

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket Nos. 34705 and 34714 (Consolidated)

EVAN LEFEVER and BETH LEFEVER,

Appellants,

v.

FIRST AMERICAN TITLE INSURANCE CO. et al.,

Appellees.

EVAN LEFEVER and BETH LEFEVER,

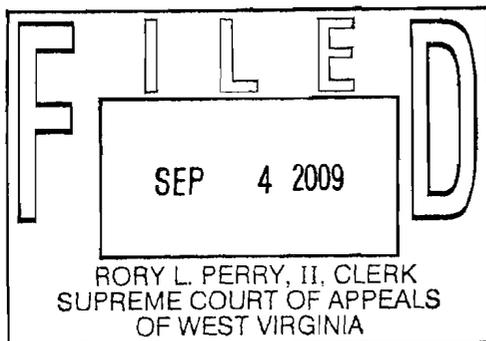
Appellants,

v.

THOMAS FIRRIOLO et al.,

Appellees.

BRIEF OF APPELLEE
FIRST AMERICAN TITLE INSURANCE COMPANY



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ORDER IN QUESTION

The Order questioned by Appellants at Docket No. 34705 and addressed by Appellee, First American Title Insurance Company, herein is the April 30, 2008 Order granting First American Title Insurance Company's Motion for Summary Judgment, entered in the Circuit Court of Morgan County, West Virginia at Civil Action No. 05-C-94.

STANDARD OF REVIEW

It is well settled that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Zimmer v. Romano*, ___ W.Va. ___, 679 S.E.2d 601 (2009) quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

APPELLEE'S STATEMENT OF THE CASE

A. **Appellant's Inaccuracies**

Contrary to the allegations and aggrandizing statements made by Appellants with respect to the trial court's April 30, 2008 Order granting Appellees, First American Title Insurance Company (hereinafter referred to as "Appellee" or "First American"), Motion for Summary Judgment, the Circuit Court of Morgan County issued an Order that was properly supported by the overwhelming evidence of record. Specifically, the Circuit Court correctly held that "**...there was no easement servicing the 4.22 Acre Tract at the time Anne Chiapella purchased the 14.33 Acre Tract" and, therefore, First American was entitled to summary judgment as a matter of law. (April 30, 2008 Order, ¶21, emphasis added). To oppose this concise finding, Appellants would have the Court expand these issues to address whether no easement previously existed or could ever exist over the 14 Acre Tract to the 4 Acre Tract. This approach seeks to steer the Court away from the fact that at all times relevant hereto, no easement existed.**

Appellant also incorrectly asserts that the Circuit Court erred in ruling that any easement that may have existed after Appellants released the prior easement with the recording of a Quit Claim Deed in 1990 would have been extinguished by the doctrine of merger once Appellee, Thomas Firriolo became the common owner of the two (2) tracts of land. Even a cursory review of the deeds conveying the ownership interests in the two (2) tracts of land at issue establish that both deeds transferred fee absolute ownership in the properties **without reserving any rights for LeFever or providing for any exceptions affecting the title of** Appellee Firriolo.

Finally, the Circuit Court correctly determined that at the time Ms. Chiapella purchased the 14 Acre Tract neither an easement by implication nor an easement by necessity had been created. In fact, the Appellants admit that they entered into a settlement agreement in Civil Action 01-C-8

before the Circuit Court could rule on the existence of an easement. Furthermore, the record is devoid of any evidence presented by Appellants in support of their easement by necessity argument.

B. Facts

The origin of this dispute dates back to a Deed of Partition dated October 31, 1988, when several property owners, James and Helen Clark, Fred Orr, Carrie Carmichael, and Dona Jean Wilcox partitioned off a 4.22 acre tract of undeveloped land (hereinafter the "4 Acre Tract") from a larger tract of land commonly known as the "Eppinger Farm" and deeded the 4 Acre Tract to Appellant Evan LeFever. The partition also created an easement benefiting the 4 Acre Tract (hereinafter, the "Original Easement"). The easement was defined as follows:

Together with a 20 foot wide right-of-Way, for ingress and egress, more particularly described as follows:

