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

REPLY BRIEF

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I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner maintains and reasserts its request for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. Specifically, the errors assigned involve the application of well settled law. The Petitioner further reasserts that this appeal is not appropriate for Memorandum Decision.

II. ARGUMENT

The Petitioner assigns six (6) errors committed by the lower Court in these proceedings. Pet. Brief at 1. Five (5) of the assigned errors focus on the lower Court's denial of the Petitioner's Motions for Judgment as a Matter of Law and alternative Motions for a New Trial.

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.

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.

(LEXIS 2025).[1]

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

[1] Note: During the pendency of this Appeal, the West Virginia Rules of Civil Procedure was amended and the amendments included Rule 19, 50, and 59, among many others. The quote rule language in this brief are from the Rules of Civil Procedure in effect at the time of trial which are no longer effective as of January 1, 2025.

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 doctrine of *res judicata* was designed to protect parties like the Petitioner from claim splitting and other duplicitous actions, including civil actions like this one, which is an attempt to relitigate issues previously decided by the Circuit Court.

Litigation must, at some point, come to an end. Our State's Constitution provides, "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; **and justice shall be administered without sale, denial or delay.**" W.Va. Const. art. 3, cl. 17 (emphasis added). In West Virginia, to properly claim *res judicata* as a bar to suit, three (3) elements must be shown:

> 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).

For the Respondents, the courts of this state were open to litigate their issue for their perceived injury, in Civil Action No. 15-C-150, the Circuit Court of Preston County reviewed written filings, held a hearing, and ultimately determined that the Respondents did not prevail.

JA000927–JA000929. The Respondents' civil action was dismissed, with prejudice, and the Respondents did not appeal. *Id.* This was, and should have been, the end of the litigation, but now, almost ten (10) years later, the Petitioner and the Respondents are still in Court, still fighting the same fight, on the same issues, over the same area of land. Justice was administered in 2015, and in 2025 that justice should be upheld. West Virginia does not permit claim splitting. *Dan Ryan Builders v. Crystal Ridge Dev., Inc.*, 239 W.Va. 549, 561, 803 S.E.2d 519, 531 (2017) ("'. . . indeed, one of the underlying rationales for the doctrine (*res judicata*) is to prevent this type of *ad infinitum* claim splitting and piecemeal litigation' 'Like *res judicata*, claim splitting "prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action."'") (internal citation omitted).

The present action, at least as it relates to the Respondents' claims against the Petitioner, satisfy all three elements of *res judicata*. First, there was a final adjudication on the merits in Civil Action No. 15-C-150, as that action was dismissed with prejudice and the decision of the Circuit Court of Preston County was not appealed. JA000927–JA000929. Second, the addition of the indispensable parties pursuant to Rule 19 does not remove the *res judicata* bar to this action; at the very least the Respondents' claims against the Petitioner should still be barred by *res judicata*. Third, the Respondents contend that the Court in Civil Action No. 15-C-150 "did not consider, on the merits, the Plaintiffs' claim of a prescriptive easement because that issue could not be dealt with under the limited scope of W.Va. Code § 55-13-1, et seq., and the indispensable parties were not given notice." Resp. Brief at 19–20. However, as described in *Blake*, the *res judicata* bar applies to actions that are "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." 201 W.Va. at Syl. Pt. 4.

Civil Action No. 15-C-150 was dismissed with prejudice. JA000043. A dismissal with prejudice means that a case cannot be refiled and therefore is a final judgment on the merits with *res judicata* effect. *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); *Mattingly v. Moss*, 2020 W.Va. LEXIS 296, *24 (2020) (Memorandum Decision) ("In order for the circuit court to apply res judicata to Petitioner's Community Bank claims, the dismissal by the magistrate had to be with prejudice."). In Civil Action No. 15-C-150, the Respondents did proceed under a different legal theory than in Civil Action No. 18-C-7, but these claims should have been brought together or alternatively pleaded. The Respondents had their opportunity to litigate this issue in 2015 and they did not prevail. Thus, element one of *res judicata* is satisfied.

