IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 21-ICA-321

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

ROBIN GOODWIN,

Defendant Below, Petitioner,

v.

JAMES R. SHAFFER and IRIS M. SHAFFER,

Plaintiffs Below, Respondents.

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

PETITIONER'S BRIEF

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II. STATEMENT OF THE CASE

Despite this Court's holding in *O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010) ("We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored."), this Court is once again being called upon to adjudicate neighborly accommodation disputes couched as a claim for a prescriptive easement. In the present case, the failure to apply the neighborly presumption in a claim for a prescriptive easement has resulted in compensatory and punitive damages, expensive removal of an outbuilding and fencing, and a dispute which is still not settled, more than nine (9) years from the filing of the first lawsuit between these parties on this issue. JA000048; JA000045; JA000930–JA000936.[1] This dispute has been the subject of two civil actions, one appeal to the Supreme Court of Appeals of West Virginia regarding the granting of Summary Judgment for the Respondents, a

[1] References to the Joint Appendix will be noted as "JA00____."

jury verdict, and over a year of post-trial motions and proceedings.[2] The assignments of error raised herein arise from the trial on the merits of this matter and the post-trial motions that followed.

The civil action subject of this appeal centers around an alley constituting the common boundary between the Petitioner, Robin Goodwin, and the Respondents, James and Iris Shaffer, in Kingwood, Preston County, West Virginia. The area at issue was the subject of two prior litigations, the first in the 1960s regarding the entire alley, and the second between the Petitioner, her late husband, Robert Goodwin, and the Respondents regarding the area at issue in the present litigation. JA000173–JA000180; JA000143–JA000145.

In 1964, the Circuit Court of Preston County, in Civil Action No. 484, heard the first case regarding the alley at issue in the present action. The Court therein found that the alley at issue was a private alley dedicated to the property owners fronting Brown Avenue. JA000179–JA000180.

In Civil Action No. 15-C-150 before the Circuit Court of Preston County, James and Iris Shaffer sued Robert and Robin Goodwin seeking a declaratory judgment alleging ownership of the disputed land and seeking a preliminary injunction or temporary restraining order via verified pleading. JA000133-JA000139. Ultimately, that case was dismissed with prejudice following the Defendants' Motion to Dismiss by Order entered January 19, 2016. JA000143–JA000145. Importantly, the Circuit Court specifically found at that time that there was no overlap between the Shaffers' and the Goodwins' Deeds. JA000144-JA000145. As part of that action, the Respondents, through counsel, filed Proposed Findings of Facts and Conclusions of Law wherein they sought relief, in the alternative, through the doctrines of adverse possession and prescriptive easement. JA0000152.

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[2] The Case Number on appeal to the Supreme Court of Appeals of West Virginia was No. 21-0010, and is cited as *Goodwin v. Shaffer*, 246 W.Va. 354, 873 S.E.2d 885 (2022).

The present action was filed by the Respondents on January 22, 2018, asserting the following five (5) counts: 1. Prescriptive easement, 2. Private nuisance, 3. Civil conspiracy, 4. Trespass, and 5. Injunctive relief. JA000053–JA000059. The Respondents alleged that since 1973 they utilized the alley to park their vehicle and to access the back of their home. JA000054. The present action involves the same parties, litigating the same piece of ground, and the same grounds for relief that were either brought or could have been brought in the 2015 action.

On or about March 6, 2018, Petitioner, Robin Goodwin, and Robert Goodwin (now deceased) filed their Answer to the Respondents' Complaint asserting, *inter alia,* the Affirmative Defense of *res judicata.* JA000060–JA000063.

The Respondents moved the Court for Summary Judgment in April 2019, which was heard on December 16, 2019. The Circuit Court granted the Respondents' Motion in part. This Order was appealed, and the decision of the Circuit Court was reversed and remanded by the West Virginia Supreme Court of Appeals.[3]

A Jury Trial was scheduled in this matter for the week of November 2, 2022, but the parties reported they were engaged in settlement negotiations. Thus, the parties next appeared before the Court for a status conference on February 9, 2023.

At the Status Conference, the Court was informed that there may be persons other than those named as Defendants in the case that have an interest and might be adversely affected by the outcome of this action. Therefore, the Court ordered, pursuant to Rule 19, that the indispensable parties, being all the other property owners along Brown Avenue, be joined as Defendants to this civil action. The Respondents thereafter filed an Amended Complaint seeking substantially the same relief as the original Complaint and joining the following persons: Paul Sommeruk, Mary

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[3] *Id.*

Sommeruk, Thresa Bautista, Paul Hart, Wendy Hart, AJane Properties, LLC, Patrick Crogan, Jane Crogan, Christopher Ranieri, French Barnett, Jr., and James H. Wolfe, Jr. JA000064-JA000074.

The Petitioner filed an Answer to the Amended Complaint, asserting and reserving, *inter alia*, the Affirmative Defense of *res judicata*. JA000075-JA000084.

The parties then proceeded to a Jury Trial on September 18, 2023, before a properly sworn and seated jury. Following opening arguments, the Respondents proceeded with their case in chief, which included, *inter alia*, the testimony of the Respondents' expert witness, surveyor Kenneth Moran. During his testimony, Mr. Moran testified that it was his expert opinion that the area of land in dispute was not owned by the Petitioner or the Respondents, but rather the heirs of PJ Crogan who were not parties to this action.[4] JA000443.

At the end of the Respondents' case-in-chief, the Petitioner made several motions including judgment as a matter of law pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure on the grounds that the Respondents failed to meet their burden for a prescriptive easement, a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, or in the alternative for judgment as a matter of law on the grounds of the Affirmative Defense of *Res Judicata*, as well as a motion regarding the heirs of PJ Crogan pursuant to Rule 19 and Rule 12(h)(2) of the West Virginia Rules of Civil Procedure. JA000602–JA000618. A written motion accompanied the Rule 12(b)(6) Motion. JA000085-JA000180.

Following the Petitioner's case-in-chief, the Petitioner renewed her Motion to Dismiss pursuant to Rule 19 and Rule 12(h)(2) regarding the heirs of PJ Crogan, her Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) or, in the alternative, judgement as a matter of law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure on *res judicata* grounds,

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[4] Note: The heirs of PJ Crogan identified by Mr. Moran are not the heirs of the witness PJ Crogan who testified in this matter, but rather an ancestor of witness PJ Crogan.

and judgment as a matter of law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure on the grounds that the Respondents failed to meet their burden for a prescriptive easement. JA000692-JA000702. The Petitioner further moved for judgment as a matter of law pursuant to Rule 50 on the nuisance claim, punitive damages claim. JA000702–JA000709.

