BEFORE THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

SUPREME COURT NO. 091667

MICHAEL O'DELL,

Appellee,

v.

ROBERT STEGALL,
VIRGINIA STEGALL,

Appellants.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

APPELLANT STEGALLS' BRIEF

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APPELLANT STEGALLS' BRIEF

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

On September 17, 2008, Plaintiff O'Dell brought this suit to establish a prescriptive easement over the Stegalls' 25 foot right of way which had been deeded to the Stegalls as the sole access to their residence. O'Dell sued all owners adjoining the right of way although only two adjoining owners, Walkers and Seibert, had legal use of the right of way. *See* Circuit Court Docket, page 3 (hereinafter referred to as "Docket, p. 3"). Count I of the complaint was captioned "(To Quiet Title by way of A Prescriptive Easement to The Driveway)." The Complaint also claimed damages against the Walkers and the Stegalls for interference with O'Dell's unestablished prescriptive easement and asserted, in paragraph 19, that the "...interference includes but is not limited to, the blocking of the driveway[1] and summoning of law enforcement officers to the location of the driveway claiming that the plaintiff has committed acts of trespass." *See* Docket, p. 3. The complaint also contained a Count for "Abuse of Process" and the "Tort of Outrage" as to the Stegalls and the Walkers.[2]

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[1]To the contrary, O'Dell admitted both in his deposition and at trial that he was never physically blocked from using the right of way. *See* Trial Transcript of June 9, 2009, page 245 (hereinafter referred to as "June 9 Tr., p. 245"), in which O'Dell testified, "...there wasn't a physical impairment."

[2]As pointed out below, on April 1, 2009, O'Dell filed a motion to amend the complaint (*see* Docket, p. 62), to include counts for "Invasion of Privacy," and "Conspiracy" to which the Stegalls timely objected on April 14, 2009. *See* Docket, p. 77-78. The Trial Court indicated that it would permit the Amended Complaint at the pretrial hearing on May 18, three (3) weeks before trial, but we find no written order granting such leave.

Ultimately, all Counts of an Amended Complaint were submitted to the jury. The jury awarded O'Dell a prescriptive easement, $5,300 in damages (being the stipulated fee of O'Dell's trial expert), and $4,700 in punitive damages (presumably related to the Stegalls' alleged interference with O'Dell's unestablished prescriptive easement). The case's rather unusual pretrial and trial events may bear close scrutiny because, during the trial, the Trial Court expressed the opinion that the Stegalls had already waived their objection to errors they alleged during the trial.[3]

On October 23, 2009, prior to the expiration of time for the Stegalls to file their answer to the suit, the Court entered a Scheduling Order, setting trial for June 9, 2009. *See* Docket, p. 28. The court's Scheduling Order required, *inter alia,* disclosure of Plaintiff's witnesses, "Including expert witnesses, plus Rule 26b [sic, meaning Rule 26 (b) (4)] material reports, opinions and authority for opinions by February 24, 2009." *See* Docket, p. 28.

On February 23, 2009, O'Dell timely filed a witness list and included, as an expert, Fred Gates, for whom no Rule 26(b) (4) expert information was supplied. *See* Docket, p.

[3]A fundamental complaint in this appeal, is that O'Dell's easement claim articulated in Count I of the Complaint was limited to an easement by *prescriptive* use. At trial, however, while he continued to use the term "prescriptive easement" in referring to his claim, O'Dell, instead, presented an illegitimate legal argument to the jury. At trial, O'Dell was allowed to present "evidence" to the jury that his rights, by deed, were the same as the Stegalls and that the grantor who had subdivided the land had intended to give him an express easement. The only clue of O'Dell's scheme given the Stegalls, was the belatedly revealed expert report of surveyor Fred Gates, dated January, 2009, and delivered April 24, 2009, in which it was opined that O'Dell was not "excluded" from use of the Stegall 25' right of way. To this clue, the Stegalls objected with a timely filed Motion In Limine. *See* Docket, p.119.

38. The Stegalls filed an objection to the failure to provide Rule 26(b) (4) expert information on March 11, 2009. *See* Docket, p. 45.

On March 27, 2009, O'Dell filed a motion for leave to file his expert witness statement but neither included the expert's statement, nor any Rule 26(b) (4) disclosure.[4]

On April 1, 2009, nearly two months after the pleading amendment deadline, O'Dell filed a motion to amend the complaint to add a count for "Civil Conspiracy" and a count for "Invasion of Privacy." *See* Docket, p. 62. On April 17, 2009, the Stegalls filed an objection to the motion to amend raising the lateness of the assertion of the motion in close proximity to trial. The Stegalls also pointed out that the motion's only factual basis was the Stegalls' tape recording of O'Dell in an area where there was no expectation of privacy. Finally, the Stegalls' pointed to the facial insufficiency of the pleading as to the allegations of conspiracy. *See* Docket, p. 77.

On April 21, 2009, the Starliper Defendants filed a motion to dismiss because they neither had claimed, nor had they any basis for a claim, to the right of way. *See* Docket, p. 79. On April 29, 2009, O'Dell filed an objection to Starlipers' motion, asserting that they were necessary parties to the suit simply because their real estate adjoined the right of way. *See* Docket, p. 111.

On April 23, 2009, as a result of mediation, O'Dell made agreements with all defendants in the suit except the Stegalls. *See* Mediator's Report, Docket, p. 106. Under

[4]We find no Expert Disclosure in the file but acknowledge that we finally received the document, containing a report dated January 20, 2009, with modifications dated April 22, 2009, on April 24, 2009.

the agreements, all parties were to be dismissed from the suit except the Starlipers and the Stegalls. As to the Starlipers, O'Dell agreed that all counts would be dismissed except the count for adverse possession, still insisting that even though they made no claim to the right of way or the real estate under it, they were necessary parties.[5] None of the settlement agreements required the payment of any money to O'Dell. In the settlement with Seibert, O'Dell obtained a "Quit Claim" deed which he would later use, over the Stegalls' strenuous pretrial and trial objections, to claim "ownership" at trial. *See* June 9 Tr., p. 156.

On April 24, 2009, the Stegalls filed a Motion To Dismiss and for Summary Judgement, pointing out, among other things, that the fee owner of the real estate over which O'Dell claimed a right of way was owned by the Walkers and that the Walkers would be dismissed from the case under the settlement recently made with O'Dell. *See* Docket, p. 102, paragraphs 9 and10. The Stegalls also sought summary judgement on the intentional interference claim and the abuse of process and tort of outrage claims in that no allegations had been set forth in the complaint to support such claims nor had the predicative facts been presented. *See* Docket, p.102, paragraphs 11, 12 and 13.

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[5]*See* motion by Starliper for summary judgement, Docket, p. 79, objected to by O'Dell Docket, p.109, and finally ruled upon by the Trial Court, on May 19, 2009, Docket, p.140, in which the Trial Court actually dismissed the entire Count I of O'Dell's complaint (his claim for adverse possession)for failure of O'Dell to join necessary parties (O'Dell's former wife) and the misjoinder of unnecessary parties. Ironically, although O'Dell insisted on badgering the disinterested and elderly Starlipers with the suit he dismissed the necessary , the Walkers, parties who owned the residue fee to the real estate over which he sought a prescriptive easement.

A pre-trial conference was conducted on May 18, 2009.[6] Although the Court verbally indicated it would deny the Stegalls' Motions for Summary Judgement, we find no order containing any findings or conclusions entered by the Court.

On the next day, May 19, 2009, all defendants, except the Stegalls, were dismissed from the suit. The Order dismissing the Starlipers found that "...Plaintiff has joined parties who should be dismissed and failed to join parties whose joinder is mandatory." Although the Court may have intended to only dismiss the Starlipers from the case, the order further reads: "It is accordingly ADJUDGED AND ORDERED that Count I of the Plaintiff's Complaint be, and the same hereby are [sic] DISMISSED WITH PREJUDICE." Count I was O'Dell's entire claim for an easement by prescription. *See* Docket, p. 140, 141.

On May 29, 2009, the Stegalls served O'Dell with a motion to have March 24, 2009, Requests For Admission, deemed admitted under Rule 36 of the West Virginia Rules of Civil Procedure. *See* Docket, p. 148-150. On the same day, approximately one

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[6]By the time of the pretrial, O'Dell's counsel had informally provided the Stegalls with the Report of Fred Gates. It is assumed that no pretrial order was ever entered for May 19, 2009, as the Stegalls' counsel received no copy of an order. A proposed pretrial order was prepared by O'Dell's counsel, but it did not accurately reflect all of the rulings of the Court. It is acknowledged that, at the pretrial hearing, the trial court stated it would grant O'Dell's motion to amend the complaint, and that Mr. Gates would be permitted to testify but only as to matters within the scope of his expertise as a surveyor and engineer and the *Daubert* standard. However, the Trial Court failed to specifically address the over arching issue. Stegall's counsel pointed out that it appeared that O'Dell was about to dismiss out of the case the owner of the dominant estate over which the claimed prescriptive easement ran and therefore the suit should be dismissed.

week before trial, the Stegalls' counsel received from O'Dell belated responses to the outstanding Requests For Admission. *See* Docket, p. 147.

