

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**KENNETH DALE NEWMAN
AND MARTY NEWMAN**

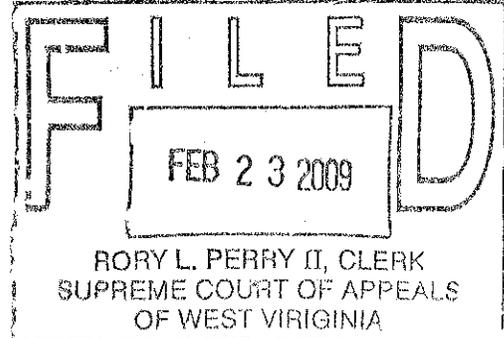
Appellants,

v.

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

Appellees.

CASE NO: 34332



REPLY BRIEF OF APPELLANTS

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I. Introduction

The Newman family currently has no access to their ancestral home. Prior to the Circuit Court's 2007 Order, they had legal and rightful access to their property via the T.M. Newman Easement. The Circuit Court abused its discretion to the substantial prejudice of Appellants by relying on the hearsay testimony of Appellee for its ruling that the Appellants had not met their burden of establishing a prescriptive easement. But for this inadmissible hearsay, Appellants have met their burden and established by clear and convincing evidence a prescriptive easement across the lands of the Appellees. Furthermore, the trial court, in its determination that the T.M. Newman Easement was in gross, made a fundamental error by failing to fully appreciate and consider the circumstances in which the Easement was granted, which clearly shows that the T.M. Newman Easement was intended by the parties to run with Appellants' farm. The Circuit Court's erroneous ruling has permitted Appellees to deny Appellants access to their farm and has landlocked their property.

II. The Circuit Court Abused its Discretion in Relying on Hearsay Testimony of Appellee James Michel

The Circuit Court improperly admitted hearsay testimony of Appellee and relied on the same in its erroneous ruling that Appellants' use of the T.M. Newman Easement was permissive. Although Appellees attempt to persuade this Honorable Court that the Circuit Court gave appropriate weight to all evidence in the case, the Circuit Court's Final Order speaks otherwise.

Appellees do not dispute that they have no personal knowledge of Appellants' use of the T.M. Newman Easement prior to their purchase of the subject property in May 1973. Appellees further do not dispute that Mr. Michel's testimony regarding what his predecessor in title, Mrs. Fletcher, purportedly told him about the Appellants' use of the T.M. Newman Easement squarely falls within the definition of inadmissible hearsay under Rules 801(c) and 802 of the West

Virginia Rules of Evidence. As set forth fully in Appellants' Appeal Brief, the Fletcher hearsay statements were expressly relied upon by the Circuit Court in both its findings of fact and conclusions of law. Simply put, absent the hearsay statements, there is no evidence that the Fletchers granted Appellants permission to use the easement or that they challenged Appellants' bona fide right to use of the same.

Despite the Circuit Court's abuse of discretion in reliance on this hearsay, Appellees contend that Appellants had "opened the door" to consider the same through Appellant's own "hearsay testimony" that their use of the Easement was without permission of previous owners of the servient estate. The fundamental problem with this argument, however, is that the alleged "testimony" of Appellants does not constitute hearsay.

Appellees cite two specific lines of questioning as evidence of hearsay statements of Appellants, which were considered by the Circuit Court. In each line of questioning, Appellant, Ken Newman, was asked if he was aware, to the best of his knowledge, if the Fletchers had ever provided permission to use the Easement. In response to each such line of questioning, Mr. Newman simply responded "No." Tr. Tran. p. 19 and 28. Mr. Newman did not testify about any communication he had with the Fletchers or any statements that they may have made. Rather, Mr. Newman simply denied knowledge of the Fletchers having ever given him or his family permission to use the Easement. This testimony does not fall under the recognized definition of hearsay because there were no out of court statements (verbal, non-verbal, written or otherwise) offered by Appellants to prove the truth of any matter asserted.

