

No. 35488

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

MICHAEL O'DELL

Plaintiff Below, Appellee

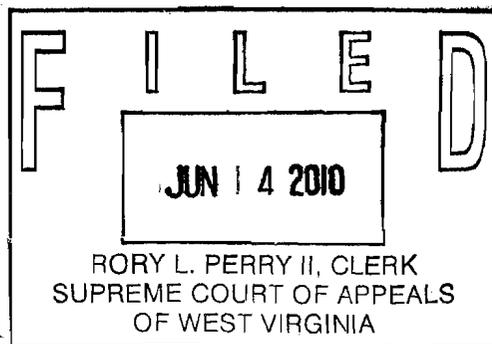
v.

Civil Action No. 08-C-366
Judge David H. Sanders

ROBERT AND VIRGINIA STEGALL

Defendants Below, Appellants

BRIEF ON BEHALF OF THE APPELLEE, MICHAEL O'DELL



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**STATEMENT OF THE KIND OF PROCEEDING
AND
THE RULING OF THE LOWER TRIBUNAL**
(West Virginia Rules of Appellate Procedure, Rule 3 (c) (1)
and 10 (d))

This civil proceeding, before the Circuit Court for Jefferson County, proceeded to a jury trial before the Honorable David H. Sanders on the 9th through the 11th of June 2009.

A verdict in favor of Michael O'Dell, the appellee, on 5 of the 6 counts submitted to the jury, was entered on the 11th of June 2009. (Verdict Form within the Lower Court Record at p. 185). Compensatory damages in the amount of \$5,300.00 and punitive damages in the amount of \$4,500.00 were awarded. In addition, the jury found in favor of Michael O'Dell as to the existence of a prescriptive easement.

Thereafter, the appellants filed in the lower tribunal three requests for post trial relief. Those were:

<u>Pleading</u>	<u>Date</u>	<u>Lower Court Record</u>	<u>Appellee's Location</u>
Motion to Set Aside Judgment (See Rule 59 (e))	22 June 2009	p. 190	Tab No.: 132
Motion for A New Trial or to Amend Order for Entry of Judgment (See Rule 50 (b))	3 August 2009	pp. 211-212	Tab No.: 142
Motion to Stay Appeal	8 September 2009	p. 233	Tab No.: 150

The Order of Judgment, based upon the jury's verdict of 11 June 2009, was entered by the trial judge on the 20th of July 2009 (Lower Court Record at p. 204) (My tab no.: 141).

By way of Orders entered on the 19th of August 2009 (Lower Court Record at p. 225) (My tab no.: 148) and 15 December 2009 (Lower Court Record at p. 252) (my tab no.: 155), the appellant's requests for post trial relief from the jury's verdict were denied.

Standard of Review

When a trial court denies a Rule 50 (b) motion, as was the ruling here, "it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of the facts might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the non-moving party."

Montgomery and Bowers v. Callison, - W. Va. -, - S.E. 2d - (No. 35126, decided 7 June 2010, slip op. at p. 4) citing *Fredeking v. Tyler*, 224 W. Va. 1, 680 S. E. 2d 16 (2009), syl. pt. 2; emphasis added.

Proceedings Before This Court

Before this Court, the appellants sought an emergency stay on the 1st of February 2010 (my appeal tab no.: 1). By an Order of this Court, dated the 23rd of February 2010, the request for an emergency stay was denied (my appeal tab no.: 3).

The appellants' petition for an appeal was granted by an Order of this Court dated the 2nd of March 2010 (my appeal tab no.: 4).

The appellants filed, with this Court, a Motion to Post Bond in lieu of Judgment on the 28th of April 2010 (my appeal tab no.: 7). On behalf of Michael J. O'Dell, a response to that request was filed on the 3rd of May 2010 (my appeal tab no.: 8).

As best as can be determined, the appellants, by way of this appeal, challenge the jury's verdict and the denial of their requests for post trial relief. It must be noted, however, that within the appellants' Prayer for Relief, with underlined emphasis, the appellants specifically do not request of this Court a remand for a new trial.

APPELLEE'S STATEMENT OF THE FACTS
(W. Va. Rules of Appellate Procedure, Rules 3 (c) (2) and 10)

On the 17th of September 2008, Michael J. O'Dell, the appellee herein, filed in the Circuit Court for Jefferson County, West Virginia, a four-count complaint against Robert and Virginia Stegall, husband and wife, and others. The four counts of the initial complaint alleged the following causes of action:

1. Quiet Title by way of a Prescriptive Easement;
2. Intentional Interference with Rights of Ingress and Egress;
3. Abuse of Process; and
4. Tort of Outrage.

Within this initial complaint, Michael O'Dell, in his prayers for relief, requested the establishment of an easement by prescription over the 'driveway' which serviced for many, many years the adjoining residential properties. In addition, Michael O'Dell requested compensatory and punitive damages, the costs of the litigation, attorney's fees and for such other as the Court deems just and proper under the circumstances.

After Michael O'Dell took the depositions of Robert and Virginia Stegall on Wednesday the 25th of March 2009, an amended complaint was filed by O'Dell against the Stegalls. This filing was on or about the 30th of March 2009. The additional causes of action directed against the Stegalls were the following:

5. Civil Conspiracy;
6. Tort of Outrage; and
7. Invasion of Privacy.

On the 27th of March 2009, Michael J. O'Dell did file with the Circuit Court Motion for Leave to File His Expert Witness Statement (see W. Va. Rules of Civil

Procedure, Rule 26 (b) (4)). This was *prior* to the discovery due date of 24 April 2009. With the Motion, Michael O'Dell did provide a synopsis of the witness' testimony. At no time thereafter did the appellants undertake the deposition of the named expert witness; nor was a discovery request presented by the appellants directed to this named expert witness.

On the 24th of April 2009, Michael J. O'Dell did fulfill his discovery obligation. Within that comprehensive discovery response was a compact disk (CD) with the report of the O'Dell expert witness, Fred Gates. At no time thereafter did the appellants request or seek leave to undertake any further discovery as to this particular witness and his findings.

The dispute proceeded to a jury trial before the Honorable David H. Sanders, commencing on Tuesday the 9th of June 2009 while concluding with a jury verdict in favor of Michael O'Dell on Thursday the 11th of June.

Notwithstanding several post trial motions for relief filed on behalf of the Stegalls, the trial court entered a Judgment Order on the 20th of July 2009.

The Plaintiff's Case¹

Robert Stegall (Tuesday 9 June 2009) (pp. 96-146)

The antagonist, Robert Stegall, acknowledged that the driveway is utilized by his co-workers as they 'car pool' to work (p. 97). The driveway has been in existence for over 10 years (p. 100). The driveway has existed in that manner since he has occupied his property (p. 101) and before O'Dell purchased his property.