On June 4, 2009, the Stegalls renewed their Motion for Summary Judgment and alternatively, to continue the trial based on the late compliance with discovery. *See* Docket, p. 151 and 152. The Stegalls again pointed out that O'Dell could not prevail on his adverse possession prescriptive easement claim without Walker, the owner of the dominant estate, in the suit. The next day, June 5, 2009, O'Dell filed an objection to the Stegalls' motion and sought sanctions. *See* Docket, p. 154. However, at the pretrial hearing conducted on May 18, 2009, the Court verbally stated that the trial would go forward on all counts and that the Court would permit the testimony of Fred Gates but only to the extent that his testimony would be limited to his expertise as a surveyor. The Court's reasoning was that the Stegalls had been given Fred Gates' name on February 26, 2009, and since the Stegalls had not deposed him, they had waived objection to the tardy receipt of his report.[7]

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[7]*See* proposed May 18, 2009, Order from pretrial submitted by O'Dell's counsel on May 19, 2009. While the Stegalls' counsel objected to omissions and extraneous findings not made by the court, the Order does reflect the substance of the court's rulings except that Fred Gates' testimony was to have been limited to his area of expertise as a surveyor.

Throughout the trial that followed, it seemed that O'Dell's counsel was able to convince the Court that critical objections to his theory of the case had not been timely asserted. To some extent it is true that the Stegalls' counsel did not fully appreciate the extent to which O'Dell might illicitly use deeds to his client to convince the jury that he could establish a prescriptive easement by grant! However, in the timely filed pretrial Motion In Limine filed on April 22, 2009, the Stegalls did object to Fred Gates's anticipated "non-exclusivity" testimony and to the anticipated Report which had not yet been disclosed. *See* Docket, pp. 87-90. The Court overruled the Motion at the Pretrial hearing, after which the Stegalls renewed their Motion contrary to the statements of O'Dell's counsel and the Judge at trial. *See* June 10, Tr., p. 55. In

The trial commenced on June 9, 2009, with an equally strange jury selection process. In an effort to aid the jury in understanding the voir dire questions, the trial court provided a brief statement about the case. However, to the dismay of the Stegalls' counsel, the trial court then essentially instructed the prospective jury panel with O'Dell's clandestine easement theory, stating that Mr. O'Dell had brought the suit to "vindicate" his right to use a right of way and suggested that there was a question as to whether or not the Stegalls' had a right to object to Mr. O'Dell's use. *See* June 9 Tr., p. 14.

Upon reducing the panel of prospective jurors to 10, the bailiff handed the jury list to O'Dell's counsel for his initial strike. O'Dell's counsel refused to exercise his peremptory strikes claiming that he wished to waive them. When the Stegall's counsel then exercised the 4 peremptory strikes, O'Dell's counsel objected. After a significant delay with the jury panel waiting, and a couple trips with counsel to the bench, it seems that the matter was resolved with the Stegalls' counsel having effectively dedicating one of his peremptory strikes to a juror who was not on the panel. *See* June 9 Tr., pp. 47- 57.

After the jury had been released back to their jury room the Stegalls' counsel expressed strong objection to the Court's pre-trial instruction to the jury panel. *See* June 9

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the Stegalls' Cross Motion For Summary Judgment, served on April 24, and filed by the Clerk on April 28, 2009, it was also pointed out that the owner of the dominant estate, Walker, was a necessary party who was being released from the case. *See* Docket, p. 102. Associate counsel Richard Sussmann reports that he spent considerable time with the Court's law clerk attempting to sort out the court file just prior to trial and it may be that the trial judge did not review the Stegalls' timely filed Motion In Limine, filed even before receiving the belated disclosure of Gates' Report on April 24, 2009.

Tr., p. 60. The Stegalls' counsel also pointed out that the case appeared to be taking an illicit course by which it could be inferred by the jury that mere objections by Stegall to O'Dell's adverse and hostile use of their right of way was actionable.[8] However, the trial court offered no curative instruction, simply responding "that's fine." *See* June 9 Tr., p 63.

At trial, over the Stegalls' renewed objections, O'Dell introduced the testimony and report of surveyor Fred Gates, who testified that he was "not sure this was a prescriptive easement," *See* Trial Transcript, June 10, 2009, page 96, line 10-11. (hereinafter referred to as ("June 10 Tr."), but who opined that the original grantor of O'Dell's out-lot in 1898 had intended to convey to him the easement in question. *See* June 10 Tr., p. 104, line 11. Over the Stegalls' objections, O'Dell also introduced his deed suggesting that the "exceptions" contained therein for rights of ways, had the same legal effect as the "granting" language in the Stegall deed by which title to the platted right of way was acquired. *See* June 9 Tr., p. 143. Over the Stegalls' objection, the Court permitted O'Dell's counsel to pose the legal question of Mr. Stegall as to whether or not he had a deed evidencing his ownership of the right of way (*see* June 9 Tr., p. 100, objection made p. 101) and whether or not Mr. Stegall had any documentation excluding any person from

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[8]Even so, perhaps Stegalls' counsel did not fully appreciate the gravity of harm done his clients by the Trial Court's pre-trial jury instruction. What Stegalls' counsel did not fully appreciate was that O'Dell's counsel was poised to try a different case than that pled in Count I of the complaint (easement by prescription). Despite the "prescriptive easement" name given it, O'Dell was actually pursuing the claim that he was vested with an easement by grant. To support his rogue theory, he would use Fred Gates to interpret the original developer's 1898 intent, the Seibert Quit Claim Deed that he received in settlement, and the reservation language contained in O'Dell's deed. Over the Stegalls' objections, the jury was about to hear legal argument on a "prescriptive easement by grant."

the right of way (*see* June 9 Tr., p.104). The Stegalls' counsel strenuously renewed his objections to challenges made to the previously uncontested issue of the Stegalls' rights to the 25 foot right of way.[9] Finally, over the Stegalls' objections, O'Dell introduced the Quit Claim deed from Seibert, to suggest that he was vested with title to the right of way from that source. *See* June 9 Tr., p. 155.[10] O'Dell even offered evidence that the fence he had built partly into the right of way and to which the Stegalls had strenuously objected, was "permitted" by the Jefferson County Planning Commission. *See* June 9 Tr., p. 139-140. In fact, the Planning Commission had no jurisdiction over the fence. *See* June 9 Tr., p.140.

On this evidence of a "titled claim" to the right of way, O'Dell was able to pursue damages claims for interference with his yet to be established right of way. First, O'Dell claimed the Stegalls committed abuse of process by calling the State Police and writing to the Governor. *See* June 9 Tr., p. 233-234. Second, O'Dell stated that the Stegalls had unlawfully invaded his privacy by photographing him driving on the right of way and tape recording their conversation with him while standing in the right of way. *See* June 9 Tr.,

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[9] The Stegalls' objections were less than subtle and admittedly reflect considerable frustration. "[The] Court needs to instruct the jury as to whether or not this party has a legal interest in that right of way and get this resolved, rather than sped two or three days fighting between ourselves on questions on [sic] lay witnesses that are legal issues." *See* June 9 Tr., p.105. Stegalls' counsel further pointed out that surely the Court would not have permitted the Stegalls to present an expert to testify before the jury that the Stegalls' do have a documented right of way. *See* June 9 Tr., p. 106.

[10]The Grantor Seibert, however, testified that she signed the deed to be dismissed from the suit and to state that as far as she was concerned, O'Dell could use the road. *See* June 9 Tr., p. 155.

p.110.

At the conclusion of O'Dell's case in chief, the Stegalls moved for a Directed Verdict as to all Counts in the Amended Complaint. *See* June 10 Tr., commencing on p. 141. The Stegalls urged that a prescriptive easement had not been established for O'Dell's residential use primarily because the prior church use had clearly been abandoned. The claims for interference were derivative, moreover, O'Dell had admitted, contrary to his Complaint, that he was never blocked from using the right of way. As had been urged in the Stegalls' objections to the Amended Complaint, the tape recording was conducted in a public place where there was no expectation of privacy and the only basis for such a claim, wire tapping, was inapplicable. The Stegalls argued that merely exercising their rights to protest with government authorities was not actionable, and there was no basis for claims of a civil conspiracy. A renewed objection was made to the testimony of Fred Gates and a motion to strike his testimony as to the intent of the original developer was made. *Wheeling v. Worwoodland,* 412 S.E2d 253, and *Crane v. Hayes,* 417 S.E.2d 117, headnote 3 were cited to the Court along with *Burns v. Golf,* 262 S.E.2d 772.

The Court found that the property had been converted to a residence no earlier than 2005. *See* June 10 Tr., p. 161.[11] The Court ruled that the recording and photographing in public could constitute the tort of outrage. *See* June 10 Tr., p. 163. The Court also ruled that a civil conspiracy does not require an overt act in furtherance of the conspiracy

[11]The church had actually been converted to a residence in the year 2000 or 2001. The substantive effect of the Court's finding, however, is correct, It is undisputed that O'Dell's property had been used as a residence for less than 10 years next preceding the filing of his suit.

because civil conspiracy requirements are relaxed from those of criminal conspiracies. *See* June 10 Tr., p. 163.

