

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH DALE NEWMAN
AND MARTY NEWMAN,

Appellants,

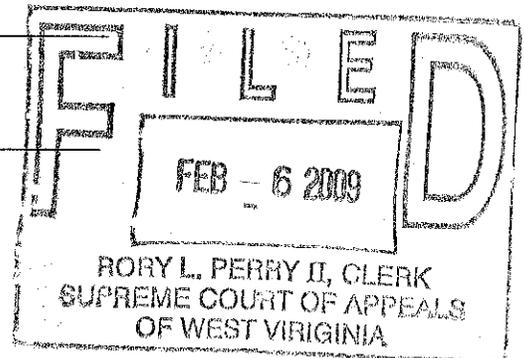
v.

CASE NO. 34332

JAMES E. MICHEL, JR. AND
TOMASINA MICHEL, HIS WIFE,

Appellees.

BRIEF OF APPELLEES



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- Holland v. Flanagan, 81 S.E. 2d 908, 912 (W.Va. 1954) Citing Black's Law Dictionary, Fourth Edition, pp. 12, 28
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- Shia v. Pendergrass, 222 S.C. 342, 72 S.E. 2d 699 (1952), pp. 15, 30
- Strahin v. Lantz, 193 W.Va. 285, 456 S.E. 2d 12 (1995), p. 6
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Wade v. McDougle, 59 W.Va. 113, 52 S.E. 1026 (1906), p. 28

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Secondary Sources:

Black's Law Dictionary, Fourth Edition, p. 12

Black's Law Dictionary, Sixth Edition, page 767, p. 12

I. Introduction and Nature of the Case

Appellees, James and Tomasina Michel, have been required to defend this action brought by Appellants, Kenneth and Marty Newman, to protect their homeplace from the now non-permissive use of their driveway and lands by members of the Newman family. Until this litigation was filed, members of the Newman family had been given permission by Appellees to access their property by use of the Michels' driveway.

A bench trial was conducted by the Honorable John Cummings on June 4, 2007. On the morning of the trial, the Court announced its ruling on cross summary judgment motions addressing the nature of an easement claimed by Appellants under a 1940 agreement between Appellants' uncle T. M. Newman and a predecessor in title to the Appellees. The Court held that the agreement had been an "easement in gross" and ceased with the death of T. M. Newman in 1946.

The Court, having heard the evidence, judged the credibility of the witnesses, and having previously conducted a physical inspection of the premises, ruled that Appellants had failed to meet their "clear and convincing" burden of proof to have established a prescriptive easement over the lands of the Appellees. The Court entered a final order on November 29, 2007, and a timely appeal was taken by the plaintiffs.

The Appellees respectfully resist the legal efforts of the Appellants to impose upon the rightful, quiet enjoyment of their land an easement to which they are not entitled.

II. Standards of Review

The parties agreed to a bench trial in lieu of a jury trial. Thus, “the findings of a trial court upon the facts submitted to it in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding” (Strahin v. Lantz, 193 W.Va. 285, 456 S. E. 2d 12 (1995)), Syllabus point 1). “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 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.” Syllabus point 1, Pobro v. LaFollette, 217 W.Va. 425, 618 S. E. 2d 434 (2005).

“The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof.” Syllabus point 1, Berkeley Development Corp. v. Hutzler, 159 W.Va. 844, 229 S. E. 2d 732 (1976).

“The West Virginia Rules of Evidence and West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, the rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.” Syllabus point 1, McCloud v. Salt Rock Public Service District, 207 W.Va. 453, 533 S. E. 2d 679 (2000).

III. Statement of Facts

James and Tomasina Michel purchased the subject property in May 1973 from Emma Fletcher. Their homeplace consists of 144 acres, complete with a small house that has continuously been their home since the date of purchase. The disputed access, called the T. M. Newman right of way (Defense Trial Exhibit 1) by the Appellants, is, in fact, the unpaved, two wheel rutted limestone and gravel driveway from the end point of what was once County Road 26 and the western line of the Michcls' property (Plaintiffs' Trial Exhibit 2). The T. M. Newman easement does not have a terminus on the Newman property (*Id.*). For the Court's convenience, a partial copy of Plaintiffs' Exhibit 2, showing the plat and driveway, is provided within this Brief.

Appellants are alternatively seeking to enforce the T. M. Newman right of way to gain access to their land which forms part of the northern border of the Appellees' boundary or, failing that, they desire to establish that they and/or their ancestors have/had established sufficient proof to perfect a prescriptive easement across the Appellees' land. The Newman property is bordered on the west by property other than that owned by Appellees. The record is silent as to any effort made by Appellants to obtain a right of way from that adjacent owner.¹

It is not disputed that the members of the Newman family have owned their property since the late 1800's or that an ancestor, Thomas M. Newman, obtained from Appellees' predecessors in title (Elwells) an agreement to build an easement across the Appellees' land in 1940 (Defense Trial Exhibit 1). At that time, based on the agreement, the right of way would connect to an existing farm road that ran north from County Road 26 along the Mud River to the Newman property's northern boundary line. Nor is it disputed that Thomas M. Newman did not have a property right or any

¹ There exists a public Boy Scout trail that goes from the surrounding roads through Appellants' property both from the east and west. The Scouts maintain the trail each year. The trail runs along the Newman farm road.

ownership interest in the Newman property when he individually obtained the right of way. Thomas M. Newman was the son of the owner of the property in 1940 (Ida Newman) and may have lived with his mother at the time.

