IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-53

SCA EFiled: Feb 27 2023
04:39PM EST
Transaction ID 69231851

**STATE OF WEST VIRGINIA EX REL.
ROBERT HOOFF**

Petitioner,

v.

**THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, and
ESTATE OF SYLVIA PEACE, By and Through TONY PEACE, EXECUTOR, and
E. PHILLIPS POLACK,**

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT

Mark A. Kepple, Esq. (WV Bar ID #7470)
Benjamin P. Visnic, Esq. (WV Bar ID # 12289)
Bailey & Wyant, P.L.L.C.
1219 Chapline Street
Wheeling, West Virginia 26003
mkepple@baileywyant.com
bvisnic@baileywyant.com

Counsel for Respondents,
E. Phillips Polack and Wendy Polack

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

West Virginia Cases:

Statutes and Rules:

III. STATEMENT OF THE CASE

Respondents and Petitioner are involved in a legal dispute because Petitioner refuses to allow Respondents, or anyone else, to modernize and upgrade a sewage system which was shared by four property owners, but which happens to lie on Petitioner's property.[1] After this dispute nearly resulted in Respondents' water being turned off, Respondents moved for an emergency injunction prohibiting the Ohio County Health Department ("OCHD"), the City of Wheeling, and the City of Wheeling Water Department from turning off Respondents' water. The Court then held a status conference two weeks later, during which it ordered that Respondents' expert be allowed to enter Petitioner's property and examine it to see if it is suitable for a modern septic system drainage field.

Petitioner now decries these pedestrian court actions as some sort of unresolved conflict between the courts and administrative agencies, claiming, *inter alia*, that the Court's orders create a new conflict between the courts and administrative law, and that the Court has tacitly decided issues it clearly has not. Both of these positions are legally and factually incorrect. Petitioner's arguments are full of *sturm und drang* claiming all manner of serious conflicts of law and violations of sacred rights, but upon closer examination, Petitioner is incorrectly raising some procedural detritus to unwarranted levels in an attempt to frustrate the resolution of this case.

In short, the Court did not err when it granted Respondents' motion for emergency injunctive relief, nor did it err when it ordered Respondents be allowed to enter Petitioner's property to conduct some preliminary testing. Petitioner's Writ should therefore be denied.

A. Factual History

[1] Currently, only the Polack property utilizes the system.

The parcels at issue in this matter were initially conveyed as a single parcel on December 4, 1976 from a series of families to Laurence Washington Farms, Inc[2]. *See* Pet'r's Appx. 72. No party disputes that the sewage disposal system at issue in this case was present on the properties at that time – based on information and belief, it had been there since at least 1926, and likely much longer.[3]

The parcel was then split and sold to three purchasers. Robert Carr and Robert Hooff purchased their parcel on Sept. 25, 1978. Pet'r's Appx. 139. Bernie and Sylvia Peace purchased one parcel on November 1, 1979. Pet'r's Appx. 92. Ruth Polack purchased two parcels on May 2, 1983. Pet'r's Appx. 109. Meanwhile, the first version of W. Va. C.S.R. 64-9-3.8 was approved and effective on Nov. 2, 1979. *See* Resp.'s Appx. 000003,[4] Resp.'s Appx. 000026. Each purchaser's deed contained the language:

> Until a public sewage disposal facility is provided, the individual property owners are responsible for the construction, maintenance, and operation of collective or individual sewage treatment plants, septic tanks, or drain fields. In all cases these sewage systems shall be constructed and maintained in accordance with the standards established by the Ohio County Health Department and the West Virginia State Department of Health.

See, e.g., Pet'r's Appx. 29, 101, 116, 142.

All parties continued to use the sewer system in place, until Petitioner decided, apparently sometime in 2020, to stop the Respondents' use of the system.[5] *See* Pet'r's Br., p. 1, ¶ 3.

---

[2] Lawrence Augustine Washington was the son of Samuel Washington, eldest full brother to President George Washington. Lawrence, his wife, and one daughter are buried a few hundred yards uphill from this system. Part of their home still stands.

[3] Rosalie Stephens Phillips originally owned the parcel. Her daughter Ruth Polack, Respondent's mother, inherited the property along with other heirs. The heirs then transferred the property to Lawrence Washington Farms, Inc.

