IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0010

(Preston County Case No. 18-C-7)

ROBERT GOODWIN and ROBIN GOODWIN,

Defendants below, Petitioners,

v.

JAMES R. SHAFFER and IRIS M. SHAFFER,

Plaintiffs below, Respondents.

APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT OF PRESTON COUNTY

PETITIONERS' REPLY BRIEF

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A. The Real Estate at issue in this action is a private way.

It is undisputed that the real estate at issue in this action is a private way in the form or a platted alley. Resp. Rep. Bf. at pp. 2-3.

Historically, the alley was created in 1900 when W.G. Brown reserved the alley along the northern boundary of a group of lots fronting Brown Avenue in Kingwood between Tunnelton Street and Price Street. J.A. 542. Long ago, a dispute arose as to various individuals using the alley. This culminated in a civil action in the Circuit Court of Preston County entitled *Robertson v. Whetsell*, Civil Action 484. J.A. 150-157. In that case, the Circuit Court of Preston County determined that the strip of land in question was a private alley. J.A. 156.

The Circuit Court of Preston County, West Virginia correctly found that the real estate at issue is a private way in the present action. J.A. 488.

The Respondents' agree that the real estate at issue is a private way. Resp. Rep. Bf. at pp. 2-3.

The undisputed nature of the real estate at issue as a private way is central to the resolution of this action, and central to the Circuit Court of Preston County, West Virginia's error in this case.

B. Respondents had implied permission to use the private way as a matter of law.

In direct contravention of West Virginia law, the Circuit Court found, and the Respondents continue to argue that mere use, without seeking permission, of a private way is sufficient to establish adverse possession under West Virginia law. This is patently erroneous.

Initially, the West Virginia Supreme Court has found that West Virginia follows the minority view that "use of another's property is deemed permissive, and the claimant must demonstrate the adverse character of the claimant's actions." *O'Dell v. Stegall*, 226 W. Va. 590,

615, n. 28, 703 S.E.2d 561, 586 (2010). Accordingly, use of another's land without permission starts as permissive use as a matter of law. *See O'Dell v. Stegall*, 226 W. Va. 590, 615, 703 S.E.2d 561, 586 (2010) ("To the extent our prior cases suggest that proof of adverse use is not required, or that the continuous and uninterrupted use of another's land for ten years is presumed to be adverse, they are hereby overruled").

This is especially true when the land used by the claimant is a private way. In this case, the real estate at issue in this action is a private way. J.A. 488. Contrary to the Circuit Court of Preston County, West Virginia and the Respondents' attempts to distinguish this case from *MacCorkle v. Charleston*, 105 W. Va. 395, 399, 142 S.E. 841, 842 (1928), *MacCorkle* is instructive in this appeal.

In *MacCorkle*, the West Virginia Supreme Court of Appeals examined whether a private way was dedicated to public use. In issuing this opinion, this Court noted the rule of law that

> ***once the private character of a way is established, mere use by the community is held to be permissive and in subordination to use by the owner.*** . . . These cases proceed on the theory that when a private way is open, it is open either for the convenience, or by the permission of the owner; that the public, finding the way open, uses it without any claim of right but merely because it is open; that the owner indulges the public's use rather than be captious; that such use is in common with his own; and that he is not to be penalized for accommodating the public. Therefore, they say, the vital elements of abandonment by the owner, and adverse user by the public, respectively, upon which an implied dedication or prescription must rest, are lacking, and "no length of time during which property is so used can deprive an owner of his title".

MacCorkle v. Charleston, 105 W. Va. 395, 399, 142 S.E. 841, 842-43 (1928) (internal citations omitted) (emphasis added). Respondents are undoubtedly members of the community.

As a result, under West Virginia law, the Respondents' alleged use began as permissive use, *O'Dell v. Stegall*, 226 W. Va. 590, 615, n. 28, 703 S.E.2d 561, 586 (2010), and the use of a

private way by a neighboring landowner is permissive. *MacCorkle v. Charleston*, 105 W. Va. 395, 399, 142 S.E. 841, 842-43 (1928).

Use that begins as permissive use, which is implied and required by law, must be repudiated. *See O'Dell v. Stegall*, 226 W. Va. 590, 613, 703 S.E.2d 561, 584 (2010) ("A use that began as permissive will not become adverse unless the license (created by the granting of permission) is repudiated.") ***Respondents presented no evidence of repudiation.*** Instead, the Respondents presented evidence of use in conjunction with other neighbors and other members of the public. J.A. 545.