Thomas M. Newman died in 1946 without issue or without having gained, through purchase or inheritance, an ownership interest in the Newman property. Mr. Newman's mother outlived her son Thomas, dying in approximately 1958, at which time Appellants' father, Hugh Newman, inherited a portion of the land and purchased the remainder from his siblings. The last known Newman to occupy the farm was E. E. (Steve) Newman in 1971. He died in 1973, after which time the farmhouse burned in 1975 and was never rebuilt (Defendants' Motion for Summary Judgement, Exhibit 6, p. 9).

The agreement that created the T. M. Newman right of way was dated June 4, 1940 and recorded in the office of the Cabell County Clerk on June 10, 1940. The agreement contains the following provisions:

1. Gladys Short Elwell and Cyril Elwell, her husband, are referred to as "parties of the first part."
2. T. M. Newman is referred to as "party of the second part."
3. The parties of the first part did "hereby grant, sell and convey unto the party of the second part, and [*sic*] easement or right of way for road purposes only, across the lands of the parties of the first part"
4. The right of way being shown on map showing property of William Short, deceased, made in June, 1940.
5. The strip of land was to be 20 feet wide and running around the base of the hill.

6. A metes and bounds description of the easement makes reference to connecting to a "20 foot road easement now in use."
7. "The party of the second part shall have the right and privilege to take and use any loose rock . . . to be used in building a roadway on said 20 foot easement."
8. "The party of the second part covenants and agrees to build a wall three feet high along the lower side of the said 20 foot easement strip, so as to protect the land of the parties of the first part."
9. "The party of the second part covenants and agrees to pay the parties of the first part for any damages done to their lands by reasons of the said road construction or the use of the 20 foot easement strip."
10. "It is understood and agreed between the parties hereto that said 20 foot right of way or road is to be used and enjoyed for road purposes only, by the parties of the first part and second part respectively, and it is not to be considered or treated as a public road."
11. The agreement is signed and notarized by both Gladys Short Elwell, her husband Cyril Elwell and T. M. Newman.

The agreement makes no mention of any other member of the Newman family or future heirs and all references to T. M. Newman are singular in referring to him as "the party of the second part" throughout. All obligations and responsibility are placed on T. M. Newman and no other family member or third party. As referenced in numbered paragraph 10 above, the language is exclusively restrictive to "road purposes only, by the parties of the first part and second part respectively" (Emphasis added).

There is no evidence that T. M. Newman constructed the designated easement. There is no physical evidence that a three foot wall was ever built and the current driveway, while it generally conforms to the description in the agreement, does not exactly track the description contained therein (See plat map contained in this brief). The current driveway consists of two limestone and gravel tire ruts and no improved 20 foot roadway as called for in the agreement. According to Appellants' trial testimony, the driveway was built around 1960, some fourteen years after the death of their uncle T. M. Newman (Trial transcript, p. 110, line 15).

There is no documentary evidence that supports Appellants' alternative position that they have a prescriptive easement over the lands of the Appellees. No letters of notice, renunciation, rejection, pleadings from prior litigation or non-hearsay evidence address any of the elements required to prove that Appellants or their ancestors adversely used the Appellees' driveway. Appellee Jim Michel testified that he had granted the Newman ancestors permission to use the driveway in 1974 (Trial transcript, p.137, line 9).

The presiding Circuit Court Judge, along with counsel for both parties, inspected the Appellees' land and driveway in question prior to the actual trial.

Appellants, in the "Statement of Facts" on page 8 of their Brief claim that shortly after their father's death in 1974 that Appellees blocked access to the "spur" near the Appellees' residence. At the trial, the Appellees had introduced a 1983 letter from attorney William N. Mathews written at the request of Appellants' sister concerning the blocked road. (Defense Trial Exhibit 2). Mr. Michel moved his vehicle that was parked near the spur adjacent to his residence. Considering Appellants' trial testimony that Kenneth Newman came to the property seven to fourteen times a year (Trial transcript, p. 49, line 15), it is understandable why the owner of the driveway would feel comfortable in parking his vehicle next to his house on his driveway.

Portion of plaintiffs' Trial Exhibit 2

Broken red line indicates 1940

T.M. Newman easement

Solid blue line is Appellees' existing driveway

Old Road Bed (Dirt & Grass)

Old Road Bed (Dirt & Grass)

Michel Residence

Existing driveway running around the base of the hill (Gravel)