[4] The Comparison indicates that there was no section comparable to § 3.8 prior to the 1979 Rules. Resp.'s Appx. 000003.

[5] Mr. Hooff claims, repeatedly, that he was blissfully unaware of the existence of the drainage system until 2020, despite having obtained an interest in the property in *1978 and owning, and residing in, a home on the property that actually utilized the system*. While not directly germane to the issue before the Court,

Historically, the system was utilized by other homes and barns on the farm property. In fact, Petitioner himself owned a home that utilized this system until the home fell into disrepair and was razed.

On July 14, 2021, Petitioner informed Respondents through his counsel that he wanted the situation resolved. *Id.* At p. 2, ¶ 1. On August 10, 2021, the Wheeling – Ohio County Department of Health issued permits to Respondents allowing them to install sewage disposal systems on their own properties. Pet'r's Appx. 35 – 37, 240 – 241. This has proved to be an unreasonable solution to the problem due to the slopes, poor drainage, and topography of the area soils. This is

---

West Virginia case law expects that possessors of property know the conditions of their land. For example, in relation to liability for artificial conditions upon the land:

Restatement (Second) of Torts § 366 (1965)[] provides that:

> One who takes possession of land upon which there is an existing structure or other artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm caused to them by the condition after, but only after,
> (a) The possessor knows or should know of the condition, and
> (b) He knows or should know that it exists without the consent of those affected by it, and
> (c) He has failed, after a reasonable opportunity, to make it safe or otherwise to protect such persons against it.

Miller v. Montgomery Investments, Inc., 387 S.E.2d 296, 300 (W.Va. 1989) (quoting Restatement (Second) of Torts), as indicated. Both the Miller Court and the Restatement itself are clear that this burden is slight for a voluntary purchaser of a property:

> Where possession is acquired voluntarily, as by purchase, lease, or the acceptance of a gift, the person taking possession is required to make reasonable inspection and inquiry as to the condition of the land. As to any defects, disrepair, or other dangers which are patent and obvious, he therefore should know of their existence at the time he takes possession. Even as to latent defects, the vendee or lessee may have enough in the way of information or warning to lead a reasonable man to investigate, so that he "should know." Where he has no such information or warning at the time he takes possession, his long continued occupation and use of the land may in itself justify the conclusion that he should have discovered the danger. For example, a possessor who has used land for years may reasonably be presumed to know every condition or danger upon it, or to have failed to exercise reasonable care to investigate and discover it.

Miller v. Montgomery Invs., Inc., 182 W. Va. 242, 245, 387 S.E.2d 296, 299 (1989) (quoting, near verbatim, Restatement § 366, Comment c.) To the extent Petitioner is attempting to offer any legal arguments tied to his lack of knowledge about waste draining on his property since 1978, those arguments are without merit.

particularly so given the availability of the current piping structure and downhill land where the current system is located. Respondents then commenced this litigation on September 3, 2021 to quiet title to their implied easement and enforce their right to upgrade the already existing system. Pet'r's Appx. 1 – 8.[6]

B. Procedural History

On September 3, 2021, Respondents filed the Complaint, alleging slander of title, conversion, tortious interference, attempted financial exploitation, to quiet the title, and for a declaratory judgment confirming the existence of the implied easement onto Petitioner's land. Pet'r's Appx. 1 – 8. On October 4, 2021, Petitioner filed a Motion to Dismiss and Memorandum in Response, claiming that a restrictive covenant located in both the deeds and the Declaration of Covenants for the Laurence Washington Farms Improvement Association required the suit be dismissed. *See* Pet'r's Appx. 7 – 8, 9 – 37, respectively.

Respondents filed a Response to that Motion on Nov. 15, 2021, pointing out, *inter alia*, that Petitioner's Motion to Dismiss was premature, and that Respondents' use was open and

[6] Respondents believe they will be successful on the underlying claim, as they clearly meet the elements of an implied easement by prior use:

> To establish an easement implied by a prior use of the land, a party must prove four elements: (1) prior common ownership of the dominant and servient estates; (2) severance (that is, a conveyance of the dominant and/or servient estates to another); (3) the use giving rise to the asserted easement was in existence at the time of the conveyance dividing the property, and the use has been so long continued and so obvious as to show that the parties to the conveyance intended and meant for the use to be permanent; and (4) the easement was necessary at the time of the severance for the proper and reasonable enjoyment of the dominant estate.

