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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HAROLD B. WOLFE and  
LUTHER ELLISON,

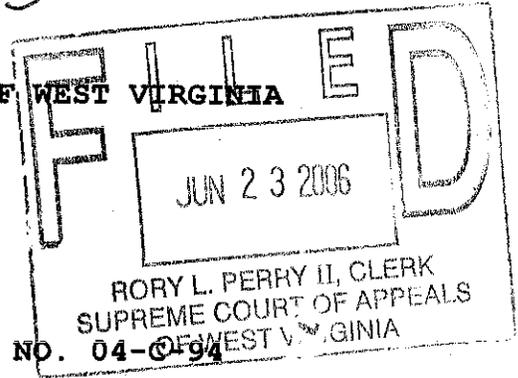
Plaintiffs,

v.

VIPS ALPIZAR,

Defendant.

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PETITIONER-APPELLANTS' BRIEF

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Statement of the Case

On October 4, 2004 the Plaintiffs filed a Petition to enjoin the Defendant, Vips Alpizar, from blocking access of the Plaintiffs across Turkey Creek and seeking an Order that the Defendant construct a bridge across Turkey Creek. On April 4, 2005 the Plaintiffs filed a Motion for Summary Judgment and on July 5, 2005 the Defendant Alpizar filed a Motion for Summary Judgment.

A hearing was conducted before the Honorable Robert A. Irons, Circuit Judge, on August 23, 2005 regarding the Defendant's Motion for Summary Judgment. Also on August 23, 2005 the Plaintiffs filed a Motion to Amend the Complaint. On August 26, 2005 the court entered an order granting the Defendant's Motion for Summary Judgment and denying the Motion to Amend.

On September 8, 2005 the Plaintiffs filed a Motion for Reconsideration of Motion for Summary Judgment and Denial of Motion to Amend Complaint. On 16 September 2005 the court entered an order denying the motions for reconsideration. Notice of Appeal was entered on \_\_\_\_\_.

Statement of the Facts

The parties to this action own adjacent pieces of property in Monroe County, West Virginia. The dispute in question is in regards to an agreement between the Plaintiffs and the prior owners of the property now owned by Defendant Alpizar.

In late 1992 or early 1993 Plaintiffs Harold Wolfe and Luther Ellison entered into an agreement with Joe and Georgia Brown to construct and maintain a bridge across Turkey Creek in Monroe County, West Virginia with each of the property owners paying one-third of the cost. Harold Wolfe paid one thousand three hundred dollars (\$1,300.00) while Luther Ellison paid one thousand dollars (\$1,000.00) in cash and provided labor on the bridge. The bridge was constructed over an easement which had been granted to the Plaintiffs.

Although no document was recorded in the Office of the Clerk of the County Commission of Monroe County, Harold Wolfe obtained hand written receipts for his payments on the

easement and cost of the bridge. The receipts were signed by Georgia Brown contemporaneously with the transfer of money, and clearly exceeded ten years prior to the destruction of the bridge by the Appellee.

Furthermore, the Appellee acknowledged in her deposition that she was aware that other people had been using the bridge, and that other people had contributed to the construction of the bridge, in addition to her predecessor in title.

In late summer of 2004 the Defendant, Vips Alpizar, had the bridge torn down without notice to either of the Plaintiffs. Negotiations continued between the parties during the discovery process but the Defendant Alpizar refused to allow the bridge to be rebuilt.

#### Assignments of Error

The trial court committed reversible error in granting the Defendant's Motion for Summary Judgment.

#### ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

"When called upon to review a circuit court's grant of summary judgment, this Court is guided by several established principles. First, '[a] circuit court's entry of summary judgment is reviewed *de novo*.' Syllabus Point 1,

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Also, we are mindful that '[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.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963). In other words, '[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.' [c] In addition, '[w]e must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.' [c] Finally, when deciding whether a summary judgment is appropriate, we apply the same test that the circuit court should have applied. Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996)." Browning v. Halle, No. 32672 (W.Va. 12/1/2005).

In this case there were clearly genuine issues of material fact and, for that reason, the trial court committed reversible error in granting the Defendant's motion for summary judgment. The court erred in finding that there was no express easement and in finding that there was no prescriptive easement.

First, the Plaintiffs provided written evidence to support their claim that there had been a contract for their use of the bridge over Turkey Creek and the West Virginia Statute of Frauds did not operate as a bar to recovery by the Plaintiffs as the trial court ruled.

W.Va. Code § 36-1-3 provides that "[n]o contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent. But the consideration need not be set forth or expressed in the writing, and it may be proved by other evidence."

