No. 24-ICA-467

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

James L. Coster
Plaintiff Below, Petitioner

v.) 24-ICA-467

Dennis Wingrove,
Lisa Wingrove,
Ronald K. Lilley, Sr.,
and Helga M. Lilley,
Defendants Below, Respondents

BRIEF OF PETITIONER JAMES L. COSTER

From the Circuit Court of Marshall County, CC-25-2019-C-40

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

III. ASSIGNMENTS OF ERROR

Petitioner James L. Coster brought the action below seeking a declaration of the parties' rights and responsibilities with respect to a right of way granting access to his property located off Aston Ridge Road in Marshall County, West Virginia (the "Coster ROW" or "ROW"). Appx._0009-0021. In the late 1960s, the Coster ROW was the subject of a previous action resolved by the Circuit Court of Marshall County. *See* Appx._0111-0128. Pursuant to both the deeds' description of the Coster ROW and the Circuit Court's orders resolving the 1960s litigation, the ROW is to be fenced on both sides with one gate permitted to be installed in the fence along the side of the Coster ROW near Aston Ridge Road. Appx._0097-0101; Appx. 0208-0213. Mr. Coster appeals from the October 30, 2024 order of the Circuit Court of Marshall County holding that the fencing and other requirements prescribed by the deeds and the prior orders entered by the Circuit Court have been abandoned and/or are otherwise unenforceable. *See* Appx. 0001-0008. Mr. Coster raises the following assignments of error:

1.) The Circuit Court erred when it failed to recognize and enforce the continuing deed covenants describing the ROW as a "private way" and requiring the Coster ROW to be fenced on both sides with one gate to be maintained at or near the county road.

2.) The Circuit Court erred when it held that its 1968 and 1969 orders resolving the previous ROW dispute contained no prohibition against any subsequent title holder's use of the Coster ROW.

3.) The Circuit Court erred when it held that its 1968 and 1969 orders resolving the previous ROW dispute did not require either party to maintain the fences or the gate identified in the orders because that duty was established by the "clear meaning" of the words used by the Court in the subject noted orders.

4.) The Circuit Court erred when it held that Petitioner abandoned and/or waived the various deed covenants including the erection of fences required by the deeds and/or the Circuit Court's 1968 & 1969 orders.

5.) The Circuit Court erred when it held that laches barred Petitioner's claims.

IV. STATEMENT OF THE CASE

A. CHAIN OF TITLE OF THE DOMINANT PARCEL

By deed dated February 10, 1958, W.O. Logsdon and Lottie Logsdon conveyed approximately one hundred forty-one (141) acres (hereinafter the "Coster Property"), to Edward B. Coster and Anne Agnes Coster. Appx. 0094-0096. The 1958 deed granted the Costers a 14-foot right of way over the real property owned by Audley E. Lilley and Cecilia C. Lilley, leading from the county road to the Coster Property (*i.e.*, the Coster ROW). The ROW is more fully described in an 1893 deed found in Marshall County Deed Book 40 at page 573:

> [S]aid right of way (14) fourteen feet wide except at two or more places are to be of sufficient width to permit teams or wagons to pass. And the said right of way from said farm to the county road is to be fenced on one side by the party of the second part, and the other side of said right of way to be fenced by the parties of the first part. But the said parties of the first part shall have the right to erect and maintain [a gate] at or near the county road[.]

Appx. 0098. The Coster ROW is further described in an 1898 deed as a "right of way over and along the road or way now used as a **private way**[.]" Appx. 0101 (emphasis added).

In 1996, Edward B. Coster and Anne Agnes Coster conveyed the Coster Property to Edward B. Coster III, James L. Coster, and Charles W. Coster, reserving life estates for themselves. Appx. 0102-0104. Edward B. Coster and Anne Coster have since passed, terminating their life estates. By deed dated July 10, 2013, Charles W. Coster conveyed his interest in the Coster Property to James L. Coster. Appx. 0105-0107. Similarly, by deed dated May 16, 2014, Edward

B. Coster III conveyed his interest in the Coster Property to James L. Coster. Appx. 0108-0110. The Petitioner, James L. Coster, is the current owner of the dominant estate.

B. CHAIN OF TITLE OF THE SERVIENT PARCELS

In 1950, approximately one hundred ninety-six (196) acres was conveyed to Audley E. Lilley and Cecelia C. Lilley as joint tenants with right of survivorship. Appx. 0055-0063. Cecelia C. Lilley died on Aprill 11, 1982, vesting full title in Audley E. Lilley pursuant to the survivorship provision in the 1950 deed. *See* Appx. 0055-0063.

By deed dated July 7, 1986, Audley E. Lilley conveyed 2.161 acres to Ronald K. Lilley and Helga. M. Lilley (hereinafter "Lilley Tract I"), subject to a 14-foot right of way along the northern boundary of the 2.161 acres (*i.e.*, the Coster ROW). Appx. 0064-0067. In 1988, Audley E. Lilley conveyed two additional tracts, a 196.72-acre tract (hereinafter "Lilley Tract II") and a 42.3-acre tract (hereinafter "Lilley Tract III"), to Ronald K. Lilley, Cecilia C. Boyd, Russel C. Lilley, Robert M. Lilley, Barbara J. Kohout and Mona F. Scalise. Appx. 0068-0072.

On May 15, 1997, Ronald K. Lilley, Cecilia C. Boyd, Russel C. Lilley, Robert M. Lilley, Barbara J. Kohout and Mona F. Scalise conveyed their interest in Lilley Tract III to Ronald K. Lilley and Helga M. Lilley. Appx. 0080-0083. And, on May 16, 1997, Ronald K. Lilley and Helga M. Lilley conveyed their remaining interest in Lilley Tracts I and II to Cecelia C. Boyd, Russel C. Lilley, Robert M. Lilley, Barbara J. Kohout and Mona F. Scalise. Appx. 0073-0074.

In 1998, Lilley Tracts I and III were conveyed to Denniss D. Wingrove and Lisa M. Wingrove by Cecelia C. Boyd, Russel C. Lilley, Robert M. Lilley, Barbara J. Kohout and Mona F. Scalise. Appx. 0075-0079. The Wingroves currently own that portion of the servient estate comprising the left side of the Coster ROW.

Lilley Tract II has remained in the Lilley family. By deed dated August 6, 2016, Helga M. Lilley conveyed her interest in Lilley Tract II to her husband, Ronald K. Lilley, and in 2019 Ronald

K. Lilley conveyed Tract II back to himself and his wife, Helga M. Lilley. Appx. 0084-0088; Appx. 0089-0093. Ronald K. Lilley and Helga M. Lilley currently own that portion of the servient estate comprising the right side of the Coster ROW.

