

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

BETTY LOU ZIRKLE CARPENTER,

Plaintiff/Appellee

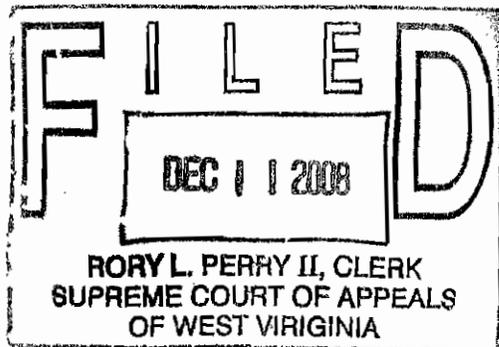
v.

Case No. 34497

SHIRLEY BLANIAR LUKE

Defendant/Appellant

BRIEF OF APPELLANT SHIRLEY BLANIAR LUKE



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v.

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ISSUE: Whether the Appellant enjoys the status of a bona fide purchaser of real estate purchased by her father and thereafter conveyed to Appellant, to which the Appellee claims title by virtue of an unrecorded document, purporting to be a public document, the original of which is in the Appellee's sole possession, and previously known only to the Appellee.

PROCEDURAL HISTORY

This civil action was brought by Plaintiff, now Appellee Betty Lou Zirkle Carpenter, seeking declaratory relief before the Circuit Court of Harrison County on or about December 18, 2006. In her Complaint, Plaintiff sought a ruling by the Court that she is the owner of real estate located in Harrison County, West Virginia,

based upon boundary lines set and recorded prior to the alleged relocation of a roadway in 1922, not consistent with deeds created and filed after the alleged 1922 relocation of the roadway, and based upon a map of such relocated roadway, purported to be a public document, not of record in the office of the Clerk of the Harrison County Commission and possessed only by Appellee. Appellee further sought to compel the Appellant from making any claims of ownership of the disputed real estate, particularly to potential purchasers to whom the Appellee sought to sell such real estate. Following discovery, both parties moved the Court for summary judgment. Appellee sought partial summary judgment on the basis that the McCoy survey of Appellant's property was incorrect and alleging that the McCoy land survey was the only basis for Appellant's claim of ownership. Appellant sought summary judgment on the basis that her predecessor in title, her father, who prior to his death had conveyed his real estate, including the portion which forms the basis for this action, to the Appellant, was a bona fide purchaser of the disputed real estate without notice of any claims of ownership by Appellee or her father and Grantor, Oren Zirkle. Alternatively, Appellant argued that if the Appellee was the true owner of the real estate, then Appellant's father, and the Appellant after him, had adversely possessed the property for over 30 years.

The Court denied the motions for summary judgment of both the Appellee and Appellant and the matter proceeded to trial by jury. At the conclusion of the

presentation of testimony and evidence at the trial of this matter, the Court entered judgment in favor of the Appellee, pursuant to West Virginia Rule of Civil Procedure Rule 54(b), finding that there was no reason for delay of judgment in favor of the Appellee as to the ownership of the real estate. Thereafter, the Court advised the jury, in its jury instructions, that the Court had determined that the Appellee was the owner of the disputed real estate and the matter was sent to the jury only for determination of Appellant's alternative claims of adverse possession and prescriptive easement. The jury found that the Appellant had not adversely possessed the real estate and had not obtained an easement by prescription.

Within ten days of the Court's decision pursuant to West Virginia Rule of Civil Procedure Rule 54(b), Appellant filed her motion to alter or amend judgment pursuant to West Virginia Rule of Civil Procedure Rule 59 and motion for new trial pursuant to West Virginia Rule of Civil Procedure Rule 59. In Rose v. Thomas Memorial Hospital Foundation, Inc., 208 W.Va. 406; 541 S. E. 2d 1 (2000), this Court found "(a) motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." Rose v. Thomas Memorial Hospital Foundation, Inc., 208 W.Va. 406,412; 541 S. E. 2d 1,8 (2000), citing James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995). By Order dated

December 18, 2007, the Court denied Appellant's motion to alter or amend judgment and motion for a new trial. Appellant thereafter filed her Petition for Appeal with this Court and Appellant's Petition was Granted.

STATEMENT OF THE CASE

The parcel or tract of land in dispute in this case is located along State Route 3 in Harrison County, West Virginia. Appellee's father, Oren Zirkle, prior to his death in 2005, owned and occupied a parcel of real estate lying on one side of State Route 3. (See Exhibit A) Appellee inherited the real estate from her father. Appellant owned and occupied a parcel of real estate situate on the opposite side of State Route 3, portions of which sit directly across the road from the real estate inherited by Appellee. The Appellant was also given her real estate by her father, Kenneth Luke, who purchased it in 1972. (See Exhibit B) Kenneth Luke financed the purchase of his real estate with a local bank and the release of the Deed of Trust was entered into evidence at the trial of this matter. In 1988, Kenneth Luke conveyed the real estate to his daughter, the Appellant. All deeds in the chain of title for both the Appellee and Appellant recite that their respective property boundary lines begin at the center of the roadway and extend therefrom in opposite directions. No deed in either chain of title recites that the boundary lines cross the roadway at any point. (See testimony of Betty Carpenter, P. 44-47)

The disputed portion of real estate is part of an area of land which was previously reclaimed by the Department of Natural Resources in 1987 and which makes up a portion of the Appellant's front yard, including her driveway. At trial, Appellant introduced evidence showing that prior to the 1987 reclamation, the Appellant's sons played in the reclaimed area, then boggy and swampy, the Appellant kept her dog in doghouses in the usable portions of the area and the Appellant mowed the portions of the property which were not too swampy. Following the reclamation, and in 1988, based on the Appellant's testimony, or in 1987, according to the Appellee's testimony, the Appellant fenced the disputed real estate, built a driveway to her home through the disputed real estate, parked her vehicles, and particularly her camping trailer on the disputed real estate, and commenced the regular mowing and upkeep of that land. (See Exhibit C) In support of her claims of ownership, Appellee introduced evidence that at some point during the 1950's she and her family had a picnic on the disputed real estate on one occasion. Pursuant to Appellee's testimony, Appellee's father attempted no use of the disputed real estate from 1972 until his death in 2005. He did, however, contact the State Department of Highways to ask them to clean a culvert which ran under the roadway abutting the disputed property when it became clogged and caused water to come onto the roadway. Furthermore, occasional visitors to the Zirkle home would park along the roadway near the disputed piece of property for short periods of time when they visited. Mr. Zirkle himself did not park his vehicle on the

property directly across the roadway from his home, but rather, parked at a nearby church parsonage, with church permission, from 1963 until his death. (See testimony of Betty Carpenter P. 30-31)