Cobb v. Daugherty, 225 W. Va. 435, 438, 693 S.E.2d 800, 803 (2010). Here, as above, the parcels were once all owned by the Phillips family and then Lawrence Washington Estates, Inc., also owned by the family, before being sold to different parties. The sewer system was unquestionably in place at that time, and had been since, at a minimum, 1926, which is about as "continuous" and "obvious" as possible. Finally, that easement would have been necessary at the time of the sale for basic health and safety reasons, let alone "the proper and reasonable enjoyment of the dominant estate."

obvious and continuous for decades. Pet'r's Appx. 38 – 43. Petitioner filed a Reply on Nov. 18, 2021, claiming that *the evidence* will show Respondents' use was not open and notorious – a curious admission when attempting to support a Motion to Dismiss. Pet'r's Appx. 44 – 45. Respondents filed a Sur-Reply identifying this incongruency on Nov. 19, 2021. Pet'r's Appx. 46 – 49. The Motion remains pending.

On December 13, 2021, Respondents filed a Motion for Preliminary Injunction Permitting Testing and Access, specifically explaining how the sewer system works and that they were specifically seeking access to the property to conduct a percolation test and to determine the viability of the property for a new sewage disposal system, so that the case could gather more accurate information for possible settlement.[7] Pet'r's Appx. 50 – 53. On the same day, Petitioner first filed an "Objection to Motion to Permit Access and Testing." Pet'r's Appx. 54 – 55. On February 2, 2022, Petitioner then filed a Response, claiming for the first time that W. Va. C.S.R. 64-9-3.8 prohibits implied easements for sewage disposal. Pet'r's Appx. 56 – 64. On March 8, 2022, Respondents filed a Reply reiterating their position and providing the chain of title and relevant deeds therein. Pet'r's Appx. 65 – 151. Petitioners then filed a short Sur-Reply on March 11, 2022, asking for an "opportunity to present information" about alleged "factual inaccuracies" in Respondents' Reply.[8] Pet'r's Appx. 152 – 153, 155 – 159.

After little to no movement in the case over the next five months, Petitioner asserted a counterclaim against Respondents on August 15, 2022, alleging Trespass, Strict Liability for a

[7] This issue was originally raised at the first mediation in this case, when Petitioner, represented at the mediation by his daughter, who is believed to reside in New York, claimed that Respondents were unprepared to mediate because they could not define how much property the sewer system would require, or the exact location where the system would have to be installed – an interesting position to take considering Petitioner denied Respondents all access to the land. Pet'r's Appx. 51, fn. 1.

[8] While a Sur- Sur- Reply did not appear to be appropriate, Respondents disagree with the assertions therein.

Condition Hazardous to Public Health, Negligence, Negligence *per se*, and Abuse of Process. Pet'r's Appx. 165 – 171. Petitioners timely filed their Answer denying the allegations. Pet'r's Appx. 172 – 182.

However, on October 27, 2022, Petitioner, through counsel, attempted an end around this litigation and demanded that Respondents' water be shut off or that he otherwise be punished during the pendency of this litigation. Pet'r's Appx. 237 – 238. Respondents, in turn, requested an emergency hearing on the injunctive relief issues before the Court and moved the Court to stay the Ohio County Health Department from shutting off Respondent Polack's water. Pet'r's Appx. 242 – 243. The Court stayed the water shutoff and scheduled a status conference for November 12, 2022. Pet'r's Appx. 178 – 179.

At the status conference, Respondents explained that they needed access to the Hooff property to determine if the site at issue in the case would even be a viable site:

> MR. KEPPLE: And so the reason why the gravity-fed system -- now I'll point out -- here, we get a lot of power supply issues. So having a -- something that has a pump and a grinder really doesn't work. So if I could suggest that maybe one smart move for us may be to clear up a threshold issue. Would this land even get through a perc test?