Although O'Dell never claimed any special damages for such, the Trial Court submitted all claims against the Stegalls to the jury along with punitive damages and O'Dell's itemized claim for attorney fees and expenses.

The jury found that O'Dell was entitled to a prescriptive easement of the lane. *See* Jury Verdict, Docket, p.185. However, the dimensions of the easement were never defined. The Trial Court failed to provide any description for the easement in its final order (see Docket, p. 204) and denied the Stegalls' post trial motions requesting same. *See* Supplemental Motion, Docket, p. 209 and Order denying the Motion, Docket, p. 225.

Although O'Dell had no special damages, the jury awarded O'Dell his litigation expenses in the amount of $5,300 which it characterized as "Compensatory Damages" on the jury verdict form. Under "Attorney Fees" it awarded nothing. Punitive damages in the amount of $4,700 were also awarded to O'Dell. *See* Jury Verdict, Docket, p.185.

On the Jury Verdict Form the Jury found that the Stegalls had intentionally interfered with O'Dell's right of ingress and egress to his residence although they had never blocked his access. It found that the Stegalls were not guilty of Abuse of Process by virtue of their threats of trespass and contacting public officials. It found that the Stegalls were guilty of an unlawful invasion of O'Dells' privacy based on recording O'Dell's conversations while standing in the lane and that this invasion of privacy constituted the Tort of Outrage. *See* Jury Verdict, Docket, p. 185.

The Court entered a final order on the jury verdict containing no independent review of punitive damages. *See* Final Order, Docket., p. 204. The Stegalls' post trial motions for an independent review of punitive damages and to amend the judgement order and/or grant a new trial were summarily denied. *See* Doc., p. 200. Likewise, Stegalls' post trial motion seeking a delineation of the dimensions and scope of use of the prescriptive easement was denied by the Court. *See* Docket, p. 256. In fact, the Trial Court agreed with O'Dell that the post trial motions were frivolous. *See* Doc., p. 256, reading, in pertinent part, "This Court finds that the plaintiff had been forced to respond to *ad seriatim* post trial motions, which are not well-founded in either fact or law. Therefore, the consideration of the imposition of sanctions and attorneys [sic] fees is warranted."[12]

Standard of Review.

On the issue of punitive damages the appellate court's review of the jury verdict and the circuit court's ruling is *de novo*. *See Peters v. Rivers Edge Mining, Inc.* 680 S.E.2d 791, 816 (W. Va. 2009). It is respectfully submitted that the $5,300 award was for Gates' litigation fee. Therefore, the entire damages award might properly be subject to *de novo* review.

II. ***STATEMENT OF THE FACTS AND THE CASE.***

In 1890 one Isaac Strider acquired a 23 Acre Tract of land situate on Route 15 near

[12]The Stegalls filed only one post trial motion after reviewing the Court's Order entered August 19, 2009, (which was not seen until August 21, after the Stegalls' had already transmitted a "Reply" to O'Dell's "Third Opposition"). *See* Docket, p. 227. Thereafter, the sole post trial motion was for a "Stay Pending Appeal." *See* Docket, p. 233.

Leetown in Jefferson County. This real estate was subsequently divided into four lots and a residue parcel as follows:[13]

1. **Starliper Out-parcel.** The first outsale parcel was conveyed in 1893. It totaled about 1.5 Acres described only by meets and bounds. No reference was made to the 25 right of way. It fronts on Route 15 and is currently owned by Starliper who has no titled right to the 25 foot right of way.

2. **O'Dell Out-parcel**. The second out-parcel, comprised of ½ Acre, was conveyed in 1898 to a German Baptist Brethren Church. It also fronts on Route 15 and is described by meets and bounds. This deed makes reference to an unrecorded plat but made no reference to the 25 foot right of way. The old church is now owned by O'Dell. *Therefore, O'Dell's sole easement legal theory contained in his complaint and amended complaint was easement by prescription*. *See* Docket, p. 2, Count I and p. 62.

3. **Seibert Out-parcel**. The third parcel, comprised of ½ Acre, was created by deed containing a plat depicting the 25 foot right of way leading to Route 15 and it includes express language granting the "right to use the road for ingress and egress to the Leetown and Charlestown [sic] road." Absent use of the 25 foot right of way, this parcel would have been landlocked.

4. **Stegall Out-parcel.** The last out-parcel to be conveyed was the Stegalls ½ Acre parcel. Like the Seibert out-parcel, the deed contains the plat depicting the right of way to the public road without which, it too would have been

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[13]The chain of title is undisputed. The recited chain is taken from O'Dell's Exhibit #10, prepared by Fred Gates. However, the Stegalls do not adopt any of Mr. Gates' findings. Mr. Gates' "O'Dell Research" report highlighted what Gates considered to be the absence of an express conveyance of the 25 foot easement in the Stegall chain of title. Gates wrote: "If the access use of this lane is intended without wording for this lot, how can it not also be intended for the U. B. Church [O'Dell] land?" As indicated above, the Stegalls strenuously objected before and during trial to the Court's permitting an unqualified expert to suggest erroneous principals of law to the jury. Gates' hypothesis was contrary to the law of implied and express easements, let alone, that of prescriptive easements. The Court erroneously permitted Gates to testify that, in 1898, Strider intended to convey the 25 foot easement to the Church, even though the easement had not yet been created of record. *See* O'Dell's counsel's closing argument, June 11 Tr., p. 38, line 18 arguing that both the Stegalls' deed and O'Dells contained identical language in regard to the right of way. However, unlike the Stegalls' granting language, the O'Dell language made express *exception* for easements of record.

landlocked. *Therefore, the Stegalls' were vested with a deeded legal right to use the 25 foot easement.*

5. **The Walkers Residue Parcel.** The residue parcel is owned by Donald Walker, *et ux.* However, the Walkers had abandoned use of the 25 foot right of way. The Walkers' land had separate road access. In order to prevent overburdening the 25 foot lane, the Jefferson County Planning Commission required the Walkers to abandon the 25 foot right of way incident to Walkers' subdivision development of his land. As owner of the residue parcel, the Walkers are successor to the real estate under the 25 foot right of way. Thus the Walkers are indisputably the owner of the dominant estate over which O'Dell sought to establish a prescriptive easement.

Mr. O'Dell's residence was originally constructed as a church with a parking area to the rear. *See* June 9 Tr., p. 78-79. However, by the time of Mr. O'Dell's purchase in October, 2006, the church had been converted to a home by O'Dell's predecessor, William Jeavons. *See* June 9 Tr., p. 78-79. The parking lot to the rear of the church had been merged into the Stegall lot by Jeavons in order to accommodate a septic system on the Stegall lot. *See* June 10 Tr., p. 166.

At trial, it was established that church goers would use the parking lot to the rear as much as twice per week, on Sunday and Wednesday evenings, normally entering into the O'Dell driveway at the Southern boundary and exiting by way of the 25 foot right of way along the Northern boundary line. *See* June 9 Tr., pp. 161, 179, 201 and 208. Some of O'Dell's witnesses also testified that it was used at least once as a polling place. *See* June 9 Tr., p. 161 and 202. The church did not convey to Jeavons until 1999. The evidence conclusively established that any residential use of the 25' right of way associated with the O'Dell lot had commenced less than 10 years before O'Dell filed suit. *See* June 9 Tr., p.

160, and Plaintiff's Exhibit # 10, reflecting that the lot was not even conveyed to its first residential occupant until May 28, 1999, while O'Dell filed suit in September, 2008.

O'Dell also produced evidence at trial that when Jeavons converted the church to a house he added a side entrance on the Northern side facing the Stegalls' 25 foot right of way. *See* June 9 Tr., p. 160. Jeavons conveyed the area of the church parking lot to the Hardy (now Stegall) lot in by deed dated July 29, 1999. *See* O'Dell Exhibit #10, Paragraph 1. e. The evidence at trial was disputed as to whether or not Jeavons had used the 25 foot right of way over the objections of the Stegalls. In any event, the Stegalls and Jeavons had coexisted without incident for over seven years, there being to evidence of a conflict in the record.

Soon after O'Dell's arrival, disputes arose between the parties. O'Dell claimed that the Stegalls' trash cans and their children waiting for their school bus were blocking his use of the 25' right of way. *See* June 9 Tr., p. 246. O'Dell constructed a fence at the highway entrance to the right of way blocking the Stegalls' view and refused to move it back. *See* June 10 Tr., pp 178 and 236. Indeed, the Stegalls' trash cans began to appear in the traveled portion of the 25' right of way causing them to stop their vehicle out in the highway upon returning home. *See* June 10 Tr., p. 222. When their efforts to dissuade O'Dell from using their right of way failed, Stegalls contacted the Jefferson County Planning Commission. *See* June 9, Tr., p. 140. They were advised to contact law enforcement and then called the state police. *See* June 9, Tr., p. 108. They also wrote a letter to the Governor asking for assistance. *See* June 9, Tr., p. 108. At one point, it

appeared that O'Dell was inclined to work with them to resolve the conflict. Both parties met on the right of way lane in an attempt to reach an agreement and Mrs. Stegall tape recorded her part of the conversation with Mr. O'Dell to memorialize what was said. *See* June 9, Tr., p. 110. Mrs. Stegall indicated that she did so because Mr. O'Dell had a history of not doing what he said he would do. *See* June 9, Tr., p. 110.

