

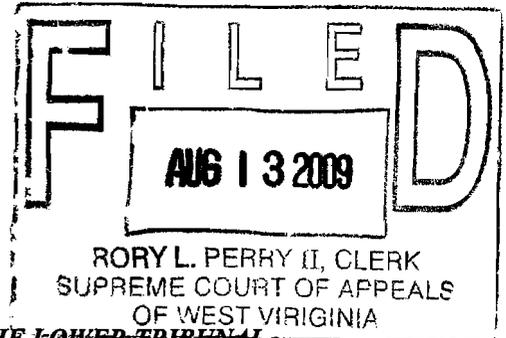
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

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

**Thomas S. Daugherty and Christine A. Daugherty,
(f/k/a Christine Klapproth), husband and wife,
Defendants Below, Appellants**

Vs.) No. 35015



BRIEF OF APPELLEES

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

This is an appeal from a jury verdict in the Circuit Court of Kanawha County, West Virginia in favor of the Appellees, granting an implied easement to the property of Appellees over the property of Appellants and finding the Appellants, having trespassed upon the property of Appellees by building a fence over the mutual boundary. Appellees at trial argued alternative theories of easement, easement by implication, easement by estoppel, and prescriptive easement. The Trial Court dismissed the prescriptive easement count at the conclusion of Appellees' case in chief. The other two theories went to the jury and the jury ruled in favor of the Appellants upon the easement by estoppel argument, but ruled that Appellees proved an easement by implication by clear and convincing evidence.

A STATEMENT OF THE CASE

This case is a dispute between neighbors about a gravel driveway which runs from Circle Road in Charleston, Kanawha County, West Virginia, over a corner portion of Appellants' property to Appellees' property. The easement, described throughout the case as a "cut in" or "gravel driveway", runs from Circle Road, across the northerly ½ of Lot 4, Block 28, of the South Charleston Improvement Company Addn. (hereinafter "the subject property") which is currently owned by the Appellants, to the southerly ½ of Lot

4, Block 28, of the South Charleston Improvement Company Addn., owned by Appellees.

Appellees, owners of Lot No. 3, purchased Lot No. 4 by deed dated December 21, 1981, of record in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 2007, at Page 616. On November 4, 1983, Appellees conveyed the northerly ½ of Lot 4, of record in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 2048, at Page 292. In this conveyance, Appellees did not specifically reserve an easement for the "cut in" or gravel driveway running from Circle Road to the Southerly ½ of Lot 4. Appellees have maintained the "cut in"/gravel driveway, as described in Appellees' testimony, since 1981.

The "cut in"/gravel driveway on the northerly ½ of Lot No. 4 and running to the Southerly 1/2 of Lot 4, was in existence and readily apparent when the Appellants purchased their property in 1994. Appellants purchased their property with actual notice of the existence of the easement, as it was readily apparent and acknowledged by Appellants.

After Appellants acquired their property, the Appellees continued to make use of the "cut in"/gravel driveway in order to access their property. Appellees had use to the "cut in"/gravel driveway in order to provide access for the movement of large vehicles and equipment onto the Appellees' property, as Appellees' lot is extremely steep. Appellees' use of the "cut in"/gravel driveway for ingress and egress was known to and acquiesced in by Appellants prior to and after their purchase of their property.

Appellees, for a period of approximately twenty-five (25) years, have maintained the "cut in"/gravel driveway for use as a right of way and graveled the "cut in"/gravel driveway for access to their property. Appellees' use of the easement was uninterrupted until some time in 1996, when Appellants began to periodically block the "cut in"/gravel driveway by parking their truck on it. Finally, as a result of a dispute concerning Appellants cutting of a tree on Appellees' property near the common boundary, Appellants constructed a fence bisecting the gravel driveway.

The jury, following a four day trial which involved a "jury view" of the subject property, found that all legal requisites were met to establish an easement by implication.

THE APPELLANTS ASSIGNMENTS OF ERROR

The following is the list of errors and issues raised by Appellants and accepted for appeal by the Court:

1. Did the Trial 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 Trial Court then erroneously instruct the jury by giving conflicting instructions?

THE TRIAL COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY ON THE THEORY OF IMPLIED EASEMENT

The weight of evidence presented by Appellees to establish their case for implied easement was clearly sufficient for the Trial Court to submit the issue to the jury. In fact, the jury found that Appellees had established their right to an implied easement by clear and convincing evidence.