Nov. 12 Hrg., 8:13 – 8:18.[9] The Court made clear that it intended to solve the problem, and that it was not particularly interested in Petitioner's position:

[9] The transcript is located at Pet'r's Appx. 187 – 216.

MR. DUFF: Your Honor, our position is Dr. Polack has no right to use -- he has no easement here at all.
THE COURT: I -- I know.
MR. DUFF: And so the permits --
THE COURT: Yeah. Okay. I'm not buying into that argument. We got to solve the problem.

Nov. 12 Hrg., 10:8 – 10:12. Despite Petitioner's draconian attempts to deny water service to a household because of a dispute over a hundred-year-old sewer system that the Petitioner himself benefitted from, the Court identified the issue before it:

THE COURT: Okay. So all you want at this time is to be able to go on the property and to have the perc test?
MR. KEPPLE: Perc test and to determine -- yes. And to see if we could have a layout that really doesn't bother anybody, you know, if we could do that. I really wish we had a map that showed the --
THE COURT: Okay. But he doesn't want you on this property at all?
MR. DUFF: That's correct, Your Honor.

Nov. 12 Hrg., 12:4 – 12:12. The Court specifically stated that it was not addressing the easement question at the hearing, and that any such question might be better suited for this Court at a later date:

THE COURT: Well, to the extent that there is a legal argument that they have a right that has continued to be on his property for this sole purpose, that's something you might have to win in the supreme court.

Nov. 12 Hrg., 16:21 – 16:24. Before ruling, the Court clarified that Respondents were only interested in conducting a percolation test to see if the land was even worth the dispute:

> THE COURT: Okay. So all you're asking now is to take perc tests along here?
>
> MR. KEPPLE: Yeah.
>
> THE COURT: Do it.
>
> MR. KEPPLE: Thank you.

Nov. 12 Hrg., 25:17 – 25:21. The Court also specified that it was not making a decision on the easement at all:

> THE COURT: On the issues but not whether there's an easement or not. I can make that decision. So, you know, anything that will help me will be fine. I suppose, you know, if you're talking about perc tests, that you ought to be doing something on Dr. Polack's property also.

Nov. 12 Hrg., 28:5 – 28:9. Rather than allowing this percolation test to occur, Petitioner filed this Writ, claiming erroneously that this Court needed to conduct a conflict of laws examination, that the Court secretly ruled on the easement and needed to be overturned, and ultimately asking this Court to decide the ultimate issue before the lower court *before the lower court actually decides it. See* Pet., pp. 1, 11, 16, 19.

IV. SUMMARY OF ARGUMENT

None of Petitioner's arguments are meritorious, and some border upon frivolous.

The Circuit Court unquestionably has the authority to issue an injunction staying administrative enforcement actions. The Circuit Court also unquestionably has the authority to permit a party to enter land for inspection and testing purposes. Finally, Petitioner's demonstrably

misleading attempt to have this Court reverse the lower court by claiming that the lower court already decided the easement issue is procedurally inaccurate and legally and factually meritless.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe that this case meets the qualifications for oral argument under W. Va. R. App. P. 19(a) because Petitioner appears to be claiming that the lower court committed assignments of error in the application of settled law. While Petitioner claims that no hearing is necessary on this matter, he does allege that this is a case of first impression, which would make it eligible for argument under W. Va. R. App. P. 20. *See* Pet. p. 16, ¶ 2. Accordingly, oral argument may benefit this Court's resolution of this matter.

VI. ARGUMENT

A. The Circuit Court did not usurp the jurisdiction of the Ohio County Health Department by ordering a temporary injunction barring the Health Department from disconnecting Respondent Polack's water.

Petitioner, in his first assignment of error, claims that the Circuit Court committed clear error by "assuming jurisdiction over a matter that falls under the jurisdiction of the West Virginia Bureau of Public Health and the Wheeling-Ohio County Health Department" when it issued a stay prohibiting the Health Department from turning off Respondent Polack's water. Pet., p. 11.[10] This "error" is not an error at all – it is a bedrock power inherent in all circuit courts.

This case presents a particularly odd set of circumstances – *i.e.*, Petitioner demanded that a non-party, the Health Department, turn off Respondents' water or otherwise punish him. Pet'r's Appx. 237 – 238. Respondents then moved this Court to enjoin the Health Department or any other department from turning off Respondents' water until the litigation before it resolved. Pet'r's Appx. 242 – 243.

