

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FIRST AMERICAN TITLE INS. CO.
Plaintiff/Appellee

v.

No. 34705

EVAN LeFEVER and BETH LeFEVER
Defendants/Appellants
THOMAS FIRRIOLO
Defendant/Appellee
and ANNE P. CHIAPELLA
Defendant/ Appellee

-----consolidated with-----

THOMAS FIRRIOLO
Plaintiff/Appellee

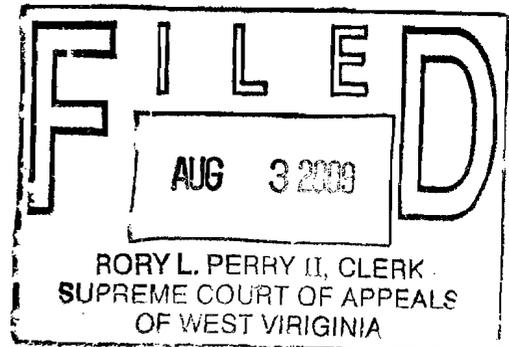
v.

No. 34714

EVAN LeFEVER and BETH LeFEVER.
Defendants/Appellants

v.

ANNE P. CHIAPELLA and JOHN FRYE
Intervenor/Appellees



Appellants' Brief

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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THOMAS FIRRIOLO
Plaintiff /Appellee

v.

No. 34714

EVAN LeFEVER and BETH LeFEVER.
Defendants/Appellants

v.

ANNE P. CHIAPELLA and JOHN FRYE
Intervenor/Appellees

Appellants' Brief

**TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA**

**Evan and Beth LeFever, defendants in each of these consolidated cases,
respectfully represent that they are aggrieved by rulings of the Circuit Court of
Morgan County entered on the 2d day of May, 2008 (Appeal No. 34705) and on
the 31st day of July, 2008 (Appeal No. 34714). They thus ask this Court to reverse
those rulings and issue writs of supersedeas thereon.**

KIND OF PROCEEDING

Each of these two consolidated appeals arises from a non-jury ruling by the Circuit Court, one on a motion for summary judgment and one on a request for alteration of a settlement.

Most broadly, the two cases involve a lost deed, an easement, a judicial undoing of a settlement that had been acted on and carried out, and a misguided effort by the Circuit Court to grant equitable relief.

More specifically, they involve:

a) a partially carried out relocation of an easement, wherein the abandonment of one easement was recorded in the Morgan County land records but the creation of a substitute easement – although surveyed – was for some unknown reason not recorded in the land records;

b) two adjoining parcels of real estate being briefly owned by the same person - - although one of the parcels was not owned permanently or absolutely, but was subject to certain court-ordered terms and restrictions that created a reversionary interest.

c) a court's misuse of its powers, in disregard of well-recognized rules of equity and the unfairness inflicted on one of the parties.

The standard of review in this appeal is de novo; abuse of discretion.

FACTS

1. A large piece of property in Morgan County known as the “Eppinger Farm” was subdivided among six purchasers on October 31, 1988.

2. Evan LeFever, one of the purchasers, received a 4.22 acre parcel. Fred Orr, another purchaser, received a 14.33 acre parcel. The two parcels adjoined each other.

3. LeFever’s 4.22 acres did not border a public road. Orr’s 14.33 acres did.

4. The deeds subdividing the Eppinger farm thus provided for LeFever’s 4.22 acres to have an easement across Orr’s 14.33 acres, leading to a public road.

5. Two years later, in early 1990, Orr asked LeFever to move his right-of-way to a different location. The new location was acceptable and LeFever agreed. So Orr hired a surveyor to lay out the new right-of-way and an attorney named David Savasten to write deeds substituting the new easement for the old one.

- one deed abandoned the original easement;

- the other deed was to create a replacement easement.

6. Orr’s 14.33 acres eventually became owned by a man named Thomas Firriolo. LeFever retained ownership of his 4.22 acres.

FIRRIOLO SUES LeFEVER. THE CASE IS SETTLED.

7. In 2000, LeFever was contacted by his neighbor Mr. Firriolo, who made a request similar to Orr’s request in 1990. Firriolo asked that the location of the easement across the 14.33 acres be moved.....LeFever said maybe. He wanted to see exactly where any new easement to his 4.22 acres would be.....Apparently

misunderstanding a “maybe” for a “yes,” Firriolo sued LeFever to enforce an alleged verbal agreement. That is Civil Action 01-C-8 (Appeal No. 34714).

8. The case was set for trial on September 11, 2003, in the courtroom at Berkeley Springs, but it was settled with the jury already assembled and the trial about to begin.....The settlement was an unusual one, but one that met the needs of the parties. It called for:

a) Firriolo to pay \$9500 to the LeFevers;

b) the LeFevers¹ to deed their 4.22 acres to Firriolo with a right to receive it back after two years. During those two years, Firriolo could try to find a buyer for the 4.22 acres, but the LeFevers would have a right to approve or disapprove any sale. If the land remained unsold after two years, the LeFevers could reacquire it by returning the \$9500 to Firriolo.

For convenience, although it is in the appellate record at numerous places (including Record C.A. 01-C- 8 at pgs. 611-14), a copy of the Circuit Court’s “Dismissal Order” implementing this settlement, is attached as Exhibit “A” hereto.

9. Pursuant to that settlement and that court order, the LeFevers deeded their 4.22 acres to Mr. Firriolo and he paid them \$9500.

10. Firriolo thus owned both tracts of land, his 14.33 acres and the LeFever 4.22 acres, with the latter being subject to the reacquisition terms of the settlement order.

¹ While all this was going on, Evan met and married Beth. Thus we will sometimes refer to “LeFever” and sometimes to “the LeFevers.”

11. Firriolo then went about trying to sell the 4.22 acres. The LeFevers rejected at least one offer as being too low.

12. Without telling the LeFevers, Firriolo also went about trying to sell his 14.33 acres. Here he was more successful. He contracted with a woman named Anne Chiapella to sell her both the 14.33 acres and the 4.22 acres - - but failed to tell her that a sale of the 4.22 would be subject to approval by the LeFevers.

13. With a contract signed for her to buy two pieces of adjoining land, Ms. Chiapella went to closing. There she unexpectedly learned that only one piece of land was available, the 14.33 acres. The other piece, the 4.22 acres which Firriolo had acquired from the LeFevers subject to their right to approve or disapprove any sale, was not available – because the LeFevers had not approved it being sold to her².

14. Somewhat surprisingly, Ms. Chiapella went ahead with her purchase of the one piece of land that was available. She bought the 14.33 acres, even though it was traversed by an easement leading to the 4.22 acres.