¹ The appellee shall to the best of his ability summarize the testimony of the witnesses called in support of his case. The transcript references shall refer to the date only at the caption of each witness' trial testimony.

Stegall did acknowledge that Sydney Seibert, a neighboring property owner located to the left rear of the lane, which lane is perpendicular to Old Leetown Pike, uses the driveway to access her property (p. 102).

Stegall did identify his letter of 12 August 2008 to O'Dell (p. 103). The letter did not solicit any help for driveway maintenance from O' Dell (p. 132).

Stegall did acknowledge his call to law enforcement authorities at least twice (p. 104) and a letter to the governor (p. 108) about this driveway.

In addition, Stegall is without any documentation which authorizes him to exclude anyone from the use of the driveway (p. 104 and 107).

Stegall admits to recording a conversation with O'Dell (as his wife held the recording device) and that such was done without any permission from O'Dell (p. 110).

Stegall acknowledges that before the property became the O'Dell residence, it was a church (p. 111).

Stegall denies that he has threatened any neighbors (p. 113).

Sydney Seibert (Tuesday 9 June 2009) (pp. 146-176)

Ms. Seibert, a nurse of 30 years, lives at 65 Old Leetown Pike (p. 147). Her residence was owned and occupied by her great-grandparents (p. 148). The driveway or lane has always been there for 50 years (p. 149). For the past 15 years cars use the lane to come in and out (p. 150).

Although her name appears on the Stegall letter of 12 August 2008 to O'Dell, Ms. Seibert did not authorize her name to be affixed to the correspondence (p. 151).

Contrary to the assertion of Robert Stegall, Ms. Seibert was threatened by Mr. Stegall when he stated: "they were coming after me next." (p. 154).

Ms. Seibert did execute, in favor of Michael O'Dell, a quit claim deed of easement prepared by her counsel, Bucky Morrow of Charles Town (p. 155).

The lane as it appears in the photographs is as it has appeared for at least 15 years (p. 159-160). The lane has been used for ingress and egress. Before that, the property was a church with members using the drive on Sundays and Wednesdays. In addition, the church served as a local polling place (p. 161).

Ms. Seibert testified that Michael O'Dell is a nice man and he has graveled the road and patched the driveway (pp. 163 and 166). Ms. Seibert has contributed to the maintenance of the road (p. 164). Ms. Seibert has no animosity to Michael O' Dell (p. 172).

With the court's permission, Ms. Seibert was able to read from the footnote that was on the first page of the O'Dell complaint. That footnote reads: "it is foreseeable that this Defendant may wish to join with the Plaintiff's claim at this time. Not knowing what the particular circumstances are for this Plaintiff, the individual has been named as a Defendant due to her geographical proximity to the parcel in question." (At p. 175).

Susan Seibert (9 June 2009) (pp. 176-196)

Susan Seibert is the adult daughter of Sydney Seibert (p. 176). She is employed at the Children's National Medical Center in Washington, D. C. (p. 177).

When Susan visits her mom she uses the drive (p. 177). It has been an 'open lane.' (At p. 178). It has been that way since 1994.

Susan has experienced difficulty with the Stegalls (p. 179). When a friend was visiting upon a return from Iraq, the Stegalls had the car towed (p. 180). The Stegalls did admit to doing this (p. 181).

Leland Bradley (9 June 2009) (pp. 196-205)

Mr. Bradley has lived at 119 Old Leetown Pike for 43 years (p. 196). Mr. Bradley's house is one away from the church, now the O'Dell residence (p. 198). The church occupying the building was the Church of the Brethren (p. 197). His great-grandfather was a preacher at the Church (p. 198). Mr. Bradley was a member of the Church for 45 to 50 years (p. 199). The Church did serve as a local polling place (p. 202).

Mr. Bradley indicated there never was a problem with the gravel lane (p. 200) and that its use has been constant for 43 years.

Sandra Dodson (9 June 2009) (pp. 205-222)

Sandra Dodson lives at 54 Old Leetown Pike. She has lived there since 1962 (p. 205). Sandra Dodson has served as the treasurer of the church, she was married there, her children were 'dedicated' there, and she has taught Sunday School at the church (pp. 207-208).

Members of the church would enter the grounds through the lane (p. 209). In addition, they would vote there.

Sandra Dodson reports that the church was converted to a residence in 1999 (p. 211).

Sandra Dodson reports no difficulty with Michael O'Dell (pp. 211-212). In fact Michael O'Dell has put in mail boxes for her and her husband.

Michael O'Dell (9 June 2009) (pp. 222-249); 10 June 2009 (pp. 13-72)

Michael O'Dell owned his residence, the former Church of the Brethren, since the

2nd of October 2006 (p. 222). Michael O'Dell, age 51 (p. 225), is a 20 year veteran of the United States Army (p. 223).

Michael O'Dell is employed by Sage Management, LLC (p. 224) as the Director for Mission Assurance Solution. His responsibility is to insure continued government operations in the event of an emergency. *Ibid.*

The residence was converted from a church in 1999 (p. 229).

With his acquisition of the residence, Michael O'Dell did not receive a request from the Stegalls to contribute to the driveway's maintenance (p. 230). Michael O'Dell did add gravel to the driveway (p. 231) and did present a receipt for that expense (p. 232).

Michael O'Dell was visited by members of the West Virginia law enforcement community as a result of a 'complaint' made by the Stegalls (p. 233). The officers were in marked vehicles with firearms visible (p. 234).

Michael O'Dell was permitted, over the objection of counsel for the Stegalls, to testify as to the fee he provided for the professional land surveying services of Fred Gates in this litigation (p. 236).

Michael O'Dell did identify the tax map for the area in question (Exhibit 10) (pp. 239-240). The Jefferson County Tax Map illustrates the 4 residences and the driveway. Michael O'Dell's deed (Exhibits 11 and 12) was admitted without objection (p. 244).

Michael O'Dell has not claimed ownership of the driveway parcel (p. 243).

Michael O'Dell testified that the Stegalls have impeded his access to his property (p. 245) and threatened criminal prosecution (p. 248). Such conduct does impact Michael O'Dell's employment due to his need to maintain a security clearance (p. 248).

Prior to resuming the direct examination of Michael O'Dell on the 10th of June 2009, the trial court addressed the issue of the admissibility of the attorney's fees incurred by Michael O'Dell (Proceedings of 10 June 2009 at pp. 3-13). As noted by the appellee, the appellants were on notice of this claim from the on-set of the law suit (p. 7). Over the objection of the appellants the testimony and related exhibits (retainer agreement and billing invoices) were ruled by the trial court to be admissible (p. 8). See Exhibit 14, pp. 19-21.

Resuming with the direct examination of Michael O'Dell, he mentioned that he paid \$325,000 for the residential property (p. 13). The driveway in question provides access to his residence. The half-moon driveway on the O'Dell property that intersects with the driveway lane was in existence when Michael O'Dell purchased the property (p. 16).