BEGINNING at a point on the east side of W.Va. County Route 13; thence, with the center of the 20 foot wide Right-of-Way, S 70 deg. 04' 27" E, 148.99 feet; thence, With the Arc of a curve to the left for distance of 275.47 feet (the central angle = 52 deg. 52' 36" and the Radius = 289.49 feet); thence, N 57 deg. 02' 57" E, 345.68 feet; thence, With the Arc of a curve to the right for a distance of 299.09 feet (the central angle = 93 deg. 13' 42" and the radius = 183.82 feet) to a point 10 feet from the line of Philip W. Harmison; thence running 10 feet from and parallel to said Harmison, S 29 deg. 43' 20" E, 259.88 feet to the west line of the above described 4.22 acres, as shown on the attached plat.

The Original Easement ran from the 4 Acre Tract across a larger 14.33 acre tract of land (hereinafter the "14 Acre Tract") to West Virginia County Route 13. *See Plaintiff's Motion for Summary Judgment, Exhibit "B"*.

For whatever reasons, by Quit-Claim Deed recorded February 6, 1990, Appellant, Evan LeFever, the then owner of the 4 Acre Tract, "... [did] release, remise and forever quitclaim unto [Fred Orr] all his right, title and interest in the following described 20 foot wide right-of-way." *See Plaintiff's Motion for Summary Judgment, Exhibit "C"*. Fred Orr was the owner of

the 14 Acre Tract at the time of the 1990 Quit Claim Deed. The Quit Claim Deed utilized the exact description of the Original Easement set forth in the Partition Deed. *See Plaintiff's Motion for Summary Judgment, Exhibit "A"*. It is uncontested that Appellants and Mr. Orr intended to create a new right of way or easement across the 14 Acre Tract to the 4 Acre Tract. The Quit Claim Deed does reference that Appellants "has or will be acquiring a new right-of-way to serve the said parcel of 4.22 acres..." Appellants concede, however, that no replacement right-of-way was ever recorded.

By Deed recorded on February 6, 1990 at 9:01 a.m., one minute after the Quit Claim Deed was recorded; Fred Orr conveyed all of his right, title and interest in and to the 14 Acre Tract to Robert L. Dunker and Hermina P. Dunker (hereinafter, the "Dunkers"). *See Plaintiff's Motion for Summary Judgment, Exhibit "D"*. The Dunker deed was not modified to reflect the termination of the Original Easement and the same mistake was repeated by each subsequent deed, including the conveyance from Firriolo to Chiapella. On March 9, 2000, the Dunkers conveyed all right, title and interest in the 14 Acre Tract to Appellee Firriolo. *See Plaintiff's Motion for Summary Judgment, Exhibit "E"*.

Subsequently, on April 24, 2000, Appellee Firriolo, as owner of the 14 Acre Tract, forwarded to Appellant, the owner of the 4 Acre Tract, a proposed Deed of Right of Way (hereinafter the "Proposed Easement") which specifically stated:

Whereas: [Firriolo] herein desires to grant and convey unto [Evan LeFever] a Right-of-Way, in consideration for the Grantee's abandonment of a previously granted Right-of-Way, as described and set forth in Deed of Quitclaim & Release, of record immediately prior hereto..."

See Plaintiff's Motion for Summary Judgment, Exhibit "F". For whatever reason, the Proposed Easement was never accepted by LeFever and was never recorded.

Contending there to have been a mutual verbal agreement to move the location of the Original Easement, which in reality had been extinguished in 1990 by the Quit Claim Deed, and seeking to enforce the verbal agreement, Appellee Firriolo filed suit against Appellant in the Circuit Court of Morgan County at Civil Action No. 01-C-8.¹ After extensive legal maneuvering by Appellant and Appellee Firriolo, the Circuit Court set the case for trial on September 11, 2003.