The Circuit Court did not consider any hearsay testimony of Appellants in reaching its decision in this case. To the contrary, the Circuit Court undeniably accepted that the Appellees relied upon representations by Emma Fletcher that there was no right-of-way or easement over

their driveway at the time of Appellees' purchase of the property and ruled that the permission of Emma Fletcher continued without interruption until she sold the property to Appellees in 1973. Absent the Fletcher hearsay statement, there is no evidence of permissive use of the Easement prior to Appellees' 1973 purchase of the property. Rather, the record consists of the express grant of the T.M. Newman Easement in 1940, with unchallenged conveyance of same through the deed record, and the testimony of Appellants and their family members who claimed a bona fide right to use of the Easement. Again, absent the hearsay statements, there is no evidence that Mrs. Fletcher or her predecessors in title disputed that the subject property was subject to a valid easement or otherwise challenged Appellants' belief that they had a bona fide right to use the same.

The Circuit Court clearly erred in admitting and relying upon the inadmissible Fletcher hearsay statements to the prejudice of Appellants. This Court should, therefore, reverse the Circuit Court's finding that the Appellants' use of the T.M. Newman Easement, at least between 1940 and 1973, was permissive.

III. Appellants' Use of the Easement was Continuous and Uninterrupted

Appellees unsuccessfully argue that Appellants failed to establish a prescriptive easement because there was no continuous and uninterrupted use for 10 years. Appellants satisfied the continuous and uninterrupted use requirement well before Appellees' 1973 purchase of the subject property. The uncontroverted testimony at trial establishes that Appellants and their ancestors began, *at latest*, using the T.M. Newman Easement in 1958 or 1959. After purchase of the T.M. Newman Easement in 1940, Appellants and their ancestors used both the T.M. Newman Easement and the Old Road to access the Newman Property. By approximately 1958 or 1959, primarily out of convenience, the T.M. Newman Easement access essentially replaced

the Old Road access as Appellants' primary means of ingress/egress to the Property. Tr. Tran. p. 21 at 10–13; 57 at 5–7.

Throughout the 1960's, Appellants and their father continuously and regularly used the T.M. Newman Easement to connect with the Old Road to the Newman Property for farming and recreation. Tr. Tran. p. 21–25; 90–93. In the spring through fall months, Appellants traversed the T.M. Newman Easement to the Old Road approximately two to three times a week to work in the family gardens. Tr. Tran. p. 21–25; 65–66. They also regularly accessed the Property via the T.M. Newman Easement during other parts of the year for hunting and recreation. Tr. Tran. p. 21; 25–26. From as early as 1958, Appellants and their family drove motor vehicles across the T.M. Newman Easement and continued up the Old Road to the Newman Property. Tr. Tran. p. 23–24, 28–32. Appellants' father maintained the T.M. Newman Easement and continued to tend his gardens and work the Property until falling ill in 1973. Tr. Tran. p. 26–27; 30–31. From 1975 forward, Appellants have traversed the T.M. Newman Easement to their property anywhere from 7 to 14 times per year.

Appellants and their families' extensive use of the Easement, particularly between 1958 and 1974, cannot be compared to the "sporadic and occasional" use by the litigants in the cases cited in Appellees' Response Brief. See, Veach v. Day, 304 S.E.2d 860 (1983) (use of a purported easement amounted to "a few times a year to hunt upon the land"); Wade v. McDougle, 59 W.Va. 113, 52 S.E. 1026, Syl. ("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."); Eagle Land Co. v. Ferrell, et al., 97 W.Va. 608, 125 S.E. 589, 591 (continuous possession of the land required more than "occasional acts of trespass, by pasturing and grubbing on the land, and perhaps planting a few trees.").

From 1958 to 1974, Appellants established significant continuous and uninterrupted use of the Easement. Appellants could offer no evidence to rebut Appellees significant and ongoing use over this 16 year period because they did not ever acquire the property until May 1973. Appellees, having established by clear and convincing evidence their open and continuous use of the easement for in excess of 10 years, and before Appellants even purchased the property, have satisfied their burden.