The second element of *res judicata* relates to the parties and the Respondents' claim that the addition of the indispensable parties, being the other property owners along Brown Avenue, precludes *res judicata* effect on the present action. However, this result is unconscionable because it would permit the very claim splitting and *ad infinitum* litigation that this doctrine is designed to prevent. Parties do not get a second bite at the apple, the Respondents' options following the dismissal with prejudice of Civil Action No. 15-C-150 were: appeal, ask the Court for leave to

amend their Complaint, or submit to the judgment. The Respondents did not appeal, did not amend, but waited three years and refiled. The addition of the indispensable parties does not preclude *res judicata* effect. *See Ciancimino v. Town of E. Hampton*, 266 A.D.2d 331, 332, 698 N.Y.S. 157, 158 (App. Div. 1999) ("Thus, the plaintiffs may not attempt to resurrect in the present action that which was dismissed in the prior action. Moreover, by virtue of their privity with the parties in the prior action, the addition of a new plaintiff and a new defendant in the present action does not bar the application of res judicata.") (internal citations omitted); *Johnson v. Girl Scouts of the United States*, 596 Fed. Appx. 797, 799, 2015 U.S. App. LEXIS 6361, **3–**4 (11th Cir. 2015) ("*Res judciata* prevents the 'relitigation of claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action' . . . *Res judicata* applies when 'some new factual allegations have been made, some new relief has been requested, or a new defendant has been added' . . . Applying *res judicata* does not create a 'grave injustice' because '"[s]imple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied."") (internal citations omitted). The addition of new claims and parties to the present action should not permit the Respondents another opportunity to litigate the claims brought in Civil Action No. 15-C-150, as they could have been brought in Civil Action No. 15-C-150, and the second element of *res judicata* is satisfied.

The Respondents claim that the addition of claims for damages, prescriptive easement, and the case strategy of the Respondents in Civil Action No. 15-C-150 throw the present civil action out of the bounds of *res judicata* and the third element of *Blake*, this is not the case. West Virginia courts do not permit claim splitting and the substitution of prescriptive easement for adverse possession, the addition of nuisance, trespass and civil conspiracy certainly *could have been brought* in the 2015 action. The Respondents, while represented by counsel, chose to seek relief in

Civil Action No. 15-C-150 through a declaratory judgment on an adverse possession cause of action – their failure to join all of their potential claims into that action still has *res judicata* effect. It is clear from the *Blake* elements that *res judicata* prevents the bringing of claims that could have been brought but were not. 201 W.Va. at Syl. Pt. 4. Even if the Respondents' argument that the addition of trespass, civil conspiracy, and nuisance as new causes of action make Civil Action No. 15-C-150 not preclude the present action, the substitution of prescriptive easement for adverse possession should be given preclusive effect and be barred by *res judicata*. The other "additional" claims brought in the present action – trespass, civil conspiracy, and nuisance arise from the adverse possession/prescriptive easement claim and are not viable without it.

C. The Respondents failed to prove the adverse element of a prescriptive easement by failing to show that the neighborly presumption of permission was repudiated, and by failing to prove a reasonably designated starting point, ending point, line, and width of the land claimed.

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 v. Brown*, Fn. 9, 239 W.Va. 316, 801 S.E.2d 194 (2017). "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)). *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."). 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). As such, "no length of time during which property is so used can deprive an owner of his title". *Irwin v. Dixion*, 50 U.S. 10, 33, 13 L.Ed. 25, 35–36 (1850).

There are few rights, if any, that the West Virginia Constitution holds higher than an individual's property rights. *See* W.Va. Const. art. 3, cl. 10 ("No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."). As such, property

rights are sacred in West Virginia. This is reflected not only in our Constitution, but this exaltation pervades our statutory and common law. It is because of our State's protection of an individual's property right that claims such as adverse possession and prescriptive easements are not only disfavored in the law but are subject to higher burdens of proof than other civil claims. *See Brown v. Gobble*, 196 W.Va. 559, 564–565, 474 S.E.2d 489, 494–495 (1996) ("Adopting the clear and convincing standard of proof is more than a mere academic exercise. At a minimum, it reflects the value society places of the rights and interest being asserted. . . Having concluded that the preponderance standard falls short of meeting the demands of fairness and accuracy in the factfinding proceeding in the adjudication of adverse possession claims, we hold that the burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title."); *O'Dell v. Stegall*, 226 W.Va. 590, 608–609, 703 S.E.2d 561, 579–580 (2010) ("The degree of proof necessary to establish a prescriptive easement is clear and convincing evidence . . . Prescriptive easements are not favored in the law."). Permission may be inferred "from the neighborly relation of the parties, or from other circumstances." *O'Dell v. Stegall*, 226 W. Va. 590, 613, 703 S.E.2d 561, 584 (2010) (quoting 4 Powell on Real Estate, § 34.10[2][a]). *See also Wall v. Landman*, 148 S.E. 779, 781 (Va. 1929) ("where 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."); *LaRue v. Kosich*, 187 P.2d 642, 646 (Ariz. 1947) ("The modern tendency is to restrict the right of one to acquire a prescriptive right of way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in the one whom he favored."); *Martin v. Proctor*, 227 Va. 61, *65, 313 S.E.2d 659, **662 (Va. 1984)