Following closing statements, the jury charge, and deliberations, the jury returned a verdict finding that the Respondents obtained a prescriptive easement, awarded the Respondents $10,000.00 in compensatory damages and awarded the Respondents another $10,000.00 in punitive damages. JA000815-JA000817.

Following the verdict, the Court heard post-trial motions. The Respondents moved for an injunction permitting the Respondents to use the alley at issue for the Buckwheat festival the following week. JA000820-JA000823. The Court granted the Respondents' motion and ordered that the Petitioner immediately remove fencing and an outbuilding by the following Tuesday, September 26, 2023, at 4:00 p.m. JA000823-JA000824.

Following the trial, the Petitioner filed written renewals of her motions for judgment as a matter of law, or, in the alternative, motion for a new trial. JA000181-JA000182. Said filing included a Memorandum of Law. JA000183–JA000193. The Respondents filed a written response opposing the renewed motions for judgment as a matter of law, or in the alternative, for a new trial. JA000194-JA000201.

Thereafter on January 25, 2024, the post-trial motions filed by the parties came before the Circuit Court of Preston County for a hearing. JA000828–JA000873. The parties were directed to submit proposed findings of facts and conclusions of law to the Court. JA000868-JA000872. The parties did submit to the Court their proposed findings of fact and conclusions of law regarding the post-trial motions. JA000961-JA001100.

By Order entered July 19. 2024, the Court denied the Petitioner's renewed motions for judgment as a matter of law, or in the alternative, motion for a new trial. JA000001-JA000043. Eventually, on August 29, 2024, the Court entered an Order entering the Jury's verdict. JA000047–JA000050.[5]

III. SUMMARY OF ARGUMENT

The doctrine of *res judicata* is a cornerstone of our judicial system, without it the doctrine of *stare decisis* would be without legs. Litigants are permitted one opportunity to have their day in court, argue their position, and receive a ruling. Unless appealed, the Court's ruling should be the end of the dispute. However, once courts begin to permit the same parties to be brought back into court to relitigate the same issues, our system begins to break down. The present case involves the same parties, litigating the same issues, over the same piece of ground, just three years after the initial case. The Court's refusal to dismiss this action on *res judicata* grounds creates dangerous precedent; not only does it collaterally attack a previous decision of the Circuit Court, but it also reached a different conclusion. In Civil Action No. 15-C-150, a final decision was entered on the merits, it was not appealed. Yet, in Civil Action No. 18-C-7, the Petitioner was brought again before the Circuit Court to relitigate her previous win.

Petitioner contends that prescriptive easements are not favored under West Virginia law. *See O'Dell*, 226 W. Va. at 599 ("We also seek to indelibly imprint in our common law a fundamental policy consideration: easements by prescription are absolutely not to be favored."). Further in *O'Dell*, the West Virginia Supreme Court of Appeals adopted the minority view that "use of another's property is deemed permissive, and the claimant must demonstrate the adverse

[5] In the interim between these two Orders, the Petitioner filed her Notice of Appeal, and a Scheduling Order was issued by the Intermediate Court of Appeals of West Virginia. Thus, the Petitioner filed a Motion to Amend Appeal including the Order entering the Jury's verdict. Said Motion was granted by Order entered October 4, 2024.

character of the claimant's actions." *O'Dell v. Stegall*, 226 W. Va. 590, 615 n.28, 703 S.E.2d 561, 586 (2010). Even if this Court did not adopt the minority view in *O'Dell*, the alley in question is a private way as set forth in prior litigation regarding this private way in the Circuit Court of Preston County. JA000037–JA000038. In accordance with *MacCorkle v. Charleston*, "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***". 105 W. Va. 395, 399, 142 S.E. 841, 842 (1928) (emphasis added). Either way, ***any*** use of the private way by the Respondents initially began as permissive use as a matter of West Virginia law. In order to obtain a prescriptive easement, the Respondents had to show repudiation of the initial permissive use mandated by *O'Dell* and *MacCorkle.* Respondents failed to show repudiation and ten years of use relying on the theory that they just used it without asking or seeking permission. Moreover, the Respondents' expert testimony never stated that the land at issue was owned by the Petitioner; instead, the Respondent's expert testified that the land at issue was owned by unknown individuals who were not parties to the action. Finally, the Respondents failed to present clear and convincing evidence of the reasonably identified ending point or width. Thus, the Respondents failed to carry their burden to establish a prescriptive easement, and the verdict is against the weight of the evidence.

Under West Virginia law, "[a] private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." *Booker v. Foose*, 216 W. Va. 727, 729, 613 S.E.2d 94, 96 (2005). The Petitioner's reliance on a final, not appealed, order of the Circuit Court of Preston County in Civil Action No. 15-C-150 cannot be considered "substantial and unreasonable" conduct required for a finding of nuisance. Thus, the Respondents failed to carry their burden to prove nuisance, and the verdict is against the weight of the evidence.

To be awarded punitive damages, the Respondents must show "by clear and convincing

evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others" W. Va. Code § 55-7-29. Again, reliance on a final, not appealed, order of the Circuit Court of Preston County in Civil Action No. 15-C-150 cannot be considered malicious, or conscious, reckless, and outrageous as a matter of law. Thus, the Respondents failed to carry their burden to prove punitive damages should be awarded and the verdict is against the weight of the evidence.

The expert testimony from the Respondents' surveyor identified a class whose rights may be impacted by the verdict of the jury or by rulings of the court regarding the area at issue. Thereafter, the Respondents failed to prove who the members of that class were, and they were not made parties to this action. A verdict that is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice are some of the recognized bases for granting a new trial. *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119, 126, 454 S.E.2d 413, 420 (1994) (citing *Poynter v. Ratcliff*, 874 F.2d 219, 223, 1989 U.S. App. LEXIS 6516, **9 (4th Cir. 1989). The failure of the heirs of PJ Crogan to be identified, served with process and notice of these proceedings, or have the ability to be heard on issues that could potentially interfere with their property rights constitutes a fatal defect in this trial. Thus, the heirs of PJ Crogan are indispensable parties to this action and must be joined as parties to give the heirs the opportunity to identify themselves, or be identified, and to protect their property rights. A new trial is necessary to ensure that the heirs of PJ Crogan, after being identified and served with notice by the Respondents, are provided due process of law.