IV. Appellants' Used the Easement Under a Bona Fide Claim of Right

Despite Appellees' arguments to the contrary, Appellants use of the T.M. Newman Easement was under a bona fide claim of right under the 1940 T.M. Newman Easement grant, which was conveyed and contained in the deed record until the Circuit Court found the same to be null and void in its 2007 Order. Appellant, Ken Newman, testified that he and his family believed the T.M. Newman Easement gave his family a right to access their property and that is why he continued to use the easement. Tr. Tran. p. 23 at 14 – 21; 74 at 8–9. The Appellees' contention that the Circuit Court's 2007 determination that the 1940 T.M. Newman Easement was in gross does not affect the Appellants' understanding and belief that prior to 2007 they had a bona fide claim of right to use the T.M. Newman Easement. In Walton v. Knight, 62 W.Va. 223, 58 S.E. 1025 (1907), this Court inquired what constitutes a bona fide claim of right in the context of a claim for prescriptive easement. Answering this question, it was found that "whenever ... there has been such use [of a right of way] for a long period, the bona fide claim of right is established, and the owner of the servient estate must rebut the presumption of right, by showing leave or license from him, or protest and objection under such circumstances as to repel the presumption."

In the present case, the Appellants' bona fide claim of right stems from the 1940 T.M. Newman Easement which was described in the deed records as an "easement or right of way for road purposes only." The fact that the T.M. Newman Easement was conveyed in the deed record five times between 1940 and 1973, including the conveyance to Appellees, further supports that the Appellees' predecessors in title also understood and believed that Appellants had an express grant or right to use of the T.M. Newman Easement. "It is ... reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it that could and ought not to be defeated." Walton at p. 1027 (citing Worrall v. Rhoads, 2 What. (PA) 427, 30 Am.Dec. 274).

For thirty-three (33) years prior to Appellees' purchase of their property and thereafter, the Appellants and their ancestors operated under the belief and assumption that they had an express right to use the T.M. Newman Easement. During this same lengthy time period, the record, in absence of the Fletcher hearsay statements, contains not a single challenge to Appellants' bona fide claim of right, either through the legal system or neighborly conversation. Under these circumstances, the law must presume that all parties believed and understood that the Appellants operated under a claim of right.

V. The Newman's Post 1946 Use of the T.M. Newman Easement was Hostile

The legal effect of the Circuit Court's 2007 Order establishes that any use by any member of the Newman family other than T.M. Newman is hostile. Appellees attempt to gloss over the effect of the Order by muddling the legal difference between *rightful* and *permissive* use. Appellees point trial testimony of members of the Newman family, and argue that because no one denied other members of the Newman family their legal right to use of the T.M. Newman

Easement, then their use of it was permissive. This argument is wrong. The mere sufferance or failure to object to another's presence upon the property of another is insufficient within itself to constitute a license to do so, unless that permission is inferred under the circumstances. See Waddell v. New River Company, 141 W.Va. 880 883-84, 93 S.E.2d 473, 476 (1956).

If one accepts Appellees' argument that T.M. Newman Easement was personal to T.M. Newman, then it logically follows that the permission granted in the deed to cross the Elwell's property was a right only given to T.M. Newman. This right did not belong to any other member of the Newman family, and it died with T.M. Newman in 1946. This position is clearly at odds with Appellees' argument that the use of the Easement by other members of the Newman family was permissive. Appellees argue that the use of the Easement by other members of the Newman family was permissive because no one ever denied members of the Newman family use of the Easement. Appellees overlook the fact that the Newman family, and everyone in the Michel's chain of title, believed that the Newman's had a legal right to use the T.M. Newman Easement by virtue of the 1940 deed that created it, as it appeared in the deed of every successor, including Appellees. These circumstances clearly indicate that permission cannot be inferred, because the use by the Newman family was under a *bona fide* claim of right.