C. THE 1966 DISPUTE

In 1966, Audley E. Lilley, who at that time owned the property on both sides of the Coster ROW, sought an injunction before the Circuit Court of Marshall County to prevent the Costers from interfering with his use of the Coster ROW. Appx. 0111-0112. According to Audley E. Lilley's 1966 Petition, "every time the plaintiff or a member of his family has appeared on said right-of-way the [Costers], or one of them, has interfered with his use of said right-of-way . . . order[ing] the plaintiff and his family off said right of way[.]" Appx. 0112. The Petition explains that the Costers have claimed the "exclusive right" to use the Coster ROW. Appx. 0112. Audley E. Lilley disagreed. Appx. 0112. He believed that he had a right to use the ROW and sought an injunction preventing the Costers from "interfering in any manner with his use and enjoyment of said portion of said land encompassed in said right-of-way." Appx. 0112.

By order dated June 24, 1968, the Circuit Court of Marshall County appointed three arbitrators to determine and identify the covenants found in the prior deeds, including the following: (1) "[t]he width and location of the 'turnouts' mentioned in the deed for the right of way and filed in this suit"; (2) "[t]he period of time to be allowed for the defendants to complete the work on the right of way and the completion date for said work"; (3) "[t]he placing of fences and location of gates along said right of way giving due regard to provisions contained in the deed for said right of way"; and (4) "[t]he drainage location of ditches on said right of way." Appx. 0113.

The arbitrators recommended that fences be erected no less than seven (7) and no more than ten (10) feet from the center line of the Coster ROW, with the Costers responsible for the

fence on the right side and the Lilleys responsible for the fence on the left site. Appx. 0119-0120. The arbitrators further recommended that the Coster ROW have three (3) turnouts and two (2) gates, one in each side of the ROW. Appx. 0118-0120. "The recommended time for completion of any and all work on the right of way, maintenance excluded, [was] ninety (90) days[.]" Appx. 0119.

By order dated July 11, 1968, the Circuit Court adopted the arbitrators' recommendations with the exception of paragraph 3-B of the arbitrators' report. Appx. 0115-0116. In doing so, the Circuit Court explained as follows:

> Defendants would agree to said arbitration report if it were not for paragraph 3-B of said report, the defendants' reason being that paragraph 3-B gave plaintiff, Audley E. Lilley, the right to have two (2) twenty (20) ft. gates along the right of way mentioned in the report, when in fact an earlier Deed setting forth a right of way only gave the plaintiff the right to erect and maintain one (1) gate across said right of way at or near the county road. **There being no dispute by anyone that said earlier Deed only gave the right to erect one (1) gate at or near the county road**, the Court was of the opinion that since defendants insisted on this right, the Court would either have to reject the arbitration report or sustain the arbitration report if paragraph 3-B of said report could be settled by agreement of the parties hereto.

Appx. 0115 (emphasis added). The Circuit Court ordered that paragraph 3-B "be deleted from said arbitration report and in place of paragraph 3-B it shall be ordered that the plaintiff, Audley E. Lilley, shall have the right to erect and maintain one (1) twelve (12) ft. gate at a distance of thirty (30) ft. from the county road, . . . said gate to be erected across the currently used right of way[.]" Appx. 0116.

On July 17, 1969, the Circuit Court modified its July 11, 1968 order pursuant to an agreement among the parties. Appx. 0127. The 1969 order stated that Audley E. Lilley and his heirs and/or assigns could erect and maintain one (1) gate in the fencing installed **on the right side**

of the Coster ROW within 30 feet of its junction with the county road and that **no gate was to be installed across the ROW**:

> plaintiff . . . shall have the right to erect and maintain one (1) twelve (12) foot gate on the right side of the currently used right-of-way . . . as you enter from the County road, in the fence line to be erected and maintained by the defendants, as a means of ingress and egress by the Plaintiff, his heirs, administrators, executors or assigns, to that part of the property of the plaintiff lying on said right side of said right-of-way, said gate to be located in said fence line . . . within thirty (30) feet of the said county road, and that no gate shall be erected across said right-of-way.

Appx. 0127-0128. This is consistent with the 1893 and 1898 deeds' description of the ROW, which describe the Coster ROW as a "right of way over and along the road or way now used as a private way" and provide that the Coster ROW is to be fenced on both sides and that "the parties of the first part shall have the right to erect and maintain [a gate] at or near the county road[.]" Appx. 0098; Appx. 0101.

D. THE CURRENT DISPUTE

After the Circuit Court of Marshall County entered its July 17, 1969 order, the Lilleys ceased using the ROW and the fencing prescribed by the order slowly fell into disrepair. In 1998, the Wingroves purchased the land currently comprising the left side of the Coster ROW "subject to that part of the right of way for the Aston Ridge public road and the 14 foot right of way along the north side that lies within the bounds of [Lilley Tract I (*i.e.*, the Coster ROW).] Appx. 0075-0076.

From 1998 to 2007, the Wingroves took no action of any kind on the subject property purchased from the Lilleys. In 2007-2008, the Wingroves began constructing a home on their property off Aston Ridge Road near its border with the Coster ROW. *Compare* Appx. 0242 *with* Appx. 0243, *see also* Appx. 0187-0188. At that time, the Petitioner, James L. Coster, wrote to the Wingroves to inform them that they did not have permission to hook up their water line at the

Costers' water meter connection box and that the Wingroves must replace the marker posts that they removed from the Coster ROW. Appx. 0187-0188. Mr. Coster explained that, pursuant to the 1969 order entered by the Circuit Court of Marshall County, "the lane is to be fenced on both sides and [is] not to be used by any individuals other than the Coster family." Appx. 0187.

During the period between 2008 and 2013, the Wingroves completed their new house and used a separate access road which they had constructed from the County Road to their new house. This access road was (and remains) wholly on the Wingrove's property. Sometime after the beginning of 2013, the Wingroves erected a pole barn on their property abutting the Coster ROW, removed some of the remaining fence posts along the left side of the ROW, and began using approximately 520 feet of the Coster ROW to access their pole barn.[1] This action was completely unnecessary as the pole barn was close to the new access road the Wingroves had constructed to their house and that road could have easily been extended to the pole barn eliminating the need to improperly access and use the Coster ROW. Mr. Coster's counsel, Andrew R. Thalman, subsequently wrote to the Wingroves explaining that, while Mr. Coster did not object to the Wingroves' continued use of the ROW, he was concerned about the legal consequences of the Wingroves' continued use of the ROW without a formal written agreement raising a possible "adverse possession" argument by the Wingroves. Appx. 0129. Mr. Coster asked that the Wingroves enter into a Use Agreement permitting the Wingroves to use the Coster ROW to access their pole barn in exchange for the Wingroves' agreement to help maintain the ROW. Appx. 0129.