During the course of the trial, counsel for Petitioner attempted to offer into evidence Proposed Findings of Fact and Conclusions of Law prepared by, then Respondents' attorney,

Rebecca Eritano, in Case No. 15-C-150. JA000666–JA000668. In January 2020, the Court sent counsel of record a letter informing both parties that he intended to review the file for Civil action No. 15-C-150 and consider the findings for a previously pending Motion for Summary Judgment in the present case. Said Proposed Findings of Fact and Conclusions of Law were a part of the Court's file in Civil Action No. 15-C-150. The Court denied the Petitioner's attempt to admit the Proposed Findings of Fact and Conclusions of Law as evidence to mitigate damages to the jury. Admission of this evidence would have clearly established good faith reliance on a prior Order of the Circuit Court of Preston County. This constitutes error that unduly prejudiced the Petitioner as she was not able to demonstrate the singular most mitigating evidence in defense of the Respondents' claims for trespass, nuisance, and punitive damages. The Petitioner is entitled to a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is appropriate for the disposition of this appeal and that the decisional process would be significantly aided by oral argument. The Petitioner believes that oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure would be most appropriate because the issues herein presented deal with the application of settled law. The Petitioner does not believe that a Memorandum Decision would be appropriate in this matter.

V. ARGUMENT

"*Interest reipub. ut sit finis litium*, cited by Edward Coke in *Ferrer v. Arden*, translates to "it is in the interest of the State that there be an end to litigation." Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 Rutgers Univ. L. Rev. 1067 (2016).

The end of litigation holds a very important position in our judicial system. Finality is what gives our decisions power; it prevents endless litigation of the same issues between the same parties until one party dies, goes broke, or simply gives up. Our system of law prides itself on finality. It is why we have appellate courts, and why doctrines such as *res judicata* and *stare decisis* are held in such high regard. Finality is even more important in a modern context. In a world of overburdened dockets, an increasingly litigious society, and fewer legal resources for individuals who need them. As a society, we need to be able to rely on the decisions of the past, unless overturned. Otherwise, particularly in the context of property and boundary disputes, every new property owner could launch a new legal attack, devolving relations to warring state, seeking to gain from his neighbor's lack of resources. The law protects both sides of a dispute, and is designed to solve issues going forward, but refusing to apply *res judicata* is diametrically opposed to that goal.

In this brief, there are six (6) assignments of error. The first assignment addresses the lower court's failure dismiss the action or enter judgment as a matter of law on the issue of *res judicata* and finality, a decision which would have removed this case from the docket. The next three (3) assignments address judgments as a matter of law where the Respondents failed to carry their burden, again, which should have narrowed the issues presented to the jury and would benefit judicial economy in doing so. The final two (2) assignments of error address procedural issues that could only be solved by a new trial – the exact opposite of promoting judicial economy, but a necessary sacrifice to ensure that all parties are properly represented and are permitted to properly present their case. These issues will be addressed in turn below.

A. Standard of Review

As to the first assignment of error, the standard of review is *de novo*. *Mt. Am., LLC v. Huffman*, 229 W.Va. 708, 710, 735 S.E.2d 711, 713 (2012) ("The application of *res judicata* to bar litigation involves a question of law, to which we accord a plenary review. 'Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review'") (citing *Chrystal R.M. v. Charlie A.L.*, Syl pt. 1, 194 W.Va. 138, 459 S.E.2d 415 (1995)).

As to the second, third, and fourth assignments of error, the standard of review is likewise *de novo*. *Fredeking v. Tyler*, 224 W.Va. 1, 5, 680 S.E.2d 16, 20 (2009) ("While the terminology changed when Rule 50 was amended in 1998, it is clear that the standards of review for rulings regarding motions made under the rule were unaffected." (citing *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001) ("We apply a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law.").

As for the fifth assignment of error, the standard of review is abuse of discretion. *McClure Mgmt., LLC v. Taylor*, 243 W.Va. 604, 614–615, 849 S.E.2d 604, 614–615 (2020) "Petitioners moved for a new trial based on this alleged error pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. This Court employs an abuse of discretion standard of review when considering a circuit court's ruling on a motion for a new trial.").

As for the sixth assignment of error, the standard of review is likewise abuse of discretion. *McDougal v. McCammon*, Syl. pt. 1, 193 W.Va. 229, 455 S.E.2d 788 (1995) ("The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence

. . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.").

B. The Circuit Court erred in failing to dismiss this action based on *res judicata*.

Res judicata is defined as "[a] legal or equitable issue, necessarily involved in a former suit, on which there has been a final judgment or decree, obtained without fraud or collusion, and rendered by a court of competent jurisdiction necessarily affirming the existence of that fact, is conclusive upon the parties or their privies, whenever the existence of that fact is again issue between them." 8B M.J. Former Adjudication or Res Judicata § 2. *See also State ex rel. W.Va. Dep't of Health & Human Res. v. Cline*, 185 W.Va. 318, 319, 406 S.E.2d 749, 750 (1991) ("the doctrine of *res judicata* guards the finality of a court's decision.") (internal citations omitted); *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W.Va. 549, 559, 803 S.E.2d 519, 529 (2017) ("Under West Virginia law, the doctrine of res judicata or claim preclusion assures that judgments are conclusive, thus avoiding the relitigation of issues that were or could have been raised in an original action.").

Rule 8(c) of the West Virginia Rules of Civil Procedure recognizes, *inter alia*, the affirmative defense of *res judicata*. In West Virginia, the test for whether *res judicata* applies concerns three core elements:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, 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, in the prior action.***

Blake v. Charleston Area Med. Ctr., Syl. Pt. 4, 201 W.Va. 469, 498 S.E.2d 41 (1997) (emphasis added); *See also Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 480, 557 S.E.2d 883,887 (2001) (citing *Blake*); *Brumfield v. McComas*, 2023 W.Va. LEXIS 46, 11 (2023) (Memorandum

Decision) (citing *Blake*). The West Virginia Supreme Court has further defined *res judicata* by holding:

> An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. ***It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits.*** An erroneous ruling of the court will not prevent the matter from being *res judicata.*

Downing v. Ashley, Syl Pt. 3, 193 W.Va. 77, 454 S.E.2d 371 (1994) (citing *Sayre's Adm'r v. Harpold et al.*, Syl. Pt. 1, 33 W.Va. 553, 11 S.E. 16 (1890); *In re McIntosh's Estate*, Syl. Pt. 1, 144 W.Va. 583, 109 S.E.2d 153 (1959)) (emphasis added).

A case dismissed with prejudice, even on a 12(b)(6) motion, is considered a judgment on the merits. *Royal Meadows Stables v. Colonial Farm Credit, ACA*, 207 B.R. 1003, 1008, 1997 U.S. Dist. LEXIS 7147 (E.D. Va. 1997) ("If a case is dismissed under Federal Rule of Civil Procedure 12(b)(6), such judgment is on the merits with *res judicata* effect."); *Sprouse v. Clay Communication*, 158 W.Va. 427, 461, 211 S.E.2d 674 (1975) ("the future law in this State with regard to dismissals under Rule 12(b) is that a judgment dismissing an action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and without reservation of any issue, shall be *presumed* to be on the merits, *unless* the contrary appears in the order, and the judgment shall have the same effect of *res judicata* as though rendered after trial in a subsequent action on the same claim.") (emphasis in original);

The West Virginia Supreme Court has defined a cause of action for *res judicata* purposes as

> [T]he fact or facts which estblish (sic) or give rise to a right of action, the existence of which afford a party a right to judicial relief . . . The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. . . If the two cases require

> substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata.