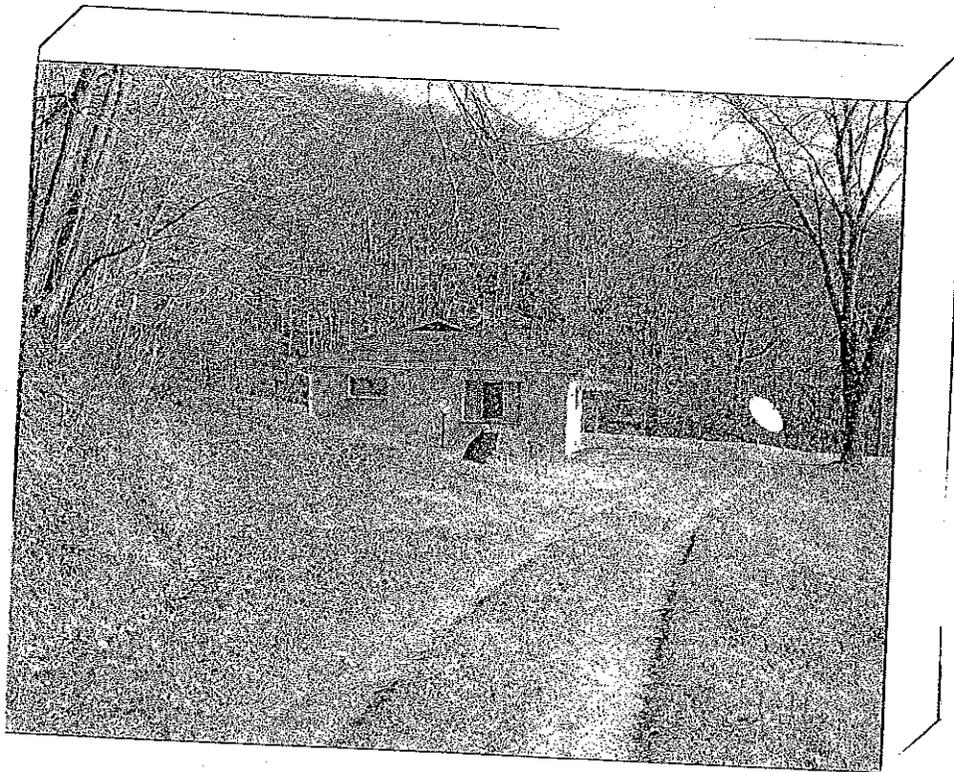
Metal Gate

Old County Road 26 (Dirt & Grass)

County Road 26 (Asphalt)

C-26





Portion of plaintiffs' Trial Exhibit 2

Driveway and Appellees' Residence

"spur" to left side of picture

Questions concerning construction and maintenance of the Appellees' driveway were raised during the litigation. The testimony from the Appellants was that their earliest memories of using the driveway to reach their farm was around 1960 (Trial transcript, pp. 17, 57, 66, 88). When asked about maintenance of the driveway, Kenneth Newman testified "from time to time I can remember that he [his father] would sometimes place a rock in the road or break it up with a sledge hammer, some small rocks and things, sandstone and whatnot. He did a lot of maintenance on the upper portion of the road" (Trial transcript, p. 26, lines 10-14). The upper portion being referred to is above the T. M. Newman easement (Trial transcript, p. 26, lines 15-16). During the ownership period of the Appellees, neither the Appellants nor their ancestors in title have done any maintenance on the driveway.

IV. Legal Arguments

A. The Circuit Court Did Not Err in Declaring the "T. M. Newman" Right of Way to be an Easement in Gross

A significant question in this appeal is whether the easement obtained in 1940 by Thomas M. Newman, an ancestor of Appellants, survived his death in 1946 and conveyed unto them a right of way over the present driveway of the Appellees. The Circuit Court correctly decided that the T. M. Newman agreement of 1940 created an easement in gross and not an easement appurtenant. Thus, said easement was an individual easement and ceased in 1946 when T. M. Newman died. It did not attach to the Appellants' land and did not confer a permanent easement upon the Newman family.

T. M. Newman was the uncle of the Appellants, having been the brother of their father, Hugh Newman (Trial transcript, p. 13, line 3). Appellants testified that T. M. Newman lived on the family farm with his mother Ida Newman and father during much of his life (Trial transcript, p.13, line 16). It is not contested that in June, 1940, at the time the agreement was executed between T. M.

Newman and Appellees' predecessor in title, Gladys Iris Short Elwell and her husband, Cyril John Elwell, that T. M. Newman did not have an ownership interest in the Newman farm nor did he ever prior to his death (Trial transcript, p. 14, line 17).²

The law recognizes several types of easement, including an "easement in gross" and an "easement appurtenant" which are relevant to the Court's analysis and ultimate decision in this case. An "easement in gross" has been defined in Black's Law Dictionary and cited in Ratino v. Hart, et al., 188 W.Va. 408, 424 S.E. 2d 753 (W.Va. 1992) as follows:

An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with the death of the grantee.

Ratino @ p. 756

An "easement appurtenant" has been defined as:

An incorporeal right which is attached to and belongs with some greater and superior right or something annexed to another thing more worthy and which passes as an incident to it and is incapable of existence separate and apart from the particular land to which it is annexed.

Holland v. Flanagan
81 S.E. 2d 908, 912 (W.Va. 1954)
Citing Black's Law Dictionary, Fourth Edition

An "incorporeal right" means "right to intangibles, such as legal actions, rather than rights to property (right to possession or use of land)" Black's Law Dictionary, Sixth Edition, page 767.

² T. M. Newman had conveyed his previously inherited interest in the property to his mother in April, 1932, as did his siblings who were of age. (See Exhibit 7 to Defendants' Motion for Summary Judgment.)

The 1940 agreement gives to the "party of the second part" (Newman) the right and privilege to use any loose rock to build the twenty (20) foot road easement. It also imposes on "the party of the second part" the obligation to build a three foot high wall along the lower side of the easement. Within the document was an agreement that the singular party of the second part, T. M. Newman, would pay the Elwells for any damage done during construction (Defense Trial Exhibit 1). All three conditions either granted rights or imposed obligations on T. M. Newman, not his family or heirs or successors in title if any right of title or interest survived his death in 1946. There is no evidence that T. M. Newman ever laid the first stone in the driveway or constructed the mandatory three foot wall anywhere along the personal right of way. The existing driveway is not twenty (20) feet in width as called for in the agreement. Trial testimony by the Appellants was to the effect that the driveway was built around 1960 (Trial transcript, p. 100, line 15). Thus, it is likely that T. M. Newman never used the easement since he died in 1946.

The final paragraph of the agreement makes the intent of the grantors abundantly clear that this agreement was personal and not to be considered appurtenant to the land. The paragraph states:

"It is understood and agreed between the parties hereto that the said 20 foot right of way or road is to be used and enjoyed for road purposes only, by the parties of the first part and the second part respectively, and is not to be considered as a public road."