[10] Respondents question whether Petitioner is legally capable of filing an assignment of error defending the jurisdiction of a non-party.

Puzzlingly, Petitioner does not actually claim that he was harmed by this decision, a prerequisite to any writ of prohibition. *See, e.g.*, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996). Rather, Petitioner seems very concerned about protecting the rights of the Health Department, and specifically, Petitioner's ability to use the Health Department to attempt to manipulate the outcome of the instant case. Petitioner claims that the Court's decision somehow raises a "new or unresolved problem . . . regarding conflicts between the jurisdiction of the state's health department and the circuit courts." Pet., p. 11, ¶ 2. It does not.

Assuming that Petitioner can even claim an assignment of error based on the Court's alleged usurpation of a non-party's alleged jurisdiction, he cannot succeed. Circuit Courts have broad – based jurisdiction over the questions at issue here. *Carey v. Dostert*, 185 W. Va. 247, 252, 406 S.E.2d 678, 683 (1991); *see also* W. Va. Code § 51-2-2(c)(2) and (d) (establishing that circuit courts have original and general jurisdiction over, *inter alia*, matters of prohibition, and to determine questions of title with respect to real property).

While, contrary to Petitioner's claims, law already exists to resolve legitimate conflicts when agencies and courts have concurrent jurisdiction over an issue. That law does not create any restrictions in the instant case.[11] *See, e.g., State ex rel. Bell Atl.-W. Virginia, Inc. v. Ranson*, 201 W. Va. 402, 410, 497 S.E.2d 755, 763 (1997) (explaining that the doctrine of primary jurisdiction applies "when a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'")

[11] Notably, Petitioner's brief does not contain a single citation to any case law in its first assignment of error.

Litigation which has both a regulatory component and a civil damages component "is within the conventional experience of judges, and does not lie peculiarly within the agency's discretion or require the exercise of agency expertise," and jurisdiction exists in both the agency and the Court as the law permits. *Hedrick v. Grant Cnty. Pub. Serv. Dist*., 209 W. Va. 591, 595, 550 S.E.2d 381, 385 (2001).

The Court unquestionably has jurisdiction over Respondents' Complaint and the appurtenant issues therein. The Health Department unquestionably has jurisdiction over water inspection duties. Neither the Court nor the Health Department strayed from their respective lanes here. The Health Department issued a notice to Respondents that it would shut down his water within 30 days due to his alleged non-compliance with the appropriate code sections.[12] The Court, in turn, did not overturn the Health Department's Order. Instead, it ordered the Health Department to *temporarily* "not interrupt or otherwise disconnect the water service" to Respondent's house, pending the resolution of this litigation. Pet'r's Appx., p. 178. Specifically, the Court's second Order extending the stay specified that the Health Department's Order would only be stayed until the investigation the Court ordered was complete. Pet'r's Appx., pp. 183 – 184.

As above, Petitioner, through counsel, attempted to pull an end around this litigation and around the Court's jurisdiction by writing a letter to the Health Department demanding that Respondents be punished for not installing a new sewer system, despite the pending dispute over Respondents' claim for access and confirmation of his easement over Petitioner's property. Pet'r's Appx. 237 – 238. Petitioner's truculence in prohibiting Respondents to set foot on the property, to take measurements, and to otherwise determine whether the disputed property is even suitable for

[12] Respondents would like to comply with the applicable code section by upgrading the existing system.

a sewer system, is the only reason this issue, and possibly the entire case, has not been resolved already.

B. The Circuit Court did not usurp the jurisdiction of the Ohio County Health Department by ordering Petitioner to allow Respondents to investigate the property at issue in this case.

Petitioner claims, in his next assignment of error, that the Circuit Court somehow committed clear error by "failing to conduct appropriate evidentiary proceedings with the appropriate burden of proof and finder of fact, prior to seemingly finding that an implied easement exists." This assignment of error is demonstrably meritless, as the Court made no findings whatsoever on the existence of an easement and, in fact, specified repeated times at the Nov. 21, 2021 hearing that it was unequivocally *not* ruling on the easement. *See, e.g.*, Nov. 12 Hrg., 8:13 – 8:18, 10:8 – 10:12, 16:21 – 16:24, 28:5 – 28:9.