[1] It is clear from the satellite photos submitted below in support of Mr. Coster's renewed motion for summary judgment that the Wingroves' pole barn did not exist at all on the property as of June 7, 2009. Appx. 0243. There was only some open space where the barn currently stands as of September 5, 2013; the final barn building shows up on the satellite imagery by October 5, 2016. Appx. 0224-0225. Accordingly, the Wingroves did not start using the Coster ROW to access the pole barn until sometime between September 2013 and October 2016. This is consistent with Mr. Wingrove's deposition testimony wherein he states that he built the barn "[l]ess than ten years ago." Appx. 0225.

By letter dated November 15, 2018, the Wingroves, through their counsel, informed Mr. Coster that they were "not interested in signing or participating in the formal written Use Agreement", that the Wingroves have "every right to go onto [the ROW]", and that the ROW "is governed by the Court Orders entered in Lilley vs. Coster, Case No. 1272-W[.]" Appx. 0133. This letter from the Wingrove's then-attorney is critical and relevant because it shows the Wingroves knew that there was a court ordered solid fence required on their side of the ROW, which prevented access from the Wingroves' pole barn to the Coster ROW.

Unable to reach an agreement with the Wingroves, Mr. Coster filed the action below on March 14, 2019, seeking a declaration of the parties' rights and duties as they pertain to the Coster ROW. Appx. 0009-0021. Mr. Coster's complaint was subsequently amended to add Ronald K. Lilley and Helga M. Lilley as defendants. Appx. 0039-0054. Mr. Coster asked the Circuit Court to enter an order prohibiting the Wingroves from using the Coster ROW for any purpose, including to access the pole barn erected on their property, and requiring the parties to bring the Coster ROW into compliance with the 1968 and 1969 orders. Mr. Coster and the Wingroves filed cross motions for summary judgment. Appx. 0162-0175; Appx. 0193-0207. On October 30, 2024, the Circuit Court entered a final order denying Mr. Coster's motion for summary judgment and awarding summary judgement to the Wingroves. Appx. 0001-0008.

The Circuit Court held that the 1968 and 1969 orders did not specifically grant the Costers exclusive use of the Coster ROW but did reaffirm the covenants in the prior deeds, including the early deed language that stated the ROW was a "private way." Appx. 0005. It further held that the orders did not require either party to maintain the fences and that, because the Coster ROW has failed to conform to the specifications prescribed by the 1969 and 1968 orders for many years, the Costers waived and/or abandoned the fences, turnouts, and gate required by the orders. Appx.

0005-0006. The Circuit Court further concluded that two instances of laches occurred: "[f]irst, the Coster family's delay in bringing any enforcement action for nearly 50 years from the time of the 1968 and 1969 Orders" and "[s]econd, Mr. Coster's delay . . . [of] approximately 10 years from [his] November 25, 2008, letter until the filing of this lawsuit." Appx. 0007.

For the reasons explained below, Petitioner asks that this Court reverse the Circuit Court's rulings and remand with instructions to award summary judgment to the Petitioner.

V. SUMMARY OF THE ARGUMENT

As explained above, the deeds describe the Coster ROW as a "right of way over and along the road or way now used as a private way" and provide that the Coster ROW is to be fenced on both sides and that "the parties of the first part shall have the right to erect and maintain [a gate] at or near the county road[.]" Appx. 0101; Appx. 0098. The covenants contained in the deeds run with the land and are intended to provide the Costers with near exclusive use of the Coster ROW. This issue has already been litigated by the parties' predecessors in interest, and it is undisputed that, in 1969, the Circuit Court of Marshall County entered a final order requiring the Coster ROW to be fenced on both sides with one (1) gate to be installed on the righthand side of the ROW at or near its junction with the county road. Pursuant to the doctrine of res judicata, the Circuit Court's 1969 order is final and conclusive. The 1969 order controls, and the Circuit Court should have required the parties to bring the ROW into compliance with the 1969 order.

The Circuit Court's conclusion that the 1969 order did not place any restriction on the servient estate holder's use of the property is clearly wrong. The purpose of the fencing prescribed by the 1969 order was to settle the usage dispute between the Costers, who claimed to have exclusive use of the Coster ROW, and Audley E. Lilley, who at that time owned the servient estate on both sides of the Coster ROW and claimed to have an unencumbered right to the use and

enjoyment of the land encompassed by the ROW. Were the ROW to conform with the fencing requirements prescribed by the 1969 order, the Wingroves would not be able to use the ROW to access their property, and the Costers would have exclusive use of the ROW beyond the gate installed on the Lilley's side of the ROW at or near the county road.

Similarly, the Circuit Court's finding that the 1969 orders did not require either party to maintain the fences and gate prescribed by the order is clearly wrong. The 1969 order specifically stated that the fence on the right side of the ROW was "to be erected and **maintained** by the defendants" and that the plaintiff "shall have the right to erect and **maintain**" the gate to be placed in that fence line. Appx. 0212 (emphasis added). Conversely, the fence on the right side of the ROW was to be erected and maintained by the plaintiff, and the arbitrators' "recommended time for completion of any work on the right of way, **maintenance excluded**, [was] ninety (90) days[.]" Appx. 0119 (emphasis added). The Court's conclusion that the parties were not required to maintain the fences is contrary to the plain language of the 1968 and 1969 orders and the arbitrators' report upon which the orders are largely based.

Finally, Mr. Coster did not waive or abandon his rights, and the doctrine of laches does not apply. Once the Circuit Court entered the 1969 order, the usage dispute between the Lilleys and the Costers was settled. The Lilleys did not continue to make use of the ROW, and the Wingroves did not move in until 2007-2008. *Compare* Appx. 0242 *with* Appx. 0243. More importantly, until the Wingroves began using the ROW to access their pole barn sometime after September 2013 (*see* note 1 *supra*), there was no usage dispute, and the state of the fence was immaterial. The Circuit Court's findings that Mr. Coster intentionally waived/abandoned his claims and/or that the doctrine of laches applies are baseless. Mr. Coster has diligently asserted his rights, informing the

Wingroves that they were not to make use of the ROW long before the Wingroves erected their pole barn.

Accordingly, Mr. Coster asks that this Court reverse the Circuit Court's rulings and remand with instructions to grant his motion for summary judgment.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because the case involves assignments of error in the application of settled law and the unsustainable exercise of discretion where the law governing that discretion is settled. This case is suitable for a memorandum decision because it "presents no substantial question of law" and therefore "satisfies the 'limited circumstances' requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure[.]" *See State v. Cook*, No. 23-28, 2024 W. Va. LEXIS 293, at *1 (June 10, 2024) (memorandum decision).