However, on the day of trial, Appellants and Appellee Firriolo entered into a settlement agreement.² As acknowledged by Appellants in their Brief, “[t]he settlement was an unusual one, but one that met the needs of the parties.” *Appellant’s Brief*, p. 4, ¶8. Pursuant to the terms of the Settlement Agreement, Appellee Firriolo paid \$9,500.00 to Appellants in return for the deed to the 4 Acre Tract. Appellee Firriolo was to have two (2) years in which to find a buyer for the 4 Acre Tract and Appellants had the right to approve or disapprove of any offers to purchase the 4 Acre Tract. If the land remained unsold after the two (2) year period, Appellants could reacquire the land by returning the \$9,500.00 to Appellee Firriolo.

On September 11, 2003, Appellant executed a Deed conveying to Appellee Firriolo conveying all right, title and interest in and to the 4 Acre Tract. *See Plaintiff’s Motion for Summary Judgment, Exhibit “G”*. Surprisingly, Appellants agreed to execute a Deed that did not reserve Appellants’ right to reacquire the 4 Acre Tract in the event that it had not been sold within the two (2) year time limit. In this regard the Deed conveyed fee simple absolute title.

¹ The civil action filed at No. 01-C-08 corresponds to the consolidated appeal docketed at Appeal No. 34714.

² Appellant appears to contend that notwithstanding that the parties reached a settlement agreement, which called for the transfer of the 4 Acre Tract to Appellee Firriolo making him the owner of both the 4 and 14 Acre Tracts, the Circuit Court should have made a judicial determination as to the existence and location of an easement to the 4 Acre Tract.

Prior to obtaining the 4 Acre Tract from Appellant, Appellee Firriolo was also the owner of the 14 Acre Tract. Accordingly, as of September 11, 2003 Appellee Firriolo became the owner of both tracts. Thus, even if a valid easement existed at the time of the September 11, 2003 conveyance, which it did not, any such easement was merged and extinguished by operation of law because there was common ownership of both parcels without reservation or rights or exceptions. Appellee Firriolo subsequently attempted to sell both the 14 and 4 Acre Tracts.³

On October 7, 2003 Appellee Chiapella negotiated directly with Appellee Firriolo for the purchase of the 14 Acre Tract and on that same day, entered into a written contract with Appellee Firriolo to acquire the 14 Acre Tract and residence located thereon for a sum of \$350,000.00. Initially, the agreement between Appellees Firriolo and Chiapella contained a settlement date of January 8, 2004. The settlement date was, however, moved to October 21, 2003. On October 21, 2003, Firriolo executed and delivered a Deed conveying all right, title and interest in and to the 14 Acre Tract to Appellee Chiapella. *See Plaintiff's Motion for Summary Judgment, Exhibit "H"*. Notwithstanding that the Original Easement had long been extinguished and no subsequent easement had been recorded, the Chiapella Deed mistakenly referenced the Original Easement. *See Plaintiff's Motion for Summary Judgment, Exhibit "H"*. The Chiapella Deed did not reflect that the Original Easement had been released thirteen (13) years earlier by Quit Claim Deed.

Prior to closing on the 14 Acre Tract, a title examination of the property was conducted. On October 21, 2003 Chiapella received a Certificate of Title and a Commitment for the 14

³ It is uncontested that the 14 Acre Tract being sold to Chiapella was the only tract of land subject to the title insurance policy issued by First American. Conversely, the 4 Acre Tract which Appellee Firriolo attempted to sell to John Frye, Ms. Chiapella's companion, was not covered by any title insurance issued by First American.

Acre Tract. Pursuant to the Commitment, Appellee First American insured that Chiapella would receive good and marketable title to the 14 Acre Tract. Appellee First American did not nor has it ever insured the title to the 4 Acre Tract. As noted by Appellants, the title insurance policy First American issued to Appellee Chiapella contained an exclusion for the Original Easement, notwithstanding that the same had been extinguished by the prior Quit Claim Deed. The title insurance policy was issued on October 23, 2003 and contained an identical exclusion for the Original Easement.

Notwithstanding that she was fully apprised of a potential right of way across the 14 Acre Tract prior to consummating the purchase of the same, Chiapella filed suit against First American asserting claims under the theories of *respondeat superior*, breach of contract and “bad faith” i.e., violation of the West Virginia Unfair Trade Practices Act, West Virginia Code 33-11-1, *et seq.* In an attempt to establish that there was no cloud upon title to the 14 Acre Tract, First American filed a Declaratory Judgment Action seeking a determination that there was no easement across the 14 Acre Tract at the time Chiapella purchased the same. The Declaratory Judgment Action was filed at Civil Action No. 05-C-94 in the Circuit Court of Morgan County, West Virginia.