(Defense Trial Exhibit 1)

The grantors restricted the use of this right of way to themselves and T. M. Newman, the "second part" and the word "respectively" refers to those individuals along with the words "parties hereto." Further, the grantors specifically stated that the right of way was not to be a

public road. The public would have included, in 1940, everyone other than the Elwells and T. M. Newman. T. M. Newman obtained permission to build a road, accepted the obligation to be responsible for money damages and agreed to limited access over said road to himself and the grantors. If the current owners, the Appellees, were attempting to enforce money damages against the alleged successors in title for damages or to compel said successors to build the never constructed three foot wall the length of the right of way, this Court would likely dismiss the Appellees' claim as being without a legal basis.

The West Virginia Supreme Court held in Post v. Bailey, 110 W.Va. 504, 159 S.E. 2d 524 (1931) that "Whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of the surrounding circumstances." Further support is found in the Ratino decision citing Mays v. Hogue, 163 W. Va. 743, 260 S.E. 2d 291 (1979) and Jones v. Island Creek Coal Company, 79 W. Va. 532, 91 S.E. 2d 391 (1917) which held:

"If an easement granted in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate."

Ratino @ 755
(Emphasis added)

In June, 1940, T. M. Newman owned no real estate adjacent to or annexed to the property now owned by the Appellees. The Newman farm would have been the "dominant estate." T. M. Newman, for reasons that died with him in 1946, did not obtain for his mother, the owner of the "dominant estate," any right to use or otherwise travel across the lands of the grantors (Elwells) in 1940. The circumstances surrounding the granting of the easement must be construed from

the four corners of the document. An unusual feature of the agreement is that T. M. Newman signed the agreement, an unnecessary but significant act (Defense Trial Exhibit 1). The Elwells, as grantors, had the sole power to grant a right of way across their lands to T. M. Newman. His signature is an affirmation that it was an easement in gross and personal to him and no one else. If it was other than personal, it would not have been signed by T. M. Newman and would not have used the term "respectively" in the final paragraph in referring to "use and enjoyment" and the grant not being a "public road." The opposite of public is private. The case law definitions of the two types of easements made it mandatory that T. M. Newman must have been an owner of the dominant estate in the adjacent land in order to have obtained an easement appurtenant and not an easement in gross. (Ratino @ 756). The document clearly states it is an "agreement" and not a deed which conveys a permanent easement (Defense Trial Exhibit 1).

Appellants' reliance on Stricklin v Meadows, 209 W.Va. 160, 544 S.E. 2d 87 (2001) is misplaced and the facts of Stricklin are distinguishable. The Stricklin case involved a factual situation dealing with a dominant estate and a servient estate. The Stricklin decision involved a dispute between adjacent landowners, not mere tenants, as was T. M. Newman, regarding the use of a fifteen foot right of way shown on a map contained in the chain of title. The opinion quotes language from prior deeds that used the term "together with the improvements therein and the appurtenances thereunto belong" The case at bar does not contain any such language.

The case of Shia v. Pendergrass, 222 S.C. 342, 72 S.E. 2d 699 (1952) is instructive in its holding where that Court held:

"An easement is either 'appurtenant' or 'in gross.' An appendant or appurtenant easement inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof. It attaches to, and passes

with, the dominant tenement as an appurtenance thereof. An easement, or right of way, in gross is a mere personal privilege to the owner of the land and incapable of transfer by him, and is not, therefore assignable or inheritable.”

.....
The evidence fails to establish that the alleged right of way has a terminus on respondent’s lot, and the absence of a terminus on his property is fatal to his claim to an appurtenant easement.

Id., p. 703

The South Carolina Supreme Court in a very recent opinion (January 20, 2009) restated its position that an “easement appurtenant” must have at least one terminus “on the land of the party claiming it” (Windham v. Riddle, 2008 WL 5510893 (S.C.)).

T. M. Newman’s lack of ownership of the adjacent, dominant lands and the fact that the right of way does not terminate, connect or come within approximately nine hundred feet (900’) of his mother’s real estate is fatal to Appellants’ claim of an appurtenant easement along the driveway of the Appellees (Trial transcript, p. 99, lines 10-22). There was no ability by T. M. Newman to assign or devise his easement to others.

The T. M. Newman right of way ran from the county road along the base of the hill and connected to “a 20 foot road easement now in use.” It did not connect to the Newman farm. Marty Newman acknowledged that significant fact in his testimony (Trial transcript, p. 99, lines 10-22). With the lack of a terminal point connecting the T. M. Newman easement and the Newman property, there can be no “easement appurtenant” created from the 1940 agreement. Nothing could attach and run with the Appellants’ property.

Appellants concede that T. M. Newman did not own any portion of the adjacent property (Trial transcript, p. 14, line 17) and advanced the theory that mere purported residence by

T. M. Newman with his mother is adequate or a “putative heir” status with an “inchoate or future interest in the Newman property” is somehow equal to ownership (Appellants’ Brief, p. 25, paragraph 3). It is not sufficient for legal purposes to be a resident and T. M. Newman died without having gained an inheritance or stake in the real estate.

Appellants ignore the significance of the Ratino decision by not citing it because the West Virginia Supreme Court recognizes the requirement that in order for an easement to be appurtenant, there must be linkage between the holder of the easement (T. M. Newman) and the ownership of the adjacent (dominant estate) land. The Ratino definition of an easement in gross as fully set out above makes it clear that unless T. M. Newman had “ownership of estate in other land” (Ratino, p. 756) then the easement is personal and “usually ends with death of grantee.” (*Id.*)

In a footnote in their Brief (p. 10), Appellants attempt to introduce an alternative relief theory not raised at trial of an easement by necessity. Having not raised it below, this Court should not consider that issue. Case law is consistent that in order for an easement of necessity to be created, there must have been a unity of ownership of the dominant and servient estates, followed by a severance thereof (Carstensen v. Chrisland Corp., 247 Va. 433, 442 S. E. 2d 660 (1994), Jordan v. Shea, 2002 ME 36, 791 A. 2d 116 (2002)). There is no evidence that the Appellants’ and Appellees’ land were ever united in ownership.