VII. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 191, 451 S.E.2d 755, 757 (1994); *see also Hayes v. Kanawha Valley Reg'l Transp. Auth*., 902 S.E.2d 477, 481 (W. Va. 2024) ("When a litigant appeals a judge's order granting summary judgment, this Court will review the order '*de novo*.'"). "The term '*de novo*' means '[a]new; afresh; a second time.'" *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017) (quoting *Frymier-Halloran v. Paige*, 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995)). Under the *de novo* standard of review, a court "give[s] a new, complete and unqualified review to the parties' arguments and the record before the circuit court." *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 95, 799 S.E.2d 520, 526 (2017). The appellate court "'appl[ies] the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most

favorable to the nonmoving party." *Powderidge Unit Owners Ass'n v. Highland Props*., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) (*Williams v. Precision Coil*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995)).

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co*., 148 W. Va. 160, 162, 133 S.E.2d 770, 772 (1963); Syl. Pt. 3, *State ex rel. Berg v. Ryan*, 249 W. Va. 657, 659, 900 S.E.2d 83, 85 (2024) (same). "A motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried", and "when both parties move for summary judgment each party concedes only that there is no issue of fact with respect to his particular motion." Syl. Pt. 9, *Aetna Cas. & Sur. Co.*, 148 W. Va. at 162, 133 S.E.2d at 772. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Orso v. City of Logan*, 249 W. Va. 602, 606, 900 S.E.2d 28, 32 (2024) (quoting Syl. Pt. 2, *Williams*, 194 W. Va. at 56, 459 S.E.2d at 333).

VIII. ARGUMENT

A. THE CIRCUIT COURT ERRED WHEN IT FAILED TO RECOGNIZE AND ENFORCE THE CONTINUING DEED COVENANTS REQUIRING THE COSTER ROW TO BE FENCED ON BOTH SIDES WITH ONE GATE TO BE MAINTAINED AT OR NEAR THE COUNTY ROAD.

"A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). "The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs", and "[t]hat intention is gathered from the

entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish." *Miller v. Bolyard*, 186 W. Va. 165, 167, 411 S.E.2d 684, 686 (1991) (quoting Syl. Pt. 2, *Allemong v. Frendzel*, 178 W. Va. 601, 603, 363 S.E.2d 487, 489 (1987)); *see also Wallace v. St. Clair*, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962) (same); Syl. Pt. 3, *Jubb v. Letterle,* 185 W. Va. 239, 241, 406 S.E.2d 465, 467 (1991) (same).

Here, the deeds describe the Coster ROW as a "right of way over and along the road or way now used as a private way" and provide that the Coster ROW is to be fenced on both sides and that "the parties of the first part shall have the right to erect and maintain [a gate] at or near the county road[.]" Appx. 0101; Appx. 0098. Because the deeds only allowed the grantors, who owned the servient estate, to erect and maintain a single gate at or near the county road, the fencing was clearly intended to secure the Costers' near exclusive use of the ROW. *See Devore v. Ellis*, 62 Iowa 505, 506, 17 N.W. 740, 741 (1883) (explaining that "the existence of a fence on one side of the way, and plaintiff's covenant to erect and maintain a fence on the other, which he performed, establishes the purpose of the parties to maintain a fenced and open way" and "[t]he existence of a fenced lane for the exclusive use of plaintiff implies his right to require it be kept open.").

This intent was fully borne out by Audley E. Lilley's 1966 ROW dispute, which centered on whether or not Audley Lilley, who at that time owned the servient estate on both sides of the Coster ROW, could make use of the ROW. The 1966 dispute was resolved when, pursuant to the parties' agreement, the Circuit Court ordered that the ROW was to be fenced and that:

> Audley E. Lilley shall have the right to erect and maintain one (1) twelve (12) foot gate on the right side of the currently used right-of-way . . . as you enter from the County road, in the fence line to be erected and maintained by the defendants, as a means of ingress and egress by the Plaintiff . . . to that part of the property of the Plaintiff lying on said right side of the said right-of-way[.]

Appx. 0180-0181. If the ROW were brought into conformity with the deed, as prescribed by the Circuit Court's 1969 order, a solid fence line along the left side of the ROW would preclude the Wingroves from using the ROW to access their property.

The doctrine of res judicata or claim preclusion bars a party from suing on a claim that has already been "litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc*., 239 W. Va. 549, 560, 803 S.E.2d 519, 530 (2017); *Lockett v. West*, 914 F. Supp. 1229, 1233 (D. Md. 1995) ("[A]s a general principle, the plaintiff must assert in his first suit all the legal theories he wishes to assert, and the failure to assert them does not deprive the judgment of its effect as res judicata.") (quoting 1B *Moore's Federal Practice* ¶ 0.410[1] (2d ed. 1995)). Res judicata "promotes economy in the use of judicial resources and finality in litigation." *Shoup v. Bell & Howell Co*., 872 F.2d 1178, 1181–82 (4th Cir. 1989) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 400–01 (1981)). Put simply, res judicata "rests on a determination that justice is better served by attributing finality to judgments . . . than by second efforts at improved results." *Id.* at 1182 (internal quotations and citation omitted).

For res judicata to apply, three elements must be present: "(1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action." *Ohio Valley Env't Coal. v. Aracoma Coal Co*., 556 F.3d 177, 210 (4th Cir. 2009) (quoting *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 42 (4th Cir.1990)); Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr*., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997) (listing similar factors).

"It is well settled that a judgment is conclusive, not only upon the parties to the litigation, but also upon all persons who are in privity with them." *Edward F. Gerber Co. v. Thompson*, 84

W. Va. 721, 727, 100 S.E. 733, 735 (1919). "With regard to who is a privy when title to real estate is involved, [the Supreme Court of Appeals of West Virginia] recognized . . . that if the interest is acquired after the litigation is commenced, then the purchaser becomes a privy." *Wolverton v. Holcomb*, 174 W. Va. 812, 815, 329 S.E.2d 885, 888 (1985); *see also*, Syl. Pt. 5, *Edward F. Gerber Co.*, 84 W. Va. at 723, 100 S.E. at 734. Accordingly, "a party who becomes a privy through succession to title of land is bound by judgments for or against the party from whom he obtained the land so long as he obtained title after institution of the litigation which resulted in the judgment." *Wolverton*, 174 W. Va. at 815, 329 S.E.2d at 889.

Here, as Mr. Coster explained below in his renewed motion for summary judgment, all three elements of res judicata are easily established. *See* Appx. 0196-0197. First, the Circuit Court of Marshal County's July 17, 1969 order is indisputably final. *See* Appx. 0180-0181. Second, the ROW is contained within the chain of title to Respondent's real property; the litigants in this case received their current ownership interests in the properties at issue by deed from the parties to the prior litigation, establishing privity under *Wolverton* and *Gerber*. Finally, the Circuit Court's 1969 order is dispositive of the issues raised below because the order states that both sides of the ROW are to be fenced, and no gate is permitted on the Wingroves' side of the ROW.

