issue of prescription obviously troubles the Petitioners, and the Respondents would concede to the Petitioners that no road exists even though the Respondents have agreed that a prescriptive right-of-way exists. The necessary elements required to establish a prescriptive easement are defined in Michael J. O'Dell v. Robert and Virginia Stegall et.al. 226 W.Va. 590, 203 S.E. 2d 561 (2010)

The location of the roadway in this case is easily ascertained. The width of the roadway is clearly visible. A prescriptive easement cannot be expanded for a future use by the Petitioners to remove timber or for any other usage. Michael O'Dell v. Robert and Virginia Stegall et.at. The attempt to expand the road to twenty-five (25) feet wide with additional cuts and slopes so as to cut timber has not been approved by the Respondents nor is there any evidence that such width ever existed. Wade v. McDougle 50 W.VA. 113 52. S.E. 1026.

III. THE CIRCUIT COURT DID NOT COMMIT ERROR BY REFUSING TO EXPAND THE EXISTING WIDTH OF THE EASEMENT

The Petitioners' claim in this case is that they need a right-of-way at least twenty-five (25) foot in width plus slopes in order to remove timber from their real estate. In the alternative,

the Petitioners assert that any single lane county road must have a width of twenty-five (25) feet (functional width). The Petitioners wish to argue functional width but cite no law allowing such argument. The roadway at issue is a single roadway lined by trees of various ages. The roadway has existed in its present location and width for many years. There are no metes and bounds description of the road as the roadway only served the two (2) properties for ingress and regress and farming purposes. Michael J. O'Dell v. Robert and Virginia Stegall et.al effectively outlines how a prescriptive easement can be established and more importantly the usages and width. A right-of-way acquired by prescription for one purpose can't be broadened or diverted for another purpose, and its character and extent are determined by the use of it during the period of prescription. Syllabus Point 3, Munk v. Gillenwater, 141 W.VA. 27, 87 S.E. 2d 537 (1955). The Petitioners are not entitled to increase the burden on the land. Crane v. Hayes 187 W.Va. 198, 417 S.E. 2d 117 (1992)

The Circuit Court in this matter properly found that the roadway could not be expanded merely because the Petitioner snow have a specific usage (timbering) for the road

The roadway is not a public road and the roadway is not established by any deed.

The Petitioners' argument that the minimum right-of-way by statute is thirty (30) foot wide would be a condemnation of the real estate and is irrelevant.

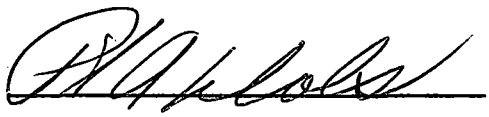
The Petitioners failed to introduce any evidence of a deed or any evidence of a condemnation proceeding to condemn the Respondent's predecessor real estate at any time.

CONCLUSION

For the reasons set forth herein, the Respondents urge the Court to affirm the decision of the Circuit Court of Upshur County.

The Court made extensive findings of fact and appropriate conclusions of law based upon the limited amount of evidence presented by the Petitioners. The sole issue in this case is whether the road is a public road. As discussed, the Petitioners have failed to satisfy the Ryan v. Monongalia County Court standard. The decision below should be affirmed.

Respectfully Submitted
Jack O. Long
Lora A. Long
Defendants Below Respondents
By Counsel



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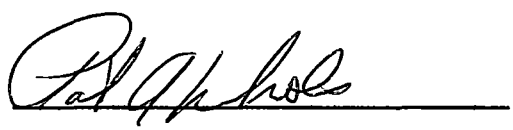
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true copy of the foregoing by depositing a copy in the United States mail, first class postage addressed to

J. Burton Hunter
One West Main Street
Buckhannon, WV 26201

Dated at Parsons, WV this 25th day of January 2021.



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