White v. SWCC, 164 W.Va. 284, 290, 262 S.E.2d 752, 756 (1980) (internal citations omitted).

"The res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong. . . ." *Hustead v. Ashland Oil*, 197 W.Va. 55, 60, 475 S.E.2d 55, 60 (1996) (quoting *Federated Dep't Stores v. Moitie,* 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981)).

In *Goodwin v. Thomas*, the West Virginia Supreme Court of Appeals wrote,

> The issue litigated and decided in the earlier declaratory judgment action was the validity of the lease. Defendants initiated that action. Defendants now wish to relitigate the lease's validity on the basis of a different legal theory. It was purely a matter of their choice to base their claim of invalidity solely on the 30 day termination provision. There was nothing to prevent them from using the zoning issue as an alternative basis for relief. The issue of the lease's validity has been decided and is res judicata.

179 W. Va. 593, 594-95, 371 S.E.2d 90, 91-92 (1988).

Applying these principles to the present case, the goals of Civil Action No. 15-C-150 and Civil Action No. 18-C-7 are exactly the same, the Respondents seeking to use the Petitioner's land as a driveway. The first element of *res judicata* is clearly satisfied in this action because there was a final adjudication on the merits by a court having jurisdiction in Civil Action No. 15-C-150. In that case, by Order Granting Motion to Dismiss entered January 19, 2016, the Defendants, Robert and Robin Goodwin's motion to dismiss was granted ***with prejudice***. JA000043.

Element two of *res judicata* is satisfied in this action, because the Respondents brought suit against the Petitioner for the purposes of utilizing the disputed property. Civil Action 15-C-150 and the present action involve the same parties as the Respondents are bringing suit against Petitioner for the purpose of using the disputed property. The presence of the indispensable parties in this action does not prevent this action from being barred by *res judicata* as the relief is being

sought against the Petitioner. To establish a prescriptive easement, the Respondents must prove each of the *O'Dell* elements by clear and convincing evidence against each owner of lots fronting Brown Avenue. The 2015 action foreclosed this because this decision was *res judicata* as to Petitioner. Moreover, as the additional parties are the other property owners along Brown Avenue, the Defendants are in privity as all Defendants have a common source of title from Brown. *See* 47 Am. Jur. § 466 ("In general, it may be said that privity involves a person so identified in interest with another that he or she represents the same legal right. Privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and the rule may be construed to mean parties claiming under the same title.") (internal citations omitted). Furthermore, "the primary purpose of the privity requirement -- assurance that the party against whom the defense is asserted had an adequate opportunity to be heard in the first action" is not implicated in this case as the Respondents had a full opportunity to be heard in Civil Action No. 15-C-150. *Comm'r of Envtl. Prot. v. Conn. Bldg. Wrecking Co.*, 227 Conn. 175, 193–194, 629 A.2d 1116, 1126 (Conn. 1993).

Element three of *res judicata* is satisfied in this action, despite the Respondents' proceeding on a theory of a prescriptive easement rather than on their ownership or adverse possession of the property. First, the 2015 Complaint alleged facts concerning long-term use of the property before the Petitioner purchased her home in 1999. JA000135. West Virginia law makes clear that *res judicata* not only bars causes of action that were put into issue in the former action but also those that might have been litigated. *See Downing*, supra; *Blake*, supra. There is no dispute that the Respondents could have brought a prescriptive easement claim in Civil Action No. 15-C-150. Moreover, as evidenced by the Proposed Findings of Fact and Conclusions of Law filed by the Shaffers' in Civil Action No. 15-C-150, adverse possession and prescriptive easements were

argued by the Shaffers as a means to seek their desired judicial relief. JA000152.

Furthermore, the allegations and evidence presented by the Respondents was the same evidence available to the Respondents in 2015. The Respondents' Complaint in Civil Action No. 15-C-150 contains allegations of the Respondents' use of the contested land. JA000135 ("Said alley has been used by the Plaintiffs since 1973 as their drive. Since 1973, each and every day, the Plaintiffs have parked their cars in this alley as their driveway."); JA000137 (". . . As the Defendants, well known, every year, the Plaintiffs have allowed their family and friends, a few of whom are physically disabled to park on their property. Compare 2015 Complaint with the Amended Complaint in this action. JA000112 ("The Plaintiffs have used a portion of the Alley to access the back of the Plaintiffs' Residence since they moved into the Plaintiffs' Residence in 1973."); JA000112 ("The portion of the Alley between the Plaintiffs' property and the Defendant, Robin Goodwin's property is the only portion of the Alley way the Plaintiffs have used, since 1973, as their driveway and to access the back of the Plaintiffs' property.").

Regardless of whether the Respondents actually pled prescriptive easement in the Complaint in Civil Action No. 15-C-150, this cause of action could have been brought as part of that action for declaratory judgment. The Respondents asserted ownership and control of the disputed land; actual ownership, adverse possession, or a prescriptive easement are the only theories on which they could have proceeded. Further, the Respondents ***actually did argue*** prescriptive easement and adverse possession before the Court as evidenced by the Proposed Findings of Fact and Conclusions of Law. JA000152. Despite this, the Circuit Court refused to apply the doctrine of *res judicata*.

After all, the doctrine of *res judicata* was designed to give finality to cases, to preserve judicial economy, and to "give repose" to defendants who have been sued and prevailed. *Slider*,

210 W.Va. at 480 ("The fundamental rationale for this doctrine is to permit repose on the part of defendants who have been subject to suit.") (internal citations omitted); *Dan Ryan Builders Inc.*, 239 W.Va. at 559 (Res judicata 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.') (internal citations omitted).

If the Respondents were unsatisfied with the decision in Civil Action No. 15-C-150, they could have appealed the decision to the West Virginia Supreme Court of Appeals, or they could have asked the Court for leave to amend their Complaint, neither of which occurred and therefore the decision became final. *Goodwin v. Thomas*, 179 W.Va. at 594 ("The trial court heard evidence and on 26 January 1982, declared the lease valid and entered judgment in favor of the lessee in the declaratory judgment action. This decision was not appealed and, therefore, became final.").