The Circuit Court's July 17, 1969 order is controlling, and the Wingroves do not disagree. By letter dated November 15, 2018, the Wingroves' counsel explained that "Mr. Wingrove believes that the right-of-way in question is governed by the Court Orders entered in Lilley vs. Coster, Case No. 1272-W, entered in the Circuit Court of Marshall County, West Virginia." Appx. 0133. Similarly, the Wingroves' motion for summary judgment acknowledges that, pursuant to "[t]he Court's final Order, dated July 17, 1969, the Coster ROW was to consist of three (3)

turnouts, with both sides of the Coster ROW fenced" and that "[o]ne (1) gate was permitted to be installed in the fence on the right side." Appx. 0166.

"An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive[.]" Syl Pt. 5, in part, *Baker v. Chemours Co. FC, Ltd. Liab. Co*., 244 W. Va. 553, 555, 855 S.E.2d 344, 347 (2021); *see also, e.g Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890); Syl. Pt. 1, *In re Estate of McIntosh*, 144 W.Va. 583, 109 S.E.2d 153 (1959) (same); Syl. Pt. 1, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983) (same). The July 17, 1969 order is final and conclusive, and the Circuit Court should have ordered the parties to bring the Coster ROW into conformity with the deeds as prescribed by the 1969 order.

B. THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE 1968 AND 1969 ORDERS CONTAINED NO PROHIBITION AGAINST THE LILLEYS' OR ANY SUBSEQUENT TITLE HOLDER'S (*I.E.* THE WINGROVES) USE OF THE COSTER ROW.

"The interpretation of a court's order is a question of law, which [is] review[ed] *de novo*", and "[w]hen interpreting a court's order, [the reviewing court] appl[ies] the same rules of construction as [it] use[s] to construe other written instruments." Syl. Pt. 6, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 256, 719 S.E.2d 722, 727 (2011). '"[A]s a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide."' *Id.* at 267, 719 S.E.2d at 737 (quoting *Appeal of Langenfeld*, 160 N.H. 85, 89, 993 A.2d 232, 236 (2010)). '"[T]he determinative factor is the intention of the court as gathered from all parts of the decree"', and '"[e]ffect is to be given to that which is clearly implied as well as to that which is expressed."' *Id*., 719 S.E.2d at 737 (quoting *In re Brown*, 776 N.W.2d 644, 650 (Iowa 2009)); *see also Devore*, 62 Iowa at 507, 17 N.W. at 741.

Although it is not a West Virginia case, *Devore* is very much on point. In *Devore*, plaintiff, who held "a private way leading from his farm to a highway", sought to enjoin the servient estate holders from erecting a gate across plaintiff's right of way. *Devore*, 62 Iowa at 505, 17 N.W. at

740. “By the terms of the written contract under which plaintiff acquired the right of way, he is required to erect and maintain a fence along the east line of the way, which he has done” and “[o]n the other side there was at the time a fence upon the division line of the lands of the grantor of the easement and the adjoining proprietor.” *Id.* at 505-06, 17 N.W. at 740-41. As the Supreme Court of Iowa explained, “the existence of a fence on one side of the way, and plaintiff's covenant to erect and maintain a fence on the other, which he performed, establishes the purpose of the parties to maintain a fenced and open way” and “[t]he existence of a fenced lane for the exclusive use of plaintiff implies his right to require it be kept open.” *Id*. at 506, 17 N.W. at 741. The court rejected the defendant’s argument that the plaintiff waived and/or abandoned his right to an exclusive and open way by failing to keep the fences in good repair, explaining that the plaintiff “entered into the contract for the right of way in view of the existence of the fence, and he ought not to be deprived of any rights he acquired by the failure to keep the fence up.” *Id*. at 507, 17 N.W. at 741. Accordingly, the court held that “the district court erred in dismissing plaintiff’s petition” and “remanded for a decree granting plaintiff the relief prayed for by him.” *Id*., 17 N.W. at 741.

Here, as in *Devore*, the clear purpose of the fencing was to guarantee the dominant estate holders near exclusive use of the ROW. The 1969 order, in keeping with the deeds upon which it is based, only allowed one gate—at about 30 feet from the county road—to be placed on the right side of the ROW for the benefit of the servient estate. Appx. 0180-0181. The entire side of the ROW facing that portion of the servient estate currently owned by the Wingroves was to have solid fencing, prohibiting access to and from the left side of the ROW from that portion of the servient estate now owned by the Wingroves. By concluding that the 1968 and 1969 orders contained no prohibition on the servient estate holders’ use of the ROW, the Circuit Court missed the forest for the trees.

The 1960s ROW dispute was first and foremost concerned with the servient estate holders' ability to make use of the ROW, not fencing. Audley E. Lilley's 1966 Petition specifically alleged that "every time the plaintiff or a member of his family has appeared on said right-of-way the [Costers], or one of them, has interfered with his use of said right-of way[.]" Appx. 0112. The 1966 Petition further explained that the Costers claim to have "exclusive use" of the ROW and asked "that the [Costers] be enjoined from interference with [Audley E. Lilley's] use of [the Coster ROW.]" Appx. 0112.

"[A] court decree or judgment is to be construed with reference to the issues it was meant to decide."' *Bedell*, 228 W. Va. at 267, 719 S.E.2d at 737. The purpose of the fencing was to settle the usage dispute between the Costers who claimed to have exclusive use of the Coster ROW, and Audley E. Lilley, who at that time owned the servient estate comprising both sides of the ROW and who claimed to have an unencumbered right to the use and enjoyment of the land encompassed by the ROW. The Wingroves themselves acknowledge this fact in their motion for summary judgment:

> On August 5, 1966, Audley E. Lielly, who in 1966 owned the property on both sides of the Coster ROW, filed an injunction against Edward B. Coster and Anne Agnes Coster requesting that the Court grant relief for Audley E. Lilley and prevent the Costers from interfering with Lilley's use of the Coster ROW.

Appx. 0165. A compromise was reached between Audley E. Lilley and the Costers, permitting Mr. Lilley to install one gate at or near the county road on the right side of the ROW. Appx. 0177-0178. This compromise served as the basis for the Circuit Court's 1969 order, ensuring that the ROW would be unencumbered by traffic from the left side of the ROW and that the Costers would have exclusive use of the ROW beyond the gate to be maintained on the right side of the ROW.

In sum, the fencing prescribed by the Circuit Court's July 17, 1969 order was clearly intended to restrict the servient estate holders' ability to access their property from the Coster ROW, and the Circuit Court's refusal to acknowledge that was clear error.

C. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE 1968 AND 1969 ORDERS DID NOT REQUIRE EITHER PARTY TO MAINTAIN THE FENCES OR THE GATE IDENTIFIED IN THE ORDERS.