15. Ms. Chiapella also bought a policy of title insurance, with the First American Title Insurance Company. That policy contained an exclusion for “A 20 foot right-of way for ingress and egress to a 4.22 acre tract.....” (Record C.A. 05-C-94 at pg. 313).

LeFEVERS TRY TO REACQUIRE THE 4.22 ACRES

16. Time Passed. Two years after deeding the 4.22 acres to Mr. Firriolo pursuant to the settlement agreement, the LeFevers attempted to get it back –

pursuant to the settlement agreement. Following the terms of the settlement agreement, they returned the \$9500 to Firriolo and asked him to reconvey the land to them.

17. Firriolo refused. The LeFevers accordingly filed a motion³ under Rule 70 of the West Virginia Rules of Civil Procedure.⁴ In that motion, they asked the Circuit Court to appoint a commissioner to execute a deed reconveying the 4.22 acres to them.

18. Firriolo resisted the Rule 70 motion. He requested "guidance" and equitable relief from the Circuit Court - pointing to a recent discovery in the case.

19. The discovery was this.....Somebody - we do not know who - noticed in the land records of Morgan County that there had been an irregularity in the 1990 exchange of easements between Orr (then-owner of the 14.33 acres) and Evan LeFever (owner of the 4.22 acres):

- a deed from LeFever to Orr abandoning the original easement across the 14.33 acres had been duly recorded in the county land records;

² They had not been told of the proposed sale to her.

³ Record C.A. 01-C-8 at pgs. 813 and 833

⁴ **Rule 70. Judgment for Specific Acts; Vesting Title.** If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court as a special commissioner and the act when so one has like effect as if done by the party.....The Court may also in proper cases adjudge the party in contempt....

- no deed from Orr to LeFever, replacing the abandoned easement with a substitute easement, had ever been recorded.

20. This discovery not only added a complication to the existing lawsuit (Civil Action 01-C-8; Appeal No. 34714), but it also caused the filing of a new lawsuit. Although its policy with Ms. Chiapella on the 14.33 acres contained an exclusion for the easement across it to the 4.22 acres, First American filed a declaratory judgment action to claim that there was no easement. That lawsuit was Civil Action 05-C-94 and is now Case No. 34705 of this consolidated appeal.....In it, First American contends that the absence of a recorded deed creating a new easement across the 14.33 acres, in exchange for the one relinquished, leaves the 14.33 acres untraversed by any easement at all and the 4.22 acres with no easement at all. The argument is simple but simplistic:

The land records showed that the original easement, created when the Eppinger Farm was subdivided, had been abandoned. The land records did not show that any deed for a replacement easement had been recorded. So the 4.22 acres had no easement and was landlocked.

21. First American also argued that any easement across the 14.33 acres would have been extinguished by merger when Thomas Firriolo owned both that land and the adjoining 4.22 acres, despite the LeFever's right to reacquire the 4.22 acres after two years.

22. The Circuit Court agreed with First American's arguments. After LeFever and the title insurance company had filed cross-motions for summary judgment, a hearing was held on March 21, 2008. Not expressing any disagreement with First American on any point, the Circuit Court denied the LeFever motion for summary judgment and granted First American's motion for summary judgment. It ruled there was no easement across the 14.33 acres to the 4.22 acres.

23. From those rulings in Civil Action 05-C-94, we now appeal (Appeal No. 34705).

THE CIRCUIT COURT'S INEQUITABLE SOLUTION IN 01-C-8

24. As mentioned above (para. 20), the discovery of the unrecorded reciprocal deed in the 1990 Orr-LeFever exchange of easements complicated the original lawsuit (01-C-80; Appeal 34714) and caused a new lawsuit to be filed (01-C-8; Appeal 34705).....In the original lawsuit, the LeFever's Rule 70 motion was before the Circuit Court. So was Mr. Firriolo's contention that the discovery of the unrecorded reciprocal deed made it necessary for the Circuit Court to grant some type of equitable relief.

25. At a hearing on October 22-23, 2007, the Circuit Court allowed Chiapella and Frye (see paras. 12-15 above) to intervene in Civil Action 01-C-8. It then heard testimony and listened to arguments. Finally, after a recess, it announced its ruling.

26. The Circuit Court's decision on October 23, 2007 was that the September 11, 2003 settlement agreement between Firriolo and LeFever should be drastically

“modified” – to the extent of being nullified. In its place, orders were issued that the LeFevers say are vastly unfair to them:

a) That the LeFevers would lose their right to reacquire the 4.22 acres;

b) That intervenors Chiapella/Frye would be allowed to purchase the 4.22 acres from Firiollo;

c) That the LeFevers would receive \$26,000.

27. The LeFevers filed Rule 59 reconsideration motions in both cases, identifying the same reversible errors as set forth here. Those motions were denied and thus this appeal.

ASSIGNMENTS OF ERROR

1. THE LOWER COURT WRONGLY RULED THAT, WITH ONE WRITTEN EASEMENT TO THE 4.22 ACRES HAVING BEEN ABANDONED BUT NO RECORD OF A NEW WRITTEN EASEMENT HAVING BEEN CREATED, THERE WAS NO EASEMENT WHATSOEVER ACROSS THE 14.33 ACRES TO THE 4.22 ACRES.

2. THE LOWER COURT WRONGLY RULED THAT, EVEN IF THERE WERE AN EASEMENT ACROSS THE 14.33 ACRES TO THE 4.22 ACRES, IT WAS EXTINGUISHED WHEN THE TWO TRACTS WERE TEMPORARILY OWNED BY THOMAS FIRRIOLO – EVEN THOUGH HIS OWNERSHIP OF THE 4.22 ACRES WAS TEMPORARY AND WAS NOT ABSOLUTE BUT BOUND BY COURT-ORDERED RESTRICTIONS.

3. THE LOWER COURT WRONGLY SET ASIDE A SETTLEMENT AGREEMENT UPON WHICH THE PETITIONERS, EVAN AND BETH LeFEVER, HAD RELIED WHEN THEY DEEDED THEIR 4.22 ACRES TO THOMAS FIRRIOLO.

4. THE LOWER COURT, HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT, DEvised A NEW “SOLUTION” THAT WAS GROSSLY UNFAIR AND INEQUITABLE TO THE LeFEVERS.

5. HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT AND WRONGLY EXTINGUISHED THE LeFEVERS’ RIGHT TO REACQUIRE THE 4.22 ACRES, THE LOWER COURT FORCED THAT LAND TO BE SOLD WITH UNFAIRLY LOW COMPENSATION TO THE LeFEVERS.