The Court's Order in Civil Action No. 15-C-150 entered January 19, 2016, the Court in ¶ 7 wrote, "Plaintiffs have not had their own survey performed" before ruling in favor of the Defendants on the grounds that the deeds and the Defendants' survey clearly show that the parcels of land do not intersect. JA000143. Later in the Order, in ¶13, the Court states, "While their Complaint for Declaratory Judgment does not specifically state such, it appears that the Plaintiffs are seeking to make a claim for a portion of the Defendants' under a theory of adverse possession." JA000144. In ¶ 17, the Court states "Given such, the relief sought by the Plaintiffs, i.e. adverse possession, in (sic) not amendable to declaratory judgment either by statute or otherwise." JA000145.

The Respondents have already brought a claim for use of the property at issue, they are barred from bringing another claim for use of the property at issue whether be adverse possession, prescriptive easement, or some other theory, with the same facts, and the same evidence that they

did or could have presented in Civil Action No. 15-C-150. The Respondents should not be given a second bite at the apple, a chance to relitigate the case that they lost in 2015. Furthermore, the status of their then-attorney should not weigh into the court's decision as to whether to apply *res judicata* or not. JA000020; JA000606–JA000612.

Without a claim or cause of action for ownership of the disputed land through a prescriptive easement, the Respondents' claims of private nuisance, civil conspiracy, trespass, and injunctive relief must also fail as a matter of course.

The present action meets all the requirements for *res judicata* to apply and this action should have been dismissed. In 2015, the Respondents had their opportunity to bring their claims before the Court and assert ownership, a prescriptive easement, adverse possession, and any other cause of action they had against the Petitioner. The Respondents had their choice of counsel, and they did not appeal the outcome of that decision. Thus, the present action, involving the same parties, over the same ground, based upon the same evidence, should be dismissed on *res judicata* grounds.

C. The Circuit Court erred in finding that the evidence presented was sufficient to find that a Prescriptive Easement was established.

The Respondents failed to prove the elements of a prescriptive easement by clear and convincing evidence.

Rule 50(a) provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion or judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought

and the facts on which the moving party is entitled to the judgment.

Rule 50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.

West Virginia has a four-part test for a trial court to consider when determining whether there is sufficient evidence to support a jury verdict: "The court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." 11A M.J. Judgments and Decrees § 28; *see also Jackson v. Brown*, Fn. 9, 239 W.Va. 316, 801 S.E.2d 194 (2017) (citing *Orr v. Crowder*, Syl. pt. 5, 173 W.Va. 335, 315 S.E.2d 593 (1983)).

Pursuant to Rule 50(b), the Court has three options when ruling on a renewed motion for judgment as a matter of law, the Court may (1) allow the judgment to stand; (2) order a new trial; or (3) direct entry of judgment as a matter of law.

"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." *O'Dell v. Stegall*, 226 W.Va. 590, 608, 703 S.E.2d 561, 579 (2010). "The burden of proof necessary to establish a

prescriptive easement is clear and convincing evidence." *O'Dell v. Stegall*, 226 W.Va. 590, 608, 703 S.E.2d 561, 579 (2010) (citing *Beckley Nat. Exchange Bank v. Lilly*, Syl. Pt. 2, 116 W.Va. 608, 182 S.E. 767 (1935)). Prescriptive easements are not favored in the law. *O'Dell v. Stegall*, 226 W.Va. 590, 608–9, 703 S.E.2d 561, 579–80 (2010). Pursuant to *O'Dell*, the owner of the alleged servient estate was an indispensable party to the lawsuit. *See also O'Dell v. Stegall*, 226 W. Va. 590, 621-22, 703 S.E.2d 561, 592-93 (2010) ("if the owner of the servient estate is not identified at trial, then the adverse use cannot be proven.").

The central error by the Respondents, which was impliedly adopted by the trial court, was a view that the Respondents use was adverse starting in 1973. Under West Virginia law, "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). Moreover, the Circuit Court of Preston County has already determined that the strip of land in question is a private alley. *See Robertson v. Whetsell*, Civil Action 484, Opinion, Mailed 8/24/70 JA000173–JA000180. Moreover, the West Virginia Supreme Court of Appeals has stated, "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***." *MacCorkle v. Charleston*, 105 W. Va. 395, 399, 142 S.E. 841, 842 (1928) (emphasis added).

In addition, *O'Dell* specifically cites, with approval, other jurisdictions for the proposition that use of a private right of way by a neighbor that does not injure or interfere with the owner's use of it will not be considered adverse and does not ripen into a prescriptive right. *See O'Dell v. Stegall*, 226 W. Va. 590, 613 n.24, 703 S.E.2d 561, 584 (2010) (citing and quoting *LaRue v. Kosich*, 66 Ariz. 299, 305, 187 P.2d 642, 646 (1947) ("It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner, the continued

use is not adverse and cannot ripen into a prescriptive right."); *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.").

Similarly, the Respondents and the trial court failed to recognize that permissive use can be implied. As stated, in *O'Dell*, "an unauthorized use would have been objected to." *O'Dell*, Fn. 28, 226 W. Va. at 615, 703 S.E.2d at 586. Respondents did not produce any evidence that any owner of a lot fronting Brown Avenue from 1973 to right before the 2015 litigation ever objected to their use of the alley. Since their alleged use was not objected to, it was impliedly authorized under West Virginia law.

As such, the Circuit Court should have instructed and found that the Respondents' use starting in 1973 was permissive as a matter of law and required the Respondents to show repudiation of that permissive use, either express or implied. *O'Dell v. Stegall*, Syl. pt. 6, 226 W. Va. 590, 703 S.E.2d 561 (2010).

The Respondents failed to show that they repudiated the express or implied permission. Respondents' own testimony recognized both neighborly accommodation and that the Respondents did not control or own the alley stating that "If any of the neighbors behind wanted to get in, I'd say "Certainly, go ahead," and I'd move my car and let them get in". JA000288; JA000588. These "neighborly" acts do not show adversity or dominion and certainly do not show repudiation of the express or implied permissive use of the alley at issue in this action. The only repudiation of evidence was the "scuffle" in 2015 when, for the first time, the Respondents exerted control and made a claim of ownership. JA000219; JA000225; JA000242-000243; JA000612;

JA000664-JA000665.

In addition, the Respondents failed to satisfy their burden of proof, by clear and convincing evidence, by failing to produce testimony that the Petitioner, or one of the other Brown Avenue Property Owner Defendants, owned the property at issue in this action. Instead, the expert testimony from the Respondents' expert was that the disputed area where the alley is situate is owned by the heirs of PJ Crogan. JA000443. *See O'Dell v. Stegall*, 226 W. Va. 590, 621-22, 703 S.E.2d 561, 592-93 (2010) ("if the owner of the servient estate is not identified at trial, then the adverse use cannot be proven."). The failure of the Respondents to name the owners of the servient estate as testified by their own expert is fatal to the cause of action in accordance with *O'Dell*.

