

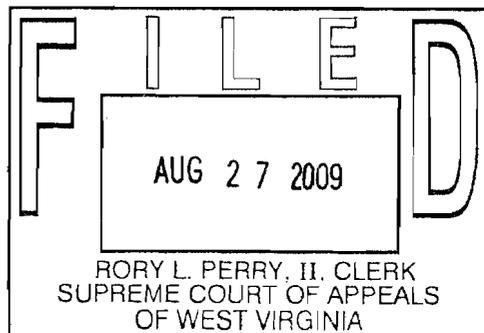
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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,



REPLY TO BRIEF OF APPELLEES

Counsel for the Daughertys has become increasingly amazed but not surprised, by the tactics of the Cobbs and their attorney in ignoring the clear law of West Virginia and continuing to supply new theories which are not based on the actual facts of this case in the face of law clearly set forth historically by the Court.

The Daughertys purchased a home place in a nice neighborhood in South Hills which they fully expected to enjoy unencumbered for as long as they owned the property. The homestead is situated in a nice neighborhood, close to good schools in which they expected to enroll their children and enjoy their family life. They had the title checked by a competent attorney and did all things necessary to assure they had a clear and unimcumbered right to the entire homestead.

For four years the Daughertys have had to defend themselves and their homestead from claims which were unfounded and when proven to be so were once again required to defend themselves against new theories, as if the original or next preceding theory had not been disproved.

Initially the Cobbs claimed a prescriptive easement. The Daughertys, by counsel, raised objections and the Cobbs asked permission to clarify. It was shown that they had no color of title thus no right to prescriptive easement. They then brought an amended complaint setting forth every conceivable type of easement mentioned in Michie's Jurisprudence. Upon deposition when pressed by the Daugherty's lawyer Mr. Cobb stated under oath that he claimed a right to cross Lot #4 because a Mr. Hudson had told him a way existed across Lot #4 at the time he purchased from one Mr. Nelson Lot #3 upon which he built his home. In other words he bought his home place because the access was there according to Mr. Hudson. By careful analysis of the Court records Thomas Daugherty discovered that this could not be true since Mr. Hudson did not own Lot #4 at the time Mr. Cobb swore he bought Lot #3 in reliance upon that statement. In other words, what Mr. Cobb swore to was not factual. Mr. Cobb claimed he did not know where Mr. Hudson was. Mr. Hudson was located by the Daughertys and made that known in Court. Mr. Cobb made no effort to follow-up with Mr. Hudson in any way that might explain his false statement.

Thus, that statement being false, the Daugherty's investigated who in fact did own the property at the time the Cobbs made their purchase. This turned out to be Larry Wilder. Larry Wilder was not called to Court by the Cobbs but was called by the Daughertys and his testimony made it perfectly clear that Lot #4 was basically a wooded area and there was no roadway there. In fact, he testified that it was so wooded and overgrown that he developed poison ivy from trying to clear it and decided to abandon his plans to build a house there and purchased property elsewhere.

At this point counsel began efforts to pin down precisely what the Cobbs were relying upon. It seemed clear that their theory was based on a false premise. In spite of repeated efforts

and several hearings the Cobbs never stated with specificity what their claim was going to be. Therefore, when the trial started it was necessary for the Daughertys to defend upon every conceivable theory of easement without facts which they could disprove. This continued until late in the trial when the Judge limited the Cobbs to theories based on estoppel and implied easement.

Shortly before jury argument and during a discussion of instructions the Judge rejected all instructions offered by the Cobbs and he and his Clerk wrote the instructions which were ultimately given for the Cobbs. This was in reality the first time the Daughertys knew precisely the issues to which the jury was limited.

The Daughertys presented to the Court a Xerox copy of the case of Stuart v. Lake Washington Realty Corporation, 92 S.E. 2d 891 (W.Va. 1956). As clearly set forth in that Brief the Judge inserted the word strictly in the first instruction he and his law clerk had written, consistent with the Stuart case. Counsel for the Cobbs has stated on page 7 of their Brief that "it is important to note that the Defendants' counsel did not object to either instruction of the Trial Court." The fact is that the instruction was not a defense instruction at all and would never have been since it was in exact conflict with Instruction No. 1 and confused strictly with reasonable necessity, which obviously confused the jury which was out for about ten hours during which time they requested a dictionary which request was denied.