After an exhaustive search and review of the land records for the tracts of land at issue as well as its participation in intensive discovery, First American filed a Motion for Summary Judgment in the Declaratory Judgment Action, 05-C-94. In the Motion for Summary Judgment, **First American alleged that the Original Easement running across the 14 Acre Tract did not exist at the time Appellee Chiapella purchased the same.** In addition, First American argued that even if the Original Easement or any other easement existed at the time Ms. Chiapella purchased the 14 Acre Tract, which it did not, the legal doctrine of merger extinguished any such easements. After careful consideration of the extensive briefs, oral

arguments of counsel and the evidence presented by the parties, the Circuit Court ruled in First American's favor and granted the Motion for Summary Judgment finding that no easement across the 14 Acre Tract existed at the time Anne Chiapella purchased the lot. The Circuit Court's findings of fact and conclusions of law were memorialized in an Order of Court dated April 30, 2008. It is from this Order that Appellants appeal.

As will be set forth herein, the Circuit Court's Order Granting First American's Motion for Summary Judgment was correct as a matter of law and should be affirmed.

ARGUMENT

A. The Circuit Court Correctly Granted Summary Judgment in Favor of Appellee First American and Against Appellants.

1. There was no Easement Across the 14 Acre Tract at the Time it was Purchased by Appellee Anne Chiapella.

a. The 1990 Quit Claim Deed extinguished the Original Easement and no subsequent easement was recorded.

It is well settled that “[T]he burden of proving an easement rests on the party claiming such right and **must be established by clear and convincing proof.**” Syl. Pt. 1, *Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976) (*emphasis added*). The evidence of record before the trial court clearly established that Appellants failed to meet their burden that, at the time Appellee Chipella purchased the 14 Acre Tract, an easement existed. “Similarly, the burden of proving the termination of an easement . . . is [on] the party who claims that the easement has been terminated.” *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001), *citing Strahin v. Lantz*, 139 W.Va. 285, 288, 456 S.E.2d 12, 15 (1995). *See also Keller v. Hartman*, 175 W.Va. 418, 333 S.E.2d 89 (1985). Here, the land record before the Circuit Court unequivocally established that at the time Chiapella purchased the 14 Acre Tract, there was no easement running from the 4 Acre Tract across the 14 Acre Tract. Further,

Appellants have failed to provide any evidence that a subsequent easement was created and recorded.

The uncontroverted record before the Circuit Court supports First American's Motion for Summary Judgment and the Circuit Court's ruling that the Original Easement was extinguished upon the recordation of the Quit Claim Deed from Appellant to Orr in 1990. Until there is a recorded grant of an easement across the 14 Acre Tract to the 4 Acre Tract or a court of competent jurisdiction makes a judicial determination that an easement by implication, necessity or prescription exists, the 4 Acre Tract must remain landlocked. However, even if a court makes a judicial determination that the owner of the 4 Acre Tract is entitled to an easement by whatever legal method; the easement would not be retroactive to the time that Ms. Chiapella purchased the 14 Acre Tract. Simply stated, at the time Appellee Chiapella purchased the 14 Acre Tract on October 21, 2003, there was no easement across it to the 4 Acre Tract because the Original Easement was extinguished in 1990 and there was no subsequent grant or judicial determination that an easement existed. Thus, the Circuit Court correctly held as a matter of law that as of the date Appellee Chiapella purchased the 14 Acre Tract, no easement existed and First American was entitled to Summary Judgment.⁴

b. The Doctrine of Merger destroyed any easements across the 14 Acre Tract.