DISCUSSION AND ARGUMENT

Because it happened first and had a pivotal effect on both lawsuits involved in this appeal, we begin our discussion with the incomplete 1990 exchange of easements between Orr and LeFever.

Assignment of Error No. 1

THE LOWER COURT WRONGLY RULED THAT, WITH ONE WRITTEN EASEMENT TO THE 4.22 ACRES HAVING BEEN ABANDONED BUT NO RECORD OF A NEW WRITTEN EASEMENT HAVING BEEN CREATED, THERE WAS NO EASEMENT WHATSOEVER ACROSS THE 14.33 ACRES TO THE 4.22 ACRES.

The Circuit Court's order in Civil Action 05-C-94 (Appeal No. 34705) states:

18. First American has alleged that there is no cloud upon the title of the 14.33 Acre Tract resulting from the existence of the Original Easement since:

- a. the Original Easement had previously been released;**
- b.**

19. The Court....concludes that the arguments made in Plaintiff's Motion for Summary Judgment are well supported by the law in West Virginia...

Record 05-C-94 at pg. 372

This ruling is not well supported by the law. It is totally contrary to all law for the past four hundred years in the State of West Virginia, the United States, and England. This ruling would make the 4.22 acres isolated, cut off from the outside world - - landlocked.

The basic facts were outlined in the earlier "FACTS" portion of this brief. Now it is necessary to provide more detail.

As stated in paragraph 5 above, Mr. Orr and Mr. LeFever agreed in 1990 to re-locate the easement leading to LeFever's 4.22 acres across Orr's 4.22 acres. There was a survey and attorney David Savasten was hired by Orr to write the two necessary deeds – a deed of abandonment and a deed of creation.

The evidence of this is overwhelming and uncontradicted:

A. Evan LeFever (owner of the 4.22 acres) has stated by affidavit and testified in person that when he abandoned his original easement, he was supposed to receive another one in return.

2. In 1990, a year or so after the Eppinger farm was subdivided and I received a 4.22 acre parcel, my neighbor Fred Orr (owner of a 14.33 acre parcel, across which I had a right-of-way) asked if I would change the location of my right-of-way. I said yes.

3. Fred Orr then went about making the necessary arrangements. I do not know what he did, but I remember signing a deed at the law office of David Savasten in Berkeley Springs.

May 15, 2007 affidavit of Evan LeFever
In record as part of "LeFever Memorandum
in Easements" Record C.A. 05-C-94
at pgs. 232, 247-8

Mr. LeFever also testified to this during a hearing held in October of 2007.

Q. And a couple years later there was an easement re-doing?

A. Yes.

Q. Tell us about that.....

A. Well, Freddie came to me.....and asked if I would consider moving the right of way.....

Q. What was your next involvement in this exchange of right of-ways?

A. My recollection is obviously pretty vague at this point, but I think that basically the next thing we did is I went into David Savasten's office to sign for a - - to sign a deed relinquishing and I gather getting another deed given from Fred to me for a new right of way.

Q. When you walked out of David Savasten's office that day back in 1990, what was your understanding, what as your belief as to whether you would or would not be – have, not be having, but have a replacement easement?

A. Well, I walked out believing that I had the right of way, of course.

Q. And after that, subsequently?

A. I always believed that I had a right of way.

**Testimony of Evan LeFever
October 23, 2007 hearing
Transcript at pgs. 9-10**

B. Fred Orr (previous owner of the 14.33 acres) has stated by affidavit and testified in person that when LeFever abandoned his original easement, he was supposed to receive another one in return.

5. A year or so later, in early 1990, it seemed to me that that the easement across my 14.33 acres was in an undesirable location. So I asked LeFever if he'd be willing to change it and he said yes. We agreed on a substitute location.

6. To accomplish what we'd agreed on, exchanging the old easement for a new one, I hired Berkeley Land Surveys to do the surveying and attorney David Savasten to write the deeds.

7. Sometime in the winter of 1990, so far as I can remember, everything was ready and I went to David Savasten's office to sign the papers. I cannot remember whether Evan LeFever was there at the same time that I was.....At Savasten's office, I signed a deed giving Evan a new easement to replace the one he was to abandon.

**December 6, 2006 affidavit of Fred Orr
In record as part of "LeFever Memorandum
on Easements" Record C.A. 05-C-94 at
pgs. 232, 249-50**

Orr also testified about this during a hearing in October of 2007.

Q. Okay. So you came up with a different place for the right of way?

A. Yes.

Q. How did you go about making that happen?

. . .

A. Went to Mike Crawford and asked him to survey it.

Q. How about after that?

A. Asked David to write it up.

Q. David who?

A. David Savasten.

. . .

Q. When you - - when Evan LeFever signed the deed surrendering to you his first right of way, what was your intention? What was your - - what were you trying to do with regards to a new right of way?

A. I was intending for him to have a right of way.

**Testimony of Fred Orr
October 22, 2007 hearing
Transcript at pgs. 101-2, 105-6**

C. After completing its fieldwork, Berkeley Land Surveys prepared two survey descriptions to be used by the lawyer (David Savasten) who would be writing the two deeds. One of those descriptions, which is in the "Lefever Memorandum

on Easements” (Record C.A. 05-C-94 at pgs. 232, 251), contains this notation:

For: Fred Orr to Evan LeFever
20 foot Right-of-Way (New)

But, for reasons unknown, this survey for a new easement was never used by Mr. Savasten for any deed that can be found at the Morgan County Courthouse.

D. The deed (prepared by attorney Savasten) by which LeFever abandoned his original easement expressly states that he was to receive a replacement easement.

WHEREAS, the party of the first part has or will be acquiring a new right-of-way to serve the said parcel of 4.22 acres and no longer needs the use of the aforesaid right-of-way..

February 6, 1990 deed from LeFever to Orr
In record as part of “LeFever Memorandum
on Easements. Record C.A. 05-C-94 at pgs.
232, 242

E. The president of Berkeley Land Surveys has stated by affidavit that his company was hired to lay out a new easement, replacing the one to be abandoned.

3. My memory and my examination of our office records show that:

a) When the Eppinger Farm was subdivided in 1988, a 14.33 acre parcel and a 4.22 acre parcel were among those created. Fred Orr owned the 14.33 acres and Evan LeFever owned the 4.22 acres.

b) Orr’s 14.33 acres borders a public road. LeFever’s 4.22 acres does not border any public road. It was thus necessary to create an easement for the 4.22 acres across the 14.33 acres, and that was done when the farm was subdivided.

c) In 1990, our office was hired by Orr to change the location of the easement across his 14.33 acres. We thus surveyed a new easement leading from the public road to the 4.22 acres.