The parties agreed to wait for two weeks for O'Dell to obtain a second highway entrance permit, and so that both parties could cool off. *See* June 9, Tr., p. 238. Prior to the expiration of the two week "cooling off" period, however, O'Dell filed suit. *See* June 10, Tr., p. 173. O'Dell admitted to the settlement discussions had in the driveway and did not deny any of the Stegalls' representations in this regard. *See* June 9, Tr., p. 238. He testified at trial that he was unable to obtain permission from the Department of Highways and the Jefferson County Planning Commission to add a new driveway entrance. *See* June 9, Tr., p. 238. He also admitted that he never got back to the Stegalls to let them know the results of his inquiry but, instead, preempted further discussions by suing the Stegalls and all the abutting neighbors and included damages claims in his suit. *See* June 10, Tr., p. 22.

III. ***ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND MANNER DECIDED IN LOWER TRIBUNAL.***

A. THE TRIAL COURT ERRED IN FAILING TO GRANT THE STEGALLS SUMMARY JUDGMENT WHERE THE OWNERS OF THE SERVIENT ESTATE, THE WALKERS, WERE DISMISSED FROM THE PRESCRIPTIVE EASEMENT CASE AND ERRED IN FAILING TO DIRECT THE VERDICT WHERE THE PRIOR ESTABLISHED CHURCH USE WAS ABANDONED.[14]

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[14]The significance of the failure to require proof of ownership of the servient estate and prove adverse possession against him was not fully appreciated in the preparation of the Stegalls'

As indicated above, the Trial Court, at the pretrial hearing on May 19, 2009, stated that it would deny the Stegalls' Motion For Summary Judgment (which had been filed as Docket, p. 102, 103). However, no order setting forth findings or any conclusions of law was ever entered by the Court. As to O'Dell's claim for an easement by prescription, the Court did not address the over arching question of the absence of the indispensable parties, being the owners of the servient estate.

The Motion For Directed Verdict made at the conclusion of O'Dell's case in chief was likewise denied although it was undisputed that the Church had physically abandoned its use of the right of way when it conveyed the real estate to Jeavons in May, 1999, and although it was established that the Church parking lot, access from which was achieved using the 25' right of way, was conveyed to the Stegalls in July, 1999. *See* assertion of abandonment, June 10 Tr., p. 142, line 18-24, and p. 159, line 3-7. The Court's ruling of the Motion For Directed Verdict adopted the hybrid theory of recovery proposed by O'Dell. The court believed that the jury should be able to consider O'Dell's rogue theory of prescriptive easement by implied grant.[15] Essentially the court opined that "Mr. Gates'

Appeal Petition. Upon a mature reflection of the entire record in this case, the significance of this irregularity has become conspicuous. Fortunately, the error was preserved with multiple motions for summary judgment, the first of which was filed before the Walkers (the servient estate owners) were ever dismissed from the case. By not requiring a showing of use hostile to the owner, O'Dell was permitted to illicitly offer proof contrary to the legal theory of recovery contained in his complaint. He was permitted by the trial court to offer evidence that his use was not hostile, but, in fact, impliedly granted by the original owner of the The Walkers tract.

[15]The Stegalls concede that, aside from issues of surprise and the failure to plead easement by implied grant, O'Dell could have submitted both, albeit conflicting, theories to the jury. O'Dell could have offered an instruction on implied easement and a second instruction on easement by prescription. What the Stegalls find so offensive to the integrity of the litigation

testimony was very useful" because, from the historic creation of the lots and their use, "we [meaning the jury] are left to divine basically from what obvious use would be and who would be obviously the beneficiaries of this piece of ground that was sort of left out after all these other lots were created." *See* June 10 Tr., p. 160. The trial court further stated:

> "...you got all of this historic, you got a piece of ground left there, it borders on all these other properties, I think that is part of the confusion and part of this just common sense notion that regardless of the doctrine of prescriptive easement that somehow every lot created that touches upon it would have its benefit, I think that is something that the jury can consider."

See June 10 Tr., p. 162.

As to the specific issue of abandonment of the use by the church, the Court noted that the church structure was still there. However, the Court made no mention of the absence of the parking lot, now owned by the Stegalls and fenced from the O'Dell lot, for which use of the 25' right of way had been established. *See* June 10 Tr., p. 161, line 16. The judge supplied his own personal knowledge about the churches and their use of a right of way. The court opined that the church's use would appear to be more burdensome than the O'Dell residence apparently concluding that the issue of abandonment was to be resolved by a burdensomeness test. *See* June 10 Tr., p. 160, line 15.

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process, is that the trial court instructed the jury only on prescriptive easements while permitting and enabling O'Dell to corrupt the jury's understanding of relevant and permissible considerations. Indeed, apparently impressed by Mr. Gates recitation of history, the trial court expressly found it appropriate to disregard the law of prescriptive easements in favor of the "common sense" notion that the jury could consider that each lot touching the easement should have its benefit. *See* June 10 Tr., p. 162, line 9.

B. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY LEGAL QUESTIONS ON WHETHER OR NOT THE STEGALLS OWNED A DEEDED EASEMENT OVER THE RIGHT OF WAY AND WHETHER OR NOT O'DELL WAS VESTED WITH A DEEDED GRANT BY IMPLICATION BY VIRTUE OF THE "INTENT" OF THE DEVELOPER IN THE YEAR 1898.

No pleadings in the case asserted that the Stegalls lacked a right of way over the 25' easement or otherwise lacked standing to object to O'Dell's use of their right of way. Accordingly, no pre-trial motions were made or ruled upon in that regard. The first appearance of O'Dell's theory that the Stegalls' lacked standing to object was provided, off the record, during jury selection when the trial court inquired of O'Dell's counsel as to how he might characterize the case to the jury panel. The Stegalls' counsel objected to the proposed choice of words, pointing out that O'Dell must first establish a right to use by adverse possession and that the Stegalls' right to protest should not be questioned. The Court then proceeded to instruct the jury "the Plaintiffs' have brought suit to vindicate their use, their right or ability to use that as a method to getting to their property and the Defendants have answered and said that they have a right to use not only as a right to use, but a right to preclude its'[sic] use by others and particularly by the Plaintiff in this case." *See* June 9 Tr., p. 18-20 and objection made, June 9 Tr. pp. 60-63 . The Court offered no curative instruction. Equally important, the Court did not find it necessary to guard against the further promotion of O'Dells' theory but even permitted O'Dell's counsel to ask Mr. Stegall the legal question of whether he had a deed to the 25' right of way. *See* June 9 Tr. pp 100, 104, and objections p. 101, 105-107. The trial court's ruling was that the questions of law would be permitted but the trial court would instruct the jury that Mr.

Stegalls' opinions were those of a lay person. *See* June 9, Tr. p. 107. The trial court's instruction did nothing to cure the error because the fact that Mr. Stegall could point to no document from which his right of way claim was derived, was not reflective of his lay opinion. Mr. Stegall testified that he believed he had an interest in the right of way. *See* June 9 Tr. P. 104, line 17. O'Dell's counsel should have been required to "take" that answer under Rule 701 of the West Virginia Rules of Evidence.

Likewise, the Stegalls objected at trial each time they perceived that O'Dell was attempting to present his illegitimate theory to the jury that he was vested with a "prescriptive easement by implied grant" and that the Stegalls' had no standing to object. The Trial Court did not appear to agree with the Stegalls that an obsequious theory of easements was afoot. Rather, the Trial Court apparently viewed the attack on the Stegalls' legal claim to the 25' easement as "fair game" along with O'Dell's prescriptive easement by implied grant theory.

When the Stegalls' counsel attempted to cross examine and challenge O'Dell on his "legal theory" O'Dell's counsel objected that legal principals were being improperly presented. O'Dell's counsel "called the kettle black," stating: "Cross examination...has to be done with questions to elicit facts and not beliefs and not theories, not legal principles that he wants to argue but didn't present beforehand." *See* June 10 Tr., p. 44 line 14. The Stegalls' counsel agreed that the case had been derailed by introducing to the jury legal questions on theories of ownership. *See* June 10 Tr., pp. 44-45.