Even if Appellants are correct in their assertion that an easement was some how created by implication, necessity and/or contract prior to Appellee Chiapella's purchase of the 14 Acre

⁴ Appellants' argument that the Circuit Court's ruling "is contrary to all law for the past 400 years in the State of West Virginia..." borders on the absurd. One need not leave the State of West Virginia and travel the "English-speaking world" to locate cases in which the Court determined that property was landlocked. See e.g. *State v. Srnsky*, 213 W.Va. 412, 582 S.E.2d 859 (2003), *Law v. Monongahela Power Co.*, supra., *Cox v. State*, 194 W.Va. 210, 460 S.E.2d 25 (1995), *Highway Properties v. Dollar Savings Bank*, 189 W.Va. 301, 431 S.E.2d 95 (1993). While it may be true that West Virginia disfavors landlocked property, it does not prohibit the same as Appellants erroneously contend.

Tract, any such easement merged when Appellee Firriolo purchased both tracts of land. In West Virginia it is well established that “When the owner of a dominant estate acquires the fee simple title to the servient estate, an easement appurtenant to the dominant estate is extinguished.” *Highway Properties v. Dollar Savings Bank*, 189 W.Va. 301, 431 S.E.2d 95 (1993), *citing* Syl. Pt. 2, *Henline v. Miller*, 117 W.Va. 439, 185 S.E. 852 (1936), *Perdue v. Balengee*, 87 W.Va. 618, 105 S.E. 767 (1921), *Pingley v. Pingley*, 82 W.Va. 228, 229, 95 S.E. 860, 861 (1918). The Court has also held as follows:

It seems to be firmly established that where the owner of land over which an easement is claimed as appurtenant to another tract of land becomes also the owner of such other tract, the easement is merged in his superior estate. No one can use part of his own estate adversely to another part, and the proposition, therefore, must be true that if the owner of one of the estates, whether the dominant or servient one, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership, and thereby extinguished.

Highway Properties, 189 W.Va. at 304, 431 S.E.2d 98 (*citations omitted in the original*). Thus, as a matter of law, all easements, if any, benefiting either of the two tracts of land to the detriment of the other were extinguished by the doctrine of merger at the time Firriolo became the common owner on September 11, 2003.

Appellants erroneously assert that the doctrine of merger does not apply in this instance because Mr. Firriolo did not own both tracts in fee simple absolute. Contrary to Appellants allegations, the law in West Virginia does not impose any such restriction. Not surprisingly, Appellants cite to no West Virginia case law that stands for such a proposition. Instead, Appellants cite to two (2) hornbook passages, but no West Virginia case law, that adopts the same. An extensive search of West Virginia law failed to produce any case in which the Court held that a dominant and servient estate must be owned in fee simple absolute in order for the doctrine of merger to apply. At best, the Court, in a footnote, stated as follows:

[t]here are some limitations to the concept of merger as summarized in 28 C.J.S. Easements § 57(b) (1941); 'in order to extinguish an easement by merger, there must be unity of title and, according to some decisions, of possession and enjoyment of the dominant and servient estates, coextensively and validity, quality, and all other circumstances of right'

Highway Properties, n.4, *supra*. Once Appellee Firriolo became the common owner of the two (2) tracts of land in fee simple, the Doctrine of Merger extinguished any remaining easement, of which there were none. Thus, the Circuit Court correctly determined that there was no easement across the 14 Acre Tract at the time she purchased the property in October 2003.

c. Even assuming, *arguendo*, that Appellants' position regarding the doctrine of merger is correct, which it is not, both tracts merged under the common fee simple ownership enjoyed by Mr. Firriolo.

A cursory review of the deed conveying Appellants' interest and rights in the 4 Acre Tract to Appellee Firriolo, clearly establishes that the deed granted "fee simple, with covenants of general warranty in fee simple" See *Respondent's Motion for Summary Judgment*, Exhibit "G". Accordingly and contrary to the Appellants' argument, Firriolo held both properties in fee simple and the doctrine of merger extinguished any pre-existing easements, of which there were none. Furthermore, Appellants' argument that they held some reversionary interest in the property based upon the Settlement Agreement reached in the 01-C-8 case is incorrect as evidenced by the deed and the Doctrine of Merger by Deed.