On cross-examination, Michael O'Dell did feel injured by the complaints of the Stegalls to law enforcement authorities (p. 29).

On at least two occasions the cross-examination of Michael O'Dell was objected to and the objections were sustained, and with the second objection, the accompanying request to strike was granted (p. 38 and p. 43).

Michael O'Dell did report that the half-moon driveway was attributed to an earlier owner of the property, a Mr. Jeavons (p. 39).

In response to an objection of the appellants, the trial court did rule that the jury as the trier of the facts was to determine the driveway easement question (pp. 44-45).

Counsel for the appellant did indirectly admit his lack of preparedness when he stated: "I am very, very frustrated because I don't know how to ask my questions." (At

p. 50, lines 18-19). It was pointed out to the court at that time, that the appellants did not depose the expert witness called in support of the Michael O'Dell position (p. 55). The trial court did note the tardiness of the defendants' 8 motions *in limine* (p. 57).

The objection on behalf of Michael O'Dell as to the line of inquiry of ownership versus the existence of an easement was sustained in the presence of the jury (pp. 58-59).

Michael O'Dell did identify his deed to the property and that the conveyance was subject to the easements (p. 63).

Allen D. Hutzler (10 June 2009) (pp. 72-83)

Mr. Hutzler was the owner of the property prior to Michael O'Dell's ownership. He owned the property in November 2004 (p. 73). The owner prior to that was William Jeavons (p. 74).

The half-moon driveway that intersects with the driveway/lane existed when Mr. Hutzler acquired the property from Mr. Jeavons (p. 75).

The driveway/lane has been used to access the residence (p. 76).

The property back then is comparable to its depiction in the photographs (p. 77).

Fred Gates (10 June 2009) (pp. 83-165)

Fred Gates, a graduate of Thiel College (p. 84), has been a professional land surveyor since 1977 (p. 83). Fred Gates had no prior professional relationship with Michael O'Dell (p. 85). He has qualified as an expert witness before in the West Virginia courts (p. 86).

Fred Gates did visit the site in question (p. 93). Fred Gates did review the documents of record (p. 95).

Fred Gates was presented to the jury as an expert witness.

Counsel for the appellants did exercise the opportunity to *voir dire* the witness on his qualifications. The objection to this examination was sustained since counsel for the appellant was not conducting a proper *voir dire* examination of the witness' qualifications (p. 97).

The primary exhibit for this witness was Exhibit 15, developed from the tax maps and his document review, which exhibit was admitted (p. 102). All of his information was scanned onto a disk (p. 106).

In its most brief form, in 1890 Isaac H. Strider laid out the lots for residences (pp. 102-103).

Based upon this witness' review, he rendered the following opinion "to a reasonable degree of certainty as to the objective or use of the 25 foot grave land" (p. 113), and that was "that back in 1890s Mr. Strider created a series of lots around a right of way that were intended to serve them." (At p. 114).

With the court's permission, counsel for Michael O'Dell was granted leave to re-open the direct examination of Fred Gates, prior to any cross-examination by counsel for the appellants, as to his civil liability for a fraud judgment (p. 116-119). This was permitted to 'take the sting out' of the anticipated cross-examination.

During the cross-examination of the expert witness, the dimensions of the easement were provided (p. 128). The fee for the expert witness was established at \$5,300 (p. 135).

Unable to properly attach the expert witness, counsel for the appellants attempted to attack counsel for Michael O'Dell with the following question:

Mr. Hamstead: Why did you make reference to the
Uniform Common Interest Ownership Act,

to invite the attorney's attention to the law,
why did you do it?
Mr. Becker: Objection, move to strike, I find that
offensive.

The Court: Sustained. The jury will disregard that.
Transcript 10 June 2009, p. 127.

With the conclusion of the expert witness, Fred Gates, the presentation on behalf of Michael O'Dell came to a close with the formal presentation of all of the exhibits (p. 139).

The appellant's motion for a direct verdict was presented (p. 141-152). The response on behalf of Michael O'Dell was presented (p. 152-159).

The court's comment about the defendant's request is insightful as to their appeal.

THE COURT: Okay. Well, Mr. Hamstead, you make an incredibly complex and dense set of motions here with a lot of sort of interlaced notions of land use and construction of different parts of the Plaintiff's claim and it makes for some real head scratching to try to find out exactly where we are on these issues.

Mr. Becker, you are much more to the point...
Transcript 10 June 2009, p. 159, lines 15-21.

The appellants' motion for a directed verdict was denied (pp. 160-161).

The Defendants' Case

Virginia Stegall (10 June 2009) (pp. 165-205)

The Stegalls reside at 65 Old Leetown Pike (p. 165).

Virginia Stegall claims that Sydney Seibert was without funds to contribute to the driveway maintenance (p. 168). She also asserts contrary to the direct testimony of Sydney Seibert, that Sydney Seibert said it was ok to send the letter of 12 August 2008 (p. 176).

Virginia Stegall claims that her tape recording of a conversation with Michael O'Dell was "in plain view." (At p. 170). Yet on cross-examination she admits that she never disclosed to Michael O'Dell her recording of the conversation (p. 186).

On cross-examination, Virginia Stegall joins with her husband, Robert, in the letter of 12 August 2008 one hundred percent (p. 184). They are willing to initiate criminal prosecution against Michael O'Dell, they did call the local law enforcement authorities, and they did contact the governor by e-mail (p. 185).

Virginia Stegall asserted that the statement by Michael O'Dell about his contributions to the gravel maintenance of the driveway and the invoice for the material are in error (p. 187). Also, Ms. Seibert's recounting of the Stegall threats to her are in error (p. 188).

Virginia Stegall admits that their 3 cars, plus others, use the driveway to access the Stegall property (p. 183).

Virginia Stegall admits the driveway is not their property (p. 194), and since 1997 she has known from the local officials that the driveway in question is indicated on the local records as a public road (p. 196).

Virginia Stegall admitted responsibility for the towing of the vehicle belonging to the Seibert visitor (p. 204-205).

Earl Stegall (10 June 2009) (pp. 205-215)

Earl Stegall, the brother of Robert Stegall and supportive of Robert in this proceeding, uses the driveway every day as he and his brother commute to work (p. 208). Earl Stegall uses the driveway twice a day (p. 213) along with the other cars at his brother's house (p. 214).

As Earl Stegall stated: It is "...more of a driveway." (At p. 214).

Tracie Stegall (10 June 2009) (p. 215-221)

Tracie Stegall is the mother of Robert Stegall (p. 215).

Her testimony appears to be of minimal value in regards to the dispute at hand. Rather she recounts her complaints about some mulch removal by Michael O'Dell, garbage can placement, and the picket fence on the O'Dell property.

Robert Stegall (10 June 2009) (pp. 222-262)

Robert Stegall testified as to the remodeling of the entrance of the O'Dell residence by an earlier owner, William Jeavons (p. 224). In addition, one is able to see through the picket fence (p. 227).