In addition, the Respondents failed to present ***any*** testimony or documentary evidence of who the owners of the lots fronting Brown Avenue were during the periods of time that the Respondents argued for a prescriptive easement. For example, although Respondents argued that they started using the alley without permission starting in 1973, the Respondents did not present any testimony or documents regarding who owned the lots fronting Brown Avenue from 1973 to 1983. Who owned 100 Brown Avenue, 102 Brown Avenue, 104 Brown Avenue, 106 Brown Avenue, 110 Brown Avenue, etc., from 1973 to 1983 ***and*** that Respondents were holding adversely to these lot owners was necessary proof that Respondents failed to present at all. Similarly, if Respondents argued that the prescriptive easement was established between 1983 and 1993, then Respondents must prove who owned 100 Brown Avenue, 102 Brown Avenue, 104 Brown Avenue, 106 Brown Avenue, 110 Brown Avenue, etc., ***and*** that Respondents were holding adversely to these lot owners. Respondents failed to prove these owners or that they held adversely to them.

Lastly, the Respondents failed to produce sufficient evidence, by clear and convincing evidence, a reasonably identified starting point, ending point, and width of the land that was

adversely used.

The Respondents failed to prove material elements of an adverse possession claim. Though the jury did return a verdict finding a prescriptive easement, the Respondents simply did not produce enough evidence to establish a prescriptive easement. As such, the weight of the evidence is against the jury's verdict and should be overturned.

D. The Circuit Court erred when it determined that the evidence presented was sufficient to support an award of punitive damages.

Rule 50(a) provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion or judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the facts on which the moving party is entitled to the judgment.

Rule 50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.

West Virginia has a four-part test for a Court to consider when determining whether there is sufficient evidence to support a jury verdict: "The court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." 11A M.J. Judgments and Decrees § 28;

see also Jackson, 239 W.Va. at Fn. 9. Pursuant to Rule 50(b), the Court has three options when ruling on a renewed motion for judgment as a matter of law, the Court may (1) allow the judgment to stand; (2) order a new trial; or (3) direct entry of judgment as a matter of law.

To be awarded punitive damages, the Respondents must show "by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others" W. Va. Code § 55-7-29.

Courts across the United States agree that the intentional violation of a court order is willful and malicious. For example in the bankruptcy context, the Virginia Eastern Bankruptcy Court wrote,

> Courts have regularly found that the violation of a court's order is per se willful and malicious and is sufficient, in and of itself, to make a debt non-dischargeable under § 523(a)(6). One court has stated that
>
> > ... when a court of the United States ... issues an injunction or other protective order telling a specific individual what actions will cross the line into injury to others, then damages resulting from an intentional violation of that order (as is proven either in the bankruptcy court or (so long as there was a full and fair opportunity to litigate the questions of volition and violation) in the issuing court) are ipso facto the result of willful and malicious injury.
>
> *Behn v. Buffalo Gyn Womenservices, Inc.*, 242 B.R. 229, 238 (Bankr. W.D.N.Y. 1999).

Beckett v. Bundick (In re Bundick), 303 B.R. 90, 110 (Bankr. E.D. Va. 2003); *see also Indirect Purchaser Class v. Andrews (In re Andrews)*, 2019 Bankr. LEXIS 2276, at *9 (Bankr. E.D. Mich. July 24, 2019) ("Failing to comply with a court order has been found to satisfy the willful and malicious conduct requirements of Code § 523(a)(6)."). If the failure to obey a court order is malicious as a matter or law, then following a final non-appealed court order is "not" malicious.

The Respondents had previously filed a civil action against the Petitioner, argued adverse

possession and prescriptive easement, lost, and did not appeal. JA000143–JA000145. Petitioner's actions in relying on a final order from the Circuit Court of Preston County, West Virginia was not malicious or indifferent and punitive damages were unwarranted and unproven. The Court should find that reliance on a final order of a circuit court of competent jurisdiction is reasonable, to find otherwise would fail to uphold the doctrine of *stare decisis* and the doctrine of *res judicata*. The Petitioner's actions, in constructing a boundary fence, and utilizing her property up and to the property line designated on her survey, following the entry of the Order dismissing the Respondents' first civil action against her cannot be considered malicious, or with a conscious, reckless and outrageous indifference to the health, safety and welfare of others under the circumstances. After all, the Respondents had their opportunity to appear in court and argue their position, they were represented by counsel, and they lost. Further, the action was dismissed with prejudice and was not appealed.

As such, the Respondents failed to prove, by clear and convincing evidence, that Petitioner's actions were malicious or indifferent. The jury did award punitive damages, but that verdict is against the weight of the evidence because it would be unconscionable to say that reliance on a final court order is unreasonable. The jury did not have a legally sufficient basis to award punitive damages.

Thus, the Respondents failed to carry their burden of proof on the punitive damages claim and entry of judgment as a matter of law for Petitioner is warranted.

E. The Circuit Court erred when it determined that the evidence presented was sufficient to support a finding of nuisance.

Rule 50(a) provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion

> or judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the facts on which the moving party is entitled to the judgment.

Rule 50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.

West Virginia has a four-part test for a Court to consider when determining whether there is sufficient evidence to support a jury verdict: "The court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." 11A M.J. Judgments and Decrees § 28; *see also Jackson*, 239 W.Va. at Fn. 9. Pursuant to Rule 50(b), the Court has three options when ruling on a renewed motion for judgment as a matter of law, the Court may (1) allow the judgment to stand; (2) order a new trial; or (3) direct entry of judgment as a matter of law.

Under West Virginia law, "[a] private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." *Booker v. Foose*, 216 W. Va. 727, 729, 613 S.E.2d 94, 96 (2005).

The Respondents previously filed a civil action against the Petitioner, argued adverse possession and prescriptive easement, lost, and did not appeal. JA000143–JA000145. The Petitioner's actions in relying on a final order from the Circuit Court of Preston County, West

Virginia were reasonable and lawful. The Court should find that reliance on a final order of a circuit court of competent jurisdiction is reasonable; to find otherwise would fail to uphold the doctrine of *stare decisis* and the doctrine of *res judicata*. The Petitioner's actions, in constructing a boundary fence, and utilizing her property up and to the property line designated on her survey, following the entry of the Order dismissing the Respondents' first civil action against her cannot be considered unreasonable under the circumstances. After all, the Respondents had their opportunity to appear in court and argue their position, they were represented by counsel, and they lost. Further, the action was dismissed with prejudice and was not appealed.