("An easement will not arise by prescription simply from permission of the owner of the servient estate, no matter how long the permissive use may continue. [citations omitted]. And having begun by permission, it will, in the absence of some decisive action the part of the owner of the dominant estate indicating an adverse and hostile claim, continue to be regarded as permissive, especially when the latter's use of the easement is in common with its use by others.") (internal citations omitted).

In the present case, the Respondents failed to prove, by clear and convincing evidence, three (3) elements of their prescriptive easement claim: adverseness and the identification of a reasonable starting point, ending point, line, and width of the land. Mere use is not nearly enough, there is plenty of evidence that the Respondents *used* the disputed area of land, but use is not enough to establish a prescriptive easement. The Respondents have the burden to show, by clear and convincing evidence, that their use was anything other than neighborly and permissive. Neighborly and permissive is the presumption for use of a neighbor's property in this State – a claimant must show repudiation of that neighborly and permissive use. The Respondents did show repudiation, and their witnesses generally agreed on the year when this repudiation occurred – 2015. JA000219; JA000242; JA000243; JA000261; JA000263. Not 1973, 1983, 1993, 2003, or 2013, but not until 2015 did repudiation of the neighborly and permissive use of the Petitioner's property occur. *Id.* In fact, the Respondents' witnesses testified to their good relationship with the prior owner of the Petitioner's property, the Fretwells, and for the first sixteen (16) years of the Petitioner's occupation of her property. JA000290; JA000295; JA000296; JA000512; JA000513; JA000586; JA000588. No date was testified to by any witness that put repudiation prior to 2015. The Respondents' use was never adverse between 1973 and 2015. In 2015, when these parties first appeared before the Circuit Court of Preston County, this repudiation reached what should have

been an end by judicial action when the Petitioner prevailed over the Respondents. However, nearly ten (10) years later, the same parties are before the Court and still, the Respondents have not reached the ten (10) year requirement for adverse use if Court intervention had not occurred.

What the Respondent and the lower Court have failed to see, is that the Respondents' use of the at-issue property started as permissive. The 1970 Opinion from the Circuit Court of Preston County established that the alley was established as a "private way" and was not a public street or alley-way. JA000180. Thus, for the Respondent's theory of adverse use to be proved, they would need to show that their use was adverse to all of the property owners along Brown Avenue for the time they were holding adverse – whether it be from 1973, 1983, or so on. Further, the Respondents did not exclude anyone from the private alley and others used the private alley – Respondent James Shaffer said as much. JA000288 ("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."). As described in *Martin*, there must be some event or act that turns the claimant's use into adverse and hostile use – absent such an event or act the use continues as permissive. In the present case, the evidence shows that this event or act occurred in 2015 and no earlier. However, even in states which presume adverse use between neighbors, the Respondents' claim should still fail. *Arana v. Perlenfein*, 156 Ore. App. 15, 19–20, 964 P.2d 1125, 1127–1128 (Or. 1998) ("where the dominant owner constructs and uses a road through the servient owner's land, there is 'a strong inference of an adverse use.' However . . . where one uses an existing way over another person's land and nothing more is shown, ***it is more reasonable*** to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.") (internal citations omitted) (emphasis added). The same is true here, rather than the Respondents' parking being adverse to the every property owner along Brown Avenue (which was not in the evidence presented), it is "more

reasonable to assume that the use was pursuant to a friendly arrangement between neighbors . . . ." *Id.* The Respondents did not show repudiation in the 1970s, the 1980s, the 1990s, or the 2000s, only in 2015.

The Respondents have also failed to satisfy the final element of a prescriptive easement claim by failing to designate a reasonably identified starting point, ending point, line and width. Sure, the starting point may begin at the public road, but where does it end? At the end of their property line? All the way through the alley? A car length? Two? At the end of the Petitioner's property? If so, there is another indispensable party that needs to be added and another fence to cut down. Also, how wide is this prescriptive easement? Is it a straight line back from the public road? Is there a bend? These questions remain unanswered and demonstrate the Respondents' failure to prove their claim on this element.