With the remodeling of the former vestibule, the entrance to the house is on the side of the driveway/lane (p. 228).

In an effort to offset the claims for attorneys fees, the witness was permitted to speak of his own expenses (p. 242-243).

The witness did attempt to avoid but did acknowledge that the only recorded document addressing the driveway was a maintenance agreement (p. 245).

The witness did acknowledge the use of a bold font in his letter of 12 August 2008 directed to Michael O'Dell to cease and desist in the use of the driveway (p. 246).

The witness did acknowledge that the appearance of the O'Dell residence now is that as when Michael O'Dell purchased the property (p. 252-253).

The witness did acknowledge that, with his wife, he recorded a conversation with Michael O'Dell (p. 255).

The witness did acknowledge that the previous owners of the O'Dell residence did use the driveway (p. 257).

The witness did acknowledge that they had the car towed (p. 259).

The Plaintiff's Rebuttal Witness

David Carter (11 June 2009) (pp. 7-14)

The defendants made much ado about the picket fence on the O'Dell property which runs parallel to the Old Leetown Pike. Due to this, Michael O'Dell was compelled to call David Carter, a compliance officer with the Jefferson County Planning Commission.

Based upon a complaint filed with his office by one named Robert, Mr. Carter went to the location and investigated the situation on the 6th of August 2008 (p. 7).

By way of a letter in September 2008, the Planning Commission determined that the fence was in compliance (p. 13). In addition, within that correspondence, the Planning Commission reached the conclusion that the driveway was a private easement (p. 13-14).

With that the evidentiary presentation portion of the proceedings concluded (p. 14).

ARGUMENT/DISCUSSION OF LAW
(With Points and Authorities Relied Upon)
(See W. Va. Rules of Appellate Procedure, Rule 3 (c)
and 10 (b))

INTRODUCTION

The appellants, by way of this appeal, specifically and with emphasis (underlined within their prayers for relief, ¶ D) request, that if successful with this appeal, that the matter not be remanded for a new trial. Rather the appellants essentially ask this court to vacate the awards of compensatory and punitive damages.

If the appellants are successful before this Court on a point of law, then the appellee is entitled to a new trial.

Although this Court's appellate jurisdiction is established by the state constitution, see W. Va. Constitution, Article III § 3¹, this Court shall not substitute its judgment for that of the jury. A jury's verdict shall not be set aside absent compelling reasons. See *Pipemasters, Inc., v. Putnam County Commission*, 218 W. Va. 512, 625 S. E. 2d 274, 280 (2005) citing *Stephens v. Bartlett*, 118 W. Va. 421, 191 SW. E. 2d 550 (1937), Syl. pt. 2.

Utilizing the appropriate Standards of Review, *ante* and *post*, the appellants' prayers for relief must be denied. The jury's verdict must be affirmed.

¹ See *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 582 S. E. 2d 885 (2003).

I. THE TRIAL COURT’S DENIAL OF THE COMPETING MOTIONS FOR SUMMARY JUDGMENT WAS NOT IN ERROR
(See § A and § B of the Appellant’s brief)²

The trial court, with the benefit of opposing motions for summary judgment³, denied the competing motions for summary judgment.

The standard of review before this Court in reviewing a summary judgment issue is that of *de novo* review. See *Harbaugh v. Coffinborger*, 209 W. Va. 57, 543 S. E. 2d 338, 343 (2000).

“Under Rule 56 (c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.” *Painter v. Peavy*, 192 W. Va. 189, 451 S. E. 2d 755, 758 (1994).

Only when it is clear that there is no genuine issue of fact to be tried, should summary judgment be granted. *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S. E. 2d 247 (1992) (Syl. pt. 1). See also, *Aetna Casualty and Surety Co., v. Federal Ins.*

² The appellee, Michael O’Dell, shall utilize the subheadings throughout this brief in an effort to ‘coordinate’ his response to the various sections of the appellants’ brief.

³ The O’Dell Motion for Summary Judgment is dated 8 April 2009.

The Stegall motion is dated 21 April 2009.

In addition, O’Dell’s Opposition to the Stegall Summary Judgment is dated 30 April 2009. Finally, O’Dell did incorporate by reference his oppositions to the requests of the other defendants’ requests for summary judgment. See the O’Dell Opposition to the Starlipper Motion, dated 21 April 2009 and his Opposition to the Walker Request, dated 21 April 2009.

Co. of New York, 148 W. Va. 160, 133 S. E. 2d 770 (1963).

The circuit court shall not weigh the evidence nor determine the truth of the matter. Rather, the circuit court is to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

Here, the competing motions for summary judgment clearly displayed to the circuit court that a genuine issue of fact was in dispute. Thus, the need for the jury to determine where the truth rests from within those facts.

A jury of one's peers, as the trier of the facts, is fundamental to our system of jurisprudence. Neither the trial court nor the appellate court shall invade the province of the jury. The function of the jury as the exclusive trier of the facts remains unimpaired. See *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S. E. 2d 236 (1964).

Any infringement upon this primary and essential function of the jury, as the trier of the facts, is a violation of a party's constitutional right to a civil jury trial. See C.J.S. *Jury* § 217; Amendment VII of the United States Constitution and W. Va. Constitution, Article III § 13 ("No fact tried by a jury shall be otherwise reexamined in any case that according to the rule of court of law.").

Since there was a genuine issue of fact, the jury as the trier of the facts, was entrusted and entitled to determine the existence of the driveway easement in dispute. The appellants' displeasure with the decision of the jury as to the existence of the easement (see Jury Verdict Form, #1) is not the functional equivalent of an error of law

which warrants reversal of the jury's decision and vacating the award of damages.

Furthermore on this point, the appellants complain that the dimensions of the easement were not established. See Appellant's Brief, ¶ G. To the contrary, the dimensions were established by the testimony and exhibits presented by the plaintiff's expert, Fred Gates. See in particular Plaintiff's Exhibit No.: 15 [Addendum C].

The appellants elected not to call or introduce the evidence generated by their own surveyor, Peter Lorenzen. See Deposition Exhibit No. 7 of the deposition of Richard Stegall, which accompanied the O'Dell post trial motion of 10 August 2009 [Addendum B]. That exhibit, without any question, corroborates the existence of this driveway easement. No wonder the appellants failed to call their own surveyor in support of their challenge to the existence of the driveway easement.

II. THE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE ESTABLISH THE EXISTENCE OF A DRIVEWAY EASEMENT. THERE IS NO COMPELLING REASON TO SET ASIDE THE JURY'S VERDICT.
(Appellant's Brief § A and B)

“The open, continuous and uninterrupted use of a road over the land of another, under *bona fide* claim of right, and without objection from the owner, for a period of ten years, creates in the user of such a road a right by prescription to the continued use thereof.” *Crane v. Hayes*, 187 W. Va. 198, 417 S. E. 2d 117, 119 (1992) citing *Norman*

v. Belcher, 180 W. Va. 581, 378 S. E. 2d 446, syl. pt. 2 (1989).