Following the death of Oren Zirkle, Appellee now claims ownership of the real estate owned, occupied, and used by Appellant and her father before her since 1972. In support of her claims Appellee produced in discovery and at the trial of this matter a document purporting to be a map of the roadway which is State Route 3, and which purports to show that the roadway was moved from a prior location and to its current location in 1922. (See Exhibit D) Appellee testified that this was an original document kept by her family and that it was given to the Grantee each time the family real estate changed hands. (See testimony of Betty Carpenter, P. 5, 32) Appellee gave no explanation of how a public document purporting to have been prepared by the Office of County Road Engineers came to be in she or her family's possession or how the Appellant is to be charged with knowledge of this secret family document. The document relied upon by Appellee is unrecorded, bears no Deed Book or Map Book number or page number and no testimony was presented to support that it was ever of record in the office of the Clerk of the Harrison County Commission. In fact, Appellee's surveyor testified as to the content of each Deed introduced by both of the parties and verified that such document was not recorded with, or referred to, in any Deed reviewed by him in the chain of title. Appellee

however contends that all deeds from 1922 to the present, which refer to the boundary lines of the respective properties beginning at the center of the roadway, necessarily refer to the location of the roadway prior to 1922, based upon that unrecorded document. In support of her claim of ownership of the disputed real estate, Appellee also produced photographs showing vehicles sitting along Route 3 near the property during the 1950s and a picnic taking place on the property prior to its 1972 purchase by Kenneth Luke. Appellee was unable to produce any photographs which depicted Appellee, her father, or anyone else acting with their permission or on their behalf, using the property at any time other than the 1950s, and prior to Kenneth Luke's purchase of the real estate. Appellee's father made no improvements to the property during his lifetime.(See testimony of Betty Carpenter, P. 30,42) Appellee produced no written communication between her father, Oren Zirkle and Appellant indicating his objection to Appellant's use of the disputed property and testified that she was never present at any time when Oren Zirkle verbally advised the Appellant that he objected to her use of property he claimed was owned by him. (See testimony of Betty Carpenter, P. 11,15,37)

Both in motions for summary judgment prior to trial and at the trial of this matter, Appellant argued that even if the document purporting to be a map of a relocation of the roadway was genuine and depicted the accurate location of the roadway prior to 1922, Kenneth Luke, Appellant's predecessor in title, was a bona

vide purchaser of the property. Appellant introduced into evidence at trial, the deeds to the real estate conveyed to Kenneth Luke and thereafter the Appellant and the deeds from 1922 and thereon conveying real estate to Oren Zirkle and his predecessors in title. No deed in the chain of either title recites that the boundary of the Appellee's property crosses the roadway, either prior to or after its alleged relocation. Furthermore, Appellee's surveyor, Mr. Jackson, testified that he examined all of the deeds in the Zirkle chain of title and that he found none that had attached to it the map upon which Appellee relies in support of her claim of ownership. (See testimony of David Jackson P. 26-38)

In further support of her claim of ownership of the property, the Appellee argued that Appellant made use of the disputed property only with the permission of her father. Appellee was unable to state a date or time or year when such permission was given or produce a writing which documented such permission. Furthermore, Appellee testified that although she did not hear her father give the Appellant permission to use the property, she was certain that he must have. (See testimony of Betty Carpenter, P. 11) Appellee also presented the testimony of family friends who testified that Oren Zirkle had told them he was the owner of the disputed property. However, no such witnesses were able to state that those claims had been made in the presence of the Appellant or her father. No testimony that the Appellant acknowledged any right of ownership in Appellee or her father was

elicited and Appellant denied any such right.

Appellant's survey, relied upon in part by Appellee's surveyor, found that the real estate in dispute was owned by Appellant. (See testimony of David Jackson P 14-16) Appellant testified that neither she nor her father had any notice of a claim of ownership of the property by Oren Zirkle. Appellant introduced into evidence the released Deed of Trust showing that Kenneth Luke had paid good and valuable consideration for the real estate, in support of her claim that Kenneth Luke was a bona fide purchaser without notice of any claims by the Appellee or her predecessors.

At the close of evidence the Court found that the Appellee was the owner of the disputed real estate and entered final judgment as to that issue pursuant to West Virginia Rule of Civil Procedure Rule 54, noting the Appellant's objection. The issue of ownership of the property was not submitted to the jury. However, the Court did publish its decision that the Appellee is the owner of the property to the jury in its jury instructions. Within ten days of entry of judgment in favor of the Appellee pursuant to Rule 54 by the Court, the Appellant filed her motions to amend or alter judgment and for a new trial pursuant to West Virginia Rule of Civil Procedure Rule 59 and the same were denied.

STANDARD OF REVIEW

In this case, the Court, after hearing the evidence, made a finding in favor of Appellee. Appellant appeals the Court's application of the law in this case. Appellant sought both a new trial and alteration of the Court's judgment pursuant to Rule 59 and was denied. "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence. Reynolds v. City Hospital Inc., 207 W.Va. 101, 104; 529 S. E. 2d 341 (2000), citing Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976). This Court, in Reynolds stated the standard of review of an order denying a new trial, finding that "We noted recently in *Gum v. Dudley*, 202 W. Va. 477, 482, 505 S.E.2d 391, 396 (1997), that in reviewing an order denying a new trial, we review "the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Id., citing Accord Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