'"The meaning of [an] order must be discerned from the plain meaning of the words used in the order"', and a reviewing court should '"give force and effect to every word, if possible, in order to give the decree a consistent, effective and reasonable meaning in its entirety."' *Bedell*, 228 W. Va. at 267, 719 S.E.2d at 737 (quoting *Bishop v. Bishop*, 858 So. 2d 1234, 1237 (Fla. Dist. Ct. App. 2003) & *Brown*, 776 N.W.2d at 650). "Courts of record speak through the judgments or decrees entered upon their records, and where a judgment or decree is unambiguous an opinion delivered by the judge rendering it at the time the same is entered will not be looked to to give such judgment or decree an effect different from that which clearly follows from the language used." Syl. Pt. 1, *Kane & Keyser Hardware Co. v. Cobb*, 79 W. Va. 587, 587, 91 S.E. 454, 454 (1917).

In their motion for summary judgment, the Wingroves argued that the Circuit Court's 1968 and 1969 orders did not require the parties to maintain the fences prescribed by the orders:

> There is no provision for the maintenance of the fences or the gates contained in the Orders. Consequently, Mr. Coster has no basis upon which to attempt to force the Wingroves, the Lilleys, or anyone else to erect new fences and gates or repair the old turnouts. The 1968 and 1969 Orders were complied with – turnouts, fences, and a gate were erected. That's it, nothing more is required.

Appx. 0169. This argument contradicts the express terms of the 1969 order, and it was clearly erroneous for the Circuit Court to buy into it.

As explained below in Mr. Coster's response to the Wingroves' motion for summary judgment (Appx. 0273), the Circuit Court's 1969 order specifically stated that the fence on the right side of the ROW was "to be erected and **maintained** by the defendants" and that the plaintiff "shall have the right to erect and **maintain**" the gate to be placed in that fence line. Appx. 0212-0213. The 1969 order further states that the right to maintain the gate passes from the Plaintiff to "his heirs, administrators, executors or assigns", establishing a clear intent that the rights and duties prescribed by the order were to run with the land. Appx. 0212-0213.

Similarly, the arbitrators' report, which the 1968 and 1969 orders adopted in its entirety with the exception of paragraph 3-B, provided that "[t]he recommended time for completion of any and all work on the right of way, **maintenance excluded**, [was] ninety (90) days[.]" Appx. 0119 (emphasis added). The arbitrators' report further stated that "the fence on the right side of the right of way as you enter from the public road be erected by the defendants" and "that the fence on the opposite side be the responsibility of the plaintiff." Appx. 0119.

While the Wingroves' motion for summary judgment did argue that the 1968 and 1969 orders did not require the parties to maintain the fences, elsewhere in their motion the Wingroves themselves explain that, pursuant to the arbitrators' report, "[o]n the right side of the right-of-way, the fence would be erected and **maintained** by the Costers, and the fencing on the left side of the right-of-way would be erected and **maintained** by the owners of the servient estate (in 1968, the Lilleys; **today, the Wingroves**)." Appx. 0170 (emphasis added). Thus, it would seem that the Wingroves' contention that the parties were not required to maintain the fences is so torturous that they could not even get through their motion for summary judgment without contradicting it.

The language of the arbitrators' report and the 1969 order parallels the description of the Coster ROW found in the 1893 deed, which provides that "said right of way from said farm to the

county road is to be fenced on one side by the party of the second part, and the other side of said right of way to be fenced by the parties of the first part. But the said parties of the first part shall have the right to erect and maintain [a gate] at or near the county road[.]" Appx. 0098. Indeed, as the Circuit Court explained in its July 11, 1968 order, the parties agreed that the "earlier Deed only gave the [Plaintiff the] right to erect one (1) gate at or near the county road[.]" Appx. 0115. Because the Circuit Court's 1968 and 1969 orders established the parties' rights and duties pursuant to the deed, the orders' prescriptions should run with the land just like the covenants contained in the deed.

The 1968 and 1969 orders, like the 1893 deed, require the Costers' to maintain the fence line on the right side of the ROW and the servient estate holders (now the Wingroves) to maintain the fence on the left side of the ROW. The Circuit Court's conclusion that the orders required the parties to erect, but not to maintain, the fences is contradicted by the plain language of the 1968 and 1969 orders.

D. THE CIRCUIT COURT CLEARLY ERRED WHEN IT HELD THAT PETITIONER ABANDONED AND/OR WAIVED THE RELEVANT DEED COVENANTS OR COURT ORDERS REQUIRING THE FENCES, TURNOUTS, AND GATE.

"Generally, acquiescence in violations of a restrictive covenant which are immaterial, and do not affect or injure one, will not preclude him from restraining violations of the restrictions which would so operate as to cause him to be damaged" and "[m]ere 'acquiescence does not constitute abandonment so long as the restrictive covenant remains of any value." *Wallace*, 147 W. Va. at 377, 127 S.E.2d at 756. The Court's conclusion that Petitioner "abandoned" and/or "waived" the fencing required by the deed and 1968/1969 orders by allowing the fences to fall into disrepair contradicts this established rule. *See id.; Miller*, 186 W. Va. at 168, 411 S.E.2d at 687; *Higgins v. Suburban Improvement Co*., 108 W. Va. 531, 538, 151 S.E. 842, 845 (1930); *Kaminsky v. Barr*, 106 W. Va. 201, 204, 145 S.E. 267, 269 (1928); *Devore*, 62 Iowa at 507, 17 N.W. at 741.

In *Kaminsky*, for example, the plaintiff sought an injunction to prevent an adjoining property owner from erecting a brick building within a fixed distance from the street line in violation of the restrictive covenants set out in the deeds. *Kaminsky,* 106 W. Va. at 202-03, 145 S.E. at 268. The defendant argued that the restriction had been waived and should not be enforced against him because a temporary frame building had stood for nearly a decade on the defendant's lot in the very position wherein the defendant proposed to erect the brick building, and the porches of several neighboring houses extended into the restricted space. *Id.* at 205, 145 S.E. at 269. The defendant further argued that the plaintiff was guilty of laches. *Id*. at 203, 145 S.E. at 268. The Supreme Court of Appeals of West Virginia disagreed. The Court held that "[t]he fact that plaintiff did not undertake to force the removal of the temporary frame building does not bar him from objecting now to the erection of the proposed permanent brick building, which latter would constitute a material and substantial violation of the building restriction covenant" and that "[s]uch circumstances do not convict the plaintiff of laches." *Id.* at 205, 145 S.E. at 269.