The Court's Jan. 19, 2023 Order specifically states that the parties are to investigate the suitability of a specific area for installation of a drainage field for septic systems and are to conduct a percolation test. Pet'r's Appx. 217. The Order does not say anything at all about deciding the easement issue. [13] The wisdom of this decision is clear. If the land subject to Respondents' easement over the Petitioner's property will not support a modern septic system, then in the interest of judicial efficiency, these facts should be known before any further litigation regarding the easement is completed.

[13] Much as judges are do not have to hunt for truffles in briefs, lawyers should likely not divine extra meaning from judicial decisions by "interpreting" Circuit Court Orders to say things they do not actually say. *See, e.g.*, *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991), *State v. Kaufman*, 227 W. Va. 537, 555, 711 S.E.2d 607, 625 (2011).

Moreover, at the Nov. 21, 2022 status conference, the Court stated repeatedly that it was not deciding the easement issue. Specifically, the Circuit Court explained twice, in no uncertain terms, that he was not ruling on the easement:

> THE COURT: Well, to the extent that there is a legal argument that they have a right that has continued to be on his property for this sole purpose, that's something you might have to win in the supreme court.

> THE COURT: On the issues but not whether there's an easement or not. I can make that decision. So, you know, anything that will help me will be fine. I suppose, you know, if you're talking about perc tests, that you ought to be doing something on Dr. Polack's property also.

Nov. 12 Hrg., 16:21 – 16:24, 28:5 – 28:9, respectively.

The Court did not need to make, as Petitioner demands, any findings of fact or conclusions of law regarding the existence of an easement because *it did not decide the easement issue at all*. Petitioner's attempts to chastise the lower court for not conducting the proper evidentiary hearing before deciding the easement when the Court specified that it was only permitting Respondents to conduct an inspection of the property:

> THE COURT: Okay. So all you're asking now is to take perc tests along here?
> MR. KEPPLE: Yeah.
> THE COURT: Do it.
> MR. KEPPLE: Thank you.

Nov. 12 Hrg., 25:17 – 25:21.

Petitioner here has presented this Court with a sloppily-constructed strawman, *i.e.*, the lower court decided the easement issue against him without proper findings, and now asks this Court to reverse a decision which was never actually made. While Respondents would obviously prefer that the Court found in their favor regarding the easement, the Court did not actually decide the easement issue yet. Petitioner's claim that proper evidentiary proceedings were not conducted is likewise baseless.[14] The Court did not *assume* the existence of anything at all. It certainly did not make a *ruling* which would be an appropriate subject for a writ of prohibition. There does not even appear to be anything in the record outside the Court's skepticism about Petitioner's theory of the case which would cause a party to believe that the easement was ruled upon. Petitioner's assignment of error, therefore, is entirely without merit.

C. The Circuit Court did not exceed its powers or commit any sort of legal error by permitting Respondents to inspect and test the property in question.

Petitioner's final assignment of error is at least as meritless as the last, if not more so. Petitioner claims that the lower court committed some kind of "clear legal error" by allowing Respondents access to the property in question. Petitioner's argument, however, appears to be another discussion about the existence or non-existence of a relevant easement in this case, rather

[14] Petitioner spends significant time claiming that 64 C.S.R. 9-3.8 prohibits implied easements for off-lot sewage disposal and therefore Respondents cannot succeed on their claim. It does not. It requires easements be recorded or authorized. While this argument is outside the scope of the actual assignments of error Petitioner alleges, as the Court has not ruled on the existence or non-existence of an easement, Respondents feel compelled to address it here out of an abundance of caution.

Petitioner here is switching the chicken and the egg. § 9-3.8, along with the rest of § 9, sets forth minimum requirements for sewer systems and provides a list of requirements that a Health Department must evaluate before approving a new or existing sewer system. *See, e.g.*, § 64-9-1. This Rule's adoption in 1978 did not foreclose all suits for implied easements as *per se* invalid – if Respondents are successful in showing the existence of an implied easement, the judgment finding the same will be a matter of public record, the easement will be recorded and authorized, and the parties will be compliant with § 9-3.8. The new sewer system can then be approved without issue.

than any sort of actual discussion of the Court's authority to allow inspections. *See* Pet., pp. 18 – 21.