It is well settled that in any conveyance or devise of land, any exclusions and/or reservations must be set forth with specificity in the deed conveying the real property. In *Cottrill v. Ranson*, 200 W.Va. 691, 490 S.E.2d 778 (1997), this Court held as follows:

At the outset, we recognize that a conveyance or devise of any real property, containing no words of limitation, shall be construed to pass the fee simple, or the whole estate or interests, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will. W.Va. Code § 36-1-11 (1985) (emphasis

added). We have made it clear that in order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such exception or reservation must be expressed in certain and definite language. Syl. Pt. 2, *Hall v. Hartley*, 146 W.Va. 328, 119 S.E.2d 759 (1961). We also have said where there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee. Pt. 6, Syllabus, *Paxton v. Benedum-Trees Oil Co.*, 80 W.Va. 187, 94 S.E.2d 472 (1917). Syl. Pt. 3, *Hall, supra*. (Internal quotations omitted).

By failing to include Appellants' right to reacquire the land after two (2) years in the recorded deed for the 4 Acre Tract LeFever again released any reversionary interest he may have had.⁵

As set forth above, it is well settled law that in order for a conveyor of property to retain some right or interest in a property such right or interest must be set forth with specific detail in the deed. Here the deed to the 4 Acre Tract contains no mention as to any right or interest Appellants' may have had to reacquire the 4 Acre Tract. *See Respondent's Motion for Summary Judgment, Exhibit "G."* Thus, the record before the Circuit Court clearly established and the Circuit Court correctly determined that the doctrine of merger extinguished any easements running between the two tracts of land in question.

Based upon the foregoing, it is evident that the Circuit Court correctly granted summary judgment in favor of the Respondent and against the Petitioners. The unequivocal evidence of record clearly established that no easement existed between the two properties in question at the time Anne Chiapella purchased the 14 Acre Tract. Accordingly, the Circuit Court committed no error and the Petition for Appeal should be denied.

⁵ It is uncontested that, at the time of the conveyance Appellants were represented by counsel who apparently failed to ensure that the terms of the 01-C-08 Settlement Agreement were reserved and/or excepted in the deed.

2. Appellants Are Not Entitled to an Easement by Implication, Necessity or Prescription.

a. Appellants lacked the standing to seek any easement across the 14 Acre Tract to the 4 Acre Tract.

Appellants lack standing to seek an easement of any manner to the 4 Acre Tract as they neither own nor do they retain any reversionary interest in the 4 Acre Tract. By failing to include their right to reacquire the 4 Acre Tract in the September 11, 2003 deed conveying the 4 Acre Tract to Appellee Firriolo, the Appellants released and relinquished any claim to the 4 Acre Tract and any subsequent ability to seek an easement thereto. However, even if the Appellants retained some reversionary right in the 4 Acre Tract, they have failed in these proceedings to establish the existence of an easement by implication, necessity or prescription.

b. Appellants failed to meet the burden necessary to establish an easement by implication, necessity or prescription.

It is well settled in West Virginia that “[t]he burden of proving an easement rests on the party claiming such right and **must be established by clear and convincing proof.**” Syl. Pt. 1, *Berkeley Development Corp. v. Hutzler*, 159 W. VA. 844, 229 S.E.2d 732 (1976) (*emphasis added*). In response to First American’s Motion for Summary Judgment, Appellants failed to introduce any evidence that an easement by implication was created between 1990 and October 25, 2003, the date Appellee Chiapella purchased the 14 Acre Tract. While some evidence has been presented that Appellants and Orr intended to create a substitute easement once the Original Easement was extinguished by the 1990 Quit Claim Deed, Appellants failed to produce any evidence that there was an actual judicial determination creating the alleged easement during that time frame. Further, by conveying the 4 Acre Tract to Appellee Firriolo, Appellants have lost standing to seek such a determination.

Moreover, at no time did Appellants adduce any evidence that an easement by necessity was created. As recognized by the treatises cited by Appellants, "...lastly, reasonable need for the easement must be proved by clear and convincing evidence." *Appellants' Brief*, p.19 citing 6B M.J. Easements §12, pg. 199. Indeed, "[i]f the need is very great, an inference will be drawn that an easement was intended to be created." *Id.* quoting, 11 *American Law of Property*, p. 259, § 60.03(b)(5)(i) (*emphasis added*). Appellants clearly failed to meet their burden of proof since they never attempted to establish why LeFever needs an easement. Clearly no easement is necessary as Appellants have no ownership interest in the land.