Appellants’ effort to bootstrap their claim to an easement in gross obtained in 1940 by an uncle is a fatal flaw to their entire claim of a permanent right of way across Appellees’ lands.

B. The Cabell County Circuit Court gave appropriate weight to the evidence.

The parties agreed to have a bench rather than a jury trial in this matter. The Circuit Court did not ignore any significant fact, improperly rely on any testimonial evidence, or give improper weight to the testimony of Appellee James Michel or other hearsay evidence given by both the Appellants, their witnesses and Appellee James Michel.

The trial judge stated on at least two (2) occasions that he would give such weight to hearsay evidence as he felt was useful. In sustaining an early Appellee objection to hearsay testimony by Appellant Kenneth Newman, the trial judge informed the parties, after initially sustaining the objection, that he reversed his decision by stating:

I'm going to, as far as this goes, and the hearsay ruling, I'm going to change. I'm going to listen to it and I'll give it what weight and credibility as may be useful. Were there a jury here, I would have to absolutely exclude it.

Trial transcript, p. 20, lines 11-15

At the conclusion of the trial, when the Court directed counsel for both parties to submit findings of fact and conclusions of law, the Court stated:

Keep in mind - - keeping in mind the burden of proof and the nature of the testimony that I, in order to get anything in for proper - - I've been a little loose with the hearsay rules, but in deciding the weight to be given that testimony, I may not be as loose.

Trial transcript, p. 145. lines 4-8

Appellants objected to hearing testimony from Appellee James Michel concerning statements made by a former owner, Emma Fletcher, regarding a lack of a right of way through her property and having granted permission to the Newman family to use her driveway to access their property. Appellants do not highlight for the Court their trial counsel's questions on the same subject elicited from their first witness in the trial, Kenneth Newman:

Q: At any time, to the best of your knowledge, did Gerry or Emma Fletcher ever give your dad, to the best of your knowledge, permission to use the T. M. Newman right of way?

A: No.

Q: Permission to use the spur?

A: No.

Q: Permission to use the bench that goes up the hill to your property?

A: No. Our dad traveled it.

Trial transcript, p. 19, lines 12-20

This line of questioning brought a hearsay objection by Appellees' counsel, to which the Circuit Court announced it would give the hearsay such "weight and credibility as may be useful" as cited above (Trial transcript, p. 20, lines 13-14). The Appellants, plaintiffs below, opened the door to hearsay testimony about the use of the right of way as being without permission of previous owners of the servient estate. There are other examples of Appellants' hearsay trial testimony that the Court listened to and gave such weight as appropriate, including permissive use:

Q: At any time, to the best of your recollection, did Emma or Gerry Fletcher ever come to anyone and say don't use this?

A. No.

Q: Did they ever say you have our permission to use this?

A: No, sir.

Testimony of Kenneth Newman
Trial transcript, p. 28, lines 2-8

The Court allowed this broad statement that would have included, presumably, all members of the Newman family during the Fletcher ownership period of 1947 - 1973. Appellant

Kenneth Newman, during his direct testimony, stated that no one had ever denied him the use of Appellees' driveway to access the Newman farm (Trial transcript, p. 33, lines 16-19). In testifying about the "old right of way . . . from the river," Appellant Kenneth Newman testified that "No one ever stopped us" when referring to the access used by his ancestors about the "existing 20 foot road easement" referred to in the T. M. Newman agreement (Defense Trial Exhibit 1) (Trial transcript, p. 54, line 23). Kenneth Newman was born in 1947 (Trial transcript, p. 14, line 15). His father Hugh Newman died in 1974 (Trial transcript p. 15, line 9). Much of Appellants' testimony was based on events prior to their birth or events that happened when they were young children.

The Trial Court based its decision on the law and the evidence it heard and clearly indicated that hearsay evidence would be allowed and filtered by the Court to reach its decision. Additionally, the Court personally viewed the disputed easement prior to the trial. Appellants have failed to establish that the underlying decision was a result of a significant abuse of discretion in allowing a relaxed, acknowledged standard of enforcing the hearsay rules of evidence by all parties. An experienced Circuit Judge is in a unique position to allow both parties to fully present their cases and to base his decision on the facts presented and the controlling law. The Circuit Court did not abuse its discretion in allowing some hearsay testimony elicited by both parties and giving it appropriate weight and credibility in reaching his decision during the bench trial.

C. The Post 1946 Use of the Appellees' Driveway Was Permissive.

The Circuit Court, based on the facts and the law, correctly decided that the easement obtained by T. M. Newman was an easement in gross and individual to him and not an easement appurtenant that attached to the ownership of the dominant estate (Newman farm) and subjected the servient estate (Appellees' property) in perpetuity to said easement. The agreement between T. M. Newman and the Elwells ceased with the death of T. M. Newman in 1946.

Appellants, plaintiffs below, failed to produce sufficient credible, clear and convincing evidence that the continued use of the Elwells', then the Fletchers', and now the Appellees' driveway was anything but with permission. Their repeated attempts to place in the trial record that no prior owner ever denied them permission does not morph over time into a prescriptive use of the lands of another. Appellee James Michel testified that Appellants had his permission to use his driveway until said permission was withdrawn on the day of the trial (Trial transcript, pp. 117, 123, 130, 131, 133, 134 and 137).