ARGUMENT

The Court erred in finding that the Appellee is the owner of the disputed real estate, particularly in light of Appellant's proof that her father was a bona fide

purchaser of the same. At the trial of this matter, Appellee testified that she and her family were the holders of the original document, purporting to be a map showing relocation of a turnpike which preceded State Route 3, upon which she relies in making her claim of ownership of portions of the Appellant's front yard and driveway. Said document bears no markings which would indicate that it is of record in any public office in Harrison County, West Virginia. Appellee was unable to state any location where such document is of record in the public records of Harrison County, West Virginia or any other location. Although this document purports on its face to be a public document, in her Response to Petition for Appeal in this case, the Appellee states at footnote 3, that "Plaintiff/Respondent still has the original plat in her possession". Appellee's surveyor examined every deed in the chain of title for both Appellant and Appellee back to the dates the roadway is said to have been relocated. Appellee's surveyor testified that the deeds as admitted into evidence encompassed the entire document he found of record in the office of the Clerk of the Harrison County Commission. (See testimony of David Jackson, P. 27-38) Based upon the testimony of Appellee's surveyor, at no point was the map or plat relied upon by Appellee made a part of, or attached to, any deed in the chain of title, either before or after the alleged roadway relocation. There were no documents of record which could have, or even should have, put Appellant or her father, Kenneth Luke, before her, on notice that Appellee, or the prior owners in her chain of title, made any claim to that undeveloped real estate which, pursuant to Appellee's own

testimony, Oren Zirkle did not set foot upon from 1972 until his death in 2005. (See testimony of Betty Carpenter, P. 30,31)

Appellant's claim of ownership of the property is consistent with the description of her real estate as made by McCoy land surveying. As the boundaries of Appellant's real estate were verified by Appellant's land surveyor, and there was no objection to the Luke's use of the real estate for over thirty years, Appellant did not act in bad faith or in any way unreasonably in her belief that she was the owner of the disputed real estate. There was no testimony presented which would indicate that Kenneth Luke did not hold himself out to be the owner of the disputed real estate. In fact, photographs of Kenneth Luke occupying and making use of the property were entered into evidence. No deed in Appellee's chain of title recites that the Appellee's parcel of real estate crosses the public way either before or after the roadway is alleged to have been relocated. Kenneth Luke was a bona fide purchaser of the disputed real estate and he and his daughter, the Appellant, used and occupied the real estate consistent with their claim of ownership.

Every deed in the chain of title for the disputed real estate, both before and after the roadway is alleged to have been relocated, provides that the outer boundary of each of the parties begins at the center line of the roadway. In support of her claim of ownership of the disputed real estate, Appellee introduced evidence that on

one occasion during the 1950s her family had a picnic on the property and that visitors parked alongside the roadway. On occasion, Oren Zirkle asked the State Department of Highways to clean a culvert running under the roadway adjacent to the property. Appellee produced no other evidence which would show that she or her father before her exercised any of the incidents of ownership over the property. Such limited use of the disputed property was not sufficient, by any standard, to put Appellant or her father on notice of Appellee's claims of ownership of the property. And no testimony was presented to indicate that the alleged prior location of the roadway was in any way discernable at the time Kenneth Luke purchased the property some fifty years later. "The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a special purpose; neither must it be consistent with the title of the apparent owner by the record. The fact of the notice must be proved by indubitable evidence; either by direct evidence of the fact, or by proving other facts, from which it may be clearly inferred. It is not in such case sufficient that the inference is probable, it must be necessary and unquestionable." Hupp v. Parkersburg Mill Co., 83 W.Va. 490, 494; 98 S. E. 518, 519-520 (1919), citing *M'Mechan v. Griffing*, 3 Pick. 149, 155 and *Brown v. Volkeing*, 64 N.Y. 76,82.

At the trial of this matter, Appellee sought to have the boundary lines of the disputed property relocated pursuant to an unrecorded instrument purporting to show that the boundaries of the real estate had changed fifty years prior to its purchase by Appellant's father. Appellee's reliance upon an unrecorded instrument in her claim to this property is akin to reliance upon an unrecorded deed or instrument. West Virginia Code § 40-1-9 provides:

“ Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.”

"The purpose of the statute is to protect a bona fide purchaser of land against creditors of the grantor, and against other persons to whom the grantor might have undertaken to execute title papers pertaining to the land embraced in the recorded instrument." Wolfe v. Alpizar 219 W.Va. 525,529; 637 S. E. 2d 623,627 (2006), citing *Bank of Marlinton v. McLaughlin*, 121 W. Va. 41, 44, 1 S.E.2d 251, 253 (1939). This Court has held that "(i)n general a party without actual notice may rely upon record titles in the office of the clerk of the county commission of the county in which the land is located." Eagle Gas Co. v. Doran & Associates, Inc., 182 W. Va. at 194.197; 387 S.E.2d 99,102(1989). "A bona fide purchaser of land is " one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry." Wolfe v. Alpizar 219 W.Va.

525,529; 637 S. E. 2d 623,627 (2006), citing *Stickley v. Thorn*, 87 W. Va. 673, 678, 106 S.E. 240, 242 (1921). In Wolfe v. Alpizar, the Court examined the various attributes of a bona fide purchaser, finding "(a) bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it.)" Id., citing *Black's Law Dictionary* 1271 (8th ed.1999) (defining a "bona fide purchaser" as "(o)ne who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."). Id. at 530:628. And, "(a)s previously held by this Court, and more recently reiterated, (a) bona fide purchaser is one who actually purchases in good faith." Id., citing Syl. pt. 1, *Kyger v. Depue*, 6 W. Va. 288 (1873)." *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292; 218 W. Va. 292, 624 S.E.2d 729, 737 (2005). There is no dispute that Kenneth Luke paid good and valuable consideration for this real estate. The release of the Deed of Trust securing his purchase of the property was entered into the evidence at trial.

