No. 24-ICA-467

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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

REPLY BRIEF OF PETITIONER JAMES L. COSTER

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

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Cases:

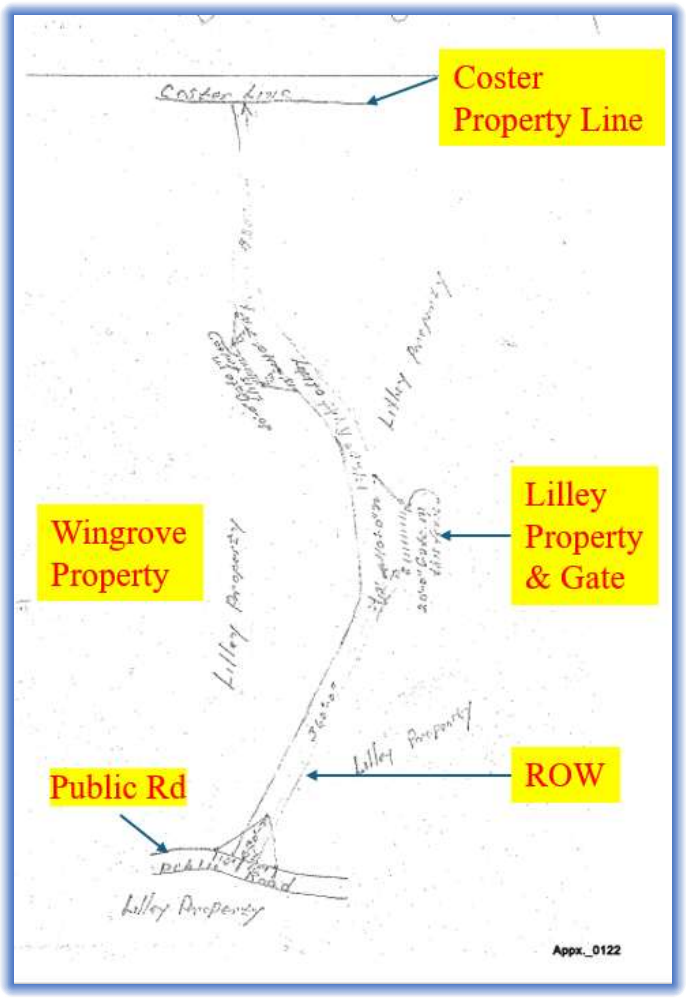
Petitioner, James L. Coster, submits this reply in opposition to the responsive briefs submitted by Respondents Dennis Wingrove and Lisa Wingrove (collectively, the "Wingroves"). In support of his reply, Mr. Coster states as follows:

III. ARGUMENT

A. THE COSTERS HAVE BEEN GRANTED NEAR EXCLUSIVE USE OF THE COSTER ROW, AND THE WINGROVES HAVE NO RIGHT TO USE THE ROW.

The Wingroves argue that the Costers have not been granted "exclusive" use of the Coster ROW. They submit that neither the deeds nor the Circuit Court's orders resolving the 1960s' ROW dispute use the term "exclusive" and that "private" does not mean "exclusive." Wingroves' Br., pp. 6-7. The Wingroves further argue that the 1969 order's prohibition against a gate across the ROW and restrictions on blocking the ROW contained in the arbitrators' report somehow establish that the Costers were never intended to have "exclusive" use of the ROW. *Id*. These arguments are a red herring.

As explained in Petitioner Coster's opening brief, the ROW at issue connects the Coster property to the public road. Both the Wingrove and Lilley parcels are adjacent to the public road and do not need the Coster ROW for access. The best visual representation of the parties' respective property lines is probably contained in the sketch attached to the arbitration report:



See Appx. 0122 (yellow labels and blue arrows added).

The deeds creating the ROW provided a "private way" along with the condition that the ROW be fenced on both sides. The deeds required the ROW to be fenced on both sides and only allowed the grantors, who at that time owned the servient estate on both sides of the ROW, to erect and maintain a single gate at or near the county road. The Circuit Court's 1969 order resolving the subsequent ROW dispute between the Costers and the Lilleys reflects the parties' agreement that that gate was to be on the right side of the ROW, not across the ROW, and that the gate was to be within 30 feet of the county road. These restrictions were obviously intended to give the Costers exclusive use of the remaining portion of the ROW, and completely restrict access to and from

that portion of the servient estate on the left side of the ROW currently owned by the Wingroves. Taken as a whole, this can only mean that the ROW was created for the near-exclusive use of the dominant estate. The Wingroves have failed entirely to grapple with the clear limitations that the Circuit Court's 1969 order places on their use of the ROW.