The uncontroverted testimony and exhibits of Michael O'Dell's expert witness, Fred Gates, and the observations of the neighbors to the property, some of whom have lived in the immediate area for 30 and 45 years, combined with how the parcel is identified within the Jefferson County Tax Maps, establishes without question that the driveway is intended to service the 4 contiguous residential lots. This was its intention when the 'subdivision' was laid out by Isaac Strider in the 1890s.

With each successive deed of conveyance, the driveway easement, without express words, passed as an incident of the principal object of the grant, that being, the conveyance of a particular residential lot amongst the 4. See *Harris v. Elliott*, 35 U. S. 25, 54 (1836).

Michael O'Dell, as the plaintiff, has met his burden of proof by clear and convincing evidence, to the satisfaction of the trier of the facts, that being, a jury of his peers. See *Pobro, LLC v. LaFollette*, 217 W. Va. 425, 618 S. E. 2d 434, 436 (2005) citing *Berkeley Dev. Corp. v. Hutzler*, 159 W. Va. 844, 229 S. E. 2d 732, syl pt.1 (1976).

The history and, therefore, the purpose of the driveway's use is equally clear: it is a driveway to enter and exit the 4 contiguous residential lots.

The Stegalls reluctantly did admit they are without any documentation whatsoever that reserves unto themselves an express reservation for the exclusive use of the driveway. See *Shepherd v. Yoho*, 210 W. Va. 759, 559 S. E. 2d 905 (2001).

Therefore, there is a complete void of any compelling reason to vacate the jury's decision. The Stegalls' displeasure with the jury's verdict is no where near Michael O'Dell's displeasure with their conduct. Yet neither affords this Court with a compelling reason to vacate the jury's decision.

III. THE EVIDENTIARY RULINGS OF THE TRIAL COURT WERE NOT IN ERROR.
(Appellant's Brief § B, C, E and F)

Standard of Review

Before this court, the standard of review utilized in examining the trial court's decisions regarding the admissibility or inadmissibility of evidence is that of an abuse of discretion.

The West Virginia Rules of Evidence... allocate significant discretion to the trial court in making evidentiary ... rulings. Thus, rulings on the admissibility of evidence...are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary... rulings of the circuit court under an abuse of discretion standard. *Green v. Charleston Area Medical Center*, 215 W. Va. 628, 600 S. E. 2d 340, 343 (2004); other citations omitted. See also *Stewart v. Johnson*, 209 W. Va. 476, 549 S. E. 2d 670, 674 (2001); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419

S. E. 2d 870, 883-884 (1992), *aff'd.*, 509 U. S. 443, 113 S. Ct. 2711 (1993).

With each and every evidentiary ruling, the trial court did consider and properly balance the probative value of the evidence against any prejudicial impact upon the non-moving party.

Any evidence that is contrary to one's position at trial will seem prejudicial to the complaining party. Such an assertion does not automatically warrant, however, that the evidence be excluded. Trial judges, in the exercise of their discretion, evaluate the competing interests of any evidence from a fulcrum point of balance. Only when the evidence has the likelihood to produce undue passion or actual prejudice - as contrasted with the evidence being material and relevant - shall the evidence be excluded. "The trial court is in the best position to make evidentiary rulings, because the judge can consider the claims and the evidence already admitted or proffered." 75 Am. Jur. 2d *Trials* § 248.

Without question, all of the plaintiff's evidence and testimony were contrary to the defensive position of the Stegalls. Yet the evidence and testimony was highly probative as to the conduct of the Stegalls and the historical background of the driveway easement in question. The admissibility of such evidence in all instances was proper. There was no abuse of discretion displayed by the trial court.

The Admissibility of the Plaintiff's Expert, Fred Gates
(Appellant's Brief § B and pp. 2-6 fnts. 3, 4, 6 and 7)

Before addressing the standard of review for the admissibility of the testimony and

evidence of an expert witness, the appellee finds it necessary to address the misconceptions that are created by language with the appellant's footnotes in the early portions of its brief. See for example, p. 2, footnote 3.

The accurate background is as follows.

A Scheduling Order was issued in this case on the 23rd of October 2008. The discovery deadline was set for the 24th of April 2009.

By way of a Motion, dated the 27th of March 2009, Michael O'Dell requested leave of the Court to file his expert witness statement.⁴ With that Motion, the Expert Witnesses Statement was filed, which included a synopsis of the expected testimony of the plaintiff's expert witness, Fred Gates.⁵

By way of an Order dated the 8th of April 2009, leave was granted to the plaintiff to file this expert witness statement.

By way of a Discovery Notice⁶ dated the 24th of April 2009, the plaintiff presented to the opposition, the report of the expert witness, Fred Gates.⁷

What is regrettable about the 'storyline' that the appellants' brief seeks to present

⁴ The undersigned's review of the Jefferson County Circuit Court case file places this filing at p. 124.

⁵ The undersigned's review of the Jefferson County Circuit Court case file places this filing at p. 129.

⁶ See W. Va. Rules of Civil Proc., Rule 5 (d).

⁷ The undersigned's review of the Jefferson County Circuit Court case file places this filing at p. 304.

is the glaring omission by the appellants that at no time, from the 27th of March 2009 until the commencement of trial, did the appellants seek to depose the plaintiff's expert witness. This ill considered tactical decision by the appellants does not provide a proper basis to either complain or to appeal.

For the appellants to create the impression, with the tone of their footnotes, that they were unaware or surprised⁸ by the area of the expert's testimony and evidence is an attempt to distance themselves from their own lack of thorough trial preparation. The appellants admit, as they must do, that the report of Fred Gates was dispatched to the appellants' counsel on the 24th of April 2009. See Appellants Brief at p. 2 n. 3.

The appellants' failure to act upon receipt of that report, other than to file a motion *in limine* on the evening before trial, is not the functional equivalent of a trial judge's error of an abuse of discretion in making an evidentiary ruling.

⁸ It seems incomprehensible that the appellants could attempt to claim surprise by the plaintiff's expert's testimony and evidence.

The appellants were fully aware of the location of the 25 foot right-of-way driveway. The appellants did commission their own survey of the area. This was done in August 2008 by Peter Lorenzen, a licensed land surveyor. The survey was acknowledged by Robert Stegall in his deposition of 25 March 2009. The Stegall survey was an admitted exhibit to that deposition.

What the appellants did, however, is to elect not to present the exhibit or testimony of their commissioned expert, Peter Lorenzen, at trial. The exhibit did, however, accompany the plaintiff's third post-trial opposition to the requests for post-trial relief presented by the Stegalls. See the plaintiff's pleading of 10 August 2009.