Also as indicated above, the Trial Judge appeared to view the issue of Gates'

testimony and the use of deeds to prove that O'Dell had been "granted" an easement as an issue of surprise and a mere refinement of O'Dell's prescriptive easement theory. The trial court seemed to suggest that the Stegalls had waived their objection to the clandestine theory of recovery prior to trial. *See* June 10, Tr., p. 58, line 3. The Trial Court did not appear to recognize that the Stegalls had objected long before they were given any indication as to what Gates might testify (*see* Docket, pp. 45, 87) and their objection was renewed once O'Dell suggested that Gates would testify that the deeds contained no exclusionary language that would preclude his client from using the 25' right of way (Docket, p. 89) and had timely filed a Motion In Limine once Gates' report was received (Docket, p. 119) and had renewed the motion again on the eve of trial (Docket, p. 168). No ruling was ever made on the pretrial motions other than the verbal pre-trial ruling in which the Court stated it would limit Mr. Gates' testimony to his area of expertise, a ruling which the Court ignored at trial.

Objections were made at trial to Mr. Gates testifying on legal opinions. It was pointed out that the public records referred to in Gates' report were not in dispute. *See* June 9 Tr., p. 64. At one point the trial court did acknowledge that the Stegalls had preserved an objection to Mr. Gates' testimony prior to him taking the stand. *See* June 9 Tr., p.220. Objections to Gates testimony were also expressed throughout the trial, *see* June 10 Tr., p. 46, line 6, p. 49, line 4 and p. 51, line 22. Apparently, however, O'Dell's counsel was able to convince the trial judge that the Stegalls had not filed a timely Motion In Limine (*see* his assertion June 10 Tr., p.55, line 3) although, as stated above, such

Motions In Limine were timely filed on April 22, 2009, before receiving Gates' report (Docket, p. 87-90) and timely filed after receiving Gates' report on May 6, 2009 (Docket, p. 119). The court ruled that "...we don't feel that they were timely made." *See* June 10 Tr., p. 58, line 3.

Fred Gates was allowed to testify and introduce his Report over the renewed objections of the Stegalls. *See* renewed objection based on Motion In Limine June 10 Tr., pp. 89-90 and objection to Report, p. 102. Yet Mr. Gates testified in voir dire to the effect that his inquiry was not pertinent to a prescriptive easement because he was not engaged to testify relevant to a prescriptive easement claim.

> Q. Okay, okay. But to be clear here, you weren't commissioned to offer an opinion on prescriptive easement, were you, on the possibility of prescriptive easement, were you, that was not what you were hired for, was it?
>
> A. Well, that is very close to a possibility because I was reviewing the documents of record to determine whether there were representations in it for the use of the property that lay around that easement.
>
> ....
>
> Q. Prescriptive easements as you understand them have to do with facts, with actual use and not [sic] as opposed to legally granting [sic] easements, would you not agree with me?
>
> A. Well, I am not sure that this particular case is either prescriptive and then granted but –
>
> Q. Yes, but could you try to address my question. As you understand it prescriptive easements are not based on a legal claim but are based on actual factual circumstances and they are based on use that can only be determined by a Court as opposed to –
>
> MR. BECKER: Objection.
>
> MR. HAMSTEAD: – a deed easement that you would find when you

do a records search, do you agree with that?

THE WITNESS; *Well, if you were looking at a prescriptive easement, yes, I could agree with that. I am not sure this is a prescriptive easement.* [Emphasis added.]

...

Q. Well, Mr. Gates, unless you are looking at facts, pictures, photographs from the air, or something like that, you are not going to find any documents in a chain of title that are going to create a prescriptive easement, are you, because the records deal with legal easements which those are conveyed or accepted [sic] or reserved, they don't have anything to do with whether or not the Court decides or the jury decides that there is a prescriptive easement based on the facts, isn't that true?

Mr. Becker: Objection.

...

THE COURT: Sustained. Let's keep this to voir dire.

See June 10 Tr., pp. 95, 96, 97.

The court then deemed Mr. Gates an "...expert in the field of land surveying,..." and permitted his testimony. Mr. Gates was permitted to testify:

I examined [the deeds in the chain of title] to try to ascertain what the wording was that was in the documents. Generally speaking, in resolving interests after the initial determination of whether it is an unwritten easement that is ripened or a senior right then comes the right of intent of the documents and the documents in this case would show hopefully what the intent was.

See June 10 Tr., pp. 100, 101.

Over the Stegalls' objection, Mr. Gates was permitted to testify that "it appears that back in the 1890s Mr. Strider created a series of lots around a right of way that were [sic] intended to serve them." *See* June 10 Tr., p. 114, and objection, p. 113.

In the Stegalls' motion for a directed verdict, they also moved to strike Mr. Gates'

testimony in regard to Mr. Strider's 1898 intent and provide a curative instruction. *See* June 10 Tr., p. 152. The court took no action on the motion.

C. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY O'DELL'S CLAIMS FOR DAMAGES FOR INTERFERENCE WITH THE UNESTABLISHED PRESCRIPTIVE EASEMENT WHERE O'DELL ADMITTED HE HAD NEVER BEEN PHYSICALLY BLOCKED FROM USE AND WHERE O'DELL TESTIFIED THAT HE CONTINUED TO USE THE RIGHT OF WAY.

As indicated above, the Court summarily overruled the Stegall's Motion For Directed Verdict on the question of interference damages. Although it was pointed out that O'Dell admitted he had never been physically blocked from using the 25' right of way (*see* June 10 Tr., p. 143) the trial court articulated no reasons for denying the Motion as to Count II of O'Dell's Amended Complaint. *See* June 10 Tr., pp. 159-164 in which the court denied all Motions For Directed Verdict.

D. THE TRIAL COURT ERRED IN FAILING TO MAKE ITS INDEPENDENT REVIEW OF THE PUNITIVE DAMAGES CLAIM BEFORE SUBMISSION TO THE JURY AND FAILED TO MAKE INDEPENDENT REVIEW OF THE AWARD AFTER THE JURY VERDICT AS PRESCRIBED BY *GARNES V. FLEMING LANDFILL*, 186 W. VA. 656, 668 (W. VA. 1991).

The trial court simply failed, at any stage of the proceedings, to comply with *Garnes v. Fleming Landfill*, 186 W. VA. 656, 668 (W. VA. 1991) in regard to punitive damages. It was the Stegalls' understanding from the pre-trial hearing that O'Dell's counsel did not view the Stegalls' actions as malicious, and that O'Dell's objective was simply to get the right of way issue resolved. *See* Motion In Limine, Docket 165, which also offered the court a reminder that punitive damages had not formally been abandoned in the case.

The record is likewise devoid of any *Garnes* findings following the conclusion of

the taking of evidence in the case and prior to instructing the jury.[16]

Following, the verdict, the Stegalls filed a motion to set aside the verdict, citing, among other things, the obligation of the Court to independently consider punitive damages under *Garnes*. *See* Docket, p. 190, paragraph 9. On July 20, the court entered judgment on the jury verdict rendering no *Garnes* findings. *See* Docket, p.204. On August 19, 2009, the trial court ruled on the Stegalls' Motion and "ORDERED, that the defendants' request to vacate the jury's award of both compensatory and punitive damages is DENIED;...." *See* Docket, p. 225. It is believed that no other reference to a ruling on punitive damages appears anywhere in the record.

E. THE TRIAL COURT ERRED IN SUBMITTING O'DELL'S CLAIM ON "INVASION OF PRIVACY, " "TORT OF OUTRAGE" AND "CIVIL CONSPIRACY" TO THE JURY WHERE THE ONLY EVIDENCE TO SUPPORT SUCH CLAIMS WAS THAT MS. STEGALL HAD TAPE RECORDED HER CONVERSATION WITH O'DELL WHILE THEY WERE STANDING ON THE RIGHT OF WAY AND THE STEGALLS HAD PHOTOGRAPHED O'DELL USING THE RIGHT OF WAY.

The Counts for Civil Conspiracy and Invasion of Privacy were first asserted in a proposed Amended Complaint filed on March 30, 2009, (*see* Docket, p. 62) to which the Stegalls objected on April 17, 2009 (*see* Docket, p. 77). The Stegalls pointed out in their objection to the amendment that it was uncontested that the recording device had been used by Ms. Stegall and uncontested that it was not used on O'Dell's real estate. Likewise, the allegation that the Stegalls had simply photographed O'Dell and his family was insufficient to state and invasion of privacy claim. The Stegalls objected to the

[16]To the extent that the Stegalls are required to preserve their objection to punitive damages in the verdict form, they did so in accord with the court's proscribed procedure, prior to the jury verdict. *See* June 11 Tr., pp. 19 and 71.

conspiracy claim because no wrongful act or impermissible objective was asserted in the amended complaint so as to state a cause of action for conspiracy.

As indicated above, no order was entered by the court on the Motion To Amend. However, at the pretrial hearing on May 19, 2009, the court indicated that the amendment would be permitted because O'Dell claimed that he had only recently discovered that he had been tape recorded in Ms. Stegall's presence in the road way.

The "Tort of Outrage" claim was also based on the recording of O'Dell's conversation with Ms. Stegall.[17]

The Stegalls moved for a Directed Verdict on the Invasion of Privacy claim at the conclusion of O'Dell's case on the grounds that the tape recording was made in the open, not on private property. Submitting the claim would create an improper inference of wrongdoing. *See* June 10 Tr., p. 148, line 3-13. The Stegalls again pointed out that the allegation as to conspiracy was facially insufficient there being no identification of any impermissible objective, let alone the commission of an unlawful act or lawful act committed in an unlawful manner. Moreover, no injury was claimed. *See* June 10 Tr., pp. 146-147.