Prior to the Circuit Court granting First American's Motion for Summary Judgment, Appellants offered absolutely no evidence, testimony or affidavits that there was a "great need" for an easement across the 14 Acre Tract to the 4 Acre Tract. As pointed out by counsel for First American during oral argument on the Cross-Motions for Summary Judgment, and apparently misunderstood by Appellants, the 4 Acre Tract is undeveloped, contains no home, cabin or other structure on the property.⁶ The record before the Circuit Court is devoid of any evidence that the 4 Acre Tract was used for any purpose. Thus, the Circuit Court was well within its right to disregard Appellants' claim that an easement by necessity was created.

c. Appellants seek a remedy not found in the law.

Absent a recorded easement, it was the Appellants burden to establish an easement by implication, necessity or prescription. Appellants, however, now appear to assert that the Circuit Court should have determined that an easement by implication or necessity was created at some

⁶ Appellants mistakenly challenge First American to cite to a case establishing that a residence, cabin or some other structure is necessary to create an easement by necessity. Appellants seem to forget that it is they who bear the burden of establishing such an easement. Moreover, Appellants challenge is apparently based on their perception that First American believes that a structure is necessary to create an easement by necessity. The point that counsel for First American was attempting to make during the oral argument on the Motion for Summary Judgment was that Appellants had utterly failed to produce any rebuttal evidence that an easement was necessary to access the undeveloped and apparently unused property.

point after the Quit Claim Deed was recorded in 1990 and Appellee Chiapella purchased the 14 Acre Tract on October 21, 2005. Put another way, Appellants appear to assert that the trial court erred by failing to create a retroactive easement by implication or necessity. Such a remedy cannot be found in the law.

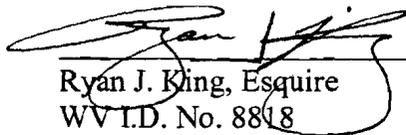
It is uncontested that Appellants extinguished the Original Easement in 1990 by Quit Claim Deed. It is further uncontested that before the Circuit Court or a jury could rule on the existence and/or location of an easement in civil action 01-C-8, Appellants entered into a Settlement Agreement and conveyed away their rights to the 4 Acre Tract to Firriolo. It was not until October 25, 2005, that Appellants sought the return of the 4 Acre Tract by filing their Rule 70 Motion (R.R. at 358). In the interim, however, Appellee Chiapella purchased the 14 Acre Tract without notice of any subsequent recorded easement or judicial determination creating an easement over the 14 Acre Tract. To accept Appellants argument would not only upend the law of property but would subject Chiapella, to an encumbrance not of record and not recordable prior to the time of purchase. In order to grant the relief requested by Appellants this Honorable Court would have to determine that the trial court erred in failing to rule that the 14 Acre Tract was encumbered by an easement by implication or necessity and making the same retroactive to 1990 for the benefit of a party having no ownership interest in the land. Such cannot be the case in a record notice state such as West Virginia. Accordingly, this Honorable court should affirm the Circuit Court's ruling.

CONCLUSION

The clear and unequivocal evidence before the Circuit Court clearly established that at the time Appellee Chiapella purchased the 14 Acre Tract on October 21, 2003, there was no easement running across the 14 Acre Tract to the 4 Acre Tract. Accordingly, the Circuit Court's ruling that First American Title Insurance Company was entitled to summary judgment as a matter of law must be affirmed.

Respectfully submitted,

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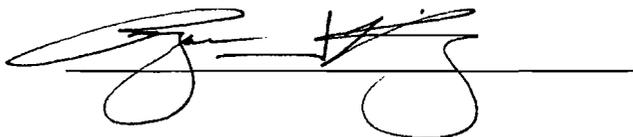
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Appellee First American Title Insurance Company** was served this 3rd day of **September, 2009**, via First Class United States Mail, postage prepaid, upon the following:

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A handwritten signature in black ink, appearing to be "R. Greg Garretson", written over a horizontal line.