For the Stegalls to attempt to create the impression of a total unawareness as to the location of the driveway easement borders on a deliberate lack of candor to the jury, the trial court and this Court.

The Standard of Review for the Admissibility of Testimony and Evidence of an Expert Witness

The admissibility of expert testimony is governed by Rule 702 of the West Virginia Rules of Evidence.

The Rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill or experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Without question, the testimony and exhibits of Fred Gates, a licensed land surveyor, were relevant and reliable as to the existence of the 100 year old driveway easement servicing these 4 residential properties.

The admissibility of the testimony from this expert witness was well within the sound discretion of the trial court. That decision was not clearly wrong. That decision must not be reversed by this Court. See *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S. E. 2d 700 (1991) *cert. denied* 502 U. S. 908, 112 S. Ct. 301 (1991). See also *State ex rel. Jones v. Recht*, 221 W. Va. 380, 655 S. E. 2d 126 (2007).

The 'reliable foundation' for the testimony of Fred Gates were the Land Records of Jefferson County, West Virginia. These records clearly are self authenticating. See W. Va. Rules of Evidence, Rules 902 and 1005.

It would 'defy logic' to assert that this reservoir of reliable material is not the

fountainhead of data from which to analyze the background of this issue. It is from this reliable data that the expert witness reaches his conclusion and presents that in the form of an opinion to the trier of the facts. See *Mayhorn v. Logan Medical Foundation*, 193 W. Va. 42, 454 S. E. 2d 87 (1994).

The fact that the appellants do not care for that opinion, based upon reliable, historical data of recorded land records, or that the jury accepted that opinion, does not render the trial court's decision to admit the testimony and exhibits, an error which is plainly wrong in the exercise of the trial court's discretion. "The jury, and not the trial judge, determines the weight to be given to the expert's opinion." *Jones v. Recht, supra.*, W. Va. at p. 385, citing *Mayhorn v. Logan Medical Foundation, supra.*

The Fees Charged by the Expert Witness

It is permissible to compensate any expert witness for the value of his time and labor in making his investigation and presenting his conclusion, in the form of an opinion, to the trier of the facts. See *Ealy v. Shetler Ice Cream Co.*, 108 W. Va. 184, 150 S. E. 2d 539 (1929).

In a 'pre-emptive trial tactic'⁹ the appellee did solicit from the expert witness on direct examination the amount of the fee the expert charged for his professional services.

⁹ In the context of a criminal trial, many times a testifying criminal defendant will, on direct examination, acknowledge one's past transgressions. See *Ohler v. United States*, 529 U. S. 753, 120 S. Ct. 1851 (2000). The purpose of doing so on direct examination is to "remove the sting" of the prior event. *Ibid.*, 120 S. Ct. at p. 1854. This included the civil liability incurred by the expert witness. See *Capper v. Gates*, 193 W. Va. 9, 434 S. E. 2d 54 (1994). There is no meaningful difference in the situation here.

It does not take much imagination to envision that had the appellee not done so on direct examination, this area of inquiry would have become a vibrant topic for the appellants' cross-examination of the plaintiff's expert witness.¹⁰ In fact, to limit cross-examination on this point may constitute reversible error. See 31A Am. Jur. 2d *Expert and Opinion Evidence* § 75 (Database update, April 2010). See, *Cross-examination of Expert Witness as to Fees, Compensation and The Like*, 33 ALR 2d 1170.

Any coincidence that this same amount was awarded by the jury as compensatory damages is still not an error warranting either reversal or vacating the damages awarded. See *Damages*, *post*.

The Admissibility of Evidence of Damages
(Appellant's Brief § C, E and F)

In the context of claims for intentional torts, many jurisdictions have either held or recognized that expenses of litigation may be considered in measuring an award of punitive damages. See Rossi, Robert L., *Attorneys Fees*, § 8:2 (3rd ed., West 2001) citing *Kemp v. Miller*, 166 Va. 661, 186 S. E. 2d 99 (1936).

From the commencement of this proceeding, Michael O'Dell placed the Stegalls on direct notice of his intent to recover all of the costs of this proceeding, including

¹⁰ The appellants were nothing short of permissibly aggressive in their cross-examination of the plaintiff's expert witness in regards to his civil liability for fraud in another, unrelated matter.

The appellants received all of the benefits of this evidentiary ruling for impeachment purposes. See for example, *Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 412 S. E. 2d 795 (1991).

attorneys fees.¹¹ See O'Dell complaint of 17 September 2008 and the 5 prayers for relief. Lest we not forget, the complaint and its later amendment, alleged causes of action that were intentional torts.

Notwithstanding the Stegalls own written admission¹² that there exists a “25ft Right of Way between addresses 57 Old Leetown Pike [the Walker residence] and 77 Old Leetown Pike [the O'Dell residence], located within the *Village of Leetown, Middleway District, Jefferson County, West Virginia, accessing the Public Road of Leetown Pike....*” (see the Stegall correspondence of Tuesday, 12 August 2008, which accompanied the O'Dell complaint) [Addendum A] (italics in original, underlined emphasis added), the appellants, by way of this appeal, ask this Court to remove the jury's award of \$5,300.00 of compensatory damages and \$4,700 punitive damages.

The costs incurred by Michael O'Dell are due to the intentional conduct displayed by the Stegalls. The expenses incurred represent ‘general damages’ for which compensation and recovery is both warranted and permissible. “General damages¹³ are those which are the probable and necessary result of the injury, or which are presumed or implied by law, to be the result of the wrongdoer's action.” *Trial Handbook for West*

¹¹ The attorneys fees segment is addressed *post*.

¹² See W. Va. Rules of Evidence, Rule 1007.

¹³ Special damages include lost wages and income, medical expenses, damages to personal property and similar out of pocket expenditures. *Trial Handbook, supra.*, citing *Bond v. Huntington*, 166 W. Va. 581, 276 S. E. 2d 539 (1981).

Virginia Lawyers, § 35:4 (Database update, Nov. 2009), citing 22 Am. Jur. 2d *Damages* § 15.

With either general or special damages, the jury determines not only if the wrong has occurred, but, if it has, what sum shall be awarded to compensate for the wrong.

The verdict, rendered in favor of the appellee, included several counts of intentional torts. Albeit the wrongs may not have inflicted direct, personal injury. The absence of such, however, is not the equivalent of the fact that the Stegalls were not financially responsible for their intentional wrongs.

Without question, Michael O'Dell was the prevailing party in this litigation which proceeded to its full conclusion with a jury's verdict. As the prevailing party, Michael O'Dell vindicated his right to use this driveway to enter and exit his residence. Thus, Michael O'Dell is entitled to his recovery. See *Buckhannon Board & Care Home v. West Virginia Dept. of Health & Human Res.*, 532 U. S. 598, 121 S. Ct. 1835 (2001).

Therefore, there is no basis to vacate the jury's awards.

