

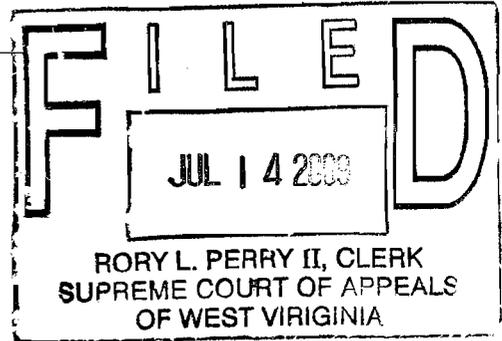
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

Ronald D. Cobb and Deborah Herrald Cobb,  
Plaintiffs Below, Appellees

Vs.) No. 35015

Thomas S. Daugherty and Christine A. Daugherty,  
(fka Christine Klapproth), husband and wife,  
Defendants Below, Appellants



**BRIEF OF APPELLANTS**

***THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL***

This case involves a claim of an easement in favor of the Appellees over and against property owned by the Appellants and is an Appeal from a ruling of the Circuit Court of Kanawha County ultimately permitting the case to go to the jury on two counts from a multiple count complaint and the finding of the jury for the Appellees on one count and the refusal of the Judge to set aside the verdict based upon the facts and law set forth below.

***A STATEMENT OF THE FACTS OF THE CASE***

This case is a dispute between two neighbors about an alleged easement that runs over one neighbor's property onto the other. The property in question is the Northerly ½ of Lot 4 Block 28 of the So. Charleston Improvement Company Addn., now part of the parcel located at 1031 Circle Road, Charleston, WV and owned by the Defendants, Thomas and Christine Daugherty. Lot 4 is a pie shaped lot that fronts on Circle Road, and is situated between Lots 3 and 5. Prior to April 23, 1979, Lots 3 and 4 were both owned by John and Bonnie Nelson.

On April 23, 1979, Ron and Deborah Cobb, Plaintiffs, bought Lot 3 (DB1904 P630) and built a house.

In the **SECOND AMENDED COMPLAINT AND VERIFIED PETITION AND MOTION FOR INJUNCTION; PETITION FOR DECLARATORY JUDGEMENT; WILLFUL, MALICIOUS, INTENTIONAL AND INDEPENDENT TORTS; COMPENSATORY AND PUNITIVE DAMAGES COUNT ONE PRESCRIPTIVE EASEMENT**, Appellees alleged:

“7. Prior to the time Plaintiffs acquired Lot No. 3 or Lot No. 4, Robert Hudson, the owner of Lot No. 4, made a “cut in” to the hill, beginning at Circle Road, crossing the northerly ½ of Lot No. 4 and continuing onto Lot No. 3.”

“8. Prior to Plaintiff’s acquisition of Lot No. 3 in 1979, they were advised by Robert Hudson that the cut in was an access for ingress and egress from Circle Road to Lot No. 3. Plaintiffs purchased Lot No. 3 relying on the fact that the cut in provided access to their property.”

In the Deposition of Ronald D. Cobb, dated October 31, 2006, Mr. Cobb made the following testimony concerning his conversation with Robert Hudson beginning on Page 38:

“Q Okay, and just so the record is clear, you stated that Mr. Hudson told you that the cut in was a right-of-way, or for the benefit of Lot Numbers 4 and 3, when they were trying to induce you into buying the property.

A: That’s right.”

Mr. Cobb continues his testimony on Page 39:

“Q And this conversation you had was prior to April 23, 1979? That’s the date you purchased your property.

A: Yes, that’s true.

MR. DAUGHERTY: Prior to when?

MR. ELMORE: April 23, 1979. I have no other questions.”

Plaintiff Ron Cobb further described this area of Lot No. 4 in testimony on Day 1 of the trial page 107.

“Q Okay, roughly in 1979, when you purchased the property, was the cut-in/ -- what you’ve described as a grassy drive, was that readily available to the naked eye?

A (interposing) Yes. Coming off the street, it made an ideal way to come up it.”

Plaintiff Ron Cobb further described this area of Lot No. 4 in testimony on Day 1, page 128:

“Q The roadway there, when did it first become established, according to your testimony now?

A I told you that we brought equipment across that road – quote, unquote, ‘roadway’ in 1979, when we started my home. We brought dozers and crawlers across that roadway. It was grass at that time.

Q In 1979.

A Basically, November is when we started breaking ground.

Q And what month in 1979?

A November.

Q So in November of '79, there was already a roadway established?

A There was a passage to get through there, yes, sir."

On June 8, 1979, Larry and Diane Wilder bought Lot 4 (DB1909 P762) from Nelson. There was no mention in this deed of an easement for ingress and egress across Lot 4 to Lot 3. A plat included with this deed showed no easement or driveway.

**Larry Wilder was the owner of record of Lot 4 from June 8, 1979 through January 10, 1980, the time period in which Mr. Cobb claimed to have had conversations with Robert Hudson concerning Lot 4.**

Mr. Wilder described his experiences on and observations of Lot No. 4 in testimony on Day 2, Page 86:

"Q During the time that you were trying to clear the land to build, did you have any bad experiences?

A Yeah, I did.

Q What happened?

A The land was, you know, its just old forest, kind of overgrowth - - it was completely wooded, but there was some very large oak trees in the middle where the site plan would have been -

Q Uh-huh, (yes).

A - - and at least one, I know, was dead. It was probably 30 - inches in diameter, and , you know, I took it down and started cutting it up and had some friends come and get firewood, but in the process, I got a severe case of poison ivy to the point that, you know, I had to take shots for it for quite a while."

“Q Now, as you cleared that particular piece of - - or tried to clear that piece of land, **would you tell the jury whether there was any roadway of any sort crossing that land over to the land - - to it’s immediate right?**

A **No, Sir.**

Q **All right.**

A **It was all just overgrowth.** (emphasis by writer)

On January 10, 1980, Robert Hudson bought Lot 4 from the Wilders (DB1933 P242).

**Despite Mr. Cobb’s claims, Mr. Hudson did not own Lot 4 prior to April 23, 1979.**

**Therefore his statements concerning alleged conversations with Mr. Hudson concerning Lot 4 were not true.**

During testimony, Day 1, Page 130, Mr. Cobb discussed his attempts to find Mr. Hudson to corroborate his earlier testimony:

“Q Did you take steps to find Mr. Hudson to come here and verify that?

A We did.

Q Could you find him?

A We did not.

Q Did we not advise the Court we knew where he was?

A You did not produce us with - - as far as I know from my - -

Q (Interposing) Did you ever ask me or did your lawyer ever ask me - -

A (Interposing) Sir, I can’t answer that.

Q - - after we advised that we knew where he was, did you ever call upon us to give you his address?

A I didn’t personally, sir. Did you ever volunteer - -

Q (Interposing) Did you ever ask your lawyer?

A Did you ever volunteer it?

Q Did you - - sir? Pardon me? This is serious business here.

A You're daggone right it is.

Q And I want to know why you wouldn't have made some inquiry into getting Mr. Hudson here, if he's going to verify things you say.

A I have an attorney that represents me. I'm sure that he's doing -- I have every confidence that he's doing the correct things. I would think that if he would make an opposing position for you that you would have him here.

Q You don't think that you had any obligation to have him here?

A That's not the question, sir."

On December 10, 1980, David and Nancy Darrah, predecessors in interest to the Daughertys, bought 1031 Circle Road from Robert and Virginia Kay (DB1963 P321). This house was situated on ½ of Lot 5, adjacent to Lot 4.

On December 21, 1981, Mr. Cobb bought Lot 4 from Hudson for \$13,500.00 (DB2007 P616).

**On November 4, 1983, Mr. Cobb split Lot 4 into two equal pieces, both of which front directly onto Circle Road for 85 feet, and sold the northerly ½ to the Darrahs for \$8,000.00 (DB2048 P292). This was a sale in fee simple with no rights specifically reserved by the Grantor, Mr. Cobb, to cross the northerly ½ of Lot 4 to access his property.**

Day 3, page 9 of the trial, the Trial Judge made the following unequivocal statement into the record:

“...in the 1983 deed, the Cobbs gave to the Darrahs fee simple for Lot Number 4 and did not reserve any easement to themselves,...”