West Virginia law in the case of an implied easement is established and clear. "An easement may be created by express grant or reservation, by implication, by estoppel or by prescription ¹. Michie's Jurisprudence, Vol. 6, Easements §7- By Express Grant or Reservation. Further, "the existence of an implied easement depends upon the factual circumstances unique to each case. Michie's Jurisprudence, Vol. 6, Easements, §9-By Implication, citing Stoney Creek Resort, Inc. v. Newman, 240 Va. 461, 397 S.E.2d 878 (1990) ².

¹ This accurate statement of the law of easements was Appellees "Proposed Jury Instruction No. 1"; rejected and not given by the Trial Court.

² This accurate statement upon the law of implied easements was Appellees "Proposed Jury Instruction No. 2", also rejected and not given by the Trial Court. Instead, the Trail Court created its own Jury Instruction and entitled them "Plaintiffs' Proposed Jury Instructions No. 1 and Defendants' Proposed Jury Instruction No. 2. It is these instructions developed by the Trial Court about which Appellant appeals.

In the instant case, the jury determined that Appellees proved by clear and convincing evidence that an easement was created by implication. Appellees originally had ownership of "Lot 4" in its entirety. In 1983, Appellees split Lot 4 into the Northerly one-half (½) and Southerly one-half (½). In the 1983 conveyance, Appellees did not specifically reserve an easement for use of the "cut in"/gravel driveway in existence at the time over the conveyed northerly ½ portion to the retained southerly ½ portion. Testimony at trial revealed that Appellees used the "cut in"/gravel driveway for construction of the residence prior to the conveyance. Appellees' testimony and a "jury view" of the subject property revealed exactly why this "cut in"/gravel driveway was created and used. The topography of Appellees' property is extremely steep rising from Circle Road and a perpendicular driveway would be too steep for large vehicles, equipment, and supplies to traverse. Thus, in the early 1980's, the "cut in"/gravel driveway was angled from Circle Road to Appellees' property. Again, it is due to the nature of Appellees' property that the "cut in"/gravel driveway was created in the first place: to benefit Appellees' property. It is uncontroverted that the "cut in"/gravel driveway was in existence and apparent at the time Lot 4 was split into halves.

Generally, "a grantor of property conveys whatever is necessary for the beneficial use of the land conveyed and retains whatever is necessary for the beneficial use of the property retained. To establish such a right, the alleged dominant and servient tracts must have belonged to the same person at some time in the past." (Emphasis added) Parker v. Putney, 254 Va. 192, 492 S.E.2d 159 (1997). Additionally, "there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have in fact been used by the owner during its unity, though they have no legal existence as easements. Michie's Jurisprudence, Vol. 6 - Easements by Implication §11, citing Scott v. Moore, 98 Va. 668, 37 S.E. 342 (1900).³ Thus, the Appellees failure to specifically reserve an easement for use of the "cut in"/gravel driveway, does not vitiate an implied easement.

"An easement by implied reservation may be created and imposed upon land when a grantor conveys a part of the land owned by him and without an express

³ This accurate statement of the law was "Plaintiffs Proposed Jury Instruction No. 7" and was also rejected and not given by the Trial Court.

reservation of the easement, if it is the intention of the parties when the conveyance is made the such easement will exist for the benefit of the grantor upon the land conveyed." Michie's Jurisprudence, Vol. 6, Easements § 13.2 Implied Reservation- Generally. Appellee testified he had no knowledge that he had to "reserve an easement" to continue to use the "cut in"/gravel driveway.

Thus, in the instant case, Appellees retained an implied easement at the time of the 1983 conveyance since all legal requisites were present and met.

The law is clear, "an easement may arise by implication upon severance of a parcel of real estate by the owner, unless the owner expressly excludes such implication. There is an implied grant of all those continuous and apparent easements which are necessary for the reasonable use of the property granted." Michie's Jurisprudence, Vol. 6, Easements by Implication § 9 & 10, citing Whitmore v. Margaret Paxton Memorial, 151 Va. 1018, 145 S.E. 827 and Cox Dept.Store v. Solof, 103 W.Va. 493, 138 S.E. 453. ⁴

"To establish an easement by implication, there must be a showing that: (1) The dominant and servient tracts originated from a common grantor; (2) the use was in existence at the time of the severance and (3) the use was apparent, continuous and reasonable necessary for the enjoyment of the dominant tract. Michie's Jurisprudence 2007 Supplement, citing Carter v. County of Hanover, 255 Va. 160, 496 S.E.2d 42 (1998). ⁵ Further, "the use of land under an implied easement must be apparent when the severance of the ownership occurs and the use is "apparent" when it may be discovered by reasonable inspection. Stuart v. Lake Washington Realty Corp., 141 W.Va. 627, 92 S.E.2d 891 (1956). Based on the testimony presented at trial, along with a "jury view", the jury determined that Lot 4 was originally owned in its entirety by Appellees, that the "cut in"/gravel driveway was in existence at the time of the severance and was apparent, and that its use by Appellees was reasonably necessary. Thus, the jury concluded, an easement by implication was established by clear and convincing evidence. Therefore, the Trial Court did in fact not err in submitting the theory of implied easement to the jury.

