INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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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 RESPONDENTS DENNIS WINGROVE AND LISA WINGROVE

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March 3, 2025

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I. ASSIGNMENTS OF ERROR

Respondents Dennis Wingrove and Lisa Wingrove ("the Wingroves") deny that the Circuit Court committed the errors set forth by Petitioner James L. Coster ("Coster"), which are addressed more specifically in this brief. Corresponding to the specific Assignments of Error by Coster, the Wingroves state as follows:

1.) The Circuit Court did not err in its finding that the subject right of way ("the ROW") was in no way "exclusive" to Coster.

2.) As with the assignment of error number 1, the Circuit Court did not err in its finding that the ROW was not "exclusive" to Coster.

3.) The Circuit Court did not err in its interpretation of the 1968 and 1969 Orders.

4.) The Circuit Court did not err in finding that Coster abandoned the requirements of the 1968 and 1969 orders soon after their entry.

5.) The Circuit Court did not err in its application of laches to Coster's claims.

II. STATEMENT OF THE CASE

The case at bar is brought due to a disagreement over the use of a ROW involving three adjacent landowners, the Wingroves, Coster, and Ronald and Helga Lilley (the Lilleys). In an effort to simplify understanding or visualizing the location of the properties involved in this dispute, we ask that the Court visualize a "T", wherein the Coster property is located at the top of the T, the Lilley property on the lower right of the T and the Wingrove property at the lower left of the T. The horizontal line of the T is the "bottom" of Coster's property line running across the "top" of the Wingroves property line and the Lilley property line. The perpendicular line of the T is the 14-foot ROW at issue, which is also the property line between the Lilleys and the Wingroves. A public road runs horizontally across the bottom of the T, and the ROW connects to it. This is roughly laid out in the attachment to the Arbitrators' Answer. Appx. 0122.

By deed dated July 29, 1998, and recorded in Marshall County Deed Book 603, at page 49, Respondents Dennis and Lisa Wingrove received approximately 136.75 acres from members of the Lilley family (the Wingrove Deed). The Wingrove Deed contained a 14-foot ROW, granted to the Coster family (the Coster ROW). The Wingroves' property line extended to the mid-point of the Coster ROW.

Defendants Ronald and Helga Lilley own the property across the Coster ROW from the Wingroves (the Lilley property). The Lilley property line runs to the midpoint of the Coster ROW and abuts the Wingroves' property line. Ronald and Helga Lilley have owned their property since 1997, although the extended Lilley family owned the property since 1950.

Petitioner Coster's family has owned his property (the Coster property) since February 10, 1958, with the petitioner acquiring an interest in the property on December 2, 1996, and vesting full ownership in the property on August 16, 2016. Coster has a 14-foot right of way over the Wingrove property and the Lilley property to access the Coster property.

In 1966, Audley Lilley, defendant Ronald Lilley's father, owned the Lilley Property and the Wingrove Property. Mr. Lilley's property was split by the Coster ROW. Audley Lilley filed an injunction in the Marshall County Circuit Court to prevent the Costers from interfering with Mr. Lilley's use of the Coster ROW and the threats of violence by the Costers.

In 1968, the Court ordered the Lilley and Coster parties to arbitrate the dispute. The arbitrators concluded, in an Answer to the Court, that the Coster ROW should have 3 turnouts to permit the parties to pass by each other when using the right of way; that all work on the right of way be completed within 90 days; and that fences be erected between 7 and 10 feet from the centerline of the Coster ROW, with the Costers responsible for the fence on the right side of the right of way, and the Lilleys responsible for the fence on the left side of the right of way. The arbitrators also decided that 2 gates be erected, one on each side of the ROW. Appx 0118-122. The Circuit Court entered an Order on July 11, 1968, adopting the Answer of the Arbitrators except for paragraph 3-B which the Court revised in its Order, and adding a few other requirements thereafter. Appx. 0123-126.