The Wingroves are attempting to make a mountain out of a mole hill, arguing that the Costers do not have exclusive use of the ROW because the Lilleys have a limited right to erect a single gate near the beginning of the ROW, as if this somehow implies that they should have unfettered access to the remaining portion of the ROW. It does not. In fact, this limitation, if it is to have any meaning, implies that the Wingroves, who purchased the parcel on the left side of the ROW from the Lilleys in 1998, have no right to access the ROW at all.

Again, "[t]he 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).

Mr. Coster is only asking this Court to give effect to the parties' agreement that the "earlier Deed only gave the [Lilleys the] right to erect one (1) gate at or near the county road" and that that gate was to be erected and maintained by the Lilleys on the right-hand side of the ROW. Appx. 0115. The 1969 order's prohibition against a gate across the ROW and the arbitrators' restrictions on blocking the ROW are wholly consistent with the Lilleys' limited right to maintain a gate at or near the county road to access that portion of the servient estate on the right side of the ROW.

Moreover, the fact that that limited right was expressly carve-out by the parties to the 1893 deed and the Circuit Court's 1969 order clearly evinces the parties' understanding that the servient estate holders' ability to access and make use of the ROW was limited. While limiting the Lilleys to one gate may not give the Costers "exclusive" use of the entire ROW, it does give them exclusive use of the ROW beyond the Lilleys' gate and completely forecloses the Wingroves' use of the ROW to access their property on the left side of the ROW. To hold otherwise would fail to give any effect to the parties' agreement.

Contrary to the Wingroves' assertions, *Devore v. Ellis*, 62 Iowa 505, 506, 17 N.W. 740, 741 (1883) is very much on point. The language of the covenants in the 1876 easement at issue in *Devore* is remarkably similar to that contained in the 1893 and 1898 deeds at issue here, granting the plaintiff a "private way" that was to be fenced on both sides. *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, which was maintained by the adjoining property owner, and the easement holder's covenant to erect and maintain a fence on the other side of the way established the parties' intent to create "a fenced lane for the **exclusive** use of [the easement holder.]" *Id*. at 506, 17 N.W. at 741 (emphasis added). Similarly, here, the 1898 deed describes the Coster ROW as a "private way" and the 1893 deed required the parties to erect an maintain fences along both sides of the ROW, establishing a fenced lane for the exclusive use of the easement holder (apart from the grantors reservation of the right to erect and maintain a single gate at or near the county road). Appx. 0098; Appx. 0101.

The Wingroves' attempts to distinguish *Devore* fall flat. The gate at issue in *Devore* was originally erected by the easement holder, who installed the gate across the way because he had rented and was cultivating the adjoining land. *Id.* at 507, 17 N.W. at 741. When the easement holder ceased renting the adjoining land, he removed the gate. The landowners then erected their

own gate across the way, arguing that the easement holder never had a right to the exclusive use of the way and that, even if he did, he forfeited that right by installing the gate and failing to maintain the fences. The Supreme Court of Iowa rejected the landowner's arguments, holding 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 that "[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 (emphasis added). The court further explained that the easement holder had not waived and/or abandoned his right to an exclusive and open way by installing the gate and/or failing to keep the fences in good repair because he "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" and he "forfeited no rights by erecting the gate, and no inference can be drawn therefrom that he did not regard the grant as securing to him an open way." *Id*. at 507, 17 N.W. at 741. Because the easement was "**granted for his use and convenience alone**", the court held that the easement holder "ought to have the right, if he so required and demanded, to use it free from all obstructions." *Id*. at 506, 17 N.W. at 741 (emphasis added).