4. I do not know what was done with the survey work after we did it. Our standard practice is to turn it over to the lawyer who would write the necessary deeds based on the surveys, and that would probably have happened here.”

April 3, 2007 affidavit of Michael Crawford
In record as part of “LeFever Memorandum on
Easements” Record C.A. 05-C-4 at pgs.
232, 244-5

F. An employee of Berkeley Land Surveys, the one who did the actual surveying, has stated by affidavit that there was to be an exchange of easements, one to be abandoned and another to take its place.

4. These surveys were done by me as the result of a request by Fred Orr to change, from one location to another, Evan LeFever’s right-of-way and receive another in return. Thus one survey description (identified as ‘old’) is for the right-of-way that LeFever was to surrender and the other (identified as “new”) is for the right-of-way that he was to receive.

April 17, 2007 affidavit of Wayne G. Stotler
In record as part of “LeFever Memorandum
on Easements” Record C.A. 05-C-94 at pgs.
232, 246

Thus there are six items of evidence, and no contrary evidence, to show that what happened is this:

- a) Orr and LeFever wanted a new easement to replace the old one;
- b) A new easement was surveyed;
- c) A deed was written and recorded, abandoning the old easement;

d) No deed creating the new easement has been recorded, despite a survey for one having been done.

Why the deed for the second easement did not get recorded is a mystery that cannot be solved. Attorney David Savasten, who was supposed to write and record the two deeds, is dead (Record C.A. 04-C-94 at pg. 435).

* *

Based on these undisputed facts, the law is also clear - - If there be no written easement to the 4.22 acres, a court must fulfill the intent of the parties by declaring an easement by implication.

The law for many centuries, both in England and America, recognizes not just written easements but implied easements.

An easement by implication is an easement not expressed by the parties in writing, but arising out of the existence of certain facts implied in the transaction. Such an easement may arise, for example, when the parties intended to create an easement but neglected to include it in a written instrument.

25 Am. Jur. 2d Easements §19, pg. 517
copy in Record C.A. 05-C-94, pg. 254

§ 2.2 Intent to Create a Servitude

The intent to create a servitude may be either express or implied. No particular form of expression is required.

1 Restatement of the Law of Property, pg. 62
copy in Record C.A. 05-C-94 at pgs 255-6

Easements are implied in certain circumstance. Courts are willing to graft an easement onto a land transaction in order to do justice in a particular case. Although such decisions commonly focus on the

inferred intent of the parties, a strong public policy favoring the productive use of land is also at work.

Bruce & Ely, Law of Easements and Licenses
In Land §4:1, pg. 4-2
copy in Record C.A. 05-C-94 at pgs. 257-9

§779 “Implied” grant or reservation of easements – In general.

Frequently, although there is no grant of an easement in express terms, an easement is regarded as arising in connection with a conveyance of land, either for the benefit of the land conveyed as against land retained by the grantor, or for the benefit of land retained by the grantor as against the land conveyed, the former being referred to as the case of the “implied grant” of an easement and the latter being referred to as a case of the “implied reservation” of an easement.

3 Tiffany, Law of Real Property, pg. 253
copy in Record C.A. 05-C-94 at pgs. 260-1

An easement may pass as well by implied as express grant.

Smyth v. Brick Row Realty Co.
97 W. Va. 40, 44
124 S.E. 499 (1924)

The general rule....is that an easement can be created only by grant, express or implied, or by prescription.....An easement may, however, be created by agreement or covenant as well as by grant.

Cottrell v. Nurnberger
47 S.E.2d 454
131 W. Va. 391, 399 (1948)

We assert that, with the reciprocal deed creating a new easement to replace the one abandoned not being recorded for some unknown reason, the 4.22 acres must have an easement by implication. Smyth v. Brick Row Realty Co. says “An easement may pass as well by implied as by express grant.” Evan and Beth LeFever say it was reversible error for the lower court to not decree an implied grant here.

* * *

In addition to having an easement by implication, based on the obvious intention of the parties (Orr and LeFever) which was only half-accomplished, the 4.22 acres has a right to an easement by necessity.

The affidavits of Orr, LeFever, Crawford, and Stotler (all part of the record, as cited above) state that the 4.22 acres has no access to a public road except by traversing the 14.33 acres. This, combined with the fact that both tracts were once part of the same Eppinger Farm, establishes a right to an easement by necessity.

To establish a right-of-way by necessity, certain conditions must be met. First, the land must have been under common ownership at some time, and this unit of title must have been severed; secondly the severance must have given rise to the need for the right-of-way; and, lastly, reasonable need for the easement must be proved by clear and convincing evidence.

6B M.J. Easements §12, pg. 199

An easement by necessity is a type of implied easement.

§8.38 --Necessity as a Factor in Implication. Among the circumstances which contribute to the inference that an easement was intended to be created is the need for an easement. If the need is very great, an inference will be drawn that an easement was intended to be created.

II American Law of Property, pg. 259
copy in Record C.A. 05-4-94 at pgs. 265-6

§60.03(b)(5)(i) Justified by Implied Intent or by Public Policy

One justification for the easement by necessity is that the grantor is “presumed to have intended” to retain or to have conveyed to grantees “a means of access to the property in question, so that the land may be beneficially utilized.”.....Another, and perhaps the better, justification is that public policy prohibits land from being conveyed away in a

manner that renders it useless, and the easement by necessity arises to cure that problem.

7 Thompson on Real Property, pg. 431
copy in Record C.A. 05-C-94 at pgs. 267-8

At oral argument, the First American Title Insurance Company argued:

In February - - on February 6, 1990, Mr. LeFever filed a quitclaim deed to that specific easement with the understanding that another easement would be recorded.

By their own admission, that easement was never recorded. It has never been recorded. Another thing the Court needs to remember is that this small lot, the four acre lot has no home on it. It is bare land. There is no necessity at this point to grant an easement.

If it were a home and somebody was coming in and out, if it were a hunting cabin somebody was using a couple of times a year, yes, I would agree there's an easement by necessity. However, there's not.

Ryan King, Esq.
Attorney for First Am. Title Ins. Co.
March 21, 2008 hearing
Transcript at pg. 10

Your Honor, Mr. King began by making a rather bizarre analysis of an easement by necessity. He said that there's no house there, so there can't be any necessity. I would point out that people use land for other things besides houses.....If a person owns a piece of land he or she has a right to get to the piece of land whether there's a house on the land or not.