In 1969, because the Lilleys and Costers recognized a discrepancy in paragraph 3-B of the July 11, 1968 Order, the Court entered a second and final Order, further revising paragraph 3-B. Appx 0127-128. That July 11, 1969 Order held that the Coster

ROW was to contain 3 turnouts, with both sides of the Coster ROW fenced. The Costers were responsible for the fence on the right side, and the Lilleys were responsible for the fence of the left side. Mr. Lilley had the right to install one (1) gate in the fence on the right side, and he and others had a right to use the ROW. (Id.). When analyzing the rights of the parties going into the current lawsuit, this Court should carefully consider the (i) Answer of the Arbitrators (undated, but clearly filed in advance of the 1968 Order), (ii) the July 11, 1968 Order, and (iii) the July 17, 1969 Order. (There are multiple copies of these documents in the Appendix, and can be found in chronological order at Appx. 0118-128)

The Coster ROW does not currently conform to the Order entered in the Marshall County Court on July 17, 1969, as there are no turnouts in the Coster ROW and the Coster ROW is not fenced on either side and has no gate, nor has it conformed to the Order entered in the Marshall County Court on July 17, 1969, for some time.

The Wingroves have used the ROW since 1998. In 2008, petitioner Coster sent written correspondence to the Wingroves, demanding that the Wingroves detach from a waterline, and cease using the Coster ROW, under the threat of towing vehicles and fencing the right of way.

The Wingroves erected a pole barn on their property and began using approximately five hundred twenty (520) feet of the Coster ROW to access the pole barn. In 2018, petitioner Coster returned to his right-of-way complaints and requested that the Wingroves abandon their rights to use the Coster ROW, in exchange for a use license from the petitioner. When the request was refused, the instant lawsuit was filed.

III. SUMMARY OF ARGUMENT

In sum, the Circuit Court of Marshall County correctly analyzed and resolved the real property dispute before it on cross-motions for summary judgment. Coster's position on appeal is premised on three issues: (i) conflating the term "private" regarding this right of way to mean "exclusive" rather than "not public," (ii) conjuring up a maintenance obligation far beyond one ever contemplated or expressed in the subject Orders, and (iii) misreading the facts of an 1883 Iowa supreme court case and citing to dicta that is inapposite in an attempt to convince this Court to ignore the applicable facts and law.

Additionally, the Circuit Court's application of the principles of abandonment, laches, and the rejection of res judicata were all proper and supported by the facts and the law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with the Petitioner that oral argument is appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure, and a memorandum decision is appropriate.

V. ARGUMENT

A. Standard of Review

Appellate review of a summary judgment order is *de novo*. *W.Va. Dept. of Transp. v. Robertson*, Syl. Pt. 1, 217 W.Va. 497, 618 S.E.2d 506 (2005). This matter was decided by the Circuit Court based on competing motions for summary judgment, suggesting that the resolution of factual disputes was not significant. Similarly, Coster asserts in his appellate brief that no new issue of law is implicated here. See Petitioner's Appeal Brief, Statement Regarding Oral Argument and Decision.

B. The Circuit Court ruled correctly that the use of the right of way is not exclusive to Coster.

The crux of Petitioner's arguments in Assignments of Error 1 and 2 are premised on the contention that the use of the ROW is exclusive to Coster. The Circuit Court correctly concluded that the 1968 and 1969 Orders did not grant Coster exclusive use of the ROW. Appx. 0005.

1. Misuse of the term "private."

Coster contends on appeal that the term "private" is synonymous with "exclusive," and because the ROW is sometimes referred to as a private right of way, Coster has the exclusive use of it – even vis-a-vis the owners of the fee interest, the Wingroves and the Lilleys. This is mistaken. Use of "private" in this context would be in contrast to a "public" right of way. If the parties or the Circuit Court intended that the use of the ROW be limited to Coster alone, the court could have and would have used the term "exclusive."

2. The Circuit Court never uses the term exclusive, which is the interpretation Coster seeks.

At no point in the Arbitrators' Award, the July 11, 1968 Order, or the July 17, 1969 Order did the Circuit Court use the term "exclusive" to describe or modify the right of way. The Arbitrators' Answer that was incorporated, in part, by the Circuit Court placed restrictions on the parties and it would have also been a logical place to include such language. Appx. 0120, at paragraph 4.C. Again, that did not happen.