Likewise, the Stegalls pointed out that there was no expectation of privacy at the locations where the Stegalls had taken photographs to document O'Dell's use of their right of way. *See* June 10 Tr., pp. 148-149. As stated above, the Tort Of Outrage, was based

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[17]The only other theoretical basis for the Tort Of Outrage, under the jury verdict form, was "threats of trespass prosecution and calls to law enforcement and the Governor" which the jury apparently did not find actionable. See paragraph 3 and 4 of jury verdict form. *See* Docket, p. 185.

solely on Ms. Stegalls' recording in a public place.

The court's ruling on the recording and photographing consisted of the following: "I think that also whether or not the recording and the photographing is such as to constitute somehow outrage, I think that is really for the jury to determine." *See* June 10 Tr., pp. 163, lin 10-12. No mention was made by the Court as to expectation of privacy or the legal standards. In regard to civil conspiracy, the Court did not believe that an overt act in furtherance of the conspiracy was required. *See* June 10 Tr., pp. 163, line 18.

F. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE AND INSTRUCTING THE JURY ON ATTORNEY FEE SHIFTING AND PUNITIVE DAMAGES WHERE NO VALID BASIS FOR COMPENSATORY DAMAGES EXISTED AND ERRED IN NOT SETTING THE ATTORNEY FEE AND PUNITIVE DAMAGES VERDICT ASIDE.

The Stegalls' procedurally objected to the submission of attorney fees to the jury when O'Dell's counsel first proffered invoices and pointed out that the survey fees were included (misstated as $6,400). *See* June 9 Tr., pp. 249 - 253. This matter was taken up the following day, with a renewed objection and cite to head note 4 of *Richardson v. Kentucky Nat. Ins.* 607 S.E.2nd 793. *See* June 10 Tr., p. 3. The court ruled that the case was distinguishable, as suggested by O'Dell's counsel, because it was an insurance "bad faith" case. *See* June 10 Tr., p. 8.

During the Jury Deliberation, the jury inquired as to the amount of Mr. Gates' fees. Recognizing that he had misstated the amount as $6,400.00 the Stegalls' counsel agreed to stipulate that the amount was $5,300 noting that the jury was considering the survey bill as an element of damages. *See* June 11 Tr., p. 72-75. The trial court opined that the jury could lump any figure they wished under the rubric of punitive damages. *See* June 11 Tr.,

p. 75.

Since O'Dell claimed no amount of damages other than attorney fees and the stipulated $5,300 in surveyor expert witness fees, and since the jury awarded $5,300 in damages, the Stegalls filed a post trial motion to set that amount aside. It was suggested that since the jury awarded O'Dell no compensatory damages, it was error for the Court to award any punitive damages. Alternatively, if the jury did award $5,300 in compensatory damages as the verdict reads for the Tort of Outrage, then it was error for the Court to award any punitive damages. *See* Docket, p. 190 and p. 200. As indicated above, the trial court merely denied the motion, finding that the jury had not awarded any attorney fees. *See* Docket, p. 225.

G. ALTERNATIVELY, THE TRIAL COURT ERRED IN FAILING TO IDENTIFY THE DIMENSIONS AND NATURE OF USE OF THE PRESCRIPTIVE EASEMENT.

After receiving the judgment order, the Stegalls sought to have the Court define the prescriptive easement that it had awarded O'Dell. Because O'Dell had placed encroachments into the 25' right of way, the Stegalls had the lane identified on a survey plat. The Stegalls submitted their plat with their motion. See Docket, p. 209. The trial court denied the motion and found that the pleading lacked a good faith basis warranting consideration of sanctions. *See* Docket, p. 256.

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

A. THE TRIAL COURT ERRED IN FAILING TO GRANT THE STEGALLS SUMMARY JUDGMENT WHERE THE OWNERS OF THE SERVIENT ESTATE, THE WALKERS, WERE DISMISSED FROM THE PRESCRIPTIVE EASEMENT CASE AND ERRED IN FAILING TO DIRECT THE VERDICT WHERE THE PRIOR

ESTABLISHED CHURCH USE WAS ABANDONED.

As was pointed out in the Stegalls' Motion For Summary Judgment, to prevail in a suit for adverse possession, the claimant must identify the owner of the servient estate and prove use adverse to that owner's title. *See* Docket, p. 96, paragraphs 8 and 9. The paramount importance of that procedural requirement could be no more clearly underscored than by the legal muddle experienced in this case. By permitting O'Dell to proceed to trial in the absence of the successor in title to the residue servient estate, the Walkers, O'Dell was able to successfully launch into a rogue theory of "prescriptive easement by intended grant." Instead of proving use adverse to the servient estate, O'Dell attacked the title and use of one that he claimed to be a co-tenant to the right of way, (the Stegalls) contrary to the law of adverse possession and prescriptive easements. *See Boggess v. Meredith*, 16 W. Va. 1 (1879); *Cochran v. Cochran*, 46 S.E. 924 (1904). As pointed out above, no order was entered on the Stegalls' Motion For Summary judgment.

The Court denied the Stegalls' Motion For Directed Verdict on the prescriptive easement claim determining that the matter was for the jury. *See* June 10, p. 162. However, none of the material facts were in dispute. The use of the 25' right of way by the church was to access a parking lot to the rear. The "half moon" driveway to access a more recently constructed side entrance to the converted church, was undisputedly not constructed until after the church use was physically abandoned, less than 10 years prior to the filing of the suit. Therefore, disputes over the half moon driveway were irrelevant and immaterial to the prescriptive easement inquiry. Not only was the church use of the right of way clearly abandoned with the May 1999 conveyance and change in use, *but the*

parking lot upon which the adverse use of the 25' right of way was predicated, was itself abandoned and conveyed to the Stegalls' lot in July 1999. *Strahin v. Lantz*, 193 W. Va. 285; 456 S.E.2d (1995). None of the material facts were in dispute.

B. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY LEGAL QUESTIONS ON WHETHER OR NOT THE STEGALLS OWNED A DEEDED EASEMENT OVER THE RIGHT OF WAY AND WHETHER OR NOT O'DELL WAS VESTED WITH A DEEDED GRANT BY IMPLICATION BY VIRTUE OF THE "INTENT" OF THE DEVELOPER IN THE YEAR 1898.

The Court's pretrial instruction, constituted a separate error which inadvertently set the jury against the Stegalls before the trial began. In stating that O'Dell had come to court to "vindicate" his right to use the lane, the Court was in essence suggesting that O'Dell might already have a vested grant in the right of way contrary to his amended complaint. However, O'Dell was required to establish an easement by one, and only one means–possession adverse to the true owner(s). Easement by implication was not pled in O'Dell's amended complaint. O'Dell should not have been permitted to surreptitiously pursue such a claim with the jury especially not under the disguise and rubric of easement by prescription.

It is elementary law that for a prescriptive easement to ripen into a legal easement, the elements of adverse possession must first be proven by clear and convincing evidence as determined by a court of equity. *Newman v Michel* 2009 W. Va. LEXIS 58. Therefore, O'Dell only had the right to file the suit to establish such prescriptive easement. A right to "establish" is not synonymous with a right to "vindicate."

Perhaps even more harmful to the Stegalls than the first part of the Court's pre-trial instruction was the second part. The Court suggested to the jury that they would have to

decide whether or not the Stegalls had the right to object to O'Dell's use. If the Court had a question about whether or not the Stegalls were vested with title to use the 25 foot easement, it should have resolved that question prior to trial. It should not have presented such legal question to the jury. It is a fundamental axiom of the law of easements that when land is conveyed with reference to a plat containing an existing easement accessing the lot, such easement constitutes an appurtenance to the lot, and will be presumed to be conveyed with the lot. *See Bennett v. Both*, 70 W. Va. 264, 266 (1912). Since the Stegalls were successors in title to the original half acre Strider Lot accessed by the 25 foot easement, the Stegalls' rights to the easement are secure as a matter of law. *Farley v. Farley*, 215 W. Va. 465, 469; 600 S.E.2d 177, 181 (2004). *To suggest that the Stegalls were vested with a property right which they could not protect from intrusion and interference by a stranger to the title is to ignore the law of property.*

As demonstrated above, the Court's pre-trial instruction was thereafter played out at trial by O'Dell with the blessing of the Court. Mr. O'Dell's counsel had come to the prescriptive easement trial primed to surreptitiously use his expert witness surveyor to testify that O'Dell was effectively vested with title to the 25 foot easement by implication. Although suit was filed solely on the prescriptive easement theory, O'Dell argued at trial that Stegalls' legal claim to the easement could not be distinguished from O'Dell's. *See* footnote 3, *supra*. O'Dell's counsel was permitted to challenge the Stegall's legal right to object, by calling Mr. Stegall as a hostile witness in O'Dell's case in chief and asking him what document gave the Stegalls the right to exclude O'Dell from the right of way. In this manner, O'Dell was enabled in transforming the Stegalls' lawful protest of his use of their

right of way into a malicious interference with a vested right.