⁴ This accurate statement of the law was "Plaintiffs Proposed Jury Instruction No. 4" and was also rejected and not given by the Trial Court.

⁵ This accurate statement of the law was "Plaintiffs Proposed Jury Instruction No. 3" and was also rejected and not given by the Trial Court.

Appellants did not purchase the Northerly ½ of Lot 4 along with Lot 5 until 1994. Trial testimony established that the "cut in"/gravel driveway was in existence, use, and readily apparent when Appellants purchased the property. And generally, "property conveyed passes in its existing state, subject to all existing easements and burdens of a similar nature in favor of the other lands of the grantor which are apparent, and which result naturally from the relative situation of the land, and from the natural construction and intended use of the buildings upon it, and their situation and connection with other property, as they were usually enjoyed at the time of the conveyance." *Id.* (citing *Lawenback v. Switzer*, 1 Va. Dec. 141 (1878)). Additionally, "when one purchases land upon which there is an obvious, visible and well-defined burden, he does so after full consideration of the effect the burden would have upon his land. *Michie's Jurisprudence, Easements by Implication* §10, citing *St. Clair v. Edgewood Water Works Co.*, 151 Va. 272, 144 S.E. 452 (1928).⁶ Testimony at trial revealed that the "cut in"/gravel driveway was obvious and visible when Appellants purchased the subject property in 1994. Thus, Appellants' property was subject to the easement at the time of purchase.

At trial and on appeal, Appellants have raised the issue that Appellees had a paved driveway upon the other side of Lot 3 for personal vehicles. Appellants also argued the possibility of the creation of an entirely new driveway. "However, the existence of an alternative access is not sufficient alone to bar the finding of an easement from previous use; rather, the particular circumstances of each case must be considered." *Carter v. County of Hanover*, 255 Va. 160, 496 S.E.2d 42 (1998). Again, the Trial Court and the jury found the circumstances of this particular case to be compelling, and there is no reason to disturb the jury verdict.

**THE COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY BY GIVING
CONFLICTING INSTRUCTIONS CONCERNING THE LAW OF IMPLIED
EASEMENT**

As it relates to the implied easement, in their Petition the Appellants argue that the Court "erred" in its instructions to the jury. However, the instructions given to the jury at

⁶ This accurate statement of the law was "Plaintiffs Proposed Jury Instruction No. 5" and was also rejected and not given by the Trial Court.

the Trial Court were an accurate statement of the law. In fact, Appellees view the instructions related to easement by implication as perhaps the most restrictive which the Trial Court could have given. This is evidenced by the fact that all instructions upon the theory presented by the Appellees, which as noted above, were accurate statements of the law, were rejected by the Trial Court.

The allegedly erroneous jury instructions given by the Trial Court were as follows:

Plaintiffs' Jury Instruction No. 1⁷

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. Citing 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).

and,

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

In fact, Plaintiffs' Jury Instruction No. 1, given by the Trial Court, with the insertion of the word "strictly" at Defendants' insistence, was much more restrictive than the instruction submitted by Plaintiffs' counsel. It is important to note that Defendants' counsel did not object to either instruction at the Trial Court.

⁷ Again, note that while the Instruction is entitled "Plaintiffs' Jury Instruction No. 1," said instruction was created by the Trial Court itself and not Plaintiffs' counsel.

Now, Appellants argue that these two instructions are conflicting as Instruction No. 1 calls for "strictly necessary" when Instruction No. allow for "reasonably necessary". At first blush these would seem somewhat contradictory. However, a review of relevant case law would reveal that both instructions are accurate statements of the law; perhaps these instructions are best explained by the axiomatic point of law that each of these types of cases is adjudicated upon its own particular facts and circumstances. For example, the Courts have stated, "[i]n case of a division of an estate consisting of two or more heritages, whether an easement or convenience which may have been used in favor of one, in or over the other, by the common owner of both, will become attached to the one or charged upon the other, in the hands of separate owners, must depend, whether such easement is necessary for the reasonable enjoyment of the part of such heritage as claims it as an appurtenance" (Emphasis added). *Id.* (citing Sanderlin v. Baxter, 76 Va. 299 (1882)). Similarly, it has been said, "there are different kinds of necessity. A thing may be necessary in the physical sense or in a practical or legal issue. The rule of strict necessity applicable to an implied easement... is not limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience." *Id.*