Of the four (4) elements outlined in *O'Dell* which the Respondents had to prove by clear and convincing evidence – the Respondents failed to satisfy three (3) of these elements. They failed to show adverseness, failed to show adverse use for ten (10) years, and failed to reasonably identify a starting point, ending point, line, and width. As such, the jury's award of a prescriptive easement to the Respondent is against the clear weight of the evidence and the Petitioner's Motion for Judgment as a Matter of Law on this issue should have been granted. The Petitioner prays this honorable Court will reverse the decision of the lower Court and remand this case with instructions to enter judgment as a matter of law on the Respondents' claim of prescriptive easement.

D. The jury verdict awarding the Respondents punitive damages is not supported by the facts, is against the weight of the evidence, and the Circuit Court erred in not granting the Petitioner's Motion for Judgment as a Matter of Law.

Jury awards and verdicts should be given a good deal of deference, but sometimes juries reach the wrong conclusion, or, as in the present case, there is simply not enough evidence to

support the jury's verdict. The standard and burden of proof for an award of punitive damages is set by statute in West Virginia – West Virginia Code § 55-7-29(a) provides:

> An award of punitive damages **may only occur** in a civil action against a defendant **if a plaintiff establishes 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.

(LEXIS 2025) (emphasis added). 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.

The Respondent generally contends that the jury heard the evidence, the court properly instructed them, and therefore there is no issue here – but this does not change the fact that the conduct complained of by the Respondents was done under the protection of an Order of the Circuit Court of Preston County that was final and not appealed. The Circuit Court of Preston County decided for the Petitioner in Civil Action No. 15-C-150 – the Petitioner relied in good faith on that Order when she erected her improvements near her boundary line. It is reasonable that an individual would rely on a Court Order in a case that the individual was party to and prevailed in. Further, an award of punitive damages is subject to a stricter burden of proof, clear and convincing evidence. This higher burden was not met in this action.

There is not enough evidence to support the jury's finding because it is inherently reasonable to rely on an Order from a Court of competent jurisdiction. Though the Respondent is

correct that the punitive damage award does not exceed the amounts permitted by West Virginia Code § 55-7-29(c), awarding punitive damages at all is erroneous.

The Circuit Court erred in denying the Petitioner's motion for judgment as a matter of law on this issue and requires reversal.

E. The jury verdict finding that the Petitioner engaged in a private nuisance is not supported by the facts, is against the weight of the evidence, and the Circuit Court erred in not granting the Petitioner's Motion for Judgment as a Matter of Law.

The Respondents' failure to prove their nuisance claim by a preponderance of the evidence is not corrected by the jury's finding of nuisance because the jury verdict goes against the clear weight of the evidence. 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. 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).

Though the burden of proof for private nuisance is a preponderance of the evidence, the standard for a finding of private nuisance is clear – the interference must be "substantial and unreasonable" and directly relate to the "private use and enjoyment of another's land." *Id.* The Petitioner's erection of improvements on the property was substantial, but the remaining elements are not satisfied. The Petitioner's interference was not unreasonable given her reliance on the final Order from the Circuit Court of Preston County in Civil Action No. 15-C-150. The Respondents

failed to prove that the Petitioner's actions took place on the land of another, which dispenses with the remaining elements. Certainly, improvements to land are substantial, but from the evidence presented at trial – the Respondents failed to carry their burden.

As such, the Circuit Court of Preston County erred when it denied the Petitioner's Motion for Judgment as a Matter of Law on this issue and should be reversed.

F. The Respondents' evidence presented at trial to the jury identified indispensable parties other than those previously added, which constitutes a fatal defect in these proceedings.

As previously described in this Reply Brief, West Virginia holds property rights in very high regard, it is a venerable right retained by the individual. *See* W.Va. Const. art. 3, cl. 10. Rule 19(a) of the West Virginia Rules of Civil Procedure provides, in pertinent part:

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .

(LEXIS 2025).