Examples of Appellee James Michel's testimony as to allowing Appellants to cross his driveway to reach their property were:

Q: . . . have you ever refused the Newmans access to their property by parking at the base of your hill?

A: No.

Trial transcript, p. 117, lines 20-23

A: (Michel) . . . She (Fletcher) said she permitted the Newmans to use the driveway. She gave them permission.

.....

Q: And she didn't tell you how long?

A: (Michel) She just said she permitted the Newmans

to use the driveway. She gave them permission.

Q: Now, I'm sure you've got something to this effect, where is the document that says you revoked that permission?

A: The document that says I revoked that permission?

Q: Yes, sir.

A: I never revoked that permission.

Trial transcript, p. 130, lines 13-22

Q: And you never got anything in writing, we've established that. Do you have anything in writing that shows that you gave permission to the Newmans to use your driveway?

A: The Newmans know they had permission to use the driveway.

Q: How did they know that?

A: Because I told them they had permission.

Q: Who did you tell?

A: I told Hugh Newman in '74.

Trial transcript, p. 137, lines 1-9

It was not until this litigation was filed that Appellees withdrew their permission for Appellants to use their driveway to access their farm (Trial transcript, p. 123, line 7-8). Because part of the "old road" had become impassable approximately thirty (30) years ago, the Appellants had to park at the foot of the hill near Appellees' house and walk the remaining nine hundred (900) feet (Trial transcript, p. 117, lines 5-12). Appellant Marty Newman testified that:

Q: And over the last 30 years when you wanted to, you've parked at the base of the hill and walked up, correct?

A: That is correct.

Q: And was that with his (Appellee's) explicit permission?

A: He never gave me permission to park there. As a matter of fact, a lot of times he come out and say you don't have any business being here. You don't own anything up there, your mother owns the property, and he would - - didn't ask me to leave, but he would just browbeat me a little bit.

Trial transcript, p. 102-103
(Emphasis added.)

In their brief, the Appellants advance a theory that actions by the Newman family's use of the T. M. Newman right of way after his death in 1946 was prescriptive, equating it to trespassing (Appellants' Brief, p. 21). Case law is clear that there had to be an affirmative action of rejection or renunciation to trigger the beginning of prescriptive use (Jamison v. Waldeck United Methodist Church, 191 W. Va. 288, 445 S.E. 2d, 229, 233 (1994)). The four Newman family members who testified during the trial all stated that they never sought or felt they needed permission to travel over the lands of the Fletchers (Kenneth Newman, Trial transcript, p. 47, 54, 57-58; Marty Newman, Trial transcript, p. 104, line 16; Margie Phillips, Trial transcript, p. 68, 70; Myrtle Belcher, Trial transcript, p. 85, lines 13-23). Appellants' claim that the Circuit Court's decision in this case makes all use of the driveway after the 1946 death of T. M. Newman prescriptive is without a legal basis. The fact that the T. M. Newman document was an "agreement" is clear and convincing evidence that it granted permission to him.

The metes and bounds of the T. M. Newman easement ran “around the base of the hill” and connected to the “center line of the 20 foot road easement now in use” (Defense Trial Exhibit 1). There is no legal claim by Appellants under any theory of law that the T. M. Newman easement extends beyond where it intersects with the old farm road referred to as the “road easement now in use.” Appellants must concede that the old farm road was used prior to approximately 1960 when the driveway was constructed. Appellants testified that after the house was built (1960-1963), they used the Fletcher’s driveway (Defendants’ Motion for Summary Judgment, p. 10). The building of the house in the middle of the easement caused the “spur” to be constructed. The “spur,” a cut up the hill connecting to the old road, was not part of the Newman easement either (Trial transcript, p.99, lines 10-22).

Appellants’ trial testimony was intended to create proof that they did not have or need permission of Appellees or their predecessors in title to establish a prescriptive easement. Appellants cited the trial testimony of Kenneth Newman for the proposition that the Fletchers never gave his father, Hugh Newman, permission to use the T. M. Newman easement (Trial transcript, p. 19, lines 12-24). However, Appellants testified that their father’s relationship with the Fletchers was always friendly, like “Friends like your next door neighbor would be” (Trial transcript, p. 57, lines 19-20). Ken Newman stated:

Q: The Fletchers never refused you or your father, your mother, your brother, anybody, from getting up the hill?

A: No, sir, or any of relatives either.

Id, p. 57, line 24, p. 58, lines 1-2

Kenneth Newman also testified that the Fletchers never denied anyone access to the Newman property by way of the driveway and never personally gave him (Kenneth Newman)

permission (Trial transcript, p. 28, lines 1-8). Appellants' testimony that they never heard or requested permission to use the driveway is not sufficient to meet their burden of clear and convincing evidence to establish their claimed prescriptive right of way in this case. A lack of personal knowledge of expressed permission does not satisfy the requirements to establish a prescriptive easement. Appellants' carefully worded testimony did not meet their burden of clear and convincing evidence. Appellant Marty Newman likewise testified that the Fletchers never refused any Newman family member permission nor did he have a specific memory of being personally granted permission (Trial transcript, p. 96-97). Appellants' sister, Margie Phillips, gave similar testimony regarding not being denied access nor receiving explicit permission (Trial transcript, p. 68) as did Appellants' aunt, Myrtle Belcher (Trial transcript, p. 79, lines 14-16 and p. 85, lines 10-23).

Their testimony helps establish and support the Circuit Court's decision that the use of the Appellees' driveway has always been with the permission of the estate's owner. There is nothing in their testimony that would be clear and convincing evidence that the easement use was ever done without the permission of the current or previous owner of the property. Appellants' inability to provide positive proof of adverse use or establish prescriptive use is significant. The Circuit Court, as the finder of fact, was in the best position to judge the credibility of the witnesses.