There is no evidence other than Appellee's testimony and his hearsay testimony about statements made by Mrs. Fletcher, that the Newman family's use of the T.M. Newman Easement was permissive. Appellee's hearsay testimony is clearly unreliable and inadmissible. Moreover, any permission granted by Appellees to the Newman family to use the Easement is not relevant as it was granted in 1973 or 1974, at least four (4) to five (5) years *after* the prescriptive period already had run. Without evidence that the Appellants' family's use was permissive, there is no burden on Appellants to establish that they renounced permission to use the Easement.

Appellees cannot have it both ways—either the post 1946 use of the T.M. Newman easement by the other members of the Newman family was of right under the terms of the T.M. Newman Easement, or it was hostile. If the Newmans’ use was of right, then it was under the rights granted in the T.M. Newman Easement and the Easement was intended by all to be an easement appurtenant. If the Newmans’ use was hostile, then the Newmans have met this element in their claim for a prescriptive easement.

VI. The Trial Court Erred in Declaring the T.M. Newman Easement an Easement in Gross

West Virginia law is clear: “[w]hether 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.*” Syl. pt. 2 Post v. Bailey, 110 W.Va. 504, 159 S.E.2d 524 (1931) (emphasis added). *See also* Syl. Pt. 1, Ratino v. Hart, 188 W.Va. 408 (1992) (citing Syl. Pt.2, Post v. Bailey, 110 W.Va. 504 (1931)). When measured by this standard, the error in the Circuit Court’s ruling is manifest, as both the language used in the T.M. Newman Easement and the surrounding circumstances clearly establish that the Easement was intended to be an easement appurtenant—a permanent rightful way for Appellants’ family to access their farm.

With respect to the language employed in the document, the Easement is a deed, and this word appears at the top of the document. T.M. Newman paid valuable consideration for the Easement, and the parties apparently went to significant effort to locate the Easement, identify its location with metes and bounds, and included this physical location and description in the deed. The Easement is of significant width (20 feet), and other rights granted in the deed indicate the parties’ intent that the Easement was permanent, including its limitation for road use by both parties, the right to use loose rock for road maintenance, and the covenant to build a wall, although the deed is silent as to when the wall is to be built. The deed requires payment for

damages done to the Elwell property during road construction. Finally, the deed is recorded in the land records of Cabell County, and each of the Elwell's successors in interest, *including Appellees* took title to the Elwell property subject to the T.M. Newman Easement.

While Appellees argue that the intent of the parties must be construed "from the four corners of the document," they fail to do so by basing their version of the parties' intent upon conjecture and a tortured reading of the deed. It is argued that the promises included in the deed that are related to the construction of the wall along the road and the obligation to pay for damages are only limited to T.M. Newman. It is also argued that the language indicating that the Easement was not meant to be a public road somehow shows the parties' intent to limit its use to T.M. Newman. It also is argued that T.M. Newman's signature on the deed is "affirmation" that the Easement was in gross, when there is no evidence in the record as to why T.M. Newman signed the agreement. It is even argued that an action by Appellees to force the Appellants to build the wall referenced in the document likely would be "dismissed by this Court as being without legal basis." These arguments lack substance, focus too narrowly on particular words and ignore *the surrounding circumstances.*" Post v. Bailey, 110 W.Va. at 504.

The surrounding circumstances buttress the argument that the parties intended the T.M. Newman Easement to be appurtenant. It has been established that at the time of the grant, T.M. Newman was living on and working the farm with his mother. The family needed an alternate access to their property because of flooding along the Mud River. There is no evidence to suggest that the Easement was purchased for any other purpose, (*i.e.* economic, leisure, or other activities on the Elwell's property by T.M. Newman) other than for the members of the Newman family to have access to their farm. The fact that every successor in interest to the Elwells took their property subject to the rights granted in the T.M. Newman Easement, even after T.M.