No evidence was produced at the trial of this matter to support any claim that Kenneth Luke or the Appellant after him had any notice of the Appellee's claims of ownership pursuant to her family's secret map. No evidence was produced which supported any claim that Kenneth Luke or the Appellant after him had any notice of

any use of the property by Oren Zirkle or the Appellee. No evidence was produced which supported any claim that Kenneth Luke or the Appellant after him were ever advised, whether verbally or in writing, of any claim of ownership of the property by Appellee or her father. "This Court has long held that, "(a) bona fide purchaser is one who actually purchases in good faith." Whiteside v. Whiteside, 663 S. E. 2d 631, 636 (2008) W.Va. Lexis 36, citing Syllabus point 1, Kyger v. Depue, 6 W.Va. 288 (1873) and Syllabus Point 4, Wolfe v. Alpizar, 219 W.Va. 525, 637 S.E.2d 623 (2006). A party purchases in good faith if he has no notice of another's claims. The evidence from 1922 and the 1950s and no later than 1963, submitted and relied upon by Appellee is not sufficient to support any claim that Kenneth Luke or the Appellant had even a hint of notice of Appellee's claims of ownership when Kenneth Luke purchased the property in 1972. "We have also described a bona fide purchaser of land as "one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry." Id. at 637, citing Stickley v. Thorn, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921) (quoting Carpenter Paper Co. v. Wilcox, 50 Neb. 659, 70 N.W. 228 (1897)). See also Simpson v. Edmiston, 23 W.Va. 675, 680 (1884) ("[A] bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it."); Black's Law Dictionary 1249 (7th ed.1999) (defining a bona fide purchaser as "[o]ne who buys something for value without notice of another's claim to the item or of any defects in the seller's title; one who has in good faith paid

valuable consideration for property without notice of prior adverse claims."). *Id.* at 637, citing *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005).

Every deed to this real estate recites that the outer boundary of each of the parties begins at the center line of the roadway and nowhere does any such deed recite that the boundary of either party crosses the roadway. Appellee brought this action to have her deed reformed to cause her boundary to cross the highway in place at the time both she and her father, her predecessor in title, and every other owner in the chain of title back to 1922 were conveyed the Zirkle real estate. Appellee's father obtained title to his real estate in 1960. Appellee claims that the real estate owned by her father, and inherited by her, includes real estate which became situate on the opposite side of State Route 3 in 1922. However, " the parties to a deed are presumed to have in mind the actual state of the property conveyed at the time of the execution of the deed, and therefore are supposed to refer to this for a proper definition of the terms used in the descriptive words." *Yonker v. Grimm*, 101 W.Va. 711,719; 133 S. E. 695,699 (1926). " A deed is to be interpreted and construed as of its date and a call in the descriptive portion thereof for an adjoining tract of land is a call for the true location of such adjoining tract at the date of the deed." *Id.* at 720. The real estate now claimed by Appellee had been located on the side of State Route 3 opposite her father's home, and the

real estate actually owned by him, for over 80 years. No deed in Appellee's chain of title recites that the boundaries of Appellee's property crosses State Route 3.

The Court reformed the deed of the Appellee to include that disputed portion of real estate situated on the opposite side of State Route 3 which had been occupied and used by Appellant and her father for over 30 years without notice of any claim of ownership by Appellee. Kenneth Luke was a bona fide purchaser of this real estate. It was reasonably included within the bounds of the real estate purchased by him, as verified by McCoy land surveying. "(I)n West Virginia reformation may not be granted if a bona fide purchaser for value has purchased property subject to reformation. Equity will not reform and correct a deed on account of mistake unless it is shown, by clear, convincing and unequivocal evidence that the mistake was mutual; but if the rights of an innocent bona fide purchaser for value have intervened, the reformation and correction will not be made." Wells v. Tennant, 180 W.Va. 166, 169; 375 S. E. 2d 798,801 (1988).

The Court erred in finding that there was no reason to delay judgment in favor of Appellee in this matter pursuant to West Virginia Rule of Civil Procedure Rule 54. "Use of Rule 54(b), of course, should not be routine and should be reserved only for the "infrequent harsh case(.)" Hubbard v. State Farm Indemnity Company, 213 W.Va. 542,550; 584 S. E. 2d 176,184 (2003), citing *Province*, 196

W. Va at 479, 473 S.E.2d at 900 (quoting Fed. R. Civ. P. 54 advisory committee's note.) Appellant established both through the testimony as well as the exhibits entered into evidence that it was in fact disputed whether the description of the real estate set forth in the deeds relied upon by Appellee included the real estate used and occupied by Appellant for over 30 years. Furthermore, Appellant argued that even if the description in the deeds included the disputed real estate, her father, Kenneth Luke, was a bona fide purchaser of the real estate with no reasonable notice of any claims of ownership by Appellee. Alternatively, Appellant argued that if the Appellee was found to be the owner of the disputed property, her father, and the Appellant, through the doctrine of "tacking" had adversely possessed the property since 1972. In support of her alternative claim of adverse possession, Appellant entered into evidence both testimony and exhibits showing that she had built a driveway on the property no later than 1990, fenced the property, mowed it as a part of her lawn since 1988, parked her vehicles, including her camping trailer on the property and had used it as her own since 1988. (See Exhibit C) Appellant further introduced evidence that her father, Kenneth Luke, had used the property as his own prior to her and from 1972 until 1988. The Court nonetheless entered judgment in favor of Appellee pursuant to Rule 54. Furthermore, the jury was instructed by the Court that Appellee was the owner of the real estate and the jury returned a finding that Appellant had not adversely possessed the property. The jury was not allowed to state an opinion regarding whether the Appellant was the true owner of the

property.

CONCLUSION

Appellee inherited real estate from her father which she now seeks to sell. Following Appellant's thirty-year use of a parcel of real estate situate alongside State Route 3 and across the roadway from the real estate inherited by Appellee, Appellee now claims ownership of that tract of land pursuant to an unrecorded map dated from 1922. Every deed in Appellee's chain of title recites that Appellee's boundary begins at the centerline of the roadway. No deed in Appellee's chain of title recites that Plaintiff's real estate crosses the roadway. Appellee's father was conveyed real estate in 1960, and after the alleged 1922 movement of the roadway. A deed and the descriptive calls of the property therein are construed as of the actual location of such property on the date of the deed. (See testimony of David Jackson, P. 16) The parties to a deed are deemed to have intended the deed to reflect the actual condition of the property on the date of the making of the deed. Appellant's father purchased his real estate with no notice of any claim of Appellee or her predecessor and used the property consistent with that lack of notice. Appellee and her family had made limited, inconspicuous, use of the property, if at all, had done no maintenance on the property, and had erected no structures on it prior to Kenneth Luke's purchase of the real estate in 1972. Neither Appellee nor her father made any use of the property or entered the property after 1972.