The Trial Judge is entitled to the presumption of fairness and good intent. However, by the time the case was ready for the jury, not a single disputed material question of fact was left for the jury to decide on the right of way issue. The trial court simply relegated to the jury, the Court's duty to decide questions of law. Indeed, the court did not find it appropriate to submit a single question of fact to the jury by interrogatory. The established undisputed material facts at the close of the evidence were:

> 1. The church had used the right of way for more than 10 years to access its parking lot to the rear on Sundays and Wednesdays. At least once the church was used as a polling place.
>
> 2. The church closed no later than 1999, and less than 10 years before the filing of the suit, it was converted to a residence.[18]
>
> 3. The church parking lot, access to and/or egress from which was gained by patrons of the church over the 25' right of way, was conveyed to the Stegall lot a few months after the church was conveyed to Jeavons for residential use in 1999.

As noted in the previous assignment of error, it is the Stegalls' view that the use established by the Church has clearly been abandoned. Therefore, even if O'Dell's release of the right of way's servient owner did not mandate dismissal, the Court should have directed the verdict based on abandonment. The Stegalls would further point out that submission of instructions and evidence to the jury on O'Dell's rogue easement theory, constituted a separate error that inappropriately exposed the Stegalls to damages. Since

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[18]Whether or not the first residential owner, Jeavons, began using the right of way to access his newly constructed side entrance to the structure is irrelevant because that new use was undisputably commenced less than 10 years before the filing of the suit to establish a prescriptive easement.

O'Dell's counsel stubbornly pursued the clandestine scheme and induced the trial court to adopt it, O'Dell should not be heard to complain if this appeal results in an order that directs the trial court to enter judgment for the Stegalls on all claims.

C. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY O'DELL'S CLAIMS FOR DAMAGES FOR INTERFERENCE WITH THE UNESTABLISHED PRESCRIPTIVE EASEMENT WHERE O'DELL ADMITTED HE HAD NEVER BEEN PHYSICALLY BLOCKED FROM USE AND WHERE O'DELL TESTIFIED THAT HE CONTINUED TO USE THE RIGHT OF WAY.

There can be no recovery in tort unless a wrong has been committed. Permitting the claim for interference with an unestablished right of way had a compound adverse effect on the Stegalls' defense. Permitting O'Dell to pursue a claim for interference suggested he should receive a favorable verdict on his claim for a prescriptive easement. Moreover, since the Stegall's had never blocked O'Dell's use, the interference instruction effectively informed the jury that the Stegalls may have acted in an unlawful way by merely protesting O'Dell's use. *If the Stegalls had the legal right to object to O'Dell's use, under this set of facts there would be no reason for interference damages to be submitted to the jury.* Therefore, the jury was led to conclude that the Court had decided–as evident in the Court's opening statement–that O'Dell was entitled to the right of way and the Stegalls were not entitled to object. The jury apparently reasoned that while the Stegalls' were protected in their right to contact public officials,[19] their objections to O'Dell's use were not grounded in any legal right. Contrary to the law of the case, the jury logically concluded that O'Dell had as much right to the easement under his

[19]The Court permitted the Stegalls a modified version of a *Noerr Pennington* instruction in its charge. Under the *Noerr Pennington* doctrine, the Stegalls are immune from exercising their First Amendment right to petition to their government.

deed as did the Stegalls.[20] The jury apparently reasoned that the Stegalls' objections to O'Dell's use were a pretext. The instruction led the jury to conclude that the Stegalls were acting with malice and had committed the "tort of outrage" by merely protesting O'Dell's use of their right of way.

D. THE TRIAL COURT ERRED IN FAILING TO MAKE ITS INDEPENDENT REVIEW OF THE PUNITIVE DAMAGES CLAIM BEFORE SUBMISSION TO THE JURY AND FAILED TO MAKE INDEPENDENT REVIEW OF THE AWARD AFTER THE JURY VERDICT AS PRESCRIBED BY *GARNES V. FLEMING LANDFILL*, 186 W. VA. 656, 668 (W. VA. 1991).

Despite the Stegalls' post trial motions requesting review, the Trial Court did not make any independent review of the punitive damages award. The principals of *Garnes* have been consistently restated in each case involving punitive damages since *Garnes*, including the most recent case, *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791; 2009 W. Va. LEXIS 48 (2009), Syllabus Points 14 through 21. The Trial Court's refusal to apply review cannot be explained. The Trial Court summarily denied Stegalls' motions without explanation.

Reasonable Relationship of Punitive Damages to Potential of Harm.

The *Garnes* Court found that punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendants' conduct as well as to the harm that has actually occurred. In this case there was no harm. Although litigation expenses were incurred, these were a necessary evil to establishment of a right to property asserted against the lawful ownership by others and against their will. Under the American

[20]As set forth in Assignment of Error "B", *supra*, over Stegalls' objections, the Court permitted O'Dell's expert, Gates, to argue to the jury that O'Dell had a legal right of way in the form of an easement by implication and "intent."

Rule, the jury was not entitled to award the litigation expenses comprised of Fred Gates' bill. *See Kansas v. Colorado*, 129 S. Ct. 1294 (U.S. 2009).

Reprehensibility of Defendants' Conduct.

In *Garnes*, the Court also held that the following factors should be considered by the Court and Jury:

* The length of time the defendant continued in his actions;

* Whether he was aware his actions were causing or were likely to cause harm;

*Whether he attempted to conceal or cover up his actions or the harm cause by them;

* Whether/how often the defendant engaged in similar conduct in the past, and

* Whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement of the actual harm occurred once his liability became clear to him.

O'Dell emphasized to the jury his importance as an individual with a security clearance associated with government contracts. Yet he testified that his security clearance had not been affected and that he had not suffered any injury as a result of the Stegalls' actions. His testimony at trial was to the effect that he was worried about losing his security clearance. Ironically, this did not stop him from violating federal law when he removed the Stegalls' mail box after trial.

At best, O'Dell testified to emotional distress damages. However, neither negligent or intentional infliction of emotional distress was pled or pursued by O'Dell. Therefore, the jury was not entitled to award emotional distress damages. There was no

evidence to the effect that the Stegalls were warned by O'Dell that their actions were causing him emotional distress or jeopardizing his job. The Stegalls did not try to cover up their actions. They did not believe that they had anything to cover up. There was no evidence that the Stegalls had engaged in similar conduct in the past. Finally, there was an attempt to work with Mr. O'Dell both before suit was filed and after suit was filed. Settlement efforts failed finally on the eve of trial when the Stegalls' again offered to permit O'Dell use of their right of way in exchange for entering into a road maintenance agreement with them and moving his fence back from obstructing their view of oncoming traffic. O'Dell refused, demanding that Stegalls pay over $20,000 in his legal fees and expenses, and move their mail box and their garbage can collection point back up the lane to their house.[21]

The award in this case is contrary to *Garnes*. The Stegalls are penalized without reasonable warning of the consequences of their acts.

As suggested elsewhere in this Petition, all of the actions taken by Stegalls were lawful. They had the lawful right to defend their right of way against trespass by those who did not have legal title to it. An owner of real estate who fails to object and defend, may loose his real estate through acquiescence and/or adverse possession. In defending their right of way, however, the Stegalls never once blocked O'Dell's use. In fact, the jury found that Stegalls' threats of prosecution for trespass and calls to law enforcement did not

[21]Moving the trash cans up to their house at the end of the lane would have been convenient for the Stegalls. However, the trash service refused stating that the lane did not have a sufficient turn around. Likewise the post carrier refused to come up the lane to make mail deliveries.

constitute abuse of process.

Any Profit From Defendants' Conduct.

Even if Stegalls' conduct could be said to be "wrongful," they did not benefit from it. Therefore, this factor does not support punitive damages under *Garnes*.

Reasonable Relationship to Compensatory Damages.

As suggested throughout this Petition, there was, in fact, no compensatory damages award. The award was actually for the Gates litigation expense which the jury should not have been permitted to consider. Therefore, the award of punitive damages does not pass the reasonable relationship test of *Garnes*.

Financial Position of the Defendant.

The financial position of the Defendants was not a factor that weighed against them. Plaintiff's financial position is significantly superior to the Stegalls. Mr. Stegall testified that his attorney fees and expenses were comparable to O'Dells and that the expenses had been devastating to his family. Therefore, the financial position of the Stegalls does not weigh in favor of punitive damages under *Garnes*.

The Costs of Litigation.

The costs of litigation should not be considered a factor against the Stegalls under *Garnes* because O'Dell had no vested property right in the lane to defend. Notwithstanding the Trial Judge's notion to the contrary, the law required O'Dell to bring suit where he chose to bully his way into use of the lane instead of working with his neighbors to gain access over the lane. O'Dell had obstructed the Stegalls' view at the highway entrance with a newly constructed fence. He had no legal expectation that he

could simply use a driveway that did not belong to him. He testified that when he closed on the purchase of his house, nothing was said about his use of the lane. He testified that he did not ask about the lane prior to purchase even though no right of way was contained in his deed. Mr. Stegall testified that his attorney fees and expenses were comparable to O'Dells and that the expense had been devastating to their family. Under *Garnes,* this fact should have weighed against a punitive damages award.