Newman's death, is a significant indicia of the parties' intent. No one challenged the Newman family's use of the Easement—not even the Appellees when they purchased what was the Elwell's property. To argue that there was some other purpose for this Easement—that it was an easement in gross and not meant to grant the Newman family permanent access to their property strains credulity.

Clearly, T.M. Newman had no legal interest in the Newman farm at the time the T.M. Newman Easement was granted. But for this fact there would be no issue. However, surrounding circumstances clearly show that T.M. Newman in fact had a *very real interest* in the Newman property. He was living on and working the Newman farm with his widowed mother when he obtained the grant from the Elwells. T.M. Newman clearly had a future interest in the Newman farm as his mother's putative heir. Had he survived his mother, T.M. Newman undoubtedly would have inherited a legal interest in the Newman farm, as did each of his surviving siblings upon her death. The trial court did not place enough emphasis on these surrounding circumstances. Rather, the Circuit Court focused too strictly upon the legal interest element at the expense of the human element, and by doing so, produced an absurd result.

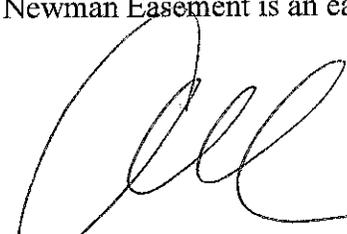
Finally, it is argued that the T.M. Newman Easement is not an easement appurtenant because it does not terminate on the Newman farm. Two cases are cited as legal support for this theory: Shia v. Pendergrass, 72 S.E. 2d 699 (1952); and Winham v. Riddle, 2008 WL 5510893 (S.C. 2008). This argument is without merit because: (1) the cases are not binding in West Virginia; (2) as of February 20, 2009, the Winham decision includes a clear notice above the case caption warning that the opinion has not been released for publication and is subject to revision and withdrawal; and (3) Shia is distinguishable from the instant matter.

In Shia, the court addressed a claim that an alley, located on respondents' property and which bordered and ran parallel to appellant's property line, was either dedicated to public use, or an easement appurtenant to respondent's property. The Shia court found that the alley had not been dedicated to public use, and that the alley was not an easement appurtenant. Unlike the instant matter, there was no written deed or grant of easement at issue in Shia. The requisite terminus is included in South Carolina's definition of an easement appurtenant, Shia, 72 S.E.2d. at 703, but not in West Virginia's definition. While the T.M. Newman Easement does not terminate on the Newman farm, it is undisputed that it connects to what has been called the "Old Road," which in turn runs to and terminates on the Newman farm. Appellees have not challenged the Newman's right to use the Old Road.

VII. Conclusion

As the Circuit Court's erroneous rulings have now landlocked Appellants' property and deprived them of their use and enjoyment of the same, and for all the foregoing reasons, Appellants Kenneth Newman and Marty Newman respectfully request that this Honorable Court reverse the Circuit Court's rulings and find that Appellees have established a prescriptive easement across the T.M. Newman Easement or in the alternative have established that the T.M. Newman Easement is an easement appurtenant to the Newman Property.

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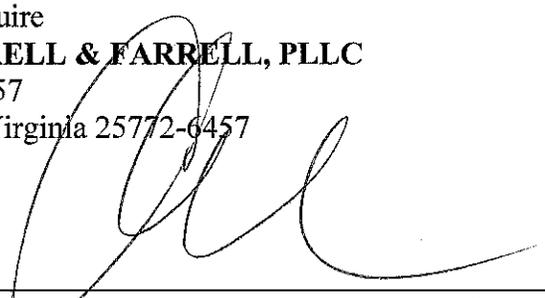
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CERTIFICATE OF SERVICE

I, Charles K. Gould, certify that I have served the foregoing "*Reply Brief of Appellants*" upon the following individual by mailing a true and correct copy of the same, first class postage prepaid, in an envelope addressed to the following counsel of record on this 23rd day of February, 2009:

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