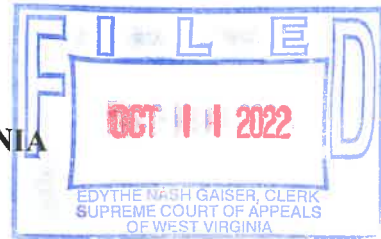


THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0380



TONEY PALETTA,

Petitioner

v.

NELSON PHILLIPS, III, NATHAN PHILLIPS,
ROBERT NESLON PHILLIPS, II, and, WEST
VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondents

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*Circuit of Harrison County, West Virginia
Civil Action No. 19-C-52-1*

**RESPONSE BRIEF OF THE RESPONDENT, WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS**

Submitted By:

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TABLE OF CONTENTS

	<u>Page No.</u>
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	2
Statement Regarding Oral Argument and Decision	2
Argument	2
I. History of the West Virginia Road Commission and Secondary Route 36/5	2
Conclusion	3
Certificate of Service	4

TABLE OF AUTHORITIES

Statutes

<u>Acts Extraordinary Session 1933, April 10 – June 3, 1933</u>	2
<u>West Virginia Code, § 17-2A-1, et seq., Acts 1957, as amended,</u>	2
<u>W. Va. Code, § 17-2A-8(12)</u>	3

Regulations

<u>W. Va. Code St. Reg., § 157-1-6</u>	3
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STATEMENT OF THE CASE

On December 11, 2019, the Plaintiff filed an Amended Complaint against the Defendants, Nelson Phillips, III, Nathan Phillips, and Nelson Phillips, II, a/k/a Robert Nelson Phillips, II (hereinafter referred to sometimes as the “Phillips Defendants”). *See Appendix pp. 16-24*. The gist of the Amended Complaint is that the Plaintiff and the Phillips Defendants own property that are situate adjacent to each other. The Plaintiff is alleging that the only means of ingress and egress to and from his property are located along a public road known as West Virginia Secondary Route 36/5 which is alleged to offer travel to West Virginia Route 36. *See Appendix pp. 17 at paragraph numbered 7*.

On March 11, 2021, the Trial Court entered an Order holding the Phillips Defendants’ Motion for Summary Judgment in abeyance and granting said defendants leave to file a Third-Party Complaint bringing the Respondent, the West Virginia Division of Highways, into the instant civil action as a necessary party. *See Appendix pp. 37-42*. The Phillips Defendants then filed their Third-Party Complaint and served it upon the Division of Highways. Thereafter, the Division of Highways filed its Answer to said Third-Party Complaint. *See Appendix pp. 58-65*. The Plaintiff and the Phillips Defendants served the Division of Highways with various forms of discovery which were timely responded to by the Division of Highways. The Plaintiff chose not to bring a direct claim against the Division of Highways.

On April 29, 2022, an Order was entered by the Trial Court granting the Phillips Defendants’ Motion for Summary Judgment. *See Appendix pp. 5-15*. Accordingly, because there was no direct claim brought by the Plaintiff against the Division of Highways, the Phillips Defendants’ third-party claims against the Division of Highways became moot upon the entry of

the Order granting their Motion for Summary Judgment as to the Plaintiff's claims against the Phillips Defendants.

SUMMARY OF ARGUMENT

The Respondent, West Virginia Division of Highways, was brought into this matter as a third-party defendant by the Phillips Defendants in the underlying matter. Accordingly, because the Petitioner/Plaintiff did not assert direct claims against it, the third-party claims against the Division of Highways became moot. Therefore, the Division of Highways is appearing to provide a historical and factual background for this appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent, West Virginia Department of Transportation, Division of Highways, respectfully requests oral argument before the West Virginia Supreme Court of Appeals pursuant to Rule 19 or Rule 20 of the West Virginia Rules of Appellate Procedure, as the Court deems appropriate.

ARGUMENT

I. History of the West Virginia Road Commission and Secondary Route 36/5.

In 1933, the West Virginia State Road Commission was created by the West Virginia State Legislature. *See Acts Extraordinary Session 1933*, April 10 – June 3, 1933. Thereafter, in 1957, the State Legislature designated the state road commission the “West Virginia Division of Highways.” *West Virginia Code*, § 17-2A-1, *et seq.*, Acts 1957, as amended. The Road Commission then identified and inventoried the roads that were brought into the State Road System, which included manually having employees walk, measure and document roads that came under this legislation. These roads are commonly referred to as “scroll roads.”

The subject Secondary Route 36/5 was initially noted on the “scrolls” as a road in or around 1937 and appears on a Harrison County Map dated 1940. Thereafter at some point in the late 1960’s or early 1970’s, Secondary Route 36/5 was obliterated when overburden from a strip mine was discarded upon it. The road no longer exists in an identifiable form and is represented on all Harrison County Road maps dated after the 1970’s as impassable.

It should be noted that during the Pretrial Conference held before Honorable Judge McCarthy held on March 23, 2022, the issue of how and if a state road could be abandoned was raised by the Trial Court. As requested by Judge McCarthy, counsel for the Respondent, Division of Highways, researched this issue and identified W. Va. Code, § 17-2A-8(12) and W. Va. Code St. Reg., § 157-1-6 as responsive to the Court’s inquiry.


W. Va. Code, § 17-2A-8(12) states that the Commissioner of Highways may discontinue, vacate and close any road or highway, or any part thereof, where he finds the continuance and maintenance of any such road unnecessary and improper. W. Va. Code St. Reg., § 157-1-6 establishes the procedure for an “interested person” or the Commissioner of Highways to determine if a road or highway should be “abandoned.”

A review of the Commissioner’s Orders for Harrison County did not reveal any action by the Commissioner of Highways to abandon Secondary Route 36/5.

CONCLUSION

WHEREFORE, the Respondent, West Virginia Division of Highways, respectfully requests that this court provide such relief as it deems just and proper.

DATED: October 11, 2022.



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CERTIFICATE OF SERVICE

I, Travis S. Haley, counsel for Respondent, West Virginia Department of Transportation, Division of Highways, do hereby certify that I have this the 11th day of October, 2022, served a true and accurate copy of the foregoing “*Response Brief of the Respondent, West Virginia Department of Transportation, Division of Highways*” by depositing a copy of the same in the regular United States mail postage prepaid to the following:

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