Again, *Devore* is very much on point. In *Devore*, plaintiff, who held "a private way leading from his farm to a highway", sought to enjoin the servient estate holders from erecting a gate across plaintiff's right of way. *Devore*, 62 Iowa at 505, 17 N.W. at 740. "By the terms of the written contract under which plaintiff acquired the right of way, he is required to erect and maintain a fence along the east line of the way, which he has done" and "[o]n the other side there was at the time a fence upon the division line of the lands of the grantor of the easement and the adjoining proprietor." *Id.* at 505-06, 17 N.W. at 740-41. As the Supreme Court of Iowa explained, "the existence of a fence on one side of the way, and plaintiff's covenant to erect and maintain a fence on the other, which he performed, establishes the purpose of the parties to maintain a fenced and open way" and "[t]he existence of a fenced lane for the exclusive use of plaintiff implies his right

to require it be kept open." *Id*. at 506, 17 N.W. at 741. The court rejected defendant's argument that the plaintiff waived and/or abandoned his right to an exclusive and open way by failing to keep the fences in good repair, explaining that the plaintiff "entered into the contract for the right of way in view of the existence of the fence, and he ought not to be deprived of any rights he acquired by the failure to keep the fence up." *Id*. at 507, 17 N.W. at 741. Accordingly, the court held that "the district court erred in dismissing plaintiff's petition" and "remanded for a decree granting plaintiff the relief prayed for by him." *Id*., 17 N.W. at 741.

Here, there is no evidence of waiver and/or abandonment. After the Court entered its 1969 order, the usage dispute between the Lilleys and the Costers was settled. The Lilleys did not continue to make use of the ROW, and the Wingroves did not move in until 2007-2008. *Compare* Appx. 0242 *with* Appx. 0243. More importantly, until the Wingroves began using the ROW to access their pole barn in or after 2013 (*see* note 1, *supra*), there was no usage dispute and the state of the fence was immaterial. Under these circumstances, Mr. Coster "ought not to be deprived of any rights he acquired by the failure to keep the fence up." *Devore*, 62 Iowa at 507, 17 N.W. at 741.

The circuit court erred in applying an "abandonment" doctrine in the present case as a "defense" against the existing deed covenants and/or the rights and duties established by prior historic court orders. This argument seems to create a new "quasi-Adverse Possession" procedure whereby rights in real property may be acquired by taking "no action" but waiting for existing rights to be "abandoned" by a second property owner. No such property rights process exists. Petitioner's fundamental rights in the present case were established by the prior deeds, and such covenants run with the land in perpetuity.

"New rights" over existing property may only be acquired under West Virginia law in a specific process governed by statute. Regarding real estate or an interest in real estate, the correct "legal" proceeding for acquiring title (or new rights) to a parcel of land that is alleged to have been "abandoned" is to bring a suit for "adverse possession" complying with all statutory requirements. *See* W. Va. Code § 55-2-1 ("No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims."). This is the statutorily-defined process that the Wingroves were required to pursue. However, they have never filed any adverse possession action regarding Petitioner's right of way.

A second argument against the Circuit Court's finding that Mr. Coster had "abandoned" his deed covenants and rights under prior historic court orders is found in *Cobb v. Daugherty*, 225 W. Va. 435, 438, 693 S.E.2d 800, 803 (2010). There, the Cobbs argued that they had acquired an "implied easement" over Daugherty's land. *Id*. at 439, 693 S.E.2d at 804. The easement argument in *Cobb* is similar to the present case where the Wingroves argue that they acquired "new rights" to enter upon an established ROW that had specific prohibition for such entry pursuant to the prior deeds and court orders. The Supreme Court of Appeals of West Virginia ruled against the Cobbs, finding that they had not acquired an "easement implied by necessity, and/or an easement implied by a prior use." *Id.*, 693 S.E.2d at 804. The *Cobb* court held: "The law does not favor the creation of easements by implied grant or reservation." *Id*. at Syl. Pt. 1 (quoting Syl. Pt. 1, *Stuart v. Lake Washington Realty*, 141 W.Va. 627, 92 S.E.2d 891 (1956)). Additionally, "[t]he burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof." *Id.* at Syl. Pt. 2 (quoting Syl. Pt. 1, *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976)).

Finally, the Court's reliance upon *Morgan v. Sundance, Inc*. as relevant authority supporting the Court's argument that Mr. Coster had "abandoned" his deed covenants and the rights established by the 1968 and 1969 court orders is entirely misplaced. *See* Appx. 0007 (citing *Morgan v. Sundance, Inc*., 596 U.S. 411, 142 S. Ct.1708, 212 L.Ed.2d 753 (2022)). In *Morgan*, the United States Supreme Court struck down the Eighth Circuit's "arbitration-specific waiver rule" because "[t]he text of the [Federal Arbitration Act] makes clear that courts are not to create arbitration-specific procedural rules like the one we address here." *Morgan*, 596 U.S. at 411-12, 142 S. Ct. at 1709-10, 212 L. Ed. 2d at 759-760. The *Morgan* Court never even addressed whether waiver applied, remanding the case to the Eight Circuit to decide whether the defendant had waived its right to arbitration by participating in the underlying litigation. *Id.* at 419, 142 S. Ct. at 1714, 212 L. Ed. 2d at 760. The *Morgan* case did not apply waiver to a deed covenant and has no application here.

The Circuit Court's finding that Mr. Coster intentionally waived and/or abandoned his claims is baseless. Mr. Coster has diligently asserted his rights, informing the Wingroves that they were not to make use of the ROW long before the Wingroves erected their pole barn. Appx. 0187-0188. Moreover, until the Wingroves removed the posts from the left side of the ROW and began using the ROW to access the pole barn on their property, the state of the fence was immaterial.

In sum, Mr. Coster did not waive and/or abandon his claims, and, as in *Devore*, this court should reverse and "remand[] for a decree granting plaintiff the relief prayed for by him." 62 Iowa at 507, 17 N.W. at 741. At the very least, the waiver/abandonment issue is one for which the Wingroves hold the burden of proof and genuine issues of material fact exist that preclude the Circuit Court's decision to award summary judgment to the Wingroves on this basis. *See* Syl. Pt. 9, *Aetna Cas. & Sur. Co.*, 148 W. Va. at 162, 133 S.E.2d at 772.

E. THE CIRCUIT COURT ERRED WHEN IT HELD THAT LACHES BARRED PETITIONER'S CLAIMS.

Under West Virginia law, a defending party must prove two elements to establish laches: (1) unreasonable delay in bringing suit; and (2) substantial prejudice caused to the defending party due to the delay in bringing the proceeding. *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996) (citing *Dep't of Health & Human Res., Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 764, 466 S.E.2d 827, 832 (1995)); *see also State ex rel. Smith v. Abbot*, 187 W. Va. 261, 264, 418 S.E.2d 575, 578 (1992). "The burden of proving unreasonable delay and prejudice is upon the litigant seeking relief." *Province*, 196 W. Va. at 484, 473 S.E.2d at 905. And, "[t]o be clear, the plea of laches cannot be sustained unless facts are alleged to show prejudice to the opposing party, or that the ascertainment of the truth is made more difficult by the delay in seeking immediate relief." *Id.*, 473 S.E.2d at 905.