As the court has noted the Code "does not itself specify a particular type of writing that is necessary to satisfy the memorandum requirement." Timberlake v. Heflin, 180 W.Va. 644, 647, 379 S.E.2d 149 (1989). "The memorandum must be (1) in writing, and (2) signed by the party against whom performance is demanded...In addition to these express requirements, our cases require that the memorandum must contain a description of the involved land and must also contain the essential elements of the contract."

As to the property description "[i]t need not be precise, but only reasonably certain, and the court can receive extrinsic evidence to complete the description.

What is required is merely that the memorandum contain 'key' or 'foundation' words from which the description may, by other evidence, be made complete and certain." Id.

One of the pieces of such evidence was a handwritten receipt stating "6-18-94 Received 300.00 from Harold Wolfe on easement Bal 500.00 Georgia Brown." Another was a handwritten receipt stating "8-14-94 Received two hundred dollars from Harold Wolfe on easement. Balance due \$300.00 Georgia M. Brown." Lastly, there was a handwritten receipt stating "7-25-93 Received of Harold Wolfe five hundred dollars as part payment on bridge across Turkey Creek on my farm." The signature is illegible. There was also a typed but unsigned "Easement Agreement" to provide "Harold B. Wolfe, his family, guests and other invitees, ...travel from the public highway to cross Turkey Creek by means of a newly constructed bridge and then to cross the GRANTORS' property to reach and use an existing easement." While not recorded it would have been evidence at trial of an agreement.

The evidence is that there were limited year-round, all-weather, access points across Turkey Creek and only one bridge. The Plaintiffs would assert that this evidence was sufficient for the matter to be asserted to a jury for a determination as to the existence and extent of the agreement between the Plaintiffs and the Defendant's

predecessor in title. As for the fact that the Defendants assert that Georgia Brown did not actually sign the receipts that simply raises an additional question which can only be decided by a finder of fact.

The reliance of the Court below, and the Appellee, on Harper v. Pauley, 139 W.Va. 17 (1953) for the assertion that the description was inadequate is unjustified. As the Court in Harper noted the test is one of "reasonable certainty". Id. The Court stated "The land must be so described that it can be identified with reasonable certainty. The writing must disclose a description which is itself definite and certain or it must furnish the means or key by which the description may be made certain and identified with its location on the ground." Id. at 22. Accordingly, the written receipts which identify the interest that was created (easement) and the location (bridge), satisfy all of the essential elements necessary to enforce the agreement of the parties. Contrary to the assertion of the Appellee, Harper is authority for the proposition that the Court below committed reversible error by granting summary judgment for Appellee.

The trial court also ruled, in error, that summary judgment was appropriate with respect to the issue regarding an easement by prescription. "To establish an easement by

prescription there must be continued and uninterrupted use or enjoyment for at least ten years, identity of the thing enjoyed, and a claim of right adverse to the owner of the land, known to and acquiesced in by him; but if the use is by permission of the owner an easement is not created by such use." Carr v. Constable, 196 W.Va. 276, 280, 470 S.E.2d 408 (1996).

The trial court based its ruling on this issue on the fact that the deposition testimony of Harold Wolfe was that the bridge was used from sometime in late 1994 until its destruction in Summer 2004 - less than ten years. But as noted above the written "Easement Agreement" between Georgia M. Brown and Joe Brown and Harold B. Wolfe was dated December 1993 and referred to a "newly constructed bridge." Also, the earliest of the receipts which the Plaintiffs alleged to be signed by Georgia Brown was dated July 25, 1993 and made reference to a bridge.

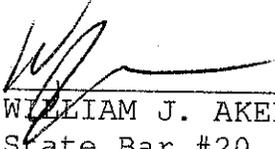
The Plaintiffs would, therefore, respectfully assert that the memory of Harold Wolfe notwithstanding the actual dates of usage were genuine issues of material fact to be resolved at trial. The trial court apparently did not take any of this evidence into consideration when issue its decision. That constitutes reversible error

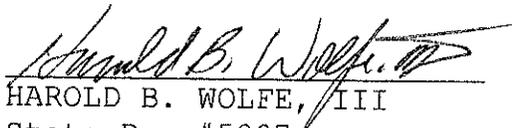
CONCLUSION

Because the Circuit Court of Monroe County committed reversible error in granting the Defendant's Motion for Summary Judgment, the Petitioner-Appellant respectfully requests that this Court reverse the Order entered by the trial court and remand the matter for a new trial.

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CERTIFICATE OF SERVICE

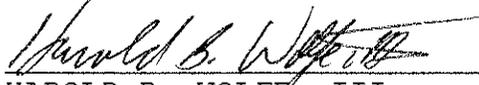
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I, William J. Akers, counsel for Petitioner-Appellants, Harold B. Wolfe and Luther Ellison, do hereby certify that today a true copy of the foregoing Petitioner-Appellant's Brief was this day mailed to the following:

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This the 22<sup>nd</sup> day of June, 2006.

  
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