Criminal Sanctions.

No criminal sanctions were imposed against the Stegalls.

Other Civil Actions Against Defendants.

No other civil suits had ever been filed against the Stegalls.

Encouragement of Fair and Reasonable Settlements.

Although the Stegalls were not aware of any injury caused O'Dell by their actions, they did seek to make a fair settlement. They offered to withdraw their objections to O'Dell's use of the road if he would simply enter a ratable maintenance agreement with them and move his fence from obstructing their sight distance at the highway entrance. O'Dell chose, instead, to use his financial resources to exploit the inferior financial position of the Stegalls. He bullied his way through a trial against them because he did not want the Stegalls to leave their mail box at its location of 50 years. With the Stegalls intimidated by the damages verdict, O'Dell then unlawfully removed the Stegalls' mail box after trial.

In its post trial consideration of punitive damages under *Garnes*, this Honorable Court should reverse the punitive damages award (and the litigation expense award) for

the reason that O'Dell should not be rewarded for bully behavior.

E. THE TRIAL COURT ERRED IN SUBMITTING O'DELL'S CLAIM ON "INVASION OF PRIVACY, " "TORT OF OUTRAGE" AND "CIVIL CONSPIRACY" TO THE JURY WHERE THE ONLY EVIDENCE TO SUPPORT SUCH CLAIMS WAS THAT MS. STEGALL HAD TAPE RECORDED HER CONVERSATION WITH O'DELL WHILE THEY WERE STANDING ON THE RIGHT OF WAY AND THE STEGALLS HAD PHOTOGRAPHED O'DELL USING THE RIGHT OF WAY.

For O'Dell to recover on his invasion of privacy claim, he must demonstrate some protected expectation of privacy that was violated by the Stegalls. There are four types of invasion of privacy: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. *See Slack v. Kanawha County Hous. & Redevelopment Auth.*, 188 W. Va. 144, 148 (W. Va. 1992). Of the four types of tortious invasion of privacy, the only type that could be said to apply here is "an unreasonable intrusion upon the seclusion of another." *See Rohrbaugh v. Wal-Mart Stores*, 212 W. Va. 358, 364 (W. Va. 2002). In this case, the only evidence relevant to O'Dell's claim for invasion of privacy was that Mrs. Stegall tape recorded him while standing in the lane and took pictures of him using the lane. In neither of these circumstances was O'Dell secluded from the public. Neither in driving on Stegalls' lane nor speaking with the Stegalls in the right of way did O'Dell have an expectation of privacy. *See Jarmuth v. Waters*, 2005 U.S. Dist. LEXIS 45570 (N.D. W. Va. Mar. 31, 2005); *holding* that a "plaintiff cannot have an expectation of non-interception unless the Court finds that the plaintiff had an objectively reasonable expectation of privacy." It was error for the Court to instruct the jury on invasion of

privacy and error for the Court to fail to set aside the verdict against the Stegalls for invasion of privacy.

For O'Dell to recover under the duplicate tort of outrage claim, he must demonstrate that the Stegalls' conduct was:

> ...so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous." *Williamson v. Harden*, 214 W. Va. 77, 81 (W. Va. 2003).

Unless it was proper for the trial Court to make the legal finding that (1) O'Dell had an established right to use of the right of way, and (2) the Stegalls had no legal right to object, the Stegalls' conduct in tape recording their conversation with O'Dell in a public place and photographing him in a public place cannot constitute interference with his right of way, let alone, outrageous conduct. Absent such finding by the Court, these actions were clearly and reasonably related to their objectives of establishing that O'Dell was using their right of way and memorializing their face-to-face interactions with him over his use of their right of way. Therefore, Mr. and Mrs. Stegall did not commit an unlawful conspiracy. The jury expressly found that the Stegalls were within their rights to contact public officials and did not commit abuse of process. *See* paragraph 3 of jury verdict form, Docket, p. 185. Therefore, Stegalls' contacting public officials cannot be said to have formulated the basis for the tort of outrage.

F. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE AND INSTRUCTING THE JURY ON ATTORNEY FEE SHIFTING AND PUNITIVE DAMAGES WHERE NO VALID BASIS FOR COMPENSATORY DAMAGES EXISTED AND ERRED IN NOT SETTING THE ATTORNEY FEE AND PUNITIVE

DAMAGES VERDICT ASIDE.

Because the Stegalls had the legal right to object to O'Dell's use of their right of way, and because they did not block his use, neither fee shifting nor punitive damages were appropriate. "A wrongful act, done under a *bona fide* claim of right, and without malice in any form, constitutes no basis for [punitive] damages." Syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912), quoted in *Peters v. Rivers Edge Mining, Inc.* 680 S.E.2d 79, 821; 2009 W. VA. LEXIS 48, 87. Absent malice, the award of attorney fees was likewise inappropriate. *See Smith v. Wade*, 461 U.S. 30, 70 (U.S. 1983); holding that "punitive damages cannot be awarded absent actual evil motive."

Moreover, although the jury entered "$5,300.00" in the verdict form for "compensatory damages," it is clear that the jury believed that Gates' expert witness fees could constitute "compensatory damages." Gates' fees were generated solely in contemplation of litigation. His work was engineered–craftily–by O'Dell's attorney for the purpose of use in the law suit.

The events of trial underscore the jury's misguided intent. Near the conclusion of the jury deliberations, the jury presented the Court with a written question. The jury wanted to know the amount of Gates' bill. Stegalls' counsel had inadvertently misstated the amount in closing argument. Realizing his error, Stegalls' attorney agreed to have the Court correct it and the Court informed the jury of the correct amount–$5,300.00. The jury did not intend, however to award attorney fees. It entered "0" under "Attorney's Fees" on the verdict form. *See* Docket, p. 185.

Therefore, in fact, the jury awarded O'Dell no compensatory damages and did not intend to award Gates' bill to the extent that it was part of O'Dell's attorney fees and expenses. The jury verdict was inherently wrong because the jury mistakenly awarded litigation expenses as compensatory damages while denying O'Dell's claim for attorney fees.

Since the jury awarded O'Dell no compensatory damages, it was error for the Court to award any punitive damages. *Garnes, supra,* clearly stands for the proposition that where no compensatory damages are awarded, it is error for the court to award punitive damages. Since the only damages offered in evidence were those incurred in litigation expense, no compensatory damages were suffered or awarded. Therefore, it was error for the Trial Court not to set aside the punitive damages award.

Alternatively, if it should be determined that the jury award was a legitimate award of damages for the tort of outrage, then it was error for the Court to permit any punitive damages. To do so constitutes a double recovery in a case such as this in which there exists no physical injury. "[D]amages awarded for tort of outrageous conduct are essentially punitive damages." Syl. pt. 8, in part, *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 445 S.E.2d 219 (1994).

G. ALTERNATIVELY, THE TRIAL COURT ERRED IN FAILING TO IDENTIFY THE DIMENSIONS AND NATURE OF USE OF THE PRESCRIPTIVE EASEMENT.

The final order of the court simply stated that O'Dell is entitled to a prescriptive easement for access to his residence. The Court failed to provide the parties with a detailed description of the dimensions and boundaries of the easement. The order is therefore

insufficient under *O'Daniels v. City of Charleston*, 200 W. Va. 711, 715 (W. Va. 1997).

The vagaries of such an outcome are evident in the continued conflicts between the parties. The only concrete evidence of the location of any prescriptive easement before the trial court was that the center 12 feet of the right of way was once used for egress only from the Church's parking lot, which lot is now owned by the Stegalls. *See* June 10 Tr., pp. 233 and 234; *also* Exhibit B to Docket, p. 209. This church parking lot is now owned by the Stegalls and is situate behind O'Dell's real estate .

The court's judgment order has not facilitated any resolution between the parties and, in fact, O'Dell has physically asserted dominion and control over it. *See* post trial motions Docket, p. 209, 227 and 238.

WHEREFORE, the Stegalls pray that this Honorable Court:

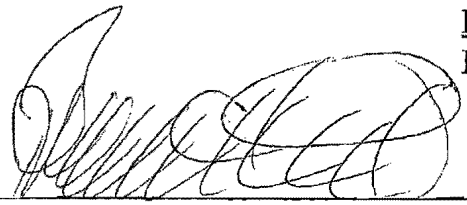
A. Exercise independent review of the punitive damages award and reverse it.

B. Reverse the award of litigation expenses and/or "compensatory damages."

C. Reverse the trial court's determination on O'Dell's right to a prescriptive easement on the grounds of abandonment or, alternatively define O'Dell's permitted use in accordance with the established prior use.

D. Such other and further relief, <u>not to include a remand for new trial</u>, as this Court may deem meet and just and proper.

ROBERT AND VIRGINIA STEGALL, Defendants
By Counsel



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