The 1940 T. M. Newman easement was, on the face of the document, an "agreement" that granted T. M. Newman permission to have an "easement or right of way, for road purposes only, across the lands" of the grantors (Defense Trial Exhibit 1). That was permissive, not in any way prescriptive, use of the grantors' land. Being an easement in gross individual to T. M. Newman,

the Appellants' have failed to produce any clear and convincing evidence that the permission granted in 1940 was ever withdrawn after the death of T. M. Newman in 1946 or renounced by a Newman family member, keeping in mind the driveway in question was not built until around 1960 (Trial transcript, p. 100, line 15).

The decisions in Faulkner v. Thorn, 122 W. Va. 323, 9 S.E. 2d 140 (1940) and Jamison are controlling in this case. Faulkner stands for the proposition that once permission is given by the owner of real estate, such permission shall continue unless otherwise revoked or renounced by the recipient of the permission and then the continued use of the same in a hostile or adverse manner. Appellants all testified, as detailed above, as to the lack of any specific request or perceived need to request continuing permission to cross the lands of the Appellees' predecessors in title. Appellee James Michel testified that he had granted members of the Newman family permission to use his driveway, park at the base of the hill, and walk to their land (Trial transcript, p. 117, 137). The upper roadway had become impassable about thirty (30) years ago (Trial transcript, p. 117).

Syllabus Point 2 of the Faulkner decision states:

The use of a way over the land of another, permissive in its inception, will not create an easement by prescription no matter how long the use may be continued, unless the licensee, to the knowledge of the licensor, renounces the permission and claims the use as his own right, and thereafter uses the way under his adverse claim openly, continuously and uninterruptedly, for the prescriptive period.

Faulkner @ 140

Appellants have produced no evidence showing a permissive to prescriptive easement conversion. The Jamison court in 1994 cited with favor the Faulkner holding and added the following supportive language:

Our case law indicates that once permission is given by the owner of a servient estate, such permission will continue unless otherwise revoked or renounced with continued use, or if there is an act indicating a hostile or adverse claim.

Jamison, p. 292, FN3

Town of Paden City v. Felton, 136 W. Va. 127, 137-138, 66 S.E. 2d 280, 287 (1951) also requires the person claiming the prescriptive easement after starting with permission, to have made a decisive act manifesting an adverse or hostile claim. Appellants produced no evidence that they or any ancestor had affirmatively renounced their permissive use under the 1940 agreement access to the driveway. Even though the driveway was not constructed until approximately 1960, the 1940 Newman agreement had granted T. M. Newman permission for use of the driveway and other Newman family members continued to use the easement after his death without the objection of any previous owner of the Michel property, including Appellees, until this litigation.

D. Appellants Failed to Establish a Prescriptive Easement by Clear and Convincing Evidence.

Appellants assert incorrectly that they presented at trial clear and convincing evidence that they had perfected a prescriptive easement over the Appellees' land having failed in their claim to have an easement appurtenant under the T. M. Newman 1940 agreement (Defense Trial Exhibit 1).

The case law on point requires the following to establish prescriptive use:

The open, continuous and uninterrupted use of a road over the land of another, under bona fide claim of right, and without objection from the owner, for a period of ten years, creates in the user of such road a right by prescription to the continued use thereof. In the absence of any one or all such requisites, the claimant of a private way does not acquire such way by prescription over the lands of another

Jamison, Syllabus Point 1
Citing Holland v. Flanagan,
139 W.Va. 884, 81 S.E. 2d 908 (1954)

“The burden of proving an easement rests on the party claiming such right and must establish by clear and convincing evidence.” (Berkeley Development Corp., Syllabus pt. 1, p. 733.

Appellants, in the last thirty years, have visited their farm a few times each year.

Appellant Kenneth Newman estimated he went to the property “several times a year” which he stated meant “seven or eight, twelve to fourteen. I don’t know.” (Trial transcript, p. 49, lines 11-16). The holding in Veach v. Day, 172 W.Va. 276, 304 S.E. 2d 860 (1983), an adverse possession case, stated that “occasional or sporadic adverse use does not constitute ‘continuous use’ ” *Id.*, p. 278. Citing Wade v. McDougle, 59 W.Va. 113, 52 S.E. 1026 (1906) and Eagle Land Co. v. Ferrell, 98 W.Va. 608, 125 S. E. 589 (1924), the Veach Court held “that mere

occasional grazing of cattle or cutting of timber or of sod on land does not constitute possession sufficient to give rise to adverse possession” *Id.*, p. 278. Kenneth Newman admits that, at least since 1974, his family had not used the family farm for other than an occasional picnic, hunting or hiking (Trial transcript, p. 25, lines 4-16). Applying the Veach holding to this case, Appellants fail to establish their use was continuous to establish a prescriptive easement.

The determination by the Circuit Court, based on the facts and the testimony, that the T. M. Newman easement was in gross and not appurtenant, removes any “bona fide claim of right” under which their actions occurred.

Appellants’ trial testimony regarding their lack of knowledge of explicit permission or ever being denied access, coupled with Appellee James Michel’s affirmative testimony of granting permission until this litigation began, eliminates the mandatory element of adverse use to claim a prescriptive easement. There was no affirmative action by Appellants or their ancestors that renounced or rejected the obvious permission the Newman family had been granted and enjoyed to access their property nor was there a ten year period when the access was used without permission and adverse to Appellees or their predecessors in title.