During the Respondents' case-in-chief, the Respondents called their expert witness, Ken Moran, a surveyor, who testified that individuals who are not parties to this action are the owners of the property in dispute. JA000443. The Respondents' expert testified, to the jury, that the property was not owned by the Petitioner, not by the Respondents, not by any of the other Defendants, but by a class of individuals identified as the heirs of PJ Crogan. *Id.* Who are the heirs of PJ Crogan? Are there heirs of PJ Crogan? These are questions that remain unanswered and while those questions hang, the potential property rights of those individuals are being disregarded and

deprived without due process of law as required by our Constitution. Additionally, if the heirs of PJ Crogan are the rightful owners of the disputed property, they must be made parties to this action because the Respondents would be unable to be afforded complete relief. The Respondents were seeking a prescriptive easement, to prove their claim the Respondents must identify who owns the land. The heirs of PJ Crogan were identified as a general class by their expert and the heirs of PJ Crogan were not party to the suit when the verdict was entered.

The failure of the Circuit Court to join the heirs of PJ Crogan constitutes error that must be reversed, and a new trial should be ordered following the mandatory joinder of the heirs of PJ Crogan.

G. The Petitioner was prohibited by the Circuit Court from introducing relevant evidence

The Respondents in this action brought claims, *inter alia*, of private nuisance, trespass, and punitive damages, to which the Petitioner sought to defend herself against. A large part of her defense was the adjudication of Civil Action No. 15-C-150, filed by the Respondents against the Petitioner regarding the same land at issue in this action. The Petitioner's attempt to introduce the Proposed Findings of Fact and Conclusions of Law signed by the Respondents' then-attorney should have been permitted to allow the Petitioner to mitigate damages. This document was filed on behalf of the Respondents and clearly displays an attempt to argue for a prescriptive easement. The Circuit Court, after inquiring if the Proposed Findings of Fact and Conclusions of Law was verified, refused to admit the document into evidence. JA000606–JA000608. This was done in spite of the stipulation between the parties on record in chambers that all documents of record in the County Clerk's Office and the Circuit Clerk's Office were admissible. JA000206–JA000208. This document goes directly to the issues of nuisance and punitive damages as evidence of the Petitioner's reasonableness in relying upon the Civil Action No. 15-C-150 Order.

This error warrants a new trial because that is the only remedy which will provide the Petitioner with the ability to properly mitigate her damages. Thus, the Circuit Court's denial of the Petitioner's Motion for New Trial on this ground should be reversed.

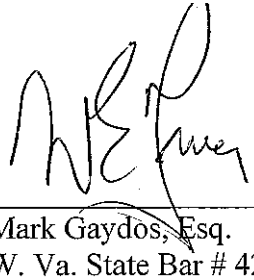
III. CONCLUSION

The Petitioner has failed to receive the speedy justice guaranteed to her by the West Virginia Constitution, and the Circuit Court of Preston County failed to protect her property rights by holding the Respondents to the clear and convincing burden of proof required in prescriptive easement cases. Nothing can be done now about the speed or length of this litigation, but justice can still prevail. The Petitioner prays that the Intermediate Court of Appeals will reverse the decision of the lower court and remand with instructions to dismiss Civil Action No. 18-C-7 on *res judicata* grounds. In the alternative, the Petitioner prays that this Court will reverse the decision of the lower court and remand with instructions to find for the Petitioner on all counts based on the Respondents' failure to prove the required elements of a prescriptive easement by clear and convincing evidence or by ruling for the Petitioner on her assignments of error as described in the Petitioner's brief.

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, Jacob Trombley, do hereby certify that I served the foregoing **"REPLY BRIEF"** upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 27th day of January, 2025.

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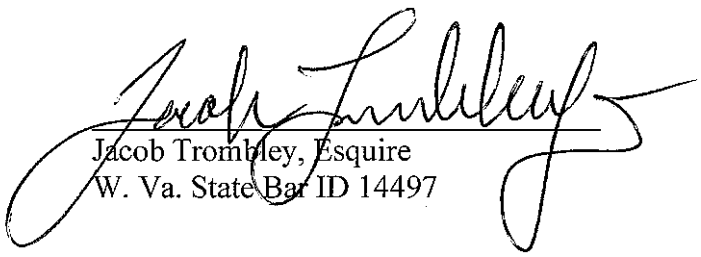
3. Paul and Wendy Hart, 2764 North Preston Hwy, Albright, WV 26537 (owners of 112 Brown Ave. Kingwood, WV 26537);
4. AJane Properties, LLC, 106 Brown Ave., Kingwood, WV 26537;
5. Patrick and Jane Crogan, 106 Brown Ave., Kingwood, WV 26537;
6. Christopher Ranieri, 104 Brown Ave., Kingwood, WV 26537;
7. 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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