

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**DAVID LEE COBUN, COBUN FAMILY
TRUST, LINDA COBUN FLOOD,
DONELLA COBUN, and RANDY COBUN,
Defendants Below, Petitioners**

**FILED
August 27, 2026**

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

v.) No. 25-ICA-451 (Cir. Ct. Preston Cnty. Case No. CC-39-2021-C-76)

**RICHARD PHILLIPS,
Plaintiff Below, Respondent**

MEMORANDUM DECISION

Petitioners David Lee Cobun, Cobun Family Trust, Linda Cobun Flood, Donella Cobun, and Randy Cobun (the “Cobuns”) appeal the Circuit Court of Preston County’s April 8, 2025, order granting judgment in Mr. Phillips’ favor following a bench trial and the circuit court’s October 15, 2025, order denying the Cobuns’ post-trial motions. Mr. Phillips filed a response.¹ The Cobuns filed a reply.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court’s orders is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

This appeal concerns a dispute over the location of the common boundary line between adjoining parcels of real estate in Preston County. The contested area is an approximately one-half-acre field situated between the parties’ properties. The record reflects that the parties’ predecessors in title occupied neighboring properties for more than a century and generally maintained cordial relations. In the 1980s, Mr. Phillips’ ancestors permitted the Cobuns’ ancestors to use the one-half-acre field now in dispute. In 2003, surveyor Aubrey Schultz prepared and sealed a plat depicting the boundary line and encompassing the disputed field in connection with the Phillips family’s conveyance of a portion of their farm.

¹ The Cobuns are represented by D. Conrad Gall, Esq. Mr. Phillips is represented by Mark E. Gaydos, Esq., Woodrow E. “Buddy” Turner, Esq., and Jacob T. Trombley, Esq.

In 2020, Mr. Phillips' father, Rodney Phillips, owned the Phillips family property and issued a notarized statement revoking the Cobuns' permission to use the field. He passed away shortly thereafter, and his property transferred to Mr. Phillips pursuant to a transfer-on-death deed. Continued disagreements prompted Mr. Phillips, in January 2021, to retain Mr. Schultz to conduct a new survey. Mr. Schultz completed a resurvey and reached the same conclusion regarding the boundary line as reflected in his 2003 plat. His crew also located remnants of underground barbed wire consistent with the boundary line he identified in 2003 and 2021.

Mr. Phillips filed this action in October 2021 seeking declaratory relief, damages for trespass, and injunctive relief. The Cobuns counterclaimed, asserting ownership of the disputed parcel through adverse possession. After discovery and an unsuccessful mediation, the case proceeded to a bench trial in November 2024. At trial, the Cobuns presented testimony regarding historical interactions between the families and past use of portions of the Phillipses' property. Their expert, Kenneth Moran, offered an opinion regarding the boundary's location but acknowledged several mathematical errors and inconsistencies in his survey during cross-examination. Mr. Phillips' expert, Mr. Schultz, testified concerning his 2021 resurvey and the 2003 plat. Mr. Phillips specifically testified that his father had given the Cobuns permission to use the disputed tract but had affirmatively withdrawn his permission in 2020.

The circuit court found Mr. Phillips' evidence to be the most reliable and adopted the boundary line identified in Mr. Schultz's survey. Further it determined that the Cobuns failed to establish adverse possession. The circuit court's April 8, 2025, judgment order set the boundary line in accordance with Mr. Phillips' survey, rejected the Cobuns' adverse possession claim, and confirmed Mr. Phillips' ownership of the contested one-half-acre field. The Cobuns filed post-trial motions to set aside findings of fact and for a new trial, which the circuit court denied in its order entered October 15, 2025. The Cobuns' appeal of these two orders followed.²

In this case, we are guided by the following standard of review:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an

² The Cobuns attached the October 15, 2025, and April 8, 2025, orders to their notice of appeal, but their brief only addresses issues related to the April 8, 2025, order. As a result, our substantive review is limited to the April 8, 2025, order. *See Goff v. Smith*, No. 23-ICA-299, 2024 WL 4052866, at *4 n.5 (W. Va. Ct. App. Sept. 4, 2024) (memorandum decision) (noting that the Court would not address the merits of order attached to notice of appeal but not addressed in the petitioner's brief).

abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996).

The Cobuns argue that the circuit court erred in concluding: (1) that their use of the disputed tract was permissive and therefore not adverse; (2) that their periodic pasturing of cattle did not satisfy the “continuous” element of adverse possession; and (3) that Mr. Schultz’s survey constituted the most reliable evidence of the boundary line. In essence, the Cobuns invite this Court to reweigh the evidence presented at trial and reach a more favorable conclusion. We decline to do so.

It is well established that “[a]n appellate court does not reweigh the evidence[.]” *State v. Thompson*, 220 W. Va. 246, 254, 647 S.E.2d 526, 534 (2007); *see also Coles v. Century Aluminum of W. Va.*, No. 23-ICA-81, 2023 WL 7202966, at *2 (W. Va. Ct. App. Nov. 1, 2023) (memorandum decision). Instead, we are governed by the following standard:

Following a bench trial, the circuit court’s findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the circuit judge to evaluate the credibility of the witnesses. Under this standard, if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently.

Brown v. Gobble, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996) (citation omitted); *see also Phillips v. Fox*, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995).

The circuit court heard testimony from the parties regarding the relations of their predecessors in title and both surveyors. It reviewed exhibits including plats, deeds, and photographs. After weighing this evidence, the court concluded that Mr. Schultz’s survey, which supported Mr. Phillips’ understanding of the boundary line, was credible, consistent, and corroborated by physical indicators on the land. It further found that the Cobuns’ use of the parcel originated as permissive and did not evolve into adverse possession sufficient to satisfy the required elements. Upon review of the record, we cannot conclude that these findings are clearly erroneous or that the circuit court abused its discretion in its ultimate disposition. The Cobuns have not met their burden of demonstrating error below. *See* Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973) (“[t]he appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment

of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court.”).

For the foregoing reasons, we affirm the circuit court’s April 8, 2025, judgment order and its October 15, 2025, order denying the Cobuns’ post-trial motions.

Affirmed.

ISSUED: August 27, 2026

CONCURRED IN BY:

Chief Judge Daniel W. Greear
Judge Charles O. Lorensen
Judge S. Ryan White