3. The restriction on both parties from blocking the right of way indicates no exclusive use by Coster.

Paragraph 4.C. of the Answer of the Arbitrators, which was adopted by the 1968 Order, explicitly anticipated the presence of both parties on the right of way. "The plaintiff

and the defendants should be restricted from unnecessarily damaging the road in the right of way or from blocking this right of way for more than five minutes out of any one hour, and should be made responsible for the compliance of these regulations from members of their families, relatives, friends, agents, or any other person they may permit to use this right of way." Appx. 0120 at para. 4.C. If the Court or Arbitrators intended that Coster have exclusive use of the right of way, there would be no need to put a time limit on the Lilleys ability to "block" the right of way, or to mention the use of the right of way by "their families, relatives, friends, agents, or any other person they may permit to use this right of way."

4. The possibility of a gate to access the right of way shows the lack of exclusive use by Coster.

If the Court had intended that Coster have exclusive use of the right of way, it would not have afforded the Lilleys the right to access the right of way from their property. The Court went even further to make sure neither party was permanently and completely blocked from access to the right of way when it clarified its July 11, 1968 Order with the July 17, 1969 Order. The 1969 Order provided that "no gate shall be erected **across** said right-of-way." Appx. 0128 (emphasis added).

5. *Devore* is inapposite.

Coster's appeal makes much ado about *Devore v. Ellis*, 62 Iowa 505, 17 N.W. 740 (1883), which he cites throughout his brief, including in his argument regarding a private right of way. This 1883 case describes a factual scenario markedly different from the Coster/Wingrove dispute. In *Devore*, the servient estate and a neighbor erected a gate that could block access to the right of way at issue from the public highway. 62 Iowa at 505, 17 N.W. at 740. Although a fence was also part of the fact pattern, this critical

difference makes Coster's reliance on the *Devore* dicta inapposite. In one of the few cases citing *Devore*, it is clear *Devore* was premised on a decision regarding a gate **blocking** a right of way, which is not at issue here. *McDonnell v. Sheets*, 234 Iowa at 1156 (1944). Other case citations to *Devore* over the last 131 years (which are few and far between) do not rely on it for what Coster does.

6. Res judicata does not apply here.

The doctrine of res judicata does not save Coster's claims. Importantly, the issues decided in 1968 and 1969 are not what Coster relies upon here. In the case at bar, Coster relies on a contrived exclusive use of the ROW to seek new and different relief, including the right to install utilities on the right of way. Appx. 0053, Amended Complaint at 15. This was not litigated in 1968. The 1968 action brought by the predecessors to the Lilleys was to obtain an injunction on the Coster predecessors from (i) blocking the Lilleys' use of the right of way and (ii) enjoining the Coster predecessors from inflicting or threatening to inflict bodily harm on the Lilleys. Appx. 0112. To the extent the 1968 and 1969 orders did address exclusive use of the right of way, the Circuit Court decided **against** Coster. As noted in sections V.B.2, 3, and 4, above, the 1968 and 1969 orders specifically contemplated non-exclusive use of the ROW.

C. Maintenance is a red herring and Petitioner's argument is erroneous.

In Petitioner's Assignment of Error #3, Coster relies upon maintenance as a basis to overturn the summary judgment order, but he is mistaken. The Court mentions "maintenance" as something the Lilleys can do if they erect a gate. Appx. 0127-128, 1969 Order. There is no obligation to erect a gate, and there is no obligation for the Wingroves and/or the Lilleys to maintain a fence. Nor is there an obligation to "maintain" anything

else upon the servient estate by the Wingroves or the Lilleys. The only other mention of maintenance is regarding the timing of providing gate maintenance **if** it is constructed by the Lilleys. Appx. 0119, Answer of Arbitrators, para. 2.