Appellants’, on page 19 of the Brief, claim support for their claimed prescriptive easement because the deeds in the chain of title to Appellees’ land contain a “subject to” paragraph referring to the 1940 Newman easement. A “subject to” clause does not, in and of itself, create an easement. The subsequent conveyance deeds reflected what was on the record books and did not constitute an intent by the grantors to create an individual easement to a man who died in 1946.

The Supreme Court of Georgia in Dyer v. Dyer, 275 Ga. 339, 566 S.E. 2d 665 (2002) addressed the formality which an easement in gross should contain by stating: "Even though an easement in gross is a personal right, inasmuch as it is an interest in land, its express grant should be drawn and executed with the same formalities as a deed to real estate" *Id.*, p. 667. The 1940 agreement was signed by all three parties, notarized and recorded in the County Clerk's office. Thus, the fact that the deeds in the chain of title has verbiage stating the Appellees' property is "subject to" an agreement does not change the character of the 1940 agreement and does not cause it to attach to the land.

The Appellees' residence was constructed by a prior owner (Fletchers) in approximately 1960-1963 and sits in the middle and at the eastern end of the purported Newman easement which is clear evidence of the superior rights of the Fletchers to control their driveway. Had it been otherwise, the Appellants' father would have objected to the construction of the house.

Case law indicates that to be an easement appurtenant, there must be a terminus on the dominant estate (Shia, p. 703). The survey submitted by Appellants within their brief (p. 5) and made part of this brief, clearly shows the terminal point of the T. M. Newman easement to be at the connecting point of the old farm road. It does not reach the southern property line of the Newman farm. In addition, the "spur" that has been referred to during the trial and reflected in the pictures on the plat (Plaintiff's Trial Exhibit 2) is not part of the T. M. Newman easement. The spur developed when the house was built in the middle of the Newman easement which is supportive of the fact that the Fletchers, who built the house, did not believe there was a continuing easement across their driveway and had granted continuing permissive use of their driveway, built in 1960, after 1946.

Appellant Marty Newman's trial testimony confirmed these important facts:

Q: And you would agree with me that the T. M. Newman right of way actually doesn't go up the hill, does it?

A: The T. M. Newman right of way did not go up the hill.

Q: It had to connect to the other - the old road, which came up from the river and went by the old barn and the old house, . . . it would have gone up to the right to connect with the road above it. Would you agree with that?

A: That is correct.

Q: So the spur was never part of the document - - it wasn't part of the T. M. Newman?

A: The document wasn't on the T. M. Newman, no, the spur on the side of the road on the left.

Trial transcript, p. 99, lines 10-22

Marty Newman further confirmed that fact that the T. M. Newman did not reach his property with his testimony:

Q: Sir, how did the T. M. Newman give you access to your property?

A: It was my understanding that the T. M. Newman ran into an existing right of way.

Q: The T. M. Newman in and of itself did not give you access to your property?

A: It gave us an all new route into.

Q: It connected to the old easement.

A: The old right of way

.....

Q: So the two together gave you access to your property?

A: That's correct.

Trial transcript, pp. 105-106

Appellant Kenneth Newman acknowledged the need to use the spur to connect to the old road when he testified:

“We traveled down Mud River Road. We'd use the T. M. Newman right of way. We'd pass to the left of the Fletcher house on (the) spur and continue up the hill on the old original right of way.”

Trial transcript, p. 22, lines 20-23

Connecting to a portion of the old farm road that ceased being used approximately fifty (50) years ago supports Appellees' position that the T. M. Newman was an easement in gross and not an easement appurtenant. The failure to reach and connect to a boundary line of the Newman property supports the Circuit Court decision. The mandatory elements required to establish a prescriptive easement were not proven by clear and convincing evidence to the satisfaction of the finder of fact in this case.

V. Conclusion

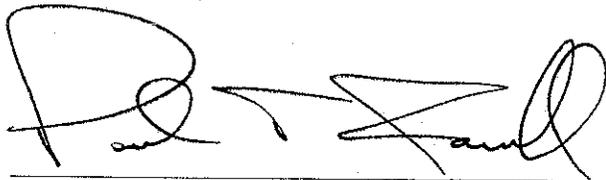
The facts and the law support the finding that the T. M. Newman right of way was an easement in gross and not an easement appurtenant and therefore did not attach to Appellees' land.

The Circuit Court did not abuse its discretion in allowing limited hearsay during the bench trial elicited by both parties. The Circuit Court was in the best position to judge the credibility of the witnesses, facts and applicable law.

The Appellants failed to introduce credible evidence that they had met all the elements to establish a prescriptive easement over the driveway of the Appellees.

Appellants failed to introduce clear and convincing evidence to meet their burden of proof. The Circuit Court's findings of facts were not clearly erroneous such that this Court should reverse the lower Court's decision.

APPELLEES JAMES AND TOMASINA MICHEL
By counsel

A handwritten signature in black ink, appearing to read "Paul T. Farrell", written over a horizontal line.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

KENNETH DALE NEWMAN and
MARTY LEE NEWMAN,

Appellants,

vs.

NO. 34332

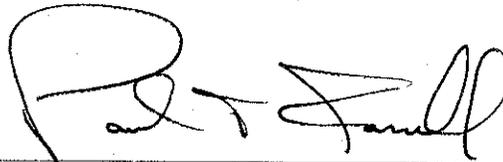
JAMES E. MICHEL, JR. and
TOMASINA MICHEL, his wife,

Appellees.

CERTIFICATE OF SERVICE

I, Paul T. Farrell, do hereby certify that I have served the foregoing *Brief of Appellees* by depositing a true copy of the same in the United States mail postage prepaid, this 5th day of February, 2009, as follows:

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