**Robert H. Skeen, Jr. was offered as an expert on property law and accepted as such by the Court to which Plaintiff's counsel agreed without exception.**

When questioned about this 1983 deed, Mr. Skeen testified Day 2 page 232:

“Q Okay. Now, the -- what is the significance of Mr. Cobb having that property and selling it to the Darrahs without reserving an easement?”

A Well, I guess, as I said a while ago, I have to look at this a little bit as hindsight is 20-20.

I know that, but as I look at the amended complaint which talks about, ‘There is an implied or a common law easement,’ I would just have to say that if you own a piece of property, and the driveway to your house goes across it, and you sell it to somebody, and you hire a lawyer to write a deed, and you sign it, and you get it notarized, and then you pay a surveyor to put a map with it, that would appear to be an appropriate time to reserve an easement so that guys like me coming along and look at the title will see and note it.

The property – in its purest sense, they sold fee simple. They sold the lot and everything that goes with it in its purest sense, ...

Q So the fact being that they sold whatever was there, including, although they didn't mention an easement, if there was an easement, and they sold the whole thing, what went was the easement and everything, is that correct?

A **Well, the deed on its face conveys fee simple absolute in all that property.** (emphasis by writer)

Thus, he deeded away any rights to an easement he had, or thought he had.

Mr. Skeen went on to testify on Day 2 page 254:

“But our Court has gone on to say in Hoffman v. Shoemaker, which is a 1911 – an old case but a leading case, and again, I’m quoting it, is that, ‘The grantor cannot derogate from his own grant. And, as a general rule, he can retain a right over a portion of his land conveyed absolutely only by express reservation.’ It’s my understanding what the Court is saying there would be exactly the facts we have here.”

It is stated in 6B MICHIE’S JURISPRUDENCE, “EASEMENTS,” § 12 at 200:

“A way of necessity does not arise if there is already another mode of access to the land, though less convenient and more expensive to develop. **Thus, there is no way of necessity where the granted or retained land adjoins a public road on one side**, although a way over other land would provide access to another public road much better than that on which the land borders and would save considerable distance. *Jennings v. Lineberry* 21 S.E.2d 769 (1942).” (emphasis by writer)

The purchase price of \$8,000.00, more than one half of Mr. Cobb’s purchase price of the entire lot, clearly showed there was no intent on Mr. Cobb’s part to retain any rights to that property.

On June 15, 1984, Mr. Cobb sold the second half, or the southerly ½ of Lot 4 to the Darrahs for \$6,000.00 (DB2066 P791). There was no mention in this deed of an easement for ingress and egress across Lot 4 to Lot 3, Mr. Cobb’s property.

**Thus, once again having the opportunity to reserve an easement, if he thought he had one, he did not.**

On June 2, 1987, Mr. Cobb bought the southerly ½ of Lot 4 back from the Darrahs for \$4,500.00 to build a pool (DB2166 P510). There was no mention in this deed of an easement for ingress and egress across Lot 4 to Lot 3, Mr. Cobb's property, and the deflated purchase price clearly showed no intent on Mr. Cobb's part to acquire the right to cross the northerly ½ of Lot 4.

**Any use of Lot 4 between the Darrahs and the Cobbs from 1987 to 1994 was permissive.**

A letter dated August 14, 2005, from David D. Darrah to Ron Cobb, stated in part:

“Ron,

You asked me to document the use of the cut in the hill which starts at Circle Road and entered my half of the lot between our houses when I owned this property and 1031 Circle Road. ...

After the improvements were made, each of us occasionally used this access. As I recall, **we normally requested permission** to bring equipment across the others property, but not always.

I never thought about the common use of this access in legal or property terms. I just thought of it as the kind of thing one neighbor did for another.” (emphasis by writer)

On July 8, 1994, Christine Klapproth, now Christine Daugherty married to Thomas Daugherty Defendants in this suit, purchased 1031 Circle Road from the Darrahs (DB2345 P100). This purchase included the northerly ½ of Lot 4 as part of the sale. There was no mention in this deed of an easement for ingress and egress across Lot 4 to Mr. Cobb's property.

In testimony, Day 2 page 174, Thomas Daugherty described the appearance of the northerly ½ of Lot No. 4 at the time of purchase.

“Q Finally, now, referring to the places where the curb is interrupted, and there’s a curb there that’s been referred to as a cut-in. I’m not talking about the road - - :

A Just the cut-in?

Q The curb. Yeah, the curb.

A Okay.

Q What did you feel that was for?

A Well, when we bought the property, we thought it was access to our side of the property.

When we bought our property in 1994, we didn’t know all this history about, you know, there was a whole Lot 4, and, you know, Mr. Cobb bought it all and sold it and bought it back, and sold it again. We didn’t know all of that stuff.

Q Uh – huh, (yes).

A What it looked to us was access where we could pull up off the street and have some off-street parking, which would make our property more valuable.

Q Now - -

A (Interposing) When we moved in Circle Road, all of those houses across the street from ours are, like double- and single-unit apartments - -

Q Uh – huh, (yes)

A - - where people were living. They were all filled up at the time, and the whole road was filled with cars.

So we looked at that - - and sometimes we would have to park way down the block and walk way back up to our street.

Then we went to that cut-in in the curb and what we saw was a future driveway for us, for our property, for our enjoyment of that property that we could develop into off-street parking for ourselves.

Q And when you looked at that, was there an apparent road or way leading over into the Cobbs' property?

A No.

Q You say it was - -

A It was a grassy area.

Q: You actually mowed it?

A: I mowed it with a lawn mower. It was a grassy area. It was kind of flat in one spot, but, you know, I didn't see it as a road that went all the way over to Lot 3 or all of the way over to the Cobbs' house.

I mean, all I saw was a break in the curb where I could put a driveway for myself someday, if I could afford to do it.

MR. GEORGE DAUGHERTY: I believe that's all. Thank you.

THE COURT: Mr. Elmore.

RE-CROSS-EXAMINATION

BY MR. ELMORE:

Q You just testified that you didn't see it go all the way over to Lot 3 in relation to the flat area, or whatever?

I'm not trying to put words into your mouth. Is that your testimony?

A I'm saying that when I bought the property, that's what I saw.

Q When you bought the property, was the red shed on the Cobb's portion of the middle lot?

A Yes, it was.

Q And you didn't see the cut-in the flat area go directly to the red shed?

A I didn't see it as a road that went directly to the red shed, no.

MR. ELMORE: No questions your Honor.

REDIRECT EXAMINATION

BY MR. GEORGE DAUGHERTY:

Q Tom, were there other accesses to the red shed?

A Well, the door faced their house, so I assumed they accessed it from that side of the property.

Q The door didn't face out there toward, like it was the end of a road, did it?

A Not like in this picture here (indicating) where they designed this building with a big double door that faces down the gravel driveway out to Circle Road.

Q So the door - - the entry place for the red shed was over toward the house?

A On the other side toward their house."

**A title search, performed by Robert H. Skeen, Jr., showed clear title passed to the Daughertys with no easements or other rights given to anyone else.**

In July 1994, the Daughertys saw Mr. Cobb cross their property with a vehicle and trailer. **They asked him not to cross again without permission and he complied. Mr. Cobb did not assert his alleged easement rights at that time.**

In August 1994, the West Virginia American Water Company did extensive work on the Daugherty's property, the northerly ½ of Lot 4. The water company graveled part of the Daugherty's property at the end of this work.

The Defense put dated photographs into evidence marked as Defense Exhibits No. 4, No.5 and No. 6. These photographs documented the condition of the property in question in 1995 and 2004. These photographs have been designated in the record for the Court's convenient reference.

In testimony on Day 1 page 205, Thomas Daugherty described these exhibits.

“This is Exhibit Number 4... with a date stamp of ‘1995’ on the back of it.

It was taken showing the property line from up here on the hill, so you can see his encroachment onto our property, and you can see the whole property line down there. (Indicating.)

And what it shows is you can see his pool, and you can see the orange stakes ... that show the property line going down the hill.