Other states agree with the principle that once a private way is opened, use by the public or by a neighbor is permissive at inception and an adverse possessor claimant must show repudiation to establish his title by adverse possession. *See Wall v. Landman*, 152 Va. 889, 895, 148 S.E. 779, 781 (1929) ("[W]here the owner of land opens a way thereon for his own use and convenience, the mere use by his neighbor under circumstances which neither injures the way nor interferes with the owner's use of it, in the absence of some other circumstance indicating a claim of right, will not be considered as adverse, and will never ripen into a prescriptive right."); *Wilfon v. Hampel 1985 Tr.*, 781 P.2d 769, 771 (Nev. 1989) ("Where a roadway is established or maintained by a landowner for his own use, the fact that his neighbor also makes use of it, under the circumstances which in no way interfere with use by the landowner himself, does not create a presumption of adverseness. The presumption is that the neighbor's use is not adverse but is permissive and the result of neighborly accommodation on the part of the landowner."); *Lewisburg v. Emerson*, 5 Tenn. App. 127, 132 (Tenn. Ct. App. 1927) ("If it were once understood that a landowner by allowing his neighbors or the public to pass through his lands without objection over a pass-way which he himself used, would thereby, after the lapse of twenty years, confer on such

neighbors, or any of them, the right to compel the way to be kept open for his or their benefit and enjoyment, a prohibition against all such travel would immediately ensue."); *La Rue v. Kosich*, 66 Ariz. 299, 306, 187 P.2d 642, 646 (1947) ("The evidence presented in the case at bar conclusively shows that the plaintiff, together with the general public, had enjoyed implied permissive use of the roadway through the neighborly indulgence of its owner and his predecessors in interest. And, a use that has its inception in the permission of the owner will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts."); *Douglas v. Knox*, 232 Ga. App. 551, 553, 502 S.E.2d 490, 492 (1998) ("An owner's acquiescence in the mere use of his road establishes, at most, a revocable license. To establish a prescriptive easement over the private property of another pursuant to O.C.G.A. § 44-9-1, it is necessary to show that the owner was given notice that the user intended to appropriate it as his own.").

At most, the Respondents presented evidence that they used another's land without permission. This is simply not enough evidence to establish a prescriptive easement over a private way under West Virginia law. *See Cotton v. May*, 301 So. 2d 168, 169 (Ala. 1974) ("Much of appellants' argument is based on the testimony of numerous witnesses that they never had 'to ask permission' to use the roadway. This approach fails to meet the requirements for the acquiring of a private easement by prescription in this state."); *Cuillier v. Coffin*, 358 P.2d 958, 959 (Wash. 1961) ("The fact that no permission was expressly asked, and that no permission was expressly given, does not preclude a use from being permissive under the circumstances of this case."); *Wilfon v. Hampel*, 781 P.2d 769, 771 (Nev. 1989) ("*Chollar-Potosi* does not stand for the proposition, as claimed by Hampel, that the mere use of another's road without asking permission constitutes adverse use.").

This Court should not backtrack to the pre-*O'Dell* presumption of adverse use. Accordingly, this Honorable Court should overrule the December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*", J.A. 539-560, and direct the Circuit Court to enter summary judgment on behalf of the Petitioners.

CONCLUSION

WHEREFORE, Petitioners, Robert Goodwin and Robin Goodwin, respectfully request that this Court reverse the Circuit Court of Preston County's December 11, 2020 "*Amended Order Granting the Plaintiffs' Motion for Summary Judgment in Part and Denying In Part*", direct that the Circuit Court of Preston County enter summary judgment in favor of the Petitioners, and such other relief as the Court deems just and appropriate.

Respectfully submitted this 15 day of June, 2021.

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CERTIFICATE OF SERVICE

I, Buddy Turner, do hereby certify that I served the foregoing "**PETITIONER'S REPLY BRIEF**" upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 15th day of June, 2021.

By U.S. Mail
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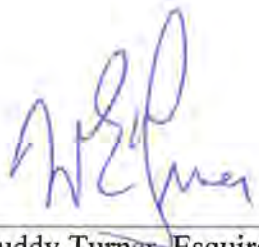

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