Counsel for the Cobbs apparently now takes the position that throughout this case an easement has been described as a "cut-in" or "gravel driveway." The evidence is clear from the testimony of Tom Daugherty, from pictures in evidence, from engineers plats or surveys, testimony of Larry Wilder and the erroneous testimony of Mr. Cobb, that such was not the case. Apparently, this is a last ditch effort to make erroneous or false facts fit some sort of a theory

which would warrant giving the Cobbs a right to property solely owned by the Daughertys. A careful reading of this entire record clearly shows that such has not been so described “throughout the case.” (See Brief of Appellees page 1) Once again, counsel is confused and perplexed in terms of how to defend against new and novel theories which are still appearing in this case. To believe this theory to the effect that the Cobbs had been maintaining for approximately twenty-five (25) years a “cut-in”/gravel driveway for ingress and egress known to and acquiesced in by Appellants prior to and after their purchase of their property is obviously contrary to the clear evidence in the case. It is noteworthy that no plat or survey ever showed such a roadway until a surveyor hired by Mr. Cobb on April 6, 2005, see Defendants’ Exhibit #7, indicated the existence of a way. All other surveys did not show such a way except the one hired by Mr. Cobb. The water company survey, see Defendants’ Exhibit #2, dated August 1, 1994, is especially noteworthy since the water company had to realign their waterline over this property and certainly would have indicated any such roadway for their own protection and would have secured a release from the Cobbs if in fact a “roadway” existed. Thus, the roadway inserted by Mr. Shaffer’s survey will cause the Daughertys difficulties in the future since it will be necessary to clear their title of this invention of Mr. Cobb. As made clear, the pictures in evidence clearly show the lack of such a roadway over to and onto the Cobbs property clearly negating the truth of his statement that such had been there for twenty-five (25) years.

The various inaccuracies are set forth in Appellants original Brief and will not be further belabored at this point.

Not only have the Cobbs been prone to invent evidence to suit their claim but they also have refused to answer, distinguish, and deal with the clear cut law of West Virginia.

A classic example of refusal to accept the clear cut law of West Virginia is found in the Brief of Appellees in their ignoring of and refusal to distinguish the West Virginia case of Shaver v. Edgell, 48 W.Va. 502, 37 S. E. 664 (WV 1900). Pertinent references to that case are as follows:

“Syllabus Point 3. Where one conveys a tract of land to another, no evidence can be received to prove an oral agreement between the parties that a private way over the land conveyed should exist in favor of the grantor.”

“Syllabus Point 4. Where an owner of contiguous tracts of land grants one away, he can claim no right of way over it for the use of another tract, even under an oral agreement at the time for such way, without reservation in the deed, unless such way be strictly and absolutely necessary for access to the other tract still vested in the grantor. Such a way must be of indispensable necessity.”

A further quotation from the South Eastern Reporter of the Edgell case follow:

Pages 666-668

“Third, Edgell seeks to maintain his claim of right of way on the ground that when he conveyed his interest in lot No. 1 to Hall it was distinctly understood that Edgell should have such right of way over the part of lot No. 1 thereafter owned in severalty by Hall. The court excluded evidence offered by Edgell to prove such agreement between him and Hall. I think the court did not err in this. To admit such evidence would be dangerous in the extreme. The estate of man in land would be very precarious if such were the rule. His deed says he has absolute ownership, unincumbered by the great burden of a right of way; but slippery memory or perjury comes up to contradict the deed and place a heavy incumbrance upon the owner’s estate, largely detractive from the value of that estate. The case of Standiford v. Goudy W. Va. 364, says that “when the owner of two tracts of land has used the way to and from one over the other, no matter how long, and he grants the former tract, without mention of any way, unless the way be necessary to the enjoyment of the tract granted the mere grant of the land does not create or confer a way appendant, appurtenant, or in gross.” The deed plainly speaks the contract, without any ambiguity, and no oral evidence is at all admissible to alter or explain it; and, even if ambiguous, the verbal talk of the parties at the time is not admissible to contradict or explain the deed. Crislip v. Cain, 19 W. Va. 438 (Syl., point 13); Towner v. Lucas, 13 Grat. 705. Here Edgell, granting all his right in land, seeks afterwards to detract from the legal effect of his conveyance by loading the land with the heavy incumbrance of a private right of way for all time. He must reserve that right of way in the deed. Without such reservation he cannot take away from Mrs. Shaver a valuable