In the context of nuisance, the central question is the reasonableness or, conversely, the unreasonableness of a party's use of their real estate. In a variety of contexts and for good reason, courts have found that parties may reasonably rely upon court orders. *See Bitseller Expert Ltd. v. Verisign, Inc.*, Civil Action No. 1:19-cv-01140 (AJT/JFA), 2019 U.S. Dist. LEXIS 248005, at *17-19 (E.D. Va. Dec. 20, 2019) ("For all of the above reasons, Verisign's reliance on the Default Judgment Order was reasonable as a matter of law. Plaintiffs have therefore failed to allege facts that make plausible that defendants acted "wrongfully" with respect to the transfer of Plaintiffs' domain name and website and as a result have failed to state a claim for either the tort of conversion or trespass to chattels."); *Blankenship CPA Grp., PLLC v. Wallick*, No. M2022-00359-COA-R3-CV, 2023 Tenn. App. LEXIS 410, at *9 (Ct. App. Oct. 3, 2023) ("Litigants, such as Mr. Wallick, are entitled to rely on a reasonable interpretation of a court order, so we interpret any ambiguities in the order in favor of Mr. Wallick."); *United States v. Stowers*, 32 F.4th 1054, 1067 (11th Cir. 2022)("it is objectively reasonable for a law enforcement officer to rely on a court order."); *Major v. Hous. Auth. of Greenville*, No. 6:12-cv-00183-GRA-KFM, 2012 U.S. Dist. LEXIS 139796, at *10 (D.S.C. Sep. 28, 2012) ("Ms. Todd was objectively reasonable in relying on the court

order and should not be subject to suit for taking action in compliance with that order."); *Soofi v. KFC Nat'l Mgmt. Co.*, No. 94-6268, 1996 U.S. App. LEXIS 3464, at *6 (6th Cir. Jan. 24, 1996) ("Equitable tolling has been applied where plaintiffs reasonably relied on a court order allowing them thirty days to file a new motion for class certification."); *Johnston v. McCargar*, 990 N.W.2d 813 n.5 (Iowa Ct. App. 2022)("But it also seems reasonable for Walke to rely on that court order in conducting the ongoing negotiations with Bell").

In this case, there was a final non-appealed order in Civil Action No. 15-C-150. This order established the boundary line between the Petitioners and the Respondents and also rejected the Respondent's arguments regarding adverse possession and prescriptive easement. The Petitioner, and her late husband, in reliance of this order, constructed fencing in accordance with the findings of the Circuit Court of Preston County. As a matter of law, following a court order cannot serve as the basis for a substantial and unreasonable interference with another person's land. The Circuit Court erred when it did not dismiss this count as a matter of law.

As such, the Respondents failed to prove, by a preponderance of the evidence, that Petitioner's actions were unreasonable. The jury did find that a nuisance had occurred, but that verdict is against the weight of the evidence because it would be unconscionable to say that reliance on a final court order is unreasonable. The jury did not have a legally sufficient basis to return the verdict that they did.

Thus, the Respondents failed to carry their burden of proof on the nuisance claim and entry of judgment as a matter of law for Petitioner is warranted.

F. The Circuit Court erred when it failed to order a new trial based on Rule 19 – Failure to Join Indispensable Parties.

Rule 59(a) provides:

A new trial may be granted to all or any of the parties and on all or part of the issues

> (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A verdict that is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice are some of the recognized bases for granting a new trial. *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119, 126 454 S.E.2d 413, 420 (1994). The power vested in Rule 59 giving the trial judge such authority to grant a new trial is derived from recognized common law principles. *Id.* at 124. As stated in *In re State Public Bldg. Asbestos Litigations*, the type of analysis entered where "every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered and those fact, which the jury might properly find under the evidence, must be assumed as true" is misleading in light of the purpose of Rule 59. 193 W. Va. at 125. Rather, the trial judge has the authority to weigh the evidence as if he or she were a member of the jury in deciding a Rule 59 motion. *Id.*

The trial judge not only has the authority to weigh the evidence, but also can consider the credibility of the witnesses. *See Coleman v. Sopher*, Fn. 28, 201 W. Va. 588, 499 S.E.2d 592 (1997); *Gum v. Dudley*, 202 W. Va. 477, 482, 505 S.E.2d 391, 396 (1997); *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119 (1994). Even if substantial evidence to support the jury verdict is presented, a trial judge may nonetheless set aside the jury verdict and grant a new trial. *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. at 125, *citing* (11 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ. § 2806* (3d ed.)).

The Respondents, in their case-in-chief, offered the expert testimony of Kenneth Moran, a

surveyor, to provide the jury with expert testimony as to the land at issue in this action. Mr. Moran testified, *inter alia*, that the area of land at issue in this action was owned by the heirs of PJ Crogan, and not by the Petitioner or Respondents. JA000443. At no time in the Respondents' case-in-chief did they identify who the heirs of PJ Crogan were. Nor did the Respondents make the heirs of PJ Crogan parties to this action of achieve service of process on them. In short, the heirs of PJ Crogan were not given notice of these proceedings, nor provided an opportunity to be heard. This is a due process issue regarding an interest in real property.

When confronted at trial with the expert testimony of Kenneth Moran, the Circuit Court, now faced with expert testimony that the owners of the real estate at issue were not parties to the ongoing action, side-stepped the issue by instructing the jury to disregard expert Moran's testimony giving the finding in Civil Action 15-C-150, *res judicata* effect. JA000758.

The failure of the heirs of PJ Crogan to be identified, served with process and notice of these proceedings, or have the ability to be heard on issues that could potentially interfere with their property rights constitutes a fatal defect in this trial. As such, the jury's verdict may implicate and deprive the property rights of persons not party to this action and a new trial with the addition of the indispensable parties is warranted pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. Thus, the heirs of PJ Crogan are indispensable parties to this action and must be joined as parties to give the heirs the opportunity to protect their property rights. A new trial is necessary to ensure that the heirs of PJ Crogan, after being identified and served with notice by the Respondents, are provided due process of law.

G. The Circuit Court erred when it prohibited the Petitioner from introducing evidence to mitigate damages.

Rule 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues

> (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A verdict that is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice are some of the recognized bases for granting a new trial. *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119, 126 454 S.E.2d 413, 420 (1994). The power vested in Rule 59 giving the trial judge such authority to grant a new trial is derived from recognized common law principles. *Id.* at 124. As stated in *In re State Public Bldg. Asbestos Litigations*, the type of analysis entered where "every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered and those fact, which the jury might properly find under the evidence, must be assumed as true" is misleading in light of the purpose of Rule 59. 193 W. Va. at 125. Rather, the trial judge has the authority to weigh the evidence as if he or she were a member of the jury in deciding a Rule 59 motion. *Id.*

The Court in this action erroneously prevented Petitioner from introducing the Proposed Findings of Fact and Conclusions of Law submitted by the Respondents, through counsel, in the previous 2015 action into evidence. Counsel sought admission of the Proposed Findings of Facts and Conclusions of Law submitted by the Respondents' then-Attorney, Rebecca Eritano, to mitigate the damages claims brought against her. JA000147-JA000154.