Appellee, and her father before her, watched Kenneth Luke and thereafter the Appellant make costly and significant improvements to the property with no objection. Those improvements were in place for a minimum of sixteen years before the Appellee made any claim to the disputed real estate. Kenneth Luke was a bona fide purchaser of the real estate with no notice of the Appellee's claims thereto. Even if the Appellee's claims of ownership of the property were valid, she and her father before her rested on their rights for well over the statutory ten-year limit to dispute the Appellant's claims of ownership of the property. The Court erred in entering judgment in favor of the Appellee without submission of this matter to the jury.

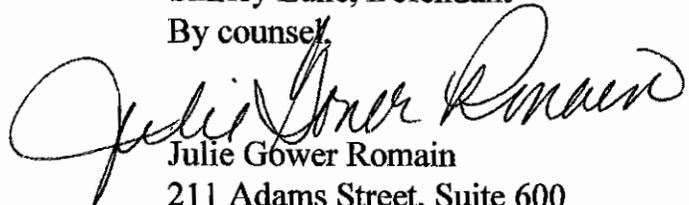
PRAYER FOR RELIEF

Wherefore the Appellant, Shirley Blaniar Luke respectfully petitions this Court to reverse the judgment entered as a matter of law by the Circuit Court of Harrison County and remand this case for trial.

Submitted this 10th day of December, 2008.

Shirley Luke, Defendant

By counsel,



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Fairmont, WV. 26554

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TABLE OF AUTHORITIES

WEST VIRGINIA RULE OF CIVIL PROCEDURE RULE 54b.....3,9

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THIS DEED, made this 19th day of November, 1960, by and between RAY O. ZIRKLE and MOLLIE M. ZIRKLE, his wife, parties of the first part, and LESLIE OWEN ZIRKLE, and MAXINE ESTELLA ZIRKLE, his wife, parties of the second part.

WITNESSETH: That for and in consideration of the sum of Ten Dollars (\$10.00) and upwards, cash in hand paid, the receipt of which is hereby acknowledged, the parties of the first part do hereby grant, sell and convey unto the parties of the second part, with covenants of general warranty, all that certain lot or parcel of land, situate in the village of Peora, on Bingamon Creek, in Eagle District, Harrison County, West Virginia, bounded and described as follows:

Beginning at the middle of the public road and running thence N. 77.5 E. ^{96.74'} 5.48 poles to a stake; S. 15 E. ^{176.0'} 10.72 poles to the middle of said road; thence with the meanders of said road S. 75 W. ^{86.52'} 4.88 poles; thence N. 17.5 W. ^{77'} 10.32 poles to the beginning, containing 55 square poles, and being the same lot that was conveyed unto Ray O. Zirkle and Mollie M. Zirkle, his wife, by Ray Cunningham and Nella Cunningham, his wife, by deed dated April 10, 1947, and of record in the office of the Clerk of the County Court of Harrison County in Deed Book No. 627, page 60.

Under the penalties of fine and imprisonment as provided by law the undersigned grantors hereby declare the total consideration of the property transferred by this deed is \$4,000.00.

WITNESS the following signatures and seals:



Ray O Zirkle (S&L)
Ray O. Zirkle

Mollie M. Zirkle (S&L)
Mollie M. Zirkle



STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:

BOOK 846 539

I, David A. Ahrens, a notary public in and for the county and state aforesaid, do certify that Ray O. Zirkle and Mollie M. Zirkle, his wife, whose names are signed to the writing hereto annexed, bearing date the 19th day of November, 1960, have this day acknowledged the same before me in my said county.

Given under my hand this 19 day of November, 1960.

David A. Ahrens
Notary Public

My commission expires:

November 16, 1968

RECORDED
INDEXED
NOV 20 1960
HARRISON COUNTY CLERK

STATE OF WEST VIRGINIA,
Office of the Clerk of Harrison County Court

... February 18, 1961, 944 A.M.
Be it remembered that this Deed
with Internal Revenue Stamps amounting to
Four 40/100 State Revenue Eight 80/100
Copies thereto attached and duly
canceled and the annexed certificate were this
day duly admitted to record in this office.

Tests: Harley G. Wolfe
Edith B. Hepler
Clerk

REVENUE
STATE
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REVENUE
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RAY O. ZIRKLE
and
MOLLIE M. ZIRKLE

AND

Max
LESLIE OWEN ZIRKLE
and
MAXINE ESTELLA ZIRKLE

Contract
Shirley Zirkle

RECORDED
INDEXED

DEED

DAVID A. ABRUZZINO
ATTORNEY AT LAW
SHINNSTON, W. VA.

FEB-18-61 04627 E-08L 1.75
FEB-18-61 04627 E-08L 1.75

PHOTOSTAT
RECORD

Exhibit B

THIS DEED, made this the 10th day of March, 1972,
by and between DAVID A. ABRUZZINO, Executor of the last will
and testament of Byron H. Jones, deceased, party of the first
part, and KENNETH LUKE and JULIA LUKE, his wife, as joint tenants
with the right of survivorship, parties of the second part.

WITNESSETH: That for and in consideration of the
sum of Ten Dollars (\$10.00) and upwards, cash in hand paid, the
receipt of which is hereby acknowledged, the said party of the
first part ~~do~~ hereby grant, sell and convey, with covenants of
special warranty, unto the said parties of the second part, as
joint tenants with the right of survivorship, in either upon the
death of the other, and not as tenants in common, a certain tract
or parcel of land situate in the Village of Peora, Eagle District,
Harrison County, West Virginia, containing two acres and twenty-
six square poles, and being the same real estate which was conveyed
unto Mary Jane Jones, by Byron H. Jones, by deed dated September
21, 1949, and of record in the office of the Clerk of the County
Court of Harrison County, West Virginia, in Deed Book No. 79, page
267.

The said Mary Jane Jones died testate, and by her last
will and testament, dated Jan. 7, 1946, probated Oct. 4, 1969, and
now of record in the office of the Clerk of the County Court of
Harrison County, West Virginia, in Will Book No. 75, page 205, did
demise and bequeath said property unto her husband, Byron H. Jones.