element in here ownership, by placing an enduring incumbrance upon it. Jones, Easem. §136, says: "There is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege, in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A 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. 'If a man conveys land which is covered by his mill pond, without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another, which he is accustomed to use as a way. He then conveys the farm, without reserving a right of way. It is clearly gone. A man cannot, after he has absolutely conveyed his land, still retain the use of it for any purpose without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plow and crop the land.'" Jones goes on further to say that it is only in case of the strictest necessity that the principle of implied reservation can be invoked, and cites the case of *Burn v. Gallagher*, 62 Md. 471, holding that no easement can be taken as reserved by implication unless it be de facto annexed and in use at the time of the grant, and it be shown, moreover, to be actually necessary to the enjoyment of the estate or parcel retained by the grantor. "And such necessity cannot be deemed to exist if a similar way or easement may be secured by reasonable trouble and expense, and especially not if the necessary way or easement can be provided through the grantor's own property. In order to give rise to the presumption of a reservation of an existing quasi easement or easement where the deed is silent, the necessity must be of such strict nature as to leave no room for doubt of the intention of the parties that adjoining property should continue to be used and enjoyed, in respect to existing easements or quasi easements, as before the severance of ownership; for otherwise parties would never know the real purport of their deeds. If the grantor intends to reserve any right or easement over the property granted, it should be done by express terms, and not afterwards require a plain grant, it may be for full consideration, to be limited and cut down by any mere implied reservation of privileges over the property granted. It is only the cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked." This doctrine is held in *Scott v. Beutel*, 23 Grat. 1. There is a great difference between an implied grant and an implied reservation. If one man grants land to another, he impliedly grants those things absolutely essential for the enjoyment of the land granted, as, for instance, a way over grantor's land to meet necessity. But he does not reserve a way over the grantee's land for the use of the grantor's remaining land, without he puts in a reservation; for he cannot, by mere implication, derogate from his own deed by destroying or rendering less valuable what he granted. To say that a grantor reserves that which may be beneficial to him, but most injurious to his grantee, is contrary to the principle on which implied grants depend. That principle is that a grantor shall not detract from his grant, or render what he granted less beneficial to his grantee. Jones, Easem. §127, and notes. Thus the law is strong against the contention for Edgell that either by legal implication or by oral agreement he

reserved a right of way over the 11 ¼ acres when he conveyed to Hall. The text of the law above given is that he could not claim such implied reservation save on the most absolute necessity for the enjoyment of that part of lot No. 1 which remained to his in severalty. The evidence show that no such necessity exists. It shows that his land runs a long distance along the public highway, and there is no obstruction of access to it, save some tolerably steep ground, and that a very usable road can be made to the highway at small expense, ranging from \$5 up to \$60, according to different witnesses; the most reliable putting the cost at \$15 or \$20. That evidence further shows, in fact, that there is already a road, and long has been, from Edgell's part of No. 1 to the highway, used for horses and cattle, and sometimes for vehicles. Therefore there is no necessity under which a court of justice should raise up a right of way in favor of Edgell, to torture Mrs. Shaver by burdening her land. The enjoyment by Edgell and his land-the full enjoyment-may be had by him without thus crippling Mrs. Shaver's estate. President Berkshire, in delivery the opinion of this court in *Powell v. Sims*, 5 W. Va. 1, holds this doctrine as to ways of even ordinary necessity. He relies upon Washb. Easem. 586, which says: "A right of way from necessity over the land of another is always of strict necessity, and this necessity must not be created by a party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way through the land of another can exist. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff."