William B. Carey, Esq.
Attorney for LeFever's
March 21, 2008 hearing
Transcript at pgs. 14-15

The Circuit Court accepted the title insurance company's unusual argument and granted its motion for summary judgment. We challenge First American in this appeal to provide any precedent to support its position - - any authority saying that

the absence of a home, or a hunting cabin, precludes an easement by necessity. Is there a case somewhere saying that unoccupied land, land usable only for farming or logging or hiking or investment, is not entitled to an easement by necessity if it would otherwise have no access to the outside world?

* * * *

The LeFevers also contended in Circuit Court, and do not wish to waive the argument here, that the law of contracts (as well as the law of easements) also requires the 4.22 acres to have an easement across the 14.33 acres.

- Orr and LeFever agreed, orally contracted, to have the old easement replaced by a new one;
- LeFever performed his part of the contract, abandoning the first easement;
- Orr did not perform his part of the contract, not providing a deed creating a new easement;
- LeFever is thus entitled to either rescission (cancellation of his deed abandoning the first easement) or to specific performance (a deed creating a new easement).

* * * *

Despite the clarity of what had happened and what was supposed to have happened, despite the long line of legal authority quoted above, the Circuit Court refused to recognize an implied easement to the 4.22 acres, or an easement by necessity, or an easement by contractual right. Neither the final order nor the transcript of the March 21, 2008 hearing in Civil Action 05-C-94 shows any effort by

the Circuit Court to explain its ruling. The order just casually concludes that the title insurance company's arguments are "well-supported" and the 4.22 acres has no easement.

Perhaps the ruling was unexplained because it is inexplicable. It should be reversed.

Assignment of Error No. 2

THE LOWER COURT WRONGLY RULED THAT, EVEN IF THERE WERE AN EASEMENT ACROSS THE 14.33 ACRES TO THE 4.22 ACRES, IT WAS EXTINGUISHED WHEN THE TWO TRACTS WERE TEMPORARILY OWNED BY THOMAS FIRRIOLO – EVEN THOUGH HIS OWNERSHIP OF THE 4.22 ACRES WAS TEMPORARY AND WAS NOT ABSOLUTE BUT BOUND BY COURT-ORDERED RESTRICTIONS.

The order in Civil Action 05-C-94 from which we appeal states:

18. First American has alleged that there is no cloud upon the title of of the 14.33 acre Tract resulting from the existence of the Original Easement since:

a.....

b. The common ownership of the 14.33 Acre Tract and the 4.22 Acre Tract caused the Original Easement to terminate pursuant to the Doctrine of Merger.

19. The Court..... concludes that the arguments made in Plaintiff's Motion for Summary Judgment are well supported by the law in West Virginia...

Record C.A. 05-C-94 at pg. 372

Here too, the lower court's ruling is not consistent with the law but contrary to it.

Here too, the lower court's ruling was rendered without explanation or reasoning. Neither the transcript nor the order gives any clue as to why the doctrine of merger was applied when the two pieces of real estate were owned in different

ways, one freely and one with court-ordered limitations on what could be done with it; a court-ordered right for Evan and Beth LeFever to reacquire it after two years.

Mr. Firriolo never owned the 4.22 acres absolutely or permanently. That land was conveyed to him by the LeFevers on September 11, 2003 by settlement agreement and court order - - both of which stated that they could reacquire the land after two years if it wasn't sold in the meantime and they had a right to approve or disapprove any proposed sale.....Firriolo's ownership of the 4.22 acres was for two years only. He was required by the Circuit Court order to convey it by September 11, 2005 – either to an outside party (with the LeFevers' approval) or back to the LeFevers.

*

The reason for the doctrine of merger is plain. It makes no sense for a person to have an easement across his or her own land. A person doesn't need any right, or right of way, to travel across his or her own land. So if two adjoining parcels of land become owned by the same person, any easement is extinguished

Here, however, the rationale for the doctrine of merger does not exist. Mr. Firriolo had only temporary ownership of the 4.22 acres. By court order, he was required to deed it to someone else within two years. His ownership of this land was so limited that he had just two choices:

- a) to sell it, with the LeFevers' approval, within two years. In this event, the new owner would need an easement to reach the outside world.

b) to let the two years go by without selling it and for it to then be returned to the LeFevers. In this event, the LeFevers would need an easement to reach the outside world.

Mr. Firriolo owned the 14.33 acres in fee simple absolute, but not the 4.22 acres. We have peered into books on the intricacies of real property law and, so far as we can tell, that 4.22 acres was owned Mr. Firriolo in fee simple conditional or fee simple determinable⁵. Regardless of the legal label, the 4.22 acres was tied up in knots. Mr. Firriolo owned it, but he couldn't do anything with it without the LeFevers' consent and they could get it back after two years.....Firriolo could do what he wanted with the 14.33. If he violated the restrictions on the 4.22, he'd be in contempt of court.

Even Mr. Firriolo's own lawyer agreed with the LeFevers on this point.

.....but I think for properties to merge, your Honor, I think that you have to have a fee simple, and I think that in this case Mr. Firriolo did not have that. He had something else. He had something less than a fee simple interest in this property (the 4.22 acres).

Greg Garretson, Esq.
Attorney for Thomas Firriolo
March 21, 2008 hearing
Transcript at pgs. 14-15

⁵

A fee simple determinable is created when the estate of the grantee expires automatically and reverts to the grantor upon the occurrence of a specified event.

26A CJS Deeds §246

The law on this issue is clear and clearly contrary to the Circuit Court's

ruling:

Before merger will occur, "[t]he ownership of the two estates must be co-extensive and equal in validity, quality and all other circumstances of right." Whether the easement is extinguished will be affected by the degree of merger between the two estates.....

7 Thompson on Real Property 2d
§60.08(b)(1), pg. 559
copy in Record C.A. 05-C-94 at pgs. 433-4

There are, however, restrictions on the operation of the doctrine of merger. For example, if the easement is appurtenant and the owner of the dominant tenement obtains an estate for life or for years in the servient tenement, the easement is not completely extinguished....

4 Powell on Real Property
§34.22[1]
copy attached

Limitations and Exceptions to Rule

In order to extinguish an easement by merger, there must be unity of title or ownership, coextensive in validity, quality, and all other circumstances of right. Ways of necessity and natural easements are, strictly speaking, not subject to the doctrine of merger.

28A C.J.S. Easement §123b, pg. 307

However, for an easement to be extinguished by merger, unity of title must exist in the same person, and ownership of the dominant and servient estates must be coextensive and equal in validity, quality, and all other circumstances.