The only obligation to maintain a fence line is on Petitioner Coster. Importantly, Coster argues that the 1969 Order mandates that the Wingroves maintain a fence line and gate. However, as even the Petitioner restates repeatedly in his argument that the 1968 and 1969 Orders apply, the 1969 Order reads:

> ORDER that paragraph 3-B shall 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) foot gate on the right side of the currently used right-of-way, which is the same right-of-way as is mentioned and described in the said arbitration report, 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 the right side of said right-of-way said gate to be located in said fence line… and that no gate shall be erected across said right of way. (emphasis added). Appx. 0127-128.

The defendants in the lawsuit containing the 1968 and 1969 Orders **were Edward B. Coster and Anne Agnes Coster**. The plain reading of the Order indicates an obligation on the Costers to erect and maintain a fence line. It does not order the Lilleys to maintain a fence line and therefore, cannot be extended to somehow obligate the Wingroves to maintain a fence line. The only obligation to maintain a fence line, *as cited by the Petitioner*, **is on the Petitioner himself**. Therefore, the Petitioner is repeatedly seeking our Courts to enforce 50-year-old orders that his family violated, that he violated, and that he has been violating since 1996.

D. The Circuit Court correctly analyzed and applied the doctrines of abandonment and waiver.

Regarding Petitioner's Assignment of Error 4, the Circuit Court appropriately found that the fence was abandoned and Coster waived any rights regarding it. Abandonment is defined as the relinquishing of a right of interest with the intention of never reclaiming it. *Abandonment*, Black's Law Dictionary (11th ed. 2019). Appx. 0005, Concl. of Law 6. Coster did not act to enforce the terms of the 1968 and 1969 Orders until the filing of this lawsuit in 2019, as evidenced by the noncompliance with the terms in the Orders for nearly fifty (50) years as well as physical evidence of abandonment through the abandoned fence posts along the right-of-way. Appx. 0005-6, Concl. of Law 7. Thus, the Circuit Court concluded that, as a matter of law, all parties willingly and intentionally abandoned the fences, turnouts, and gate required in the Court's Orders of 1968 and 1969; and therefore, abandoned those requirements contained in the 1968 and 1969 Orders. Appx. 0006, Concl. of Law 8.

Waiver is the intentional relinquishment or abandonment of a known right. *Morgan v. Sundance, Inc*. 569 U.S. 411, 142 S.Ct.1708, 212 L.Ed.2d 753, Syl. pt. 2 (2022). In deciding whether or not a waiver of rights had occurred, the Circuit Court rightfully focused on the actions of the person who held the right. *Id.* At Syl. pt. 3. Appx. 0007, Concl. of Law 13. Coster waived his right to assert claims at bar because he and his father intentionally decided to not enforce the 1968 and 1969 Orders. Both Coster, who had an ownership interest in his property since 1996 and his family who owned the dominant estate since 1958, knew of the 1968 and 1969 Court Orders and knew the terms and requirements therein. Appx. 0007, Concl. of Law 14.

Coster's knowledge includes the knowledge of the right to bring a cause of action if and when the Orders were not complied with. (Recall that Coster is a practicing attorney.) Appx. 0006-7, Concl. of Law 11. By not complying with the 1968 and 1969 Orders and by intentionally not bringing a cause of action for nearly fifty (50) years, the Circuit Court correctly concluded that this right was intentionally relinquished and therefore waived according to law. Appx. 0007, Concl. of Law 14.

Coster tries to reverse the Circuit Court's decision on appeal by relying on *Devore*, a case he did not brief before the Circuit Court. Regardless, *Devore* is distinguishable for a number of reasons, all of which make the Petitioner's current reliance upon it misguided. First, factually Mr. Devore took affirmative actions in furtherance of his rights – he erected and maintained a fence pursuant to his obligations under a right of way. Unlike Coster, who did nothing since 1996, or his family, who took no action since the alleged fence erection in 1969. Second, Mr. Devore was enforcing his right to utilize the right of way, unlike Coster, who is attempting to prohibit the use of the right of way by those persons who have the right to use it. Third, in *Devore*, the defendants blocked the right of way at issue by erecting a fence and a gate, thereby physically blocking Mr. Devore's use of the right of way. There is no allegation in the matter at bar that either the Wingroves or the Lilleys blocked the right of way. These differences make the *Devore* opinion inapplicable for this case.