This lack of critical analysis of the Court's decision is for good reason. Respondents asked, repeatedly, to enter Petitioner's property to inspect it. Petitioner repeatedly said no. W. Va. R. Civ. P. 34 clearly allows a party to request entry upon land or other property "for the purpose of inspection and measuring, *surveying*, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." In comparison, the text of Petitioner's third assignment of error states that the Court erred because it ruled that Respondents were allowed to "enter Petitioner's property to *survey*, locate, and conduct percolation testing…" Pet. p. 19. It is not often that an assignment of error mirrors a Rule of Civil Procedure so accurately.

Discovery disputes are squarely within the scope of the Circuit Court's authority. *See, e.g.*, *Evans v. Mut. Min.*, 199 W. Va. 526, 530, 485 S.E.2d 695, 699 (1997), *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999), *State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 223 W. Va. 452, 459, 676 S.E.2d 156, 163 (2009). Here, the Court's Order clearly resolves this dispute, and specifies the conditions under which the inspection and testing is to occur. Pet'r's Appx., 217 – 218. Petitioner cannot, and does not, provide any law or statute forbidding courts from resolving discovery disputes or from allowing entry to a property under W. Va. R. Civ. P. 34.[15]

Instead, Petitioner repeats his argument from his second assignment of error, and merely alleges that no implied easement exists. That is not the question Petitioner put before this Court as

[15] It should be noted that initial discovery was served upon Petitioner by Respondents on Jan. 18, 2022. Resp.'s Appx. 000104. Petitioner failed to respond. Respondents also attempted to depose Petitioner, which Petitioner declined. Respondents filed a Motion to Compel. Resp.'s Appx 000117. The Respondent also suggests that Petitioner's pending Motion to Dismiss is specious at best. *See* Pet'r's Appx. 9. This procedural history of obstinance combined with what Respondent believes is a baseless writ demonstrates that Petitioner's defense to the case is simply to fail to cooperate.

its third assignment of error. Nor is the existence or non-existence of an implied easement an appealable issue since it is still pending before the lower court, as described *supra*.

Petitioner has improperly filed this Petition in an attempt to bootstrap its dislike of Respondents' unquestioned right to inspect the property under the Rules of Civil Procedure, and the court's unquestioned authority to resolve that discovery dispute, to the larger dispute about the existence of an implied easement on Petitioner's property. He has not yet identified a meaningful assignment of error. The ones he has identified in this claim are without merit, for the reasons stated herein. The petition should therefore be denied.

VI. CONCLUSION

Petitioner has no right to any of the extraordinary relief he requests in this matter, and his writ should be denied on each assignment of error.

Submitted by:

/s/ Mark A. Kepple
Mark A. Kepple, Esq. (W. Va. Bar Id. 7470)
Benjamin P. Visnic, Esq. (W.Va. Bar Id. 12289)
Bailey & Wyant, P.L.L.C.
1219 Chapline St.
Wheeling, West Virginia 26003
P: (304) 233-3100
F: (304) 233-0201
Email: mkepple@baileywyant.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-53

STATE OF WEST VIRGINIA EX REL.
ROBERT HOOFF

Petitioner,

v.

THE HONORABLE RONALD E. WILSON,
JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, and
ESTATE OF SYLVIA PEACE, By and Through TONY PEACE, EXECUTOR, and
E. PHILLIPS POLACK,

Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel for the Petitioners, herby certify that I served a true copy of the foregoing **RESPONDENT'S OPPOSITION TO PETITION FOR WRIT** upon the following individuals, on the 27th day of February 2023.

Frank X. Duff, Esq.
Sandra K. Law, Esq.
R. Jared Lowe, Esq.
SCHRADER COMPANION DUFF & LAW, PLLC
401 Main Street
Wheeling, West Virginia 26003

/s/ Mark A. Kepple
Mark A. Kepple, Esq. (W. Va. Bar Id # 7470)
Benjamin P. Visnic, Esq. (W.Va. Bar Id #12289)