You can see up here, right there (indicating) is that little piece of gravel driveway that after the water company was done in 1995, they said – they asked us ‘ Do you want us to reseed this with grass, or do you want us to put some gravel on it?’

So we said, ‘Okay. Go ahead and put some gravel on it.’

So that's the gravel that the water company put there in 1995.

Q Now, is there an absence of gravel over on Mr. Cobb's side up to his shed?

A Over - - well, you can't see his shed. It's over here (indicating) farther next to the pool, but you can see that the gravel stops well - - a few feet short of the property line, and the gravel does not extend over the property line on to Mr. Cobb's side of the property.

Q The property line is designated on that picture by what?

A The orange stakes that were put in the ground by the water company in 1995.”

“Q Now, Number 5 here, Tom, point out right now where the - - where that concrete is where your truck is, and point out what is shown over toward the - - on the Cobbs’ property.

A: This shows -- That’s that blue and white truck you saw parked on that gravel driveway in my part of the yard there. ...

... You can see the gravel underneath the truck. That’s the gravel that the water company placed in 1995, and on in front of the truck, that’s the property line on Ron Cobb’s property.

You can see that there’s no gravel in front of that truck on Ron Cobb’s property. And the date stamp on this thing is ‘June of 2004.’

Q So there’s no - - there’s no gravel extending to the end of your property which would be here (indicating) at the end of your truck over to his - - what was then an outbuilding?

A What was than the red metal shed. I Guess.”

“Q Oh, incidentally. Let me ask you, why did the water company have gravel on there -- on your side?

A I just said that they -- the water company - - when they were done with their work and refilled the big ditch that they dug across there (indicating), they asked us if they (sic) wanted to reseed it with grass or to put gravel on it for our convenience.

We asked the gravel (sic) company to go ahead - - the water company to go ahead and put gravel on it.

Q So that’s how it got gravel, didn’t it?

A That’s how it got gravel.”

“Q So there wasn’t any gravel up there on either side of it prior to that?

A No.

Q Okay. And that's what you mowed with the lawn mower down there before?

A Yes. That's what I was mowing with the lawn mower -

Q -- earlier .Okay.

A Picture Number 6 is stamped 'November 4<sup>th</sup>, 2004,' - and it is a picture in which you can see - - it's taken from my property, but you can see the Cobbs' pool fence right here (indicating), and you can see his red metal shed that preceded the outbuilding that's there now - - that red metal shed that was set on skids.

You can't see that - - you can't see the truck or the property line, but you can see the property up to that red metal shed has no gravel on it.

**Q So that is contrary to what Mr. Cobb talked about earlier being graveled historically?**

**A Yes.”(emphasis by writer)**

Defense Exhibit Number 6, a picture taken from the Daugherty's side of the property line, clearly shows that the doors of the red metal shed on the Cobb's property did not face the Daugherty's property; and therefore, gave no indication that the Cobbs used the Daugherty's property as access to that building.

Mr. Cobb did not sign a release to the water company for this work because he had no legal rights involved in this property. Mr. Cobb did not assert his alleged easement rights at that time.

In August 1994, the Daughertys and Mr. Cobb tried to negotiate a settlement for the encroachment of Mr. Cobb's retaining wall and pool fence onto the Daugherty's property. No agreement was reached, but Mr. Cobb did not assert his alleged easement rights at that time.

From 1995 to 2004: Mr. Cobb made no use of the Daugherty's property, he did no maintenance on the Daugherty's property, he placed no gravel on the Daugherty's property and he made no investment in the Daugherty's property.

In the SECOND AMENDED COMPLAINT AND VERIFIED PETITION AND MOTION FOR INJUNCTION; PETITION FOR DECLARATORY JUDGEMENT; WILLFUL, MALICIOUS, INTENTIONAL AND INDEPENDENT TORTS; COMPENSATORY AND PUNITIVE DAMAGES COUNT TWO EASEMENT BY IMPLICATION, Appellees presented the following statements:

“25. Plaintiff's for a period of approximately twenty-five (25) years, have maintained the cut in for use as a right of way and graveled the cut in for their convenience.”

Testimony of Ron Cobb Day 1 page 111 stated the following:

“We used the aforementioned gravel driveway. We brought dirt back in there on the gravel drive - - and I've maintained it - - actually since 1981, we've maintained that driveway up until '94 when Tom and Chrissy (sic) bought it and continued to put gravel and stuff on it up there until we began to be in dispute.”

From 1995 to 2004, Mr. Cobb made no complaints about the Daugherty's property to the city Planning or Building departments, or to any other government agency. Mr. Cobb did not assert his alleged easement rights during that time.

In 2004, Mr. Cobb built an addition onto his house and a deck onto the addition without bringing materials or equipment across the Daugherty's property. Mr. Cobb did not assert his alleged easement rights at that time.

In January 2005, Mr. Cobb applied for a variance to replace a storage shed on his property with a new freestanding building. Mr. Cobb asked the Daughertys not to oppose his variance permit and they did not.

**In February 2005, Mr. Cobb offered to purchase the driveway on the northerly ½ of Lot 4 from the Daughertys for \$3,000.00 to give himself more convenient access to his property to facilitate the construction of his new outbuilding.**

On Day 1 page 216, Thomas Daugherty testified:

“Shortly before he began, after he got his permit to build that building, two days before his construction was due to start on that building, he came over to our house and he was frantic - -

Q No characterization.

A I'm sorry. He came over to our house and made an offer to buy the driveway outright on the north one half of Lot 4 and the strip of land to protect his encroachment onto the Daugherty's property.

So that's what he told us - - I mean, we can only assume he wanted to buy the driveway - -

Q At that time, did he say to you, 'I've got an easement across that driveway,' or did he say, 'I want to buy a right across it'?"

A He never said that he had an easement or alleged that he had an easement or any right to it.

He said that he needed that access to build his building, and he wanted to buy that driveway outright, because his construction process was supposed to start in two days, and he had to have that access to build that building."

On Day 2 page 10, Thomas Daugherty continued his testimony:

"Mr. Cobb offered my wife and I \$3,000 to purchase outright the driveway on the north one half of Lot 4 and a strip of land to protect his encroachment onto our property."

The Daughertys rejected the offer.

Mr. Cobb did not claim any rights to an alleged easement at that time.

**In fact, Mr. Cobb asked for permission from the Daughertys to use the driveway to facilitate the construction of his outbuilding.**

The testimony of Ron Cobb, Day 1 page 114, question by Mr. Elmore stated as follows:

"Q Did you ever ask anyone permission to use it between 1979 and 2005?"

A No."

Once again, as stated above, the letter dated August 14, 2005, from David D. Darrah to Ron Cobb, stated in part:

“Ron,

You asked me to document the use of the cut in the hill which starts at Circle Road and entered my half of the lot between our houses when I owned this property and 1031 Circle Road. ...

After the improvements were made, each of us occasionally used this access. As I recall, **we normally requested permission** to bring equipment across the others property, but not always.

I never thought about the common use of this access in legal or property terms. I just thought of it as the kind of thing one neighbor did for another.” (emphasis by writer)

In **PLAINTIFF’S RESPONSE TO DEFENDANT’S FIRST SET OF INTERROGATORIES**, the Cobbs were asked:

**“INTERROGATORY NO. 11:** Please state in detail the dates and duration of the temporary access you enjoyed across and on the Defendant’s property during the construction process of your outbuilding, describe the consideration you paid to Defendants to secure this access, estimate the amount of money you saved on your construction process by having this temporary access.

**ANWER:** In response to Interrogatory No. 11, Plaintiff states that no money was paid for the access to the property.

**Plaintiffs merely asked and were given permission by Defendants.”** (emphasis by writer)

**This access saved Mr. Cobb thousands of dollars in construction costs.**

Mr. Cobb agreed to repair any damage done to the Daugherty's property. In the spirit of neighborly cooperation, the Daughertys granted their permission for this use. Mr. Cobb did not claim any rights to an alleged easement at that time.

During the construction process, **Mr. Cobb offered to pave the driveway in exchange for continuous access to the driveway. The Daughertys rejected the offer.**

In PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES, the Cobbs were asked:

**"INTERROGATORY NO. 10:** Please state in detail the second offer you made during the construction of your outbuilding to try and gain permanent access to the driveway located on Defendant's property, describe the consideration you were to give for this access, and the answer you received to this offer.