Petitioner sets forth no legal or factual basis to reverse the findings and conclusions of the Circuit Court. In fact, the actions, or more precisely, the inactivity of Coster evidence that Coster abandoned the fence line requirement and waived his right to enforce the fencing requirements of the 1968 and 1969 Orders. Since the Wingroves

purchased their property in 1998, Coster took no action to repair, replace, or erect a fence on the right side of the ROW, as required by the 1968 and 1969 Orders. From 1998 until 2019, despite being a lawyer that visited the property frequently according to his 2008 letter, Coster took no action to enforce the 1968 and 1969 Orders. Appx. 0375. Therefore, the Circuit Court had ample grounds to enter summary judgment on behalf of the Wingroves and Lilleys.

E. The Circuit Court correctly applied the doctrine of laches.

Petitioner's Assignment of Error #5 takes issue with the doctrine of laches, but laches was applied correctly by the Circuit Court. Appx. 0006-7, Concl. of Law 9-12. Laches is an equitable defense that protect defendants against plaintiffs who unreasonably delay in bringing a claim. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products*, 580 U.S. 328, 137 S.Ct. 954, 197, L.Ed.2d 292, 960 (2017). The general rule is that simply a lapse of time, unaccompanied by any circumstance that creates a presumption that the right has been abandoned, does not constitute laches. *Stuart v. Lake Washington Realty Corp*., 141 W. Va. 627, 92 S.E.2d 891, Syl. Pt. 4 (1956). Appx. 0006, Concl. of Law 9. There is no dispute of material fact that Coster, or his family who previously owned the dominant estate, delayed in bringing a claim for nearly fifty (50) years. Appx. 0006, Concl. of Law 10. The lapse of time here, plus the intentional noncompliance with the 1968 and 1969 Orders by all of the Parties creates the presumption that the right had been abandoned. Appx. 0006, Concl. of Law 10.

The Circuit correctly found further that Coster knew about the Wingroves' occupancy of their property and use of the right-of-way since November 25, 2008, at the latest. At that time, Mr. Coster wrote to the Wingroves, threatening to sue them for tapping

into a waterline and using the right-of-way. Despite this, Coster took no action on his or his family's behalf until 2019, despite being an attorney who frequently utilized the right-of-way to visit his family property. Appx. 0006-7, Concl. of Law 11.

Based on all this, the Circuit Court concluded, as a matter of law, 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 to the filing of this lawsuit; and second, Coster's delay in bringing an action against the Wingroves for approximately 10 years from the November 25, 2008, letter until the filing of this lawsuit. Appx. 0007, Concl. of Law 12.

Petitioner sets forth no reasonable basis to reverse the Circuit Court's findings and conclusions that result in the application of the laches doctrine. There is no factual dispute that Coster unreasonably delayed in bringing the instant lawsuit. The Coster family never made any effort to comply with the requirements of the 1968 and 1969 Orders, and no finder of fact could conclude otherwise. Thus, laches must be applied as and how the Circuit Court ordered.

VI. CONCLUSION

From the totality of the evidence presented, the record could not lead a rational trier of fact to find for Coster. The Circuit Court's findings of fact and conclusions of law were well-founded, there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to the application of the law. Thus, the Circuit Court's grant of summary judgment in favor of the Wingroves was appropriate, and should be affirmed by this Court.

DENNIS WINGROVE AND LISA WINGROVE

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CERTIFICATE OF SERVICE

I, Gerald E. Lofstead, III, do hereby certify that the foregoing "**BRIEF OF RESPONDENTS DENNIS WINGROVE AND LISA WINGROVE"** has been served upon all parties via electronic filing on this 3rd day of March 2025 as follows:

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