"A party may be barred from enforcing [a restrictive covenant] where, through *laches* or acquiescence for an unreasonable period, it would be inequitable to enforce the same, and in such circumstances the defense of equitable estoppel may be relied upon by a defendant who, through such *laches* or acquiescence, has been misled to his prejudice." *Ballard v. Kitchen*, 128 W. Va. 276, 283, 36 S.E.2d 390, 393 (1945). However, "[o]ne's acquiescence in a minor violation [of a restrictive covenant] will not bar him from later insisting upon the covenant being complied with, when the subsequent violation becomes consequential as affecting his use of his property." *Id.* at 285; 36 S.E.2d at 394; *see also Wallace*, 147 W. Va. at 377, 127 S.E.2d at 756 (holding that one's acquiescence to "immaterial" violations of a restrictive covenant will not preclude a subsequent challenge to a material violation of the covenant); Syl. Pt. 2, *Miller*, 186 W. Va. at 166, 411 S.E.2d at 685 (". . . nor is any lot owner precluded from insisting upon such observance because of his failure to complain of violations of the restriction by other property owners in a different portion

of the restricted area, which were not consequential or if consequential, did not materially and adversely affect him in the use and enjoyment of his own property."); *Devore*, 62 Iowa at 507, 17 N.W. at 741 ("[Plaintiff] entered into the contract for the right of way in view of the existence of the fence, and he ought not to be deprived of any rights he acquired by the failure to keep the fence up.").

Here, the Circuit Court concluded that two instances of laches occurred: "First, the Coster family's delay in bringing any enforcement action for nearly 50 years from the time of the 1968 and 1969 Orders" and "Second, Mr. Coster's delay . . . [of] approximately 10 years from [his] November 25, 2008, letter until the filing of this lawsuit." Appx. 0007. Neither of these findings warrants the imposition of laches. As explained below in Mr. Coster's response to the Wingroves' motion for summary judgment, there was no unreasonable delay and, even if there were, the Respondents were not prejudiced by that delay. Appx. 0280-0284.

The cases cited by the Circuit Court do not support its finding of laches. *See* Appx. 0006 (citing *SCA Hygiene Products Aktiebolag v. First Quality Baby Products*, 580 U.S. 328, 137 S. Ct. 954, 197 L. Ed. 2d 292 (2017) and *Stuart*, 141 W. Va. at 627, 92 S.E.2d at 891). In *SCA Hygiene*, the Supreme Court of the United States held that the "[l]aches cannot be interposed as a defense against damages where [patent] infringement [has] occurred within the period prescribed by [the applicable statute of limitations.]" 580 U.S.at 346, 137 S. Ct. at 967, 197 L. Ed. 2d at 305. And, in *Stuart*, the Supreme Court of Appeals of West Virginia held that [t]he contention of the defendants that the right of the plaintiff to injunctive relief which she seeks in this suit is barred by laches is devoid of merit" because "lapse of time, unaccompanied by circumstances which create a presumption that the right has been abandoned, does not constitute laches" and "[e]ven long delay

does not bar the right of the plaintiff if his intent to abandon [his claim] is negatived by his conduct." 141 W. Va. at 645, 92 S.E.2d at 901.

Again, there was no dispute over the ROW from 1969 until sometime after 2013, when the Wingroves removed fence posts from the left side of the ROW and began using some 520 feet of the ROW to access their pole barn. *See* note 1, *supra*. The fence posts were not abandoned. The court order stated that the fence posts were to be erected, and they were. *See* Appx. 0169. It was the Wingroves that ultimately removed the fence posts that were still in place pursuant to the 1968/1969 orders. The Costers did not "delay [] bringing any enforcement action for nearly 50 years[.]" Until the Wingroves began using the ROW on a regular basis to access their pole barn, the condition of the fences was immaterial, and the Costers therefore did not waive their rights by failing to bring an action to enforce the 1968/1969 orders.

Moreover, Mr. Coster's 2008 letter, if anything, cuts against a finding of laches. In 2008, the Wingroves were completing their new home beside the ROW and had dug a water line ditch from Mr. Coster's tap-in to their new house. Appx. 0187. In his 2008 letter, Mr. Coster informed the Wingroves that they were not permitted to use the Coster ROW. Appx. 0187. The letter was a warning not an acquiescence. *See* Appx. 0187-0188. It cannot create a presumption of abandonment and, in fact, proves the opposite.

The Wingroves did not build a house on the adjacent property until 2007-2008, and the 2008 letter establishes that the Petitioner did not delay in informing the Wingroves of the restrictions placed on their use of the ROW. Additionally, the Wingroves testified in their depositions that they had the survey of the ROW and the 1968/1969 orders and were, therefore, well aware of the 1960s ROW dispute in as early as 1998 when they purchased their property. Appx. 0220. As such, the Wingroves could not be "prejudiced" by Mr. Coster's 2019 declaratory

judgment action, as they had prior knowledge of ALL issues in that action in as early as 1998 when they purchased their property. The 2008 letter does not establish that Mr. Coster delayed in bringing an action against the Wingroves for approximately 10 years because, again, there was no dispute concerning the ROW until the Wingroves began using the ROW to access their pole barn. Furthermore, because Mr. Coster informed the Wingroves of the restrictions placed on their use of the Coster ROW long before they started using the ROW to access the barn, the Wingroves were not misled or otherwise prejudiced by Mr. Coster's petition.

Accordingly, the Court should reverse and remand the case with instructions to enter judgment for Mr. Coster. In the alternative, Mr. Coster submits that the Wingroves hold the burden of proof in this matter as it pertains to the applicability of laches and that genuine issues of material fact exist that preclude the Circuit Court's award of summary judgment to the Wingroves on this basis. *See* Syl. Pt. 9, *Aetna Cas. & Sur. Co.*, 148 W. Va. at 162, 133 S.E.2d at 772.

IX. CONCLUSION

For the reasons explained above, Petitioner James L. Coster asks that this Court reverse the Circuit Court's rulings and remand with instructions to award summary judgment to the Petitioner as to the validity and enforceability of all prior deed covenants referenced in the record of this case. Additionally, in light of Respondent's prior knowledge of and disregard for the deed covenants affirmed by court order in previous litigation, Petitioner requests an award of all fees, costs, and attorney fees taxable in accordance with Rule 24(d) of the West Virginia Rules of Appellate Procedure.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

James L. Coster
Plaintiff Below, Petitioner

v.) 24-ICA-467

Dennis Wingrove,
Lisa Wingrove,
Ronald K. Lilley, Sr.,
and Helga M. Lilley,
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Christopher M. Hunter, do hereby certify that on this 30th day of January, 2025, a copy of the forgoing ***Brief of Petitioner James L. Coster*** and the accompanying ***Joint Appendix*** was filed via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

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