**ANSWER:** Objection. Settlement negotiations are not admissible as evidence and such this interrogatory is not intended to lead to discoverable evidence; However in the spirit of cooperation and discovery, **Plaintiffs offered to pave the disputed 'cut-in', lay an off street parking cite for defendants and purchase the area encompassing the encroachment all at plaintiffs expense in exchange for a perpetual easement to the disputed 'cut-in'.**" (emphasis by writer)

Mr. Cobb did not claim any rights to an alleged easement at that time. Mr. Cobb had gravel placed on both sides of the property line in order to allow access for the concrete trucks to his building site. He placed more gravel on the driveway to repair damage done by the trucks.

**In February 2005, Mr. Cobb again asked permission** to use the Daugherty's driveway to deliver stone to his construction site for a retaining wall. In the spirit of neighborly

cooperation, the Daughertys agreed to the delivery. Mr. Cobb did not claim any rights to an alleged easement at that time.

**In June 2005, Mr. Cobb staked out a proposed driveway to his new outbuilding on his own property.**

During testimony on Day 2 page 40, Thomas Daugherty described Defense Exhibit No. 14 a picture showing the Cobb's proposed driveway.

“WITNESS MR. THOMAS DAUGHERTY: You’ll have to excuse the poor quality of these copies, because we don’t have the originals with us here today.

This is a picture with a date stamp on it of 7/13/05. It’s Defendant’s Exhibit 14, and it shows a proposed driveway that Mr. Cobb staked out on his own property. You can see the string and the property line here. (indicating.)

But this is a driveway that he staked out on his own property up to his new outbuilding after we declined to sell him the driveway that exists.

In **PLAINTIFF’S RESPONSE TO DEFENDANT’S FIRST SET OF INTERROGATORIES**, the Cobbs were asked:

**“REQUEST FOR ADMISSION NO. 18:** Please admit or deny that you staked out a proposed driveway to your new outbuilding.

**ANSWER:** Admit.”

Day 3 page 34 the Trial Judge stated:

“THE COURT: Now, in this case, there wasn’t any testimony about the necessity of the right of way. After he deeded it away, the testimony was that he marked off on his own land, a roadway to get up there.”

This driveway was never constructed. Mr. Cobb did not claim any rights to an alleged easement at that time.

**On July 6-11, 2005**, Mr. Cobb made repeated calls to metro 911 to complain that the Daughertys were burning a fire in their outdoor fireplace.

**Thus began the harassments, engaged in by the Cobbs, to try to secure by intimidation, that which the Daughertys would not sell to them, and to which they had no right.**

**On July 12 or 13, 2005**, attorney O. Gay Elmore, Jr. visited the Daughertys at their home. Mr. Elmore stated that Mr. Cobb wanted to make an offer to settle the dispute over the driveway and the separate issue of Mr. Cobb’s encroachment onto the Daugherty’s property. Mr. Elmore further stated that he had examined the Daugherty’s deed and there appeared to be a problem with the transfer of title. He claimed there was also possibly a prescriptive easement that was already in place across the Daugherty’s property and they should consider this offer so they wouldn’t have to spend a whole lot of money in court. No offer was made.

**After 11 years, this was the first mention the Daughertys had heard about any right of any nature that the Cobbs had across their property.**

It is stated in 6B MICHIE’S JURISPRUDENCE, “EASEMENTS,” § 10 at 194:

“Where no private right-of-way or other easement is reserved in the deed itself and the purchaser has no notice of any such claim, he takes the property without the burden of any claim, either from the grantor or any person claiming under him.<sup>14</sup>”

“14. An easement created by implication, which is appurtenant to the land, may be vitiated if, when the servient estate is purchased by another, the purchaser of the servient tract does not have notice of the easement, or the use is not apparent. Under those circumstances, the purchaser takes the land free from such easement or use. *Russakoff v. Scruggs*, 241 Va. 135, 400 S.E.2d 529 (1991).”

**On August 3, 2005**, the Daughertys met with Robert H. Skeen, Jr., the lawyer who completed the original title search, and after reviewing his notes and rechecking the title, he assured them that no possibility of an easement existed.

**On August 3, 2005**, Mr. Elmore again visited the Daugherty home. He inquired if they had considered the offer he made previously. The Daughertys made it clear that they own the property in its entirety, and any offer to buy property, or any rights in the property, must be in writing. Again, no offer is made.

In testimony day 2 page 62 Thomas Daugherty stated the following:

“He signed the complaint where he sued us on August 26, 2005, and we were served with the law suit on August 29, 2005. ... Now, this was after August 3<sup>rd</sup>, when we had asked his lawyer that if he wanted to buy any part of our property that we needed to have an offer in writing. They declined to give us an offer in writing.

The next writing that we got from them was the summons to a law suit.”

**On August 9, 2005**, The Daughertys mailed a registered letter to Mr. Cobb, as recommended by Robert Skeen, stating that the Daughertys have clear title to their property, it is not for sale and they do not acquiesce any rights in their property to anyone.

On **August 12, 2005**, Mr. Cobb complained to the city that the Daugherty’s deck did not comply with city codes.

**On August 14, 2005, Mr. Cobb received a letter from Mr. Darrah, the previous owner of 1031 Circle Road, in which he detailed the use of the northerly ½ of Lot 4. He described it as permissive use between friendly neighbors:**

“I never thought about the common use of this access in legal or property terms. I just thought of it as the kind of thing one neighbor did for another.”

**Although Mr. Cobb had this letter in his possession prior to filing this lawsuit, he did not disclose it to the Daughertys. They found it through investigation, by contacting Mr. Darrah directly.**

On **August 16, 2005**, Mr. Cobb complained to the city that the Daugherty’s garage doors needed repair.

On **August 17, 2005**, Mr. Cobb complained to the city that the Daugherty’s grass was too high.

On **August 20 and 21, 2005**, The Daughertys built a fence along the property line.

On **August 22, 2005**, Mr. Cobb complained to the city that the fence was too high, and built improperly with “the ugly side” toward his house. Debbie Rowsey from the city planning department inspected the fence and approved it the same day.

On **August 26, 2005**, The Cobbs signed the summons and complaint that started this lawsuit.

On **April 11, 2006**, a complaint was made to the Kanawha County Schools about the way the bus stopped in front of the Cobb’s house to let first grader Kiera Daugherty off the bus.

On **May 23, 2006**, Mr. Cobb complained to the city that the Daughertys had a swing set in their front yard.

On **May 27, 2006**, Mr. Cobb threatened to have Tom Daugherty arrested for taking pictures of the fence for evidence to be used in this lawsuit.

On **March 23, 2007**, Thomas Daugherty was accused of child neglect and referred to Child Protective Services by plaintiff Deborah Cobb’s first cousin, Tammy L. Tucker.

This action was filed August 29, 2005. After numerous delays trial finally began on September 8, 2008. Although, as indicated below, the Defendants had beseeched the Court to require a more particular statement of the case so that a knowledgeable defense could be presented, it was only on the last day of trial testimony September 11, 2008 that the Judge finally concluded that only two counts could be permitted to go to the jury. All of the instructions offered by the Plaintiff were rejected. The Court through his Clerk wrote the instructions, including the erroneous and contradictory instructions complained of below, and refused to give Defense counsel an opportunity to further research and offer appropriate instructions concerning the two counts which the jury was permitted to consider.

***THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL***

The following is a list of errors and issues raised as set forth in the Docketing Statement:

1. Did the Court err in submitting the case to the jury on the theory of implied easement;
2. Having erroneously submitted the case to the jury on the theory of implied easement did the Court then erroneously instruct the jury by giving conflicting instructions concerning the law of implied easement;
3. Did the Court err in ruling “as a matter of law” without hearing any evidence, that the Defendant’s counterclaim based upon the theory of Illegal Abuse of Civil Process was inappropriate and striking it from the case;
4. Did the Court err in denying the Defendant the right to view, under Court supervision, the Complaint of the Plaintiff Deborah Cobb’s first cousin to the Child Protective Services to provide Defendants with the information necessary to cross examine the first cousin as to prejudice, the Court having ruled that her denial of any knowledge of the case rendered it improper to further pursue her interest in behalf of her first cousin;
5. Did the Court err in denying repeated requests by the Defendants for a More Particular Statement so that it was not until the evidence was all in and jury instructions were being discussed that the Defendant’s finally knew that which they were accused of and needed time to prepare a defense to and to prepare appropriate instructions to counter the instructions erroneously written by the Court;
6. That the Court erred in denying the right of the Defendants to present evidence of Illegal Abuse of Civil Process both as a defense and as a counterclaim;

7. That the Court erred that the defense could not present evidence of continued harassment thus raising an inference that the Cobbs did not believe they had a legal right to the easement and thus were employing bullying tactics to secure that to which they were not entitled;
8. That the Court erred in denying the right of the Defendants to present evidence of continued harassment such as evidence of the fact that the female Plaintiff in this case accused the Defendant Tom Daugherty of accusations similar in part to that which she accused Federal Judge John Copenhaver of, to wit, and denying the Defendants the right to utilize the memorandum of Judge Copenhaver defending himself, the Defendants having lost the case in the Fourth Circuit Court of Appeals which sustained Judge Copenhaver's decision to dismiss the case.
9. That the Court erred in denying Defendants the right to present evidence that in the case before Judge Copenhaver the female Plaintiff filed ethics complaints against Paula Durst Gillis, and David B. Thomas, which complaints were dismissed as unfounded by the ethics committee, thus showing a pattern of harassing tactics to secure their goals in the judicial process, along with all of the other harassing tactics already mentioned;

The errors relied upon were clearly enlarged upon in a document entitled "Motions for New Trial and Accompanying Affidavits" which is set forth here, without the accompanying Affidavits as follows:

**"MOTIONS FOR NEW TRIAL AND ACCOMPANYING  
AFFIDAVITS**

This day came the Defendants, Counterclaimants, Thomas S. Daugherty and Christine A. Daugherty (f/k/a Christine Klapproth), husband and wife, and moved the Court for a new trial under the provisions of Rule 59 of the

West Virginia Rules of Civil Procedure citing the following grounds supported by accompanying Affidavits based upon the following grounds:

1. That the Court erred in giving conflicting instructions on material matters to the jury, to wit, while the Court inserted the word strictly in Plaintiff's Instruction No. 1 at the insistence of Defense counsel, the Court wrote an additional instruction and labeled it Defendant's Instruction No. 2 directly contradicting Plaintiff's Instruction No. 1 by instructing the jury that only a "reasonable necessity" was required. Defense counsel did not offer this instruction. It was written by the Court and labeled Defendant's Instruction No. 2 by the Court. Defense counsel had no opportunity to study this instruction prior to its being given due to the circumstance that the Court wrote all of Plaintiff's Instructions and denied Defense counsel opportunity to view, study, go to the law library and prepare counter instructions. It is obvious, after the strenuous insistence that "strictly" be inserted in Plaintiff's Instruction No. 1, written by the Court, Defense would not have offered a diametrically opposed instruction such as Defendant's Instruction No. 2 as his own instruction. The Court will recall that the jury asked for dictionary which request was denied. The jury was out approximately ten hours and obviously could not have understood the necessity for "strictly necessary" in view of the conflict in the two instructions. Attached to this Motion is the Affidavit of Defense counsel attaching the two mentioned conflicting instructions. The Court cited Stuart v. Lake Washington Realty Corporation, 92 S.E. 2d 891 as authority for the conflicting instruction. Counsel has carefully analyzed that case and it in no way stands as authority for the instruction inappropriately labeled as Defendant's Jury Instruction No. 2.
2. That the Court erred in ruling "as a matter of law" without hearing any evidence that the Defendant's Counterclaim based upon illegal abuse of civil process was stricken from the case and the Defendant was denied the right to offer that Counterclaim or to use illegal abuse of civil process as a Defense. Defendant's Affidavit includes a Motion, entitled "Pretrial

Motions” filed in Court and served upon opposing counsel by Certificate on September 5, 2007 including citations of law concerning Illegal Abuse of Civil Process, among other matters which will be referred to as this Motion progresses.

3. That the Court erred in denying Defendant’s an opportunity, under Court supervision, to view a complaint made to Child Protective Services by the first cousin of the Plaintiff Debroah Herrald Cobb, in order to test the veracity of the first cousins Tammy Tucker as part of a family pattern of harassment of the Daughertys as set forth in No. 2 of the above mentioned Pretrial Motions.
4. That the Court erred in denying Defendant’s Motion No. 3 in the Pretrial Motions requiring the Cobbs to state with specificity the facts and law under which they contend a jury issue would be raised. Defense counsel persistently moved the Court to so require so that he might prepare a defense. The problem became clear when Plaintiff’s counsel finally presented his offered instructions which were so confusing it was necessary for the Court to ignore them and to write instructions for the Plaintiff’s counsel, such confusion making it impossible to defend the case and for the Court to understand offered instructions, as predicted by Defense counsel, thus leading to the necessity on the part of the Defendant to prepare to defend against no specified theories, and, made it impossible for Defense counsel to prepare opposing instructions in a studied and appropriate way due to the fact that the final Plaintiff’s instructions, written by the Court, were not presented to Defense counsel in a timely manner so that he could prepare appropriate counter instructions, and in fact an erroneous instruction was prepared by and read to the jury by the Court and mislabeled as Defendant’s Jury Instruction No. 2.
5. That the Court erred in not permitting the Defendant to utilize evidence of illegal abuse of civil process in order to illustrate a pattern of abuses of the Court systems by the Plaintiffs as set forth in Pretrial Motions No. 4 including the matter claimed against Judge John Copenhaver, a Federal

Judge, the two lawyers in that case, David Thomas and Pamela Durst Gillis who the Cobbs referred to the State Ethics Committee, which was dismissed and matters involving Robert and Judy Smith. The deposition of Tammy Tucker is included in the attached Affidavit as Exhibit A to Pretrial Motions, the deposition of Deborah Cobb as Exhibit B, the memorandum of Judge Copenhaver defending himself against accusations of prejudice, as Exhibit C, the Court Order of Judge Irene Berger in a related case as Exhibit D, the Opinion of Judge Berger as Exhibit E, the Opinion Order of Judge Berger as Exhibit F, the Judgment Order dismissing the case from the federal docket dated June 23, 1999 by Judge John Copenhaver as Exhibit G, the deed of Bob Hudson to the Cobbs as Exhibit H, the deposition of Ronald Cobb as Exhibit I, the deed of the Wilders to Robert Hudson, et al as Exhibit J and of course the law of abuse of process, referred to above as Exhibit K.

Therefore, based upon all of the above, the Defendant's respectfully move that the verdict rendered against them be set aside and a new trial granted, and, in support thereof presents the Court with their Affidavit referred to above and respectfully moves it be placed in the official record in support of these Motions."

The crucial instructions referred to above which were attached to the Motions above and referred to therein read as follows:

"Plaintiffs' Jury Instruction No. 1

The general rule is that there is no implied reservation of an easement when an owner conveys a part of his land over which he has previously exercised a privilege for the benefit of the land which he retains unless the burden upon the land conveyed is apparent, continuous and strictly necessary for the enjoyment of the land retained.

Syl. Pt. 2, Stuart v. Lake Washington Realty Corp., 141 W.Va. 627, 92 S.E.2d 891 (1956)

Syl. Pt. 1, Miller v. Skaggs, 79 W.Va. 645, 91 S.E. 536 (1917).

Defendants' Jury Instruction No. 2

Necessity for an easement created by an implied reservation or grant is not an absolute necessity but a reasonable necessity as distinguished from mere convenience for its use.

Stuart v. Lake Washington Realty Corp. 141 W.Va. 627, 92 S.E.2d 891 (1956)”

The Appellants presented further argument in support of the Motions referred to above in a document presented to the Court on November 26, 2008 and is repeated here as follows:

**“ARGUMENT IN SUPPORT OF MOTION TO SET ASIDE  
VERDICT**

This day came the Defendants by counsel and presented to the Court this Brief in support of Motions heretofore made with accompanying Affidavits.