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EXHIBIT
B

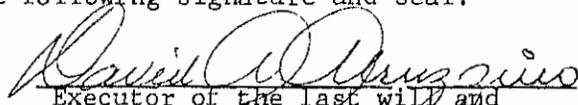
The said Byron H. Jones died testate, and by his last will and testament, dated May 24, 1966, and probated Oct. 23, 1969, and now of record in the office aforesaid, in Will Book No. 75, page 201, did direct his Executor, the said David A. Abruzzino, to grant and convey said property.

This conveyance is made subject to all reservations, exceptions, easements, conditions, and rights-of-way made or contained in prior instruments of record affecting said title.

DECLARATION OF CONSIDERATION OF VALUE

The undersigned grantor does hereby declare that the total consideration of the property transferred by this document is \$1900.⁰⁰.

WITNESS the following signature and seal:

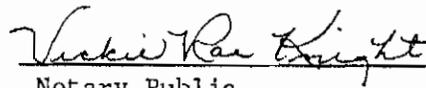
 (SEAL)
Executor of the last will and
testament of Byron H. Jones, dec'd.

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:

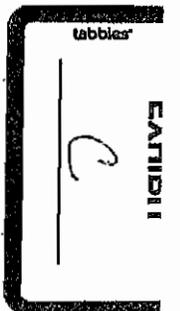
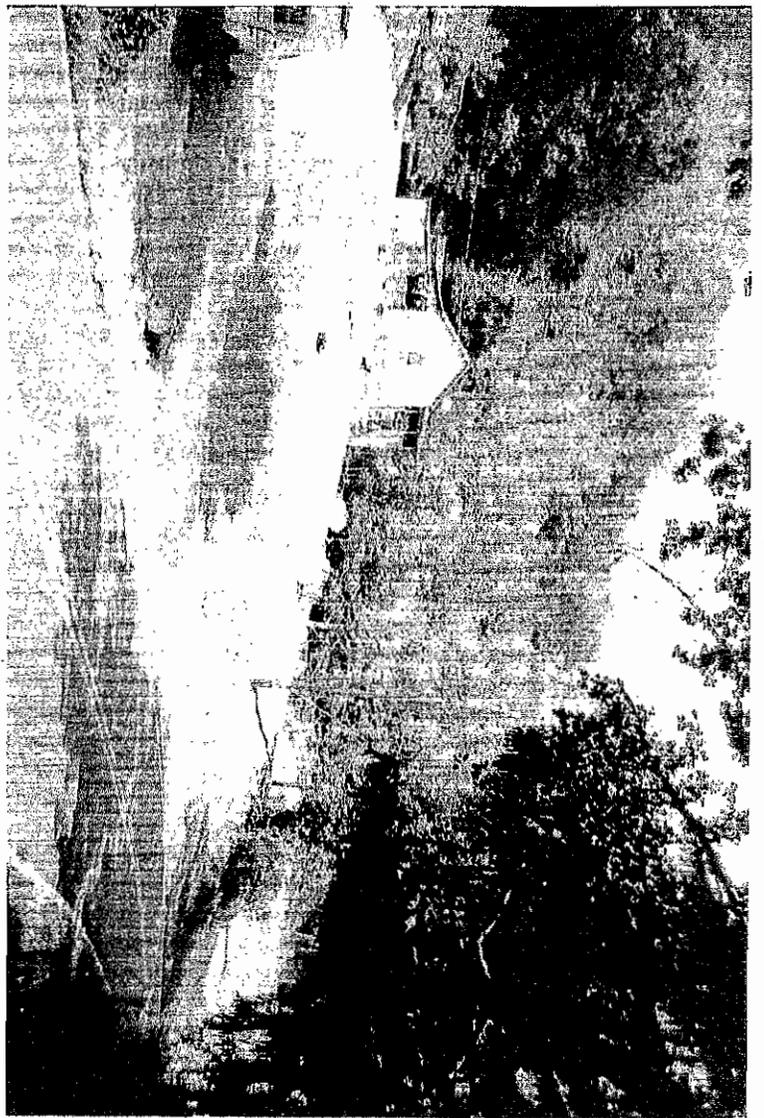
I, Vickie Rae Knight, a Notary Public, in and for the County and State aforesaid, do certify that David A. Abruzzino, Executor of the last will and testament of Byron H. Jones, deceased, whose name is signed to the writing above, bearing date the 10th day of March, 1972, has this day acknowledged the same before me in my said County.

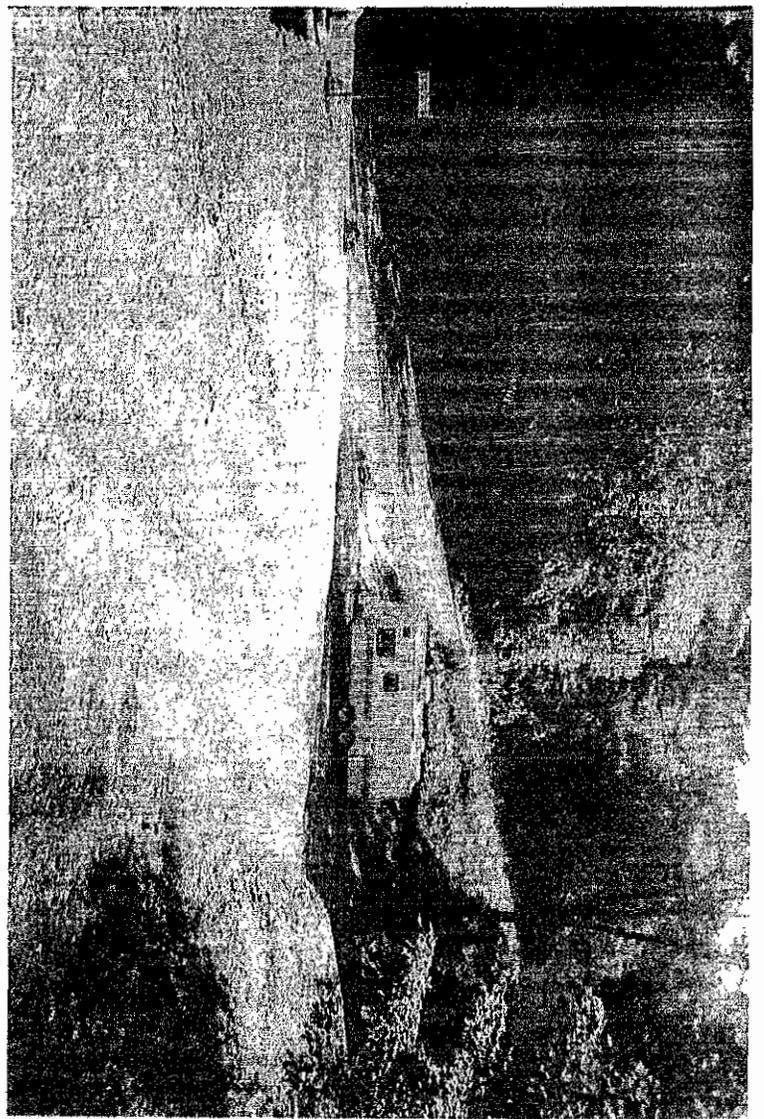
Given under my hand this 22nd day of March, 1972.