**The Appellant's Complaint Regarding the
Admissibility of Attorney's Fees**
(Appellant's Brief § F)

As a component of the plaintiff's claim for damages¹⁴, the plaintiff provided testimony and exhibits as to the attorneys fees he incurred in the presentation of his claims. For purposes of discussion only the appellee would agree that the basic principle

¹⁴ See the plaintiff's complaint and the Discovery Filing of 24 April 2008.

is, under the American Rule, each side of a civil dispute bears the expense of their own attorneys fees. See for example, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 95 S. Ct. 1612 (1975); *Key Tronic Corp. v. United States*, 511 U. S. 809, 114 S. Ct. 1960 (1994). “However, the fact that the general rule concerning fees works well most of the time does not necessarily imply the rule works well all of the time.” *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897, 903 (W. Va. 1991); *rehrg. denied*.

Yet with each principle there are recognized exceptions. Fee shifting¹⁵ is permitted in instances where one party’s conduct is in bad faith, wantonly or for oppressive reasons. See *Ibid*. Since the conduct of the Stegalls constituted intentional torts, the presentation of this testimony and the accompanying exhibits was a decision well within the discretion of the trial judge.

If the admission of this evidence was in error¹⁶ - a point certainly not conceded in the slightest by the appellee - any error was harmless to the Stegalls. The jury did not award any attorneys fees.

Due to the jury’s verdict, the appellee is at a complete loss as to why this point is even being mentioned by the appellants. If there ever was a point that was not an issue

¹⁵ Fee shifting is permitted, for example, in first party insurance claims. See *Hayseeds v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S. E. 2d 73 (1986).

¹⁶ For reference purposes, the argument regarding the admissibility/inadmissibility of the attorneys fees testimony and exhibits is found at pages 3-13 of the proceedings of 10 June 2008.

for the appellants' appeal, this certainly seems to be it.

With that being said, if the jury's verdict is reversed, the appropriate remedy is to remand the matter for a new trial. At that juncture the appellee again would assert, that in the context of an intentional tort action, which this is, the appellee is entitled to the recovery of attorneys fees.

IV. THE JURY'S DAMAGE AWARDS DID NOT NECESSITATE OR WARRANT A POST TRIAL HEARING OR ANY FURTHER REVIEW BY THE TRIAL COURT.
(Appellants Brief § D)

The appellants assert error due to the failure of the trial court to afford them a post trial hearing to review the punitive damage award. The supposed basis for this error is the decision of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991). The *Garnes* decision does not stand for the principle the appellants attempt to assert.

The appellants, in their brief, do not specifically cite any of the factors that are utilized to evaluate an award of punitive damages and the corresponding assignment of error corresponding to a particular factor. It is the position of the appellee that the points are therefore waived as a matter of state law. *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897, 909 and 910 (1991).

Rather than address the various factors and the supposed error made by the jury,

the appellants seem to claim that due to the failure of the trial court to afford them a post trial hearing or for the trial court to individually recount each of the factors utilized in evaluating the amount of punitive damages assessed, there is an error that warrants reversal not only of the jury's verdict but the complete vacating of the jury's damage awards.

At best, if either is in error, a point not conceded in the slightest by the appellee, then the remedy would be a remand for purposes of addressing the punitive damage award only. The 'supposed foul' does not afford the appellants the complete and permanent removal of the jury's award of punitive damages.

Lest the following facts are overlooked, it must be noted:

1. The jury found the Stegalls responsible for intentional torts;
2. The jury did award compensatory damages;
3. The amount of punitive damages was less than the award of compensatory damages¹⁷; and
4. By way of three post trial filings, the appellants presented their requests to the trial court to review and/or vacate the jury's awards.
5. Those requests for a post trial review were denied three times by the trial court.

¹⁷ The appellants are totally unable under such a circumstance to claim that the punitive damage award is so 'grossly excessive' as to violate the Due Process Clause of the Fourteenth Amendment. See *TXO Productions Corp. v. Alliance Resources Corp.*, *supra.*, 113 S. Ct. at p. 2720 citing *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 29 S. Ct. 227 (1909).

Notwithstanding these facts, the appellants, without any specifics *whatsoever*, ask this Court to vacate the awards. The *Garnes* decision does not mandate a robotic review by the trial court of the jury's verdict.

The circumstances of this case are not so complex, nor were the awards so significant, making it mandatory or necessary for the trial court to schedule a hearing to conduct its own line-by-line review of the damages awarded. The trial court, by way of the multiple post trial motions filed by the appellants, surely used those opportunities to review and reflect on the totality of the proceedings that were presented before the court. The award was no where near the line, let alone, cross the line, of an award of punitive damages that enters into the area of constitutional (or procedural) impropriety. See *Pacific Mutual Life Ins. Co., v. Haslip*, 499 U. S. 1, 111 S. Ct. 1032, 1046 (1991).

The trial court in its concluding remarks to the jury was well aware of the seriousness of the jury's deliberations and their decision. The trial court stated:

You have listened carefully, you have gone back and deliberated as you swore that you would, you have taken your oaths very seriously, you did just what a jury does, you let the chips fall where they may in making the best you can out of all of the evidence that has been laid before you. Transcript of 11 June 2009 at pp. 78-79.

Such an awareness by the trial court of the jury's verdict, after serious and conscientious deliberation, does not warrant a post trial hearing. The appellants shall not be given a 'second bite at the apple' by way of a post trial hearing, especially when the

trial court has acknowledged the proper workings of the collective wisdom of the jury in reaching its verdict; a verdict with the accompanying damage awards that in no way shocked the conscience of the trial court.

Punitive damages in civil cases between private parties are permitted. See *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 109 S. Ct. 2909 (1989). “Punitive damages have long been a part of traditional state tort law.” *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 255, 104 S. Ct. 615, 625 (1984). The potential of a punitive damage award is to encourage, even if only subliminally, an adjustment or correction of one’s behavior¹⁸ (or business practice) in an effort to reach a good faith resolution to the dispute. Punitive damages “are imposed for purposes of retribution and deterrence.” *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U. S. 1, 111 S. Ct. 1032, 1044 (1991); other citation omitted. The Stegalls chose not to adjust their behavior. Each deliberate decision has its own consequences. The jury’s punitive damage award is the consequence of the Stegalls own decisions, made with all of the attributes of one acting under their own free will.

Punitive damages that bear a reasonable relationship to the harm caused by the defendants’ actions and bear a reasonable relationship to compensatory damages need not be vacated. *Garnes, supra.*, at p. 667.

¹⁸ “Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation, but principally at retribution and deterring harmful conduct.” *Exxon Shipping Co. v. Baker*, - U. S.-, 128 S. Ct. 2605, 2621 (2008); footnote omitted.