25 Am. Jur. 2d Easements §00, pg. 598

And even if the easement were ended when the two pieces of land became owned by the same person, it would be born again like a phoenix if the two parcels were ever – as the settlement agreement required – owned by two different persons in the future.

Unity of seisin. Easements are also extinguished by unity of seisin, that is to say if the fee simple of both the dominant and the servient tenements become united in the same owner.....An easement which has been destroyed by this union of title in one hand may, however, revive under the doctrine of implied grant if the property is again severed into its original parts. A complete extinguishment occurs when both the tenements become united in one person for an estate in fee simple, but if he acquires only a particular estate in one of them, as for instance a life estate or a term of years, the easement is merely suspended and will revive again if upon the determination of his particular estate the tenements are once more in different hands.

Burn, *Cheshire's Modern Law of Real Property*
pgs. 557- 8
London (1976)
copy attached

Nevertheless, with the LeFevers arguing that Mr. Firriolo had different types of ownership in the 14.33 acres and the 4.22 acres , and with Mr. Firriolo's own lawyer agreeing, the judge – again without explanation – decided in favor of the title insurance company in Civil Action 05- C-94 and ruled that the easement was extinguished by merger.

That ruling should be reversed.

Assignment of Error No. 3

THE LOWER COURT WRONGLY SET ASIDE A SETTLEMENT AGREEMENT UPON WHICH THE APPELLANTS, EVAN AND BETH LeFEVER, HAD RELIED WHEN THEY DEEDED THEIR 4.22 ACRES TO THOMAS FIRRIOLO.

Being rather accusatory by his nature, Mr. Firriolo responded with accusations to the discovery in about 2006 that the second deed in the 1990 exchange of easements by Orr and LeFever had not been recorded. He accused LeFever, the victim of the failure to have the deed recorded, of knowing all along of what hadn't happened. For example:

LeFever engaged in inequitable conduct or outright fraud.

Record 01-C-8 at pg. 1189

The evidence and the Circuit Court's finding were otherwise.

At the hearing on October 22-23 , 2007, Evan LeFever testified that he had been as surprised as everyone else to learn many years after 1990 that the deed giving him an easement replacing the one he relinquished had not been recorded. There was other supporting evidence, including testimony from Fred Orr. Then the court concluded that LeFever had done nothing wrong:

The Court believes Mr. LeFever when he says that he believed there was a right of way, and I make that finding because of the allegation of fraud, but anyway, I think I have covered that.

Oct. 23, 2007 transcript at pg. 9

The basis for an equitable dissolving or modification of the settlement agreement based on some fraud thus vanished.

*

As an alternative, with considerably less emphasis, Mr. Firriolo also alleged that the four-year old settlement agreement should be set aside or modified because it was based on a mutual mistake of fact.

It has been clearly established that Firriolo was mistaken about the fact that a right-of-way existed.

Firriolo April 25, 2007 Moton at pg. 12
Record C.A. 01-C-8 at pg. ____⁶

With regard to this so-called mutual mistake of fact, LeFever asserts:

1. There was no mistake. A right-of-way across the 14.33 acres DID exist. It was just an implied right-of-way rather than a written one, because of the failure in 1990 to record the return deed from Orr to LeFever. See Assignment of Error No. 1.

2. Even if there was a mistake, it was minor and insignificant. It was easily curable (by recognizing an implied easement). And it was discovered so late (four years afterward) and LeFever had so strongly relied on the settlement (by deeding away his land) that scrapping the settlement was vastly unfair to LeFever.

⁶ The record has already been sent to Charleston when we write this and thus we cannot ascertain the page number in the record.

* * *

Setting aside a judgment is one of the most severe steps a court can take⁷. It is an action looked upon with disfavor and appropriate only in the clearest and strongest circumstances.

The exercise of the power to set aside or enjoin the enforcement of judgments is confined to clear cases and well recognized grounds of equitable interference. In other words, equitable relief against a judgment will not be granted in the absence of clear and sufficient grounds of an equitable character. It should appear that it would be unjust and against good conscience to enforce the judgment, that some rule or law of public policy has been violated, or that the defense available to the party seeking relief is one of purely equitable cognizance, and equity will not interfere merely on account of hardship, or because an equity court in deciding the same case would have reached a different conclusion.

49 CJS Judgments §446

For a contract to be set aside, even one that has not been elevated and transfigured by a court order, there must not have been – as there was here – any significant action taken in reliance on it.

§28.37 Negligence and Delay of Mistaken Party, Change of Position by Others, and Ratification

Relief for mistake depends not only upon the materiality of the mistake, but also upon the stage in the transaction at which the mistake is discovered and notice given. How far has performance

⁷ A note on wording.....The September 11, 2003 settlement between Firriolo and LeFever, while a jury was waiting to decide their dispute (C.A. 01-C-8), was ratified by the Circuit Court and embodied in an order. Thus it is both an agreement, a contract, and a court order. We are trying, without being too confusing, to make that clear in this brief.....The Circuit Court's decision on October 23, 2007, from which we appeal in this Assignment of Error, was labeled as a reformation of the 2003 settlement. agreement/order. It was an extreme reformation, so extreme as to essentially set aside the settlement agreement/order and substitute an arrangement devised by the Circuit Court. Not thinking it appropriate to refer in this brief to either a reformation or a setting aside, both of which are technical legal terms, we have challenged our vocabulary and used such terms as "evisceration", "scrapping" , etc.

already gone?.....What changes in position in reliance on the contract, by a party to it or by third parties, have occurred?

7 Corbin on Contracts §28.37, pg. 193
copy in Record C.A. 01-C-8 at pgs 1351 and 1398

Contracts are not reformed for mistake; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of mistake. A court will, however, rewrite a writing that does not express the bargain.

7 Corbin on Contracts §28.45, pg. 282
copy in Record C.A. 01-C-8 at pg. 1399

c. *Materiality of matter.* Relief may be granted only if the judgment depended on the matter with respect to which the mistake was made. A mistake concerning.....a peripheral matter will not justify setting aside a judgment.

2 Restatement of Judgments 2d §71, pg. 189
copy in Record 01-C-8 pgs. 1402-3

The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syllabus Point 1, Sanders v. Roselawn Memorial Garden, Inc., 152 W.Va. 91, 159 S.E.2d 784 (1968).

Syllabus Point No. 2
Bd. of Ed. of Monongalia Cty. v. Starcher
176 W Va. 388, 389
343 SE2d 673 (1986)

Motion to vacate a judgment on the basis of mistake, inadvertence, excusable neglect, unavoidable cause, newly discovered evidence, fraud, or other such circumstance should be granted only in the most extraordinary of circumstances.