Courts have also stated that, "It is the law in West Virginia that for an easement to arise by implication from a pre-existing use, the plaintiffs must prove by clear and convincing evidence that the use is a reasonable necessity, not an absolute physical necessity." *Michie's Jurisprudence Vol. 6, Easements §12, of Easements of Necessity* (citing Brown v. Haley, 233 Va. 210, 355 S.E.2d 563 (1987)). And again, "the existence of reasonable necessity depends on the circumstances of each particular case." *Id.*

Moreover, "to raise an implied reservation or grant of an easement, the existing servitude must at the time of the deed be apparent, continuous and strictly necessary." Myers v. Stickleby, 375 S.E.2d 595 (W.Va. 1988).

Furthermore, "to establish an easement from previous use, there must be a servient tract originated from a common grantor; (2) the use was in existence at the time of the severance and (3) the use was apparent, continuous and reasonable necessary for the enjoyment of the dominant tract. Carter v. County of Hanover, 255 Va. 160, 496 S.E.2d 42 (1998). Thus, differing decisions have used both "strictly necessary" and

"reasonably necessary" depending upon the facts of the particular case. Thus it would appear that both of the jury instructions contain accurate statements of the law in West Virginia and leave room for the consideration of all relevant facts.

It is unfathomable for Appellants to now claim that these instructions were somehow erroneous and unfair. Again, Appellants' counsel did not object to the instructions. More specifically, it was at the insistence of Appellants' counsel that the word "strictly" was added to the Court drafted Plaintiffs' Instruction No. 1. Again a review of Plaintiffs' proposed instructions relating to "easement by implication" which were all accurate statements of the law and rejected by the Trial Court, reveals that the instructions given by the Court were very strenuous statements of the law which Appellees had to meet. For the Appellant to now argue that these instructions were somehow unfair is ludicrous.

Additionally, the Appellants argue that the jury debated the apparent inconsistencies in these two instructions and suggests the jury asked for a dictionary to compare these instructions. However, these assertions are merely unsubstantiated conjecture and supposition upon Appellants' part. It is as likely that the jury was debating a myriad of other issues, including equitable estoppel and/or damages. Appellants present these assertions as if fact, when there is no basis for this argument.

CONCLUSION

"In determining whether there is sufficient evidence to support a jury verdict the court shall (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984); Syl. Pt. 6 McClung v. Marion County Comm'n, 178 W.Va. 444, 360 S.E.2d 221 (1987)." Syl. Pt. 2, Tanner v. Rite Aid, 194 W.Va. 643, 461 S.E.2d 149 (1995). Furthermore, "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." Addair v. Majestic Petroleum Co.,

Inc., 160 W.Va. 105, 232 S.E.2d 821 (1977)." Syl. Pt. 5, Roberts v. Stevens Clinic Hosp. Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986). And, where, in the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong." Jamison v. Waldeck United Methodist Church, 191 W.Va. 277, 445 S.E.2d 229 (1994) citing Syl. pt. 2, French v. Sinkford, 132 W.Va. 66, 54 S.E.2d 38 [(1948)].' Syllabus Point 1, McCormick v. Hamilton Business Sys., 175 W.Va. 222, 332 S.E.2d 23 (1985)." Syllabus Point 7, Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990).

In the instant case, Appellants received a fair trial upon the merits. The Trial Court and the jury found in Appellants' favor on some issues and Appellees' favor on others. The Trial Court made no errors in allowing the presentation of the case for easement by implication to the jury. In fact, the jury determined that Appellees had proved their case for implied easement by a clear and convincing standard. Moreover, the appealed instructions were accurate statements of the law and in no way prejudicial to Appellants' case. Thus, not only is the verdict not "plainly wrong", it is equitable, just, and as such, should be upheld.

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Defendants Below, Appellants.

CERTIFICATE OF SERVICE

I, O. Gay Elmore, Jr. counsel for Respondents, do hereby certify that service of the foregoing "Brief of Appellees" was made upon the following by mailing a true and exact copy thereof to:

George A. Daugherty, Esq.
Daugherty Law Offices
P.O. Box 490
Dunbar, WV 25064

in a properly stamped addressed envelope, postage prepaid, and deposited in the United States mail this 12th day of August, 2009.



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