ARGUMENT

As already submitted in the prior Motions and Affidavits counsel now respectfully urges the following:

1. Contrary instructions were given by the Court which were not supported by law, were confusing, misleading, and basically were irreconcilable with the law and each other. Plaintiffs Jury Instruction No. 1 instructed the jury that an easement conveyed had to be “apparent, continuous and strictly necessary for the enjoyment of the land retained.” Syl. Pt. 2, Stuart v. Lake Washington Realty Corp., 141 W.Va. 627, 92 S.E. 2d 891 (1956)

“Plaintiffs Jury Instruction No. 1

The general rule is that there is no implied reservation of an easement when an owner conveys a part of his land over which he has previously exercised a privilege for the benefit of the land which he retains unless the burden upon the land conveyed is apparent, continuous and strictly necessary for the enjoyment of the land retained.”

The Court added “strictly necessary” to the above Instruction at the insistence of Defense counsel after Defense counsel showed the above

cited case to the Court wherein that precise language was used. The Court then, citing the same case and erroneously labeling the instruction, as if offered by the Defendant, instructed the jury as follows:

“Defendants’ Jury Instruction No. 2

Necessity for an easement created by an implied reservation or grant is not an absolute necessity but a reasonable necessity as distinguished from mere convenience for its use.”

It is obvious that the Defendant’s counsel would not have offered such a contradictory instruction which misquoted the law of Stuart, supra. No where in Stuart, supra is there such language as applicable in this case.

The jury was obviously confused in that they were out about ten hours and one point requested a dictionary from the Court, which request was refused. The instructions were written by the Court’s Law Clerk at the last minute and counsel had no opportunity to clearly analyze them or he certainly would have called the attention of the Court to the fact it was claimed that the erroneous instruction was offered by him and that it erroneously stated the law. It was Defense counsel who gave a copy of the Stuart case to the Court and to the Clerk. It was profusely underlined in green, attention was called to the syllabus of the Supreme Court, as opposed to that of the Reporter system and the “strictly” language was carefully pointed out to the Court. Counsel has no idea how that instruction ended up in the Court’s charge. Nonetheless, the jury, obviously confused, found for the Defendants on the crucial Count involving the erroneous instruction.

2. The Court denied the Defendants the right to utilize “Illegal Abuse of Civil Process” either as a defense or a counterclaim. This was done although Plaintiff’s counsel never cited a case or distinguished the cases cited to the Court by Defense counsel.

Attention is respectfully invited to the West Virginia case of Wayne County Bank v. Hodges, 338 S.E. 2d 202 (1985), opinion by Justice McHugh. The Court held as follows:

[1,2] In *Preiser v. MacQueen*, No. 16620 (W.Va. June 12 1985), this Court discussed abuse of process and stated that “[g]enerally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process.” *Preiser*, slip op., at 13. Moreover, with regard to outrageous conduct, we recognized in syllabus point 6 of *Harless v. First National Bank in Fairmont*, - W.Va. -, 289 S.E. 2d 692 (1982) that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the others results from it, for such bodily harm.”

There was clear proof produced to the Court in various pleadings urging the Court to permit abuse of process both as a defense and a counterclaim. The fact that no claim of easement was ever made until the Defendants refused to sell a right of way to the Plaintiffs, the Plaintiff’s conduct in a case against Dupont in the Federal Court in which the Plaintiffs harassed Defense counsel, referred them to the Ethics Committee of the Bar which found the referral to be groundless, the fact that after the Daugherty’s refusal to sell a right of way, consistent and systematic accusations were made by the Plaintiffs to various city governmental agencies, and that the Plaintiffs moved Federal Judge John Copenhaver to remove himself from the Dupont case as prejudiced against the Plaintiffs on grounds that were not only frivolous and spurious but required the Judge to write an extensive opinion absolving himself from prejudice (one of the claims against Judge Copenhaver being similar to one of the claims against Tom Daugherty, to wit, going by the home of the Plaintiffs and harassing the female Plaintiff) certainly raised an inference that all of the harassment against the Daughertys was for the purpose of intimidating them into selling an easement across their property even after such property had been certified by a competent title lawyer, Robert Skeens as free and clear of impairment, and after a bank loan had been approved based on their investigation and that of Mr. Skeens. Certainly had the jury known all of the facts mentioned above it would have had a material bearing on the claims of the Plaintiffs. The Court did not heed

serious arguments nor consider the law on this point but simply ruled as a matter of law that the Defendant's were not entitled to either a cause of action or a defense based on illegal abuse of civil process. It seems almost as if the Court was reasoning that there was no such cause of action known in the law, even though counsel provided the Court well in advance of trial of the case citations substantiating such cause of action. The Court did not hold a specific hearing on this issue so that specific findings of fact and conclusions of law could be determined. The Court simply dismissed the Defendant's pleas as a matter of law.

3. The Court basically ruled that since the female Plaintiff's first cousin was discovered to have filed a complaint against the Daughertys alleging child neglect and the cousin denied the female Plaintiff had any knowledge of the fact she had done so until later advised after the fact, that the Defendants could not follow up in order to test the credibility of the cousin by having the opportunity, under careful Court supervision, to review the import of her complaint to Child Protective Services pertaining to time, precise accusations and other factors involving credibility. The Court basically ruled that once she, and the female Plaintiff, denied any involvement that ended the matter and Defendants simply could not further investigate by studying what was alleged to CPS in order to show further the pattern of the Plaintiffs in harassing the Daughertys in order to force them to sell a right of way across their property.
4. The Court never required the Plaintiffs to state definitely what their cause of action was. It was only in the late stages of the trial that the Court ruled certain allegations out of the case that the Defendants had any comprehension what they were required to defend. Had the Court required a more definite statement when the Motion was made repeatedly many months before the trial the Defendants could have clearly and decisively defended on the issues involved rather than making a shotgun defense to a shotgun attack. The jury was undoubtedly confused and the Defendants spent hours undertaking to defend against every conceivable

type of easement which caused not only confusion to the jury but confusion to Defense counsel, as well as, I respectfully submit, the Court. This was evidenced by virtue of the fact that all of the instructions offered by the Plaintiffs were refused by the Court and the Court, in fact, prepared Plaintiff's instructions.

PLEA

Based upon all of the above counsel respectfully moves that the Court set aside the verdict heretofore rendered, enter a verdict for the Defendants, as a matter of law, or, in the alternative grant a new trial.

Respectfully submitted,

THOMAS S. DAUGHERTY and  
CHRISTINE A. DAUGHERTY  
(f/k/a Christine Klapproth),  
husband and wife

By Counsel

---

George A. Daugherty, WV Bar #943  
DAUGHERTY LAW OFFICE  
P.O. Box 490  
Dunbar, WV 25064  
(304) 546-8900

Dated: November 26, 2008"

In order to make sure that the Court's various rulings were of record the Appellants on the 22<sup>nd</sup> day of August 2008 presented to the Court "Motions for Pretrial Rulings Governing Which Evidence in the Case May Be Presented by the Defendants/Counterclaimants at the Trial and Ruling Thereon by the Court." That document with the rulings of the Court underlined was entered by the Court prior to trial thus saving the issues for appeal at that juncture as follows:

**“MOTIONS FOR PRETRIAL RULINGS GOVERNING WHICH  
EVIDENCE IN THE CASE MAY BE PRESENTED BY THE  
DEFENDANTS/COUNTERCLAIMANTS AT THE TRIAL AND  
RULINGS THEREON BY THE COURT”**

On the 22<sup>nd</sup> day of August, 2008 came the Plaintiffs by their attorney, O. Gay Elmore, Jr., and the Defendants/Counterclaimants by their attorney, George A. Daugherty to argue Motions for Pre-Trial Rulings heretofore made and the Ruling are of the Court are as follows:

1. The Daughertys be permitted to offer illegal abuse of civil process as a defense to the Plaintiff's case to be presented from opening statement on.

\_\_\_\_\_  
Granted

Denied as a matter of law  
Denied

2. The Daughertys be permitted to offer illegal abuse of civil process as their counterclaim to be presented immediately after the Plaintiff's closing of their case.