Syllabus Point No. 5
Coffman v. WV Division of Motor Vehicles
209 W. Va. 736
551 S.E. 2d 658, 659 (2001)

The reasons given here by the Circuit Court of Morgan County for vacating its own Dismissal Order, by which it had approved the September 11, 2003 settlement agreement between two litigants represented by counsel, fail woefully to meet the standard set forth by all the authorities quoted above.

The reasons given by the Circuit Court were these:

The mutual mistake of fact was that there was an express right-of-way over the 14.22-acre tract which served the 4.22-acre tract. But they were both mistaken that was one, and they were also mistaken as to where it was.

October 23 transcript (18 page excerpt) at pg. 9

What I'm saying is that mutual mistake of fact was they both thought that there was an express right of way, but they were not on the same page as to where it was, you know.

Ibid at pg. 15

That is it. That is all.....The nature of the right-of-way across the 14.33 acres to the 4.22 acres, whether it be express or implied, was the mutual mistake of

fact upon which the lower court based its drastic action⁸.

* * * *

Any mutual misunderstanding by LeFever and Firriolo when they made their settlement agreement on September 11, 2003, was minor, peripheral, and easily cured. It was not anything so “unjust and against good conscience” – CJS supra - as to justify jettisoning the agreement.

Let us remember:

- a) This lawsuit was filed by Firriolo to force a change in the location of an easement, from one place to another;
- b) When the settlement was agreed on, with the jury assembled and ready to determine whether LeFever had agreed to a change in the easement’s location, everyone did indeed believe that the deeds to the two pieces of property were accurate and there was a written easement across the 14.33 acres to the 4.22 acres;
- c) It was discovered several years later, as LeFever was trying to enforce the settlement and Firriolo was being sued by Ms. Chiapella for his shenanigans in dealing with her, that a 1990 deed from Orr to LeFever for a re-located easement had never been recorded.

⁸ We see nothing in the record or transcripts to indicate any mistake or misunderstanding as to the location of the easement to the 4.22 acres, and believe the Circuit Court was mistaken on this matter.

d) The missing deed did not, as alleged by opposing parties, leave the 4.22 acres landlocked. It simply created a situation where the 4.22 acres would have an implied easement rather than an express easement. See Assignment of Error No. 1.

Once the unrecorded 1990 deed was discovered, the Circuit Court could and should have found that the 4.22 acres had an implied easement/easement by necessity across the 4.22 acres and then gone on to address the LeFever's Rule 70 motion, ordering the 4.22 acres returned to the LeFever's. Instead, it brought out the most powerful weapon in its judicial arsenal and destroyed the settlement instead of curing it.

A November 9, 2007 affidavit⁹ by Evan LeFever states that it was meaningless to him whether his 4.22 acres would have an express easement or an implied easement – so long as it has an easement. That is a totally logical attitude.....Who would care if he/she inherits a million dollars in a will or by intestacy – so long as the money comes in. The distinction grasped at by the Circuit Court in this case – that the difference between a written easement and an unwritten easement is so significant as to mandate setting aside a four-year-old agreement – is the type of thing that makes ordinary people question the soundness of our legal system.

On September 11, 2003, there was an agreement – a contract – that was transformed and strengthened into a court judgment.

⁹ Record C.A. 01-C-8 at pg. ____.

The mere fact that both parties are mistaken with respect to such an assumption does not, of itself, afford a reason for avoidance of the contract by the adversely affected party.Relief is only appropriate where a mistake of both parties has such a material effect on the agreed exchange of performance as to upset the very basis for the contract.

This Section applies to such situations. Under it, the contract is voidable by the adversely affected party if three conditions are met. First, the mistake must relate to a “basic assumption on which the contract was made.” Second, the party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances. Third, the mistake must not be one as to which the party seeking relief bears the risk.

1 Restatement, Contracts Second §152
Comment a.
copy attached

Note the reference to “the adversely affected party.”.....Here, Mr. Firriolo did not attack the settlement because he was adversely affected by it. He attacked it, filing his motion for equitable relief and accusing LeFever of fraud, simply for tactical reasons. He was being sued by Chiapella/Frye of concealing the settlement, so it was to his advantage to have the settlement nullified.

In his brief, Mr. Firriolo will have a chance to show how he was so “adversely affected” by the settlement of September 11, 2003 that a court of equity should have so greatly reformed it – to the point of nullifying it – in October of 2007. He will have a chance to show why, after finding the LeFever's blameless and not guilty of the fraud that had been alleged, the court should have gone ahead and reformed/nullified the settlement. He will have a chance to show how any mutual mistake was so significant to him that reformation/nullification was proper.

* * * * *

Evan and Beth LeFever assert that the action taken by the Circuit Court of Morgan County was not in any way appropriate to the situation it faced. The settlement agreement, and its formal approval by the Court, and its implementation by the parties – payment of money in exchange for conveyance of land – had no flaw that justified its judicial evisceration four years later.

The settlement agreement of September 11, 2003 should have been enforced in 2007, not “reformed” to the extent of ending it.

We appeal the Circuit’s Court’s decision in Civil Action 01-C-8 to “reform” the settlement agreement, rather than curing whatever misunderstanding may have existed between Firriolo and LeFever.

Assignment of Error No. 4

THE LOWER COURT, HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT, DEvised A NEW “SOLUTION” THAT WAS GROSSLY UNFAIR AND INEQUITABLE TO THE LeFEVERS.

After not ruling on the central issue before it - what easement led across the 14.33 acres to the 4.22 acres – and thereby curing the insignificant misunderstanding by Messrs. Firriolo and LeFever back in 2003, the Circuit Court tore their settlement agreement to shreds in the name of equity. And then, in the name of equity, it ordered that the 4.22 acres be granted to persons who had not even been part of the settlement agreement.

THE COURT.....So in attempting to exercise equitable powers equitably, the Court has decided that the suggestion advanced by Mr. Hamstead is the fairest solution to this situation. Therefore reformation of the settlement would provide in principal part that legal title to the 4.22-acre tract remains with Mr. Firriolo, but he must convey the contract, I mean the parcel, to Dr. Frye, if he tenders \$26,000.

Oct. 23, 2007 transcript at pg. 12

There was nothing even slightly equitable about this peculiar ruling, improvised by the Circuit Court

Consider its effect on each of the three parties:

Firriolo. Under the settlement, the LeFevers had a right to reacquire the 4.22 acres from him. But he had contracted to sell it to Chiapella and Frye, with no right to do so, and found himself being sued by them (CA 05-C-34).....This ruling is a gift to him, enabling him to sell what he previously had no right to sell.