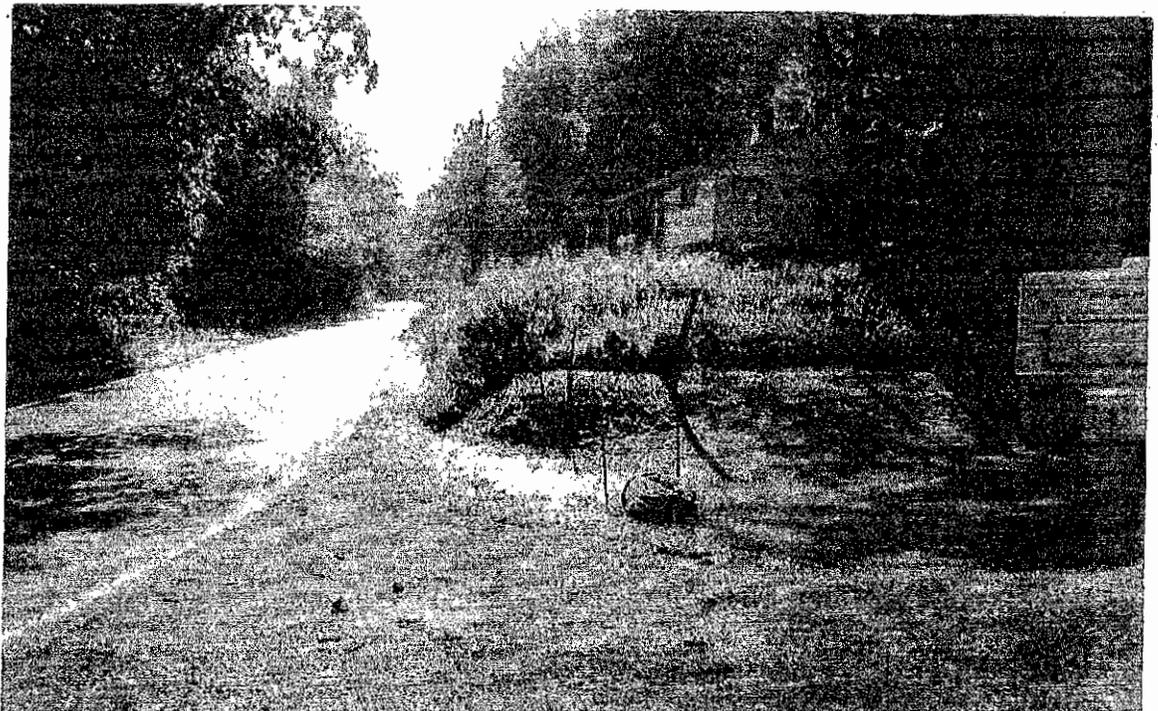
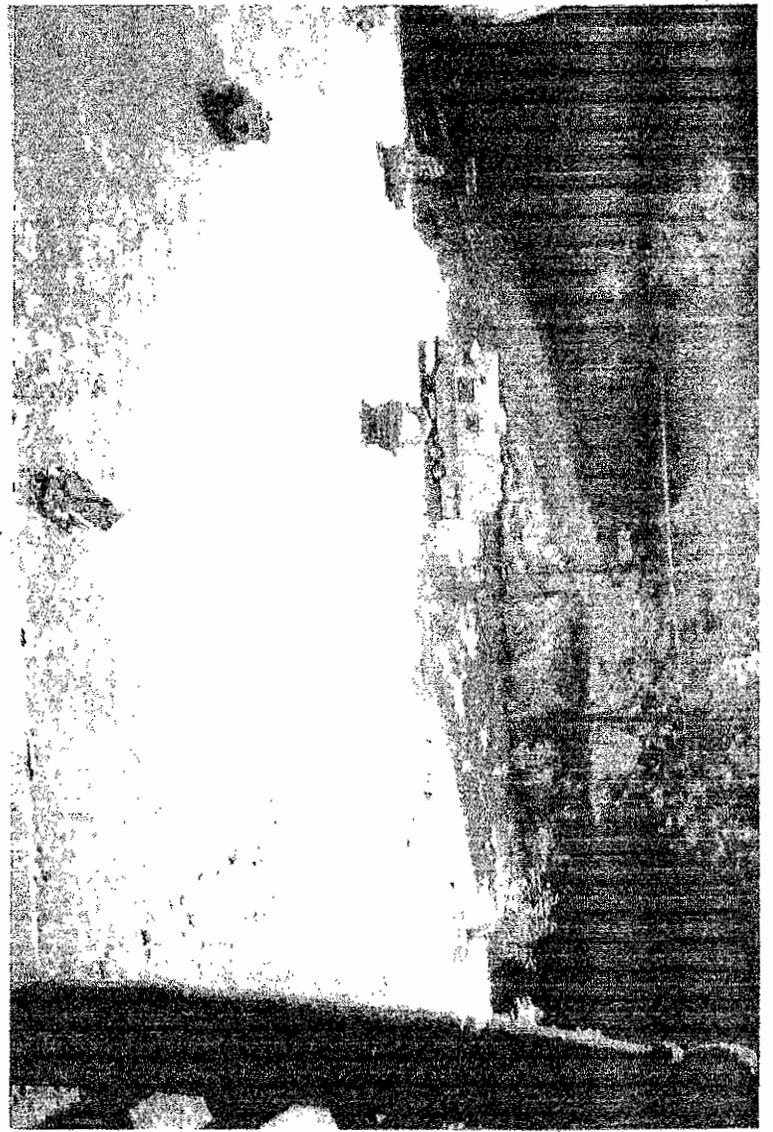
My commission expires: June 24, 1980.