In this case, the trial court, upon multiple requests from the appellants, did review the jury's awards. When the trial court reviews the propriety of a punitive damage award -without repeating the litany of all of the factors here - one of which is "the costs of the litigation..." (See *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S. E. 2d 122, 131 (1996) citing *Garnes, supra.*, and *TXO Production Corp., supra.*), there is no need to do anything further.

Since the appellants failed to specifically address within their petition for review before this Court any of the factors in evaluating an award of punitive damages which they believe constitute an assignment of error, the same shall be deemed waived as a matter of law. *Garnes, supra.*, at p. 696. No further consideration of this issue is warranted by this Court.

V. THE FAILURE OF THE TRIAL COURT TO ESTABLISH THE DIMENSIONS OF THE EASEMENT WAS NOT IN ERROR. THE POINT WAS NOT PRESERVED FOR APPEAL BY THE APPELLANTS.
(Appellants Brief § G)

Standard of Review

A verdict form was submitted to the jury. The crafting of the form was the combined efforts of the trial attorneys and the court. The final verdict form utilized and presented to the jury was without the presentation or reservation of any objection, especially from the appellants.

This Court shall apply an ‘abuse of discretion’ standard of review when reviewing a trial court’s decision regarding a verdict form. See *Perrine v. E. I. Du Pont De Nemours and Co.*, -W. Va.-, -S. E. 2d-, (No.: 34333, 34334 and 34335, decided 26 March 2010, slip op. at p. 59; footnote omitted).

With the return of the jury’s verdict, the following colloquy did occur:

COURT: Mr. Becker, could we ask that Plaintiff prepare an order
consistent with this judgment?

Mr. Becker: Yes, Your Honor, certainly.

The Court: Thank you.

Mr. Becker: May I ask the Court’s guidance on the first question.

The Court: On the first question.

Mr. Becker: On the prescriptive easement.

The Court: Yes, sir.

Mr. Becker: Just leave that alone just say that now at this
geographical area there is this prescriptive
easement for ingress and egress.

The Court: I think that is what we all assume without
a whole lot of other questioning when
we chose to put it down like that it stands
for the proposition that the jury has established
a prescriptive easement in favor of your client.

Mr. Becker: Very well.

The Court: I believe that is what it stands for.
Mr. Hamstead.

Mr. Hamstead: I was thinking that the order would incorporate the jury verdict form into it.

The Court: Certainly, that is very standard.

Mr. Hamstead: Incorporate that in there, the jury found as follows, then I guess based on the jury's verdict the Court enters judgment, one would be the finding of the jury with regard to prescriptive easement, and, two, would be the damages based on the verdict form. That is my thinking.

The Court: I don't think we are in any kind of controversy. I think that is all ordinary thing.

Mr. Hamstead: Send it over and we'll look at it.

Mr. Becker: Sure, absolutely.

Tr. 11 June 2009, at pp. 81-82; emphasis added.

Simply stated the appellants did not object to the verdict form when presented and when returned. The issue has been waived for purposes of this appeal.

Only later, in an effort to vacate the damages awarded, did the appellants seek to object. The objection, both in a post trial request and at this juncture, is tardy.

Even if the objection were to have a scintilla of merit, the error, if any, is corrected not by vacating of the damages awarded. Rather, since no contradictory evidence *whatsoever* was offered by the appellants to the testimony and exhibits of Fred Gates, this Court simply directs that the dimensions of the easement be established in accord with the admitted exhibit and the testimony of the plaintiff's expert, for that is the finding of this

jury as reflected on the approved jury verdict form.

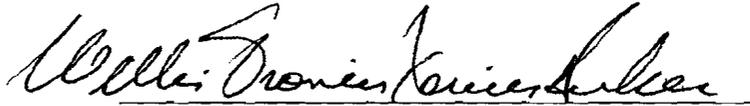
Again, this is a factual finding by the jury. It is not an error of law which warrants either a reversal of the jury's finding or vacating the damages awarded.

O'Dell argument for appeal
7 June 2010

PRAYER FOR RELIEF*

(See W. Va. Rules of Appellate Procedure, Rules 10 (d),
28 and 3 (c) (4))

Michael J. O'Dell, the appellee before this Court and the plaintiff below, requests
that the jury's verdict in its entirety be affirmed by this Court.



William Francis Xavier Becker

W. Va. Bar Id. No.: 5238

PNC Bank Bldg., 2nd Flr.

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Rockville, Maryland 20850

301-340-6966

Wfxbecker@aol.com

Wfcbecker@verizon.net

* If the Clerk of this Court is considering the assignment of cases for oral argument at locations other than Charleston, West Virginia, Michael O'Dell and his counsel, William Francis Xavier Becker, Esquire, hereby volunteer for the re-assignment of this case to Wheeling College (now Wheeling Jesuit University), Wheeling, West Virginia.

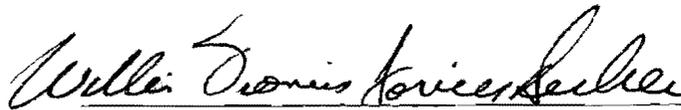
CERTIFICATE OF SERVICE

(West Virginia Rules of Appellate Procedure, Rule 15)

I hereby certify that a copy of the brief on behalf of Michael O'Dell, the appellee, was sent by way of first class mail, postage prepaid to:

Braun A. Hamstead
Attorney for the Stegalls
1802 W. King Street
Martinsburg, West Virginia 25401

on the 10th day of June 2010.


William Francis Xavier Becker

ADDENDUM

On Behalf of Michael J. O'Dell
(West Virginia Rules of Appellate Procedure, Rule 10(d))

Stegall Letter of 12 August – Accompanying the O'Dell Complaint.....A

Stegall Survey of 20 August 2008 – Accompanying the O'Dell Third
Opposition to the Stegall Supplemental Post Trial Motion for a New
Trial (10 August 2009).....B

O'Dell Plat as Prepared by Fred Gates.....C

Robert and Virginia Stegall
69 old Leetown Pike
Kearneysville, West Virginia, 25430

Sydney Siebert
65 Old Leetown Pike
Kearneysville, West Virginia, 25430

Donald and Patricia Walker
411 N. Mildred Street
Charles Town, West Virginia, 25414

Tuesday, August 12, 2008

Michael O'Dell
77 Old Leetown Pike
Kearneysville, West Virginia, 25430

Dear Michael O'Dell,

It has been in our attention that you are not authorized to use the 25ft Right Of Way located between addresses 57 Old Leetown Pike and 77 Old Leetown Pike, located within the *Village of Leetown, Middleway District, Jefferson County, West Virginia*, accessing the Public Road of Leetown Pike. 77 Old Leetown Pike property has already established a primary access to the public road from the southern corner of it's parcel. Robert Stegall, acting on behalf of parties with joint interests of said Right Of Way, has on numerous occasions verbally declined you permission of person and/or vehicular usage of aforementioned Right Of Way.

You are hereby notified to Cease and Desist Trespassing.