\_\_\_\_\_  
Granted

Denied as a matter of law  
Denied

3. That the Daughertys be permitted to offer evidence of continued harassment throughout the time prior to the first visit to the Daughertys by Plaintiff's counsel up to and including the present time with specific reference to the following:
  - a. The offer to buy the easement prior to any litigation being brought by the Plaintiffs thereby raising an inference that they did not believe they had a legal right thereto or they would have sought enforcement of that

right immediately by notifying the Daughertys of it rather than coming with an offer of purchase.

---

Granted

Denied as a matter of law  
Denied

- b. The continued inclusion of a demand for punitive damages in the original Complaint and the Amended Complaint in spite of a total lack of any evidence indicating conduct on the part of the Daughertys which would warrant punitive damages, i.e. conduct so outrageous that the jury should give an award to discourage others from doing likewise, thereby raising an inference of mean-spiritedness and harassment.

---

Granted

Denied as a matter of law  
Denied

- c. The continual and repeated referral of the Daughertys to various agencies of government concerning a variety of complaints by the Cobbs, including the Building Commission and Fire Department of the City of Charleston.

---

Granted

Denied as a matter of law  
Denied

- d. The continued allegations in deposition testimony that Tom Daugherty had harassed the Plaintiffs by making intimidating gestures such as “the finger,” and lewd comments toward the female Plaintiff and that we be allowed to offer character evidence that such conduct is inconsistent with the character of Tom Daugherty.

---

Granted

Denied as a matter of law

Denied

- e. The fact that the female Plaintiff during a Federal case before the Honorable John Copenhaver made very similar accusations against Judge Copenhaver in support of a Motion to remove him from a case against E. I. DuPont, et al. on the eve of trial of a case that had been going on for years requiring the Judge to extensively defend and deny such allegations and that the Daughertys be permitted to enter into evidence the Memorandum Order of Judge Copenhaver entered April 21, 1997 as evidence of outrageous conduct by the female Plaintiff, a case which the Plaintiff lost, Cert denied by the Fourth Circuit Court of Appeals.

---

Granted

Denied as a matter of law

Denied

- f. The fact that the female Plaintiff filed an ethics complaint in the case just referred to which case was dismissed by the Ethics Committee of the West Virginia State Bar as unfounded and that the Daughertys be permitted to offer the testimony of Paula Durst Gillis, Esquire and David B. Thomas, Esquire to establish such facts and such conduct.

---

Granted

Denied as a matter of law

Denied

- g. That the first cousin of the female Plaintiff brought a complaint of child neglect before the Child Protective Services during the past year which complaint was unfounded and which raises an inference of family

harassment of the Daughertys and that the Daughertys be permitted to testify concerning the facts of the case and the conclusion of the Child Protective Services personnel.

\_\_\_\_\_  
Granted

Denied as a matter of law  
Denied

4. That the jury be instructed prior to opening statement that the Plaintiffs have stipulated that they cannot offer and will not offer any evidence of “color of title” to the alleged easement.

\_\_\_\_\_  
Granted

Agree and stipulated to by Counsel.

\_\_\_\_\_  
Denied

5. That the jury be instructed prior to opening statement that “color of title” is absolutely necessary to be alleged and proven by the Plaintiffs and in the absence of such allegation and proof the jury’s verdict must be for the Defendants/Counterclaimants.

\_\_\_\_\_  
Granted

Denied as a matter of law  
Denied

6. That the Daughertys be permitted to ask the jury to consider all of the matters referred to above as a defense to the Plaintiff’s case in support of their counterclaim including their claim for illegal abuse of civil process and that such evidence be put on immediately after the Plaintiff’s case to be considered by the jury.

\_\_\_\_\_  
Granted

Denied as a matter of law  
Denied

- 7. That the Daughertys be permitted to offer Robert Skeens, Esquire as an expert on property matters including title searches and easements and that he be permitted to testify that he checked the title in question in this case and that he found no easement or any other impediment to a clear title and he so certified to the Daughertys and to the lending authorities.

Granted  
Granted

\_\_\_\_\_  
Denied

- 8. That the Daughertys be permitted to offer Robert Skeens, Esquire, as an expert on property matters including the elements necessary to establish easements and that in his opinion to a reasonable degree of legal certainty, based on his analysis of the facts of this case, that no “color of title” existed and therefore the claims of easement by the Plaintiffs are not justified.

Granted  
Granted

\_\_\_\_\_  
Denied

- 9. That the Plaintiff’s counsel be prohibited from mentioning in opening statement and at any stage of the trial or offering proof of hearsay statements by anyone with particular reference to any statement which may claim to have been made by Robert Hudson to either of the Plaintiffs or any other person.

\_\_\_\_\_  
Granted

Denied as a matter of law

Denied

The Defendants/Counterclaimants renewed their Motions heretofore made on a prior date along with their Exhibits, particularly those Motions for Summary Judgment and Motions to Dismiss all of which documents are incorporated in this Motion by reference and made part of the record of this case and the Court overruled such Motions as a matter of law. In addition, the Daughertys renewed Motions heretofore made with respect to the testimony of Tammy Tucker and the Plaintiff Deborah Cobb which Motions included their respective depositions which are incorporated by reference herein and made part of the record in this Motion. Further, the Daughertys moved that the Court permit inspection of the facts complained of to CPS so that the facts Tammy Tucker stated could be further tested against her deposition for purposes of impeachment and to test the veracity of the timing and factual allegations made by both Ms. Tucker and Mrs. Cobb which Motions were considered and denied as a matter of law by the Court by Order entered 9-3-08 and is one of the Exhibits included in a document entitled "Additional Affidavits to Motion for New Trial and Accompanying Affidavits."

To all of the above set forth denials the Defendants/Counterclaimants the Daughertys respectfully object."

The Court entered a document entitled "Order Denying Defendants' Motions to Set Aside Verdict and Motion for New Trial" on 12/22/08 a copy of which follows:

**"ORDER DENYING DEFENDANTS' MOTIONS TO SET ASIDE  
VERDICT AND MOTION FOR NEW TRIAL**

On the 1<sup>st</sup> day of December, 2008, came the Plaintiffs, Ronald D. Cobb and Deborah Herrald Cobb, by counsel, O. Gay Elmore, Jr., and came the Defendants, Thomas S. Daugherty and Christine A. Daugherty, by counsel, George A. Daugherty, for hearing before this Honorable Court upon Defendants' "Motion to Set Aside Verdict" and "Motion for New Trial."

The Defendants, by counsel also filed "Accompanying Affidavits" which were sworn to and verified by counsel in support of his Motions, all of which were made part of the record.

The Defendants assigned as Error the giving of conflicting Instructions, including the fact that the conflicting Instruction was mislabeled as if offered by the Defendant, which was untrue. The Defendants also moved in support of this Ground of Error that counsel had been denied opportunity to prepare counter Instructions. The Court overruled this Motion to which the Defendants Objected and Excepted.

The Defendants also assigned as Error the denial as a matter of law without hearing any evidence that the Defendants could proceed to defend and present their Counterclaim based upon Illegal Abuse of Civil Process. The Defendants offered in their Affidavit case law supporting the fact that Illegal Abuse of Civil Process is an accepted cause of action under West Virginia law citing in their argument the case of Wayne County Bank v. Hodges, 338 S.E. 2d 202 (1985), opinion by Justice McHugh. The Court overruled this assignment of Error as it had consistently done during the many months prior to the Trial. The Court also excluded evidence of other abuses of civil process including making allegations against Federal Judge John Copenhaver in part similar to the accusations made against the male Defendant alleging harassing of the female Plaintiff and numerous citations against the Defendants after Defendants refused to sell an easement to the Charleston City Planning Commission, the Fire Department, unfounded allegations to the Ethics Committee of the West

Virginia State Bar against former Defense Counsel in the same case as the Judge Copenhaver situation. The Court overruled this Motion to which the Defendants Objected and Excepted.