Another theory for Edgell's claim of right of way is that when Hall conveyed the 11 ¼ acres to Mrs. Shaver he pointed out the way, and reserved it orally for Edgell and others. The deed does not say so. For reasons stated above, the court properly excluded that evidence.

Counsel for Edgell insist that when Mrs. Shaver purchased of Hall there lay before her eyes, easy to be seen, this way and that she was affected with notice of it. No doubt of this being law, but here we must have two things, namely, a visible track, which probably there was; and, secondly, an existing right of way, valid under the law; and the latter is not the case, and the whole argument on this basis falls. If there had been a public road there, the purchaser would have to take notice of it; but there was no public road there. If there had been a valid private way, that would not affect Mrs. Shaver with notice, in the absence of actual notice, which it was proposed to prove she had; but then there was no right of way to have notice of. Whence did it originate? How came it into existence? Under this head, counsel reply upon *Patton v. Quarrier*, 18 W. Va. 447. It holds that were, at the time of purchase of land, there is a public road, the purchaser takes the land subject to such rights, and is not protected by a deed of warranty against the incumbrance of that road. In this case there was no public road. That case also holds that where no private right of way is reserved in the deed itself, and the purchaser has no notice of it, he takes without the burden of that way, and that where the deed has no reservation the purchaser takes the land unincumbered by a way, unless he has notice that there is such a way; but this presupposes the

existence of a valid prior right way, whereas in this case there is no valid right of way. Why speak about notice – legal notice- of a thing nonexistent? The case of Patton v. Quarrier, under the facts of this case, lays down legal principles against Edgell's right of defense. It was not a case of reservation by a grantor against his own deed.

For Edgell the point is made that when an estate is partitioned by decree there exists a right of way over other lots to the highway. Concede this. But does such right exist, giving Edgell a right to invade this 11 ¼ acres, when it and his own land constituted one lot in the partition, and when there is no necessity for him to invade the 11 ¼ acres, from the fact that he has access to the highway, or ready means of access, without touching the 11 ¼ acres? Moreover, that decree dealt with the rights of various lots as to outlet, and only gave to certain lots a right of way over certain other lots, and did not give lot No. 1 any right of way, because it needed none, and certainly did not give one part of lot No. 1 outlet over another part, as it was then all together.

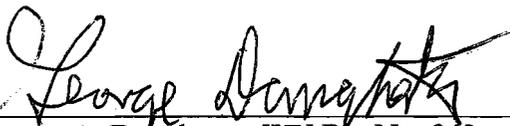
It is suggest that when Edgell conveyed the 11 ¼ acres to Hall he conveyed only his undivided interest, meaning to say, if I catch the meaning, that, the land being undivided between him and Hall, his conveyance passed only the land; but, his right to pass over the 11 ¼ acres being an individual right in him, that right did not pass under his deed. I do not see why a deed conveying all the grantor's right, title and interest, though undivided, with general warranty, does not pass every kind of interest the grantor has in the land at the time, or how against the grant or the warranty of such a deed the grantor can set up in detraction from his deed a pretended right or a real right vested at the date of that deed in him to the injury of his grantee."

Based upon all of the above it is respectfully submitted that the verdict of the jury and the judgment of the Trial Court should be reversed and judgment entered for the Appellants as a matter of law.

Respectfully submitted,

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

By Counsel


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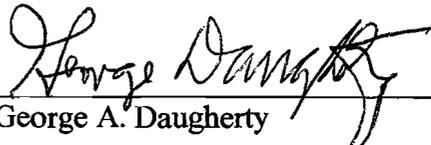
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CERTIFICATE OF SERVICE

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 27th of August 2009, I filed the original and nine copies of the attached *Reply to Brief of Appellees*, by hand delivery to the Office of the Clerk of the Supreme Court of Appeals of West Virginia, and to the law office of the following:

O. Gay Elmore, Jr.
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George A. Daugherty