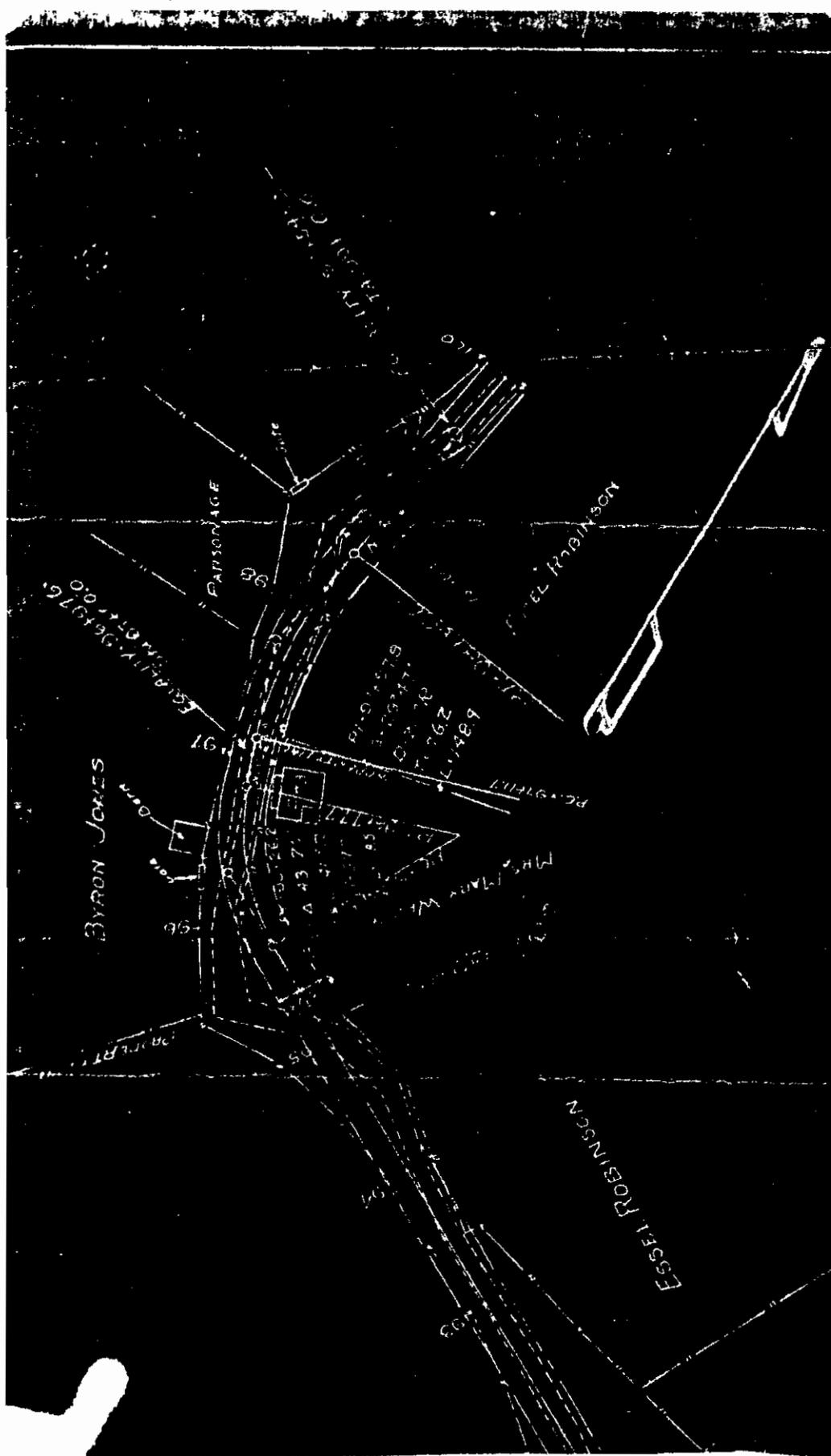

Notary Public

This instrument prepared by:
David A. Abruzzino
Attorney at Law
Shinnston, W. Va. 26431









SECTION OF ROBINSON RUN - PECRA ROAD
 THROUGH PROPERTY OF CHAS L. ASHCRAFT
 AND OTHERS

OFFICE COUNTY ROAD ENGINEER
 CLAPHAM, W. VA.

SCALE 1" = 100'
 SECTION 122

tabbles

EXHIBIT

 D

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

BETTY LOU ZIRKLE CARPENTER,
Plaintiff,

v.

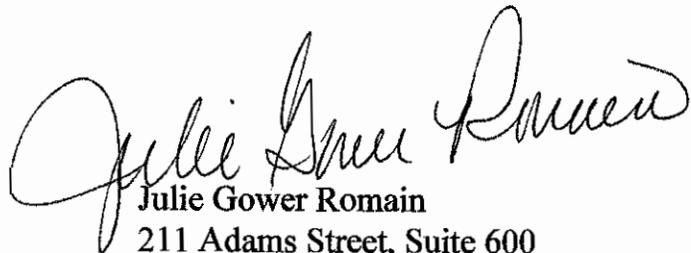
Case No. 34497

SHIRLEY BLANIAR LUKE
Defendant

CERTIFICATE OF SERVICE

I certify that I have this 10th day of December, 2008, served a true and accurate copy of: BRIEF OF APPELLANT SHIRLEY BLANIAR LUKE upon counsel for the Appellee by depositing the same in the United States Mail with sufficient postage attached thereto and addressed to:

Aimee N. Daugherty
Edmond L. Wagoner
Steptoe and Johnson
PO Box 2190
Clarksburg, WV. 26302-2190



Julie Gower Romain
211 Adams Street, Suite 600
Fairmont, WV. 26554
WV State Bar ID #5544
304-368-1490
facsimile: 304-368-1529

Counsel for Appellant,
Shirley Blaniar Luke