The Defendants also assigned as Error the denial of Defendants' Motion to view a complaint made to Child Protective Services of West Virginia under Court supervision, the Court having previously privately reviewed such complaint and advising Defense Counsel the name of the complainant who happened to be the first cousin of the female Plaintiff. On deposition the female Plaintiff and her first cousin both denied the first cousin had any knowledge of the conflict between the parties herein and since they denied it the Court ruled that Defendants were not entitled to know the facts and circumstances alleged in the CPS Complaint by the first cousin, under Court supervision, in order to confront and discredit the female Plaintiff and her cousin based upon the actual facts of the Complaint, thus denying the right of the Defendants to confront and test credibility, as a matter of law. The Court overruled this Motion to which the Defendants Objected and Excepted.

In addition, the Defense assigned as Error the denial by the Court on numerous occasions of a Motion for a More Particular Statement. The Plaintiffs alleged every conceivable possible type of Easement set forth in Michies Jurisprudence requiring the Defendants to defend them all before the jury. On the last day of trial the Court narrowed the issues to two Easements, to wit, Easement by Implication and Easement by Equitable Estoppel. The jury, after many hours of deliberation, found against the Defendants on the theory of Easement by Implication and the Defendant renewed their objection repeatedly that the confusion would have been obviated and the Trial shortened materially had the Court granted a Motion for a More Particular Statement. The Court once again overruled this Assignment of Error to which the Defendants Objected and Excepted, the Court having never granted a Motion for a More Particular Statement, as a matter of law.

The Judgment Order of the Court entered November 13, 2008 is attached hereto and incorporated herein by reference as Exhibit A.

At the end of arguments of counsel the Court overruled all of the Motions and Assignments of Error, to which the Defendants Objected and Excepted.

In addition, Counsel for Defense renewed all Motions made during the Trial and the preliminary motions made prior to the trial which the Court overruled and to which the Defendants Objected and Excepted.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge James C. Stucky

Submitted by:



George A. Daugherty, WV Bar #943

DAUGHERTY LAW OFFICE

P.O. Box 490

Dunbar, WV 25064

Approved by:

O. Gay Elmore, Jr., WV Bar #5487

ELMORE & ELMORE

121 Summers Street

Charleston, WV 25301"

***POINTS AND AUTHORITIES RELIED UPON, A DISCUSSION OF LAW,  
AND THE RELIEF PRAYED FOR***

Based upon all of the points and authorities and legal precedent set forth above the Appellants respectfully move this Court to reverse the decision of the Trial Court and grant judgment as a matter of law in behalf of the Appellants. The following excerpts from the above set forth Statement of the Facts of the Case, it is respectfully submitted, would justify this action by the Court.

Day 3, page 9 of the trial, the Trial Judge made the following unequivocal statement into the record:

“...in the 1983 deed, the Cobbs gave to the Darrahs fee simple for Lot Number 4 and did not reserve any easement to themselves...”

Mr. Skeen went on to testify on Day 2 page 254:

“But our Court has gone on to say in Hoffman v. Shoemaker, which is a 1911 – an old case but a leading case, and again, I’m quoting it, is that, ‘The grantor cannot derogate from his own grant. And, as a general rule, he can retain a right over a portion of his land conveyed absolutely only by express reservation.’ It’s my understanding what the Court is saying there would be exactly the facts we have here.”

Day 3 page 34 the Trial Judge stated:

“THE COURT: Now, in this case, there wasn’t any testimony about the necessity of the right of way. After he deeded it away, the testimony was that he marked off on his own land, a roadway to get up there.”

In the alternative the Appellants respectfully move that this Court grant a new trial.

Respectfully submitted,

THOMAS S. DAUGHERTY and  
CHRISTINE A. DAUGHERTY  
(f/k/a Christine Klapproth), husband and wife

By Counsel

  
George A. Daugherty, WV Bar No. 943  
DAUGHERTY LAW OFFICE

P.O. Box 490  
Dunbar, WV 25064  
(304) 766-7701  
(304) 546-8900

## IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

---

AT CHARLESTON

---

Ronald D. Cobb and Deborah Herral Cobb,  
Plaintiffs Below, Appellees

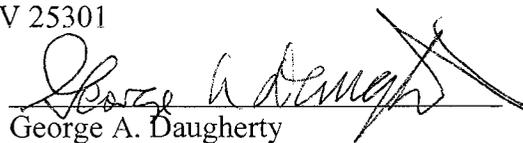
Vs.) No. 35015

Thomas S. Daugherty and Christine A. Daugherty,  
(fka Christine Klapproth), husband and wife,  
Defendants Below, Appellants

**CERTIFICATE OF SERVICE**

I, George A. Daugherty, counsel for the Appellants, THOMAS S. DAUGHERTY and CHRISTINE A. DAUGHERTY (f/k/a Christina Klapproth), husband and wife, do hereby certify that on this 14<sup>th</sup> of July 2009, I filed the original and nine copies of the attached *Brief of Appellants*, as required by law, by hand delivering them to the Office of the Clerk of the Supreme Court of Appeals of West Virginia, and a copy to the law office of the following:

O. Gay Elmore, Jr.  
ELMORE & ELMORE  
121 Summers Street  
Charleston, WV 25301

  
George A. Daugherty

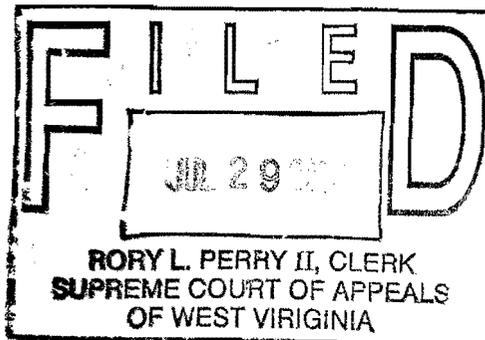
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

RONALD D. COBB and  
DEBORAH HERRALD COBB,  
Appellees.

vs.) No. 35015

THOMAS S. DAUGHERTY and  
CHRISTINE A. DAUGHERTY  
(f/k/a Christine Klapproth), husband and wife  
Appellants,



**ADDED CITATIONS TO BRIEF OF APPELLANTS**

Appellant Thomas Daugherty has done some added research in the Supreme Court Library and has located three cases in support of the Appellants position. Counsel respectfully requests that the Court consider these citations. The Shaver case appears particularly pertinent.

Shaver v. Edgell, 37 S.E. 664 (WV 1900)

Patton, et ux v. Quarrier, Trustee, et als, 18 W.Va. 447 (1881)

Berkeley Development Corp v. Hunter Hutzler, 229 S.E. 2d 732 (WV 1976)

I am this day forwarding the original to the Clerk and posting a copy to opposing counsel as set forth in the attached Certificate of Service.

Thank you most sincerely for including these references with the Appellants' Brief.

Respectfully submitted,

THOMAS S. DAUGHERTY and  
CHRISTINE A. DAUGHERTY  
(f/k/a Christine Klapproth), husband and wife

By Counsel

George A. Daugherty, WV Bar No. 943  
DAUGHERTY LAW OFFICE  
P.O. Box 490  
Dunbar, WV 25064  
(304) 766-7701  
(304) 546-8900

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

---

AT CHARLESTON

---

RONALD D. COBB and  
DEBORAH HERRALD COBB,  
Appellees.

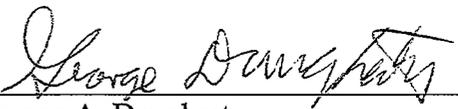
vs.) No. 35015

THOMAS S. DAUGHERTY and  
CHRISTINE A. DAUGHERTY  
(f/k/a Christine Klapproth), husband and wife  
Appellants,

**CERTIFICATE OF SERVICE**

I, George A. Daugherty, counsel for the Appellants, THOMAS S. DAUGHERTY and CHRISTINE A. DAUGHERTY (f/k/a Christina Klapproth), husband and wife, do hereby certify that on this 27<sup>th</sup> of July 2009, I filed the original and nine copies of the attached *Added Citations to Brief of Appellants*, by U.S. Mail, postage prepaid to the Office of the Clerk of the Supreme Court of Appeals of West Virginia, and a copy to the law office of the following:

O. Gay Elmore, Jr.  
ELMORE & ELMORE  
121 Summers Street  
Charleston, WV 25301

  
George A. Daugherty