In said Proposed Findings of Fact and Conclusions of law, the Respondents argued adverse possession and prescriptive easement over the disputed land that was the subject of both 15-C-150 and 18-C-7. JA000152. The Court determined that, because Rebecca Eritano lost her bar license

pursuant to disciplinary action nearly two years after the decision in that case, the documents submitted by her on behalf of the Respondents were inadmissible at trial, despite Respondents' decision not to appeal or take action against Rebecca Eritano. JA000665–JA000668; JA000039–JA000040.

Said evidence should have been admitted because, Rebecca Eritano was not disbarred as a result of her representation of the Respondents, the Respondents did not sue Ms. Eritano or bring an action against her for ineffective assistance of counsel, and she was not disbarred until two years after the conclusion of Case No. 15-C-150. JA000039-JA000040. Moreover, the statement of a parties' attorney is a party admission. *See Hardy v. Johns-Manville Sales Co.*, 851 F.2d 742, 745 (5th Cir. 1988)("there is a well-established rule that factual allegations in the trial court pleadings of a party in one case may be admissible in a different case as evidentiary admissions of that party."); *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998)("Under the federal rules, a statement made by an attorney is generally admissible against the client."). *See also* W. Va. R. Evid. 801(d)(2)("An Opposing Party's Statement. The statement is offered against an opposing party and: . . . (C) was made by a person whom the party authorized to make a statement on the subject"). Instead, the trial court required the pleading filed by the Respondents to be verified despite this requirement not being contained in the rules of evidence for hearsay, authentication, or admissibility. JA000611-JA000612. This constitutes error that unduly prejudiced the Petitioner as she was not able to demonstrate mitigating factors to the Respondents' claims for trespass, nuisance, and punitive damages.

The failure of the circuit court to admit the Proposed Findings of Fact and Conclusions of Law prevented the Petitioner from showing the jury that Civil Action No. 15-C-150 provided her with an order that defended her actions. Without this document to mitigate damages, the jury

awarded the Respondents' $10,000.00 in compensatory damages and $10,000.00 in punitive damages. JA000816-JA000817. This verdict is against the clear weight of the evidence and would result in a miscarriage of justice as the Petitioner was unable to defend her actions to mitigate damages. Thus, a new trial is warranted pursuant to Rule 59 of the West Virginia Rules of Civil Procedure.

VI. CONCLUSION

This Court should reverse the Circuit Court of Preston County's decision not to apply the doctrine of *res judicata* and should dismiss this action as it fails to state a claim upon which relief can be granted. The Court's ruling on the Rule 19 issue of indispensable parties highlights the errors in the court's rulings throughout. The cascading errors of the trial court are inherently inconsistent. The Court gives *res judicata* effect to part of Civil Action No. 15-C-150, as to the issue of the boundary, then instructs the jury to disregard the expert testimony of the Respondents' own expert, then, denies the Petitioner the opportunity to use evidence from Civil Action No. 15-C-150 that adverse possession and prescriptive easement had been argued in her defense. It cannot, as a matter of equality and fundamental fairness; go both ways. The Court cannot give a prior action *res judicata* effect when it helps one party then refuse to give that same case, between the same parties, *res judicata* effect, when it helps the ***other*** party. This Honorable Court should give *res judicata* effect to all aspects of the non-appealed final order in Civil Action No. 15-C-150, remand this action, and direct the Circuit Court of Preston County to dismiss the present action on *res judicata* grounds.

In the event that this Court does not dismiss this action on *res judicata* grounds, then the remaining assignments of error should be addressed. First, this Court should find that the Respondents failed to prove by clear and convincing evidence that they established a prescriptive

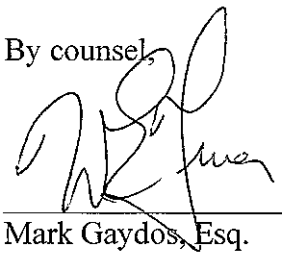
easement over the Petitioner's land as a matter of law. Second, this Court should find that the evidence presented by the Respondents was not sufficient to support a finding of nuisance and an award of punitive damages.

Should this Court not find for the Petitioner on the foregoing assignments of error, then this Court should order a new trial based on the Respondents' failure to join the PJ Crogan heirs as indispensable parties and/or the failure of the Circuit Court to permit the admittance of the Proposed Findings of Fact and Conclusions of Law in Civil Action No. 15-C-150 into evidence to mitigate damages. The Rule 19 issue prejudices the heirs of PJ Crogan, who likely do not know that they have an interest in the property, if they do at all, but regardless, this causes a due process issue. The ruling of the Court will necessarily affect the property rights of the heirs of PJ Crogan, whether the Court determines their ownership or not. The mitigation issue prejudiced the Petitioner, as she was unable to use a document in the Court's file to show the jury the strength of the Order in Civil Action No. 15-C-150 and use it to defend her actions.

Respectfully submitted,

ROBIN GOODWIN,

By counsel,



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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Robin Goodwin,
Defendant Below, Petitioner,

v.) No. 24-ICA-321

James R. Shaffer and Iris M. Shaffer,
Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Buddy Turner, do hereby certify that I served the foregoing **"JOINT APPENDIX" and "PETITIONER'S 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 18 day of November, 2024.

Via File & ServeXpress
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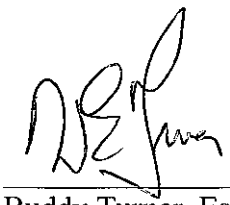
2. Thresa Bautista, 116 Brown Avenue, Kingwood, WV 26537;
3. Paul and Wendy Hart, 2764 North Preston Hwy, Albright, WV 26537 (owners of 112 Brown Ave. Kingwood, WV 26537);
4. AJane Properties, LLC, 106 Brown Ave., Kingwood, WV 26537;
5. Patrick and Jane Crogan, 106 Brown Ave., Kingwood, WV 26537;
6. Christopher Ranieri, 104 Brown Ave., Kingwood, WV 26537;
7. French Barnett, Jr., 102 ½ Brown Ave., Kingwood, WV 26537;

8. James Wolfe, III, c/o Michael and Erika Anderson, 100 Brown Ave., Kingwood, WV 26537.



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