Chiapella and Frye. The obverse of Firriolo. By this ruling, they acquire the 4.22 acres despite Firriolo's previous inability to sell it to them, and despite the LeFevers' previous right to reacquire it.....The ruling is a gift to them, enabling them to buy what they previously had no right to buy.

LeFevers. What was given to Firriolo, Chiapella, and Frye came from the LeFevers. They lost the 4.22 acres. Despite being entirely innocent in every way – victims of the unrecorded deed back in 1990; sued by Firriolo over an agreement which never existed; dragged into court on accusations

which didn't hold water; believing they could reacquire the 4.22 (as the settlement said) when they conveyed it in 2003 – they have been unfairly made the losers by the Circuit Court's ruling.....Evan LeFever testified¹⁰ that he wants to own the land; not sell it. Yet the land is being taken away from him and his wife, for the benefit of Firriolo, Chiapella, and Frye.

*

We do not know if a court can be estopped, but all the elements of estoppel exist here. On September 11, 2003, the Circuit Court of Morgan County issued an order approving the Firriolo/LeFever settlement. In reliance on that order and the underlying agreement, the LeFever deeded their 4.22 acres to Firriolo – with a right to take it back after two years. When that time came, however, the Court negated that right of reacquisition – rather than resolve an easily resolvable misunderstanding.

Punishing the LeFever, taking away their right to reacquire the land, was not equity. Chiapella and Firriolo should have been left to battle between themselves as to who was right or wrong, rather than alleviate their problems at the expense of those who are innocent – Evan and Beth LeFever.

* *

We believe this taking away of the LeFever's right to reacquire the land was an error of constitutional magnitude. To promise that they could get the 4.22 acres back if they did what the court ordered, and then deprive them of that right even

¹⁰ Oct. 22, 2007 transcript at pgs. 21-22.

though they did exactly what had been ordered, violates not just the basic principles of equity, not just the law of contracts, not just the rule of estoppel – but also the guarantee against loss of property without due process of law, as set forth in the Fourteenth Amendment to the U.S. Constitution and Article 3 §10 of the West Virginia Constitution.

Assignment of Error No. 5

HAVING WRONGLY SET ASIDE THE 2003 SETTLEMENT AGREEMENT AND WRONGLY EXTINGUISHED THE LeFEVERS' RIGHT TO REACQUIRE THE 4.22 ACRES, THE LOWER COURT FORCED THAT LAND TO BE SOLD WITH UNFAIRLY LOW COMPENSATION TO THE LeFEVERS.

This, we will concede, is a fallback argument.

If this Court decides, despite all the authority set forth above, that the LeFevers must lose their right to reacquire the 4.22 acres, they ought to at least get a fair price for it. At the October 22-23 hearing, Mr. Firriolo brought forth an appraiser who – without identifying any “comparable” sales or other standard tools of the trade – stated that the 4.22 acres was worth \$26,000 acres.

That price is way too low for raw land in Morgan County during the last part of 2007. Asking the Circuit Court to reconsider its ruling, the LeFevers – who want to keep the land and not have it be sold at all – produced evidence of a considerably greater value:

- a) a letter from Sandra Stotler, a realtor, saying that the going price would be between \$12,000 and \$15,000 per acre (Record C.A. 01-C-8 at pg. 1410);
- b) copies of real estate listings from other realtors (Record C.A. 01-C-8 at pg. 1411).

Despite this evidence, the Circuit held fast to its ruling that the 4.22 acres was worth only \$26,000.

From that, we also appeal.

CONCLUSION

We have tried our best to simplify the complex tangle of facts in this appeal, and apologize if we've not completely succeeded.

If the facts be complicated, however, the legal issues are sharply defined. The Circuit Court erred grievously on each of the issues presented in this appeal and its rulings require reversal.

Reversal of the Circuit's Court's rulings is required for all the reasons set forth in this brief. Reversal is required by established authority in several fields of law, by basic principles of equity and fairness, and by common sense.

*

If all the circumstances of a situation call for the existence of an easement despite the absence of a writing, an easement will be implied by the court.....If a parcel of land has no access to a public road, an easement by necessity must be decreed by a court.....If two landowners make an agreement that is only half-completed, a court should order either rescission or specific performance of the agreement.

For an easement to be extinguished by merger, the dominant and servient tenements must be held by someone with an identical interest in each.....Here, where Thomas Firriolo owned the 14.33 acres in fee simple absolute but – by his own lawyer’s admission – owned “something else” with regard to the 4.22 acres, the easement to the 4.22 was not extinguished.

If the settlement of a lawsuit, finalized and embodied in a court order, causes one of the parties to deed away four acres of land on the condition that he may reacquire it later on certain conditions, and all those conditions are met, a court cannot subsequently “reform” its earlier order because of a minor mutual mistake which has hurt no one and which can be easily corrected.

And when a court undertakes to do equity, its solution to the problem it faces must not be such as to severely injure one of the parties - - preventing the LeFevers from reacquiring the 4.22 acres - - while bestowing unjustified benefits on the other parties (including intervenors who had not been parties to the original agreement).

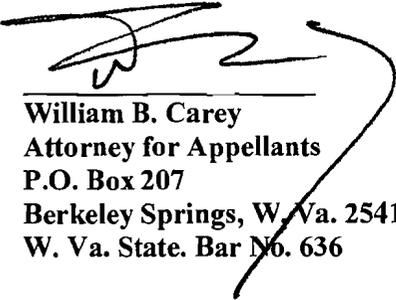
For all these reasons, the rulings of the Circuit Court of Morgan County should be reversed and the LeFevers allowed to regain their 4.22 acres – with an easement to it across the 4.33 acres.

* *

All during this litigation, it seems that the central issues have been evaded. Opposing parties have raised peripheral points, distracting the court with minor issues or non-issues. Here, we have asserted five assignments of error and the Rules of Appellate Procedure require the appellees to address the points that we present. We trust that they will not digress.

RESPECTFULLY SUBMITTED on this 31st day of July, 2009.

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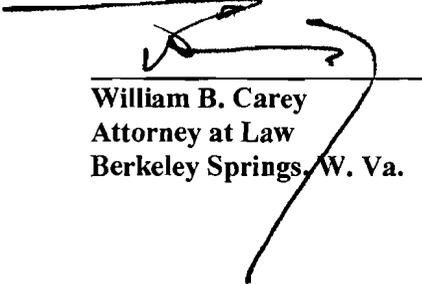
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EXHIBITS

ON

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