Moreover, res judicata applies here. Contrary to the Wingroves' assertions, Mr. Coster's "exclusive use" argument is not "new" nor is it "contrived." Wingroves' Br., p. 8. It was the central issue laid to rest by the 1960s ROW dispute. The 1960s litigation was all about the servient estate holder's right, or lack thereof, to make use of the Coster ROW. Indeed, Audley E. Lilley's 1966 petition explains that the Costers claimed the "exclusive right" to use the Coster ROW and that "every time [Mr. Lilley] 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. Moreover, the Circuit Court did not rule against the Costers. *See* Wingroves' Br., p. 8. The usage dispute was settled because the parties agreed that the prior deeds required the ROW to be fenced on both sides and "only gave [Mr. Lilley the] right to erect one (1) gate at or near the county road[.]" Appx. 0115. The parties further agreed that that gate would be on the right side of the ROW within 30 feet of the county road. Appx. 0180-0181. Accordingly, the purpose of the fencing was to settle the usage dispute between the Costers, who held the dominant estate, and the Lilleys, who at that time owned the servient estate on both sides of the ROW. There was no fencing dispute. The fencing was merely intended to embody the parties' agreement as to their respective rights to access and make use of the ROW, and that is precisely what is at issue here.

In sum, the fencing prescribed by the Circuit Court's 1969 order and 1893 deed was clearly intended to restrict the servient estate holders' ability to access their property from the Coster ROW, and this Court must give effect to that intent.

B. 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 Wingroves argue that "[t]he only obligation to maintain a fence line is on Petitioner Coster." Wingroves' Br., p. 9. This is a blatant misreading of the Circuit Court's 1969 order and the arbitrators' report upon which it is based. The "fence line to be erected and maintained by the [Costers]" is the fence line "on the right side of the currently used right-of way, which is the same right-of-way mentioned and described in said arbitration report[.]" Appx. 0180-0181. The arbitration report explains that "the fence on the right side of the right of way as you enter from the public road [is to] be erected by the defendants" and "that the fence on the opposite side [is] the responsibility of the plaintiff." Appx. 0119. The report further 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). Clearly, if the defendant (*i.e.*, the easement holder) was responsible for maintaining the fence line on the right side of the ROW, the plaintiff (*i.e.*, the holder of the servient estate) was responsible for maintaining the fence line on the left side of the ROW.

Indeed, in their motion for summary judgment 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). This is consistent with 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." Appx. 0098. Thus, it is clear that the fence line on the right side of the ROW was to be erected and maintained by the easement holder (*i.e.*, the Costers), and that the fence line on the left side of the ROW was to be erected and maintained by the holder of the servient estate (*i.e.*, the Wingroves).

The Wingroves' argument that the 1969 order required both parties to erect—but only Petitioner Coster to maintain—the fences contradicts the express terms of the 1969 order and fails to give effect to the parties' agreement concerning the covenants contained in the 1893 deed memorialized therein. The Circuit Court clearly erred in accepting this argument.

C. 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.

The Wingroves next argue that Mr. Coster and/or his father waived the right to enforce the 1969 order and/or 1893 deed covenants by allowing the fences along the ROW to fall into disrepair. Wingroves' Br., pp. 10-12. They repeatedly assert that the Costers waited fifty years to

enforce the deed covenants. Not so. The Wingroves did not even purchase the parcel on the left side of the ROW until 1998 and did not begin openly using the ROW until 2013. Moreover, as explained above, the fencing was only ever intended to embody the parties' agreement as to their respective rights to access and make use of the ROW. Accordingly, the Wingroves' repeated assertions that Mr. Coster waited over 50 years to enforce the deed covenant is a mischaracterization of the record.

Furthermore, 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 sometime after September 2013,[1] the state of the fence was immaterial. The Costers could not have waived and/or abandoned their rights simply by failing to maintain the fences. "[A]cquiescence 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; *see also 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).

Again, *Devore* is on point, and the Wingroves' attempts to distinguish it fall flat. *See* 62 Iowa at 507, 17 N.W. at 741. The defendants in *Devore*, just like the Wingroves here, argued that the easement holder waived his right to an exclusive and open way because "the fence built by the

[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.

[easement holder was] not sufficient" and "the fence of the adjoining proprietor was and has continued to be in a bad condition, being not sufficient to turn stock." *Id*., 17 N.W. at 741. The court rejected these arguments. *See id.*, 17 N.W. at 741. Moreover, the point at issue in *Devore* was not, as the Wingroves contend, whether the easement holder could make use of the right of way. That was undisputed. The issue was whether the defendant landowners could erect a gate across the right of way, presumably so that it could be enclosed in common with their property upon which they intended to maintain stock. The court held that the defendants had no right to make such a use of the easement because "[t]he existence of a fenced lane for the **exclusive** use of plaintiff implies his right to require it be kept open" and the easement was "**granted for [the easement holder's] use and convenience alone**[.]" *Id*. at 506, 17 N.W. at 741 (emphasis added).

Like the defendants in *Devore*, the Wingroves myopically focus on the physical state of the fences, missing the forest for the trees. Mr. Coster could not have waived and/or abandoned his right to a near exclusive and open right of way merely by failing to maintain the fences when there was no live dispute amongst the parties regarding their respective rights. Like the plaintiff in *Devore*, the Costers "contract[ed] for the right of way in view of the existence of the fence, and [they] ought not to be deprived of any rights [they] acquired by the failure to keep the fence up." *Id*. at 507, 17 N.W. at 741.

Additionally, the Wingroves have failed entirely to respond to Mr. Costers' argument that the Circuit Court erred in applying an "abandonment" doctrine as a "defense" against the existing deed covenants and/or the rights and duties established by prior historic court orders. As explained in Mr. Coster's opening brief, such rights could only be acquired through adverse possession and/or prescription, not through abandonment and/or waiver. Costers' Br., pp. 23-25.

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

Finally, the Wingroves argue that the Circuit Court properly applied the doctrine of laches. Wingroves' Br., pp. 12-13. In doing so, the Wingroves seem to simply rehash the arguments made below, which were already addressed by Mr. Coster's opening brief. *See* Costers' Br., pp. 27-29. The Wingroves make no attempt to address the arguments or issues raised by Mr. Coster.

As previously explained, laches is an affirmative defense upon which the Wingroves bear the burden of proof. *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 905 (1996). To establish laches, the Wingroves must prove (1) that there was an unreasonable delay in bringing suit and (2) that the Wingroves were substantially prejudiced by that delay. *Id.*, 473 S.E.2d at 904 (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). "[L]apse 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." *Stuart v. Lake Wash. Realty Corp.*, 141 W. Va. 627, 629, 92 S.E.2d 891, 894 (1956) (holding modified on other grounds by *Cobb v. Daugherty*, 225 W. Va. 435, 448, 693 S.E.2d 800, 813 (2010)).

Here, there was no unreasonable delay because there was no dispute over the ROW from 1969 until sometime after September 2013, when the Wingroves began using some 520 feet of the ROW to access their pole barn. *See* note 1, *supra*. 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. The 2008 letter does not, as the Wingroves argue, 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.

As explained in Mr. Costers' opening brief, Mr. Coster's 2008 letter, if anything, cuts against a finding of laches. Costers' Br., pp. 26-29. The 2008 letter 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 2008 letter establishes that Mr. Coster did not delay in informing the Wingroves of the restrictions placed on their use of the ROW.

Moreover, the Wingroves could not have been prejudiced by Mr. Coster's 2019 declaratory judgment action because they had prior knowledge of ALL of the issues raised by Mr. Coster in as early as 1998 when they purchased their property, and Mr. Coster indisputably informed the Wingroves of the restrictions placed on their use of the Coster ROW in 2008, long before they started using the ROW to access their barn.

The Wingroves were not misled or otherwise prejudiced by Mr. Coster. The Wingroves knew that Mr. Coster believed that he had the exclusive right to use the ROW and that Mr. Coster was bound to take issue with the Wingroves' use of the ROW to access their new pole barn. They were not duped. They were not lulled into believing that Mr. Coster had abandoned his rights. Any reasonable person that read Mr. Coster's 2008 letter to the Wingroves would have known that the Wingroves' unpermitted use of the ROW to access a pole barn on the Wingroves' property would result in litigation. Accordingly, even if there was an unreasonable delay (there was not), any inference of abandonment was dispelled by Mr. Coster's 2008 letter.

In sum, the Wingroves cannot establish laches. There was no unreasonable delay in bringing this action because there was no dispute until the Wingroves began using the ROW to

access their pole barn sometime after September 2013, and the Wingroves, who were fully aware of Mr. Costers' contentions that he had the exclusive right to use the ROW, were certainly not prejudiced by this action.

IV. CONCLUSION

For the reasons explained above and in Petitioner's opening brief, 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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CERTIFICATE OF SERVICE

I, Christopher M. Hunter, do hereby certify that on this 17th day of March, 2025, a copy of the forgoing ***Reply Brief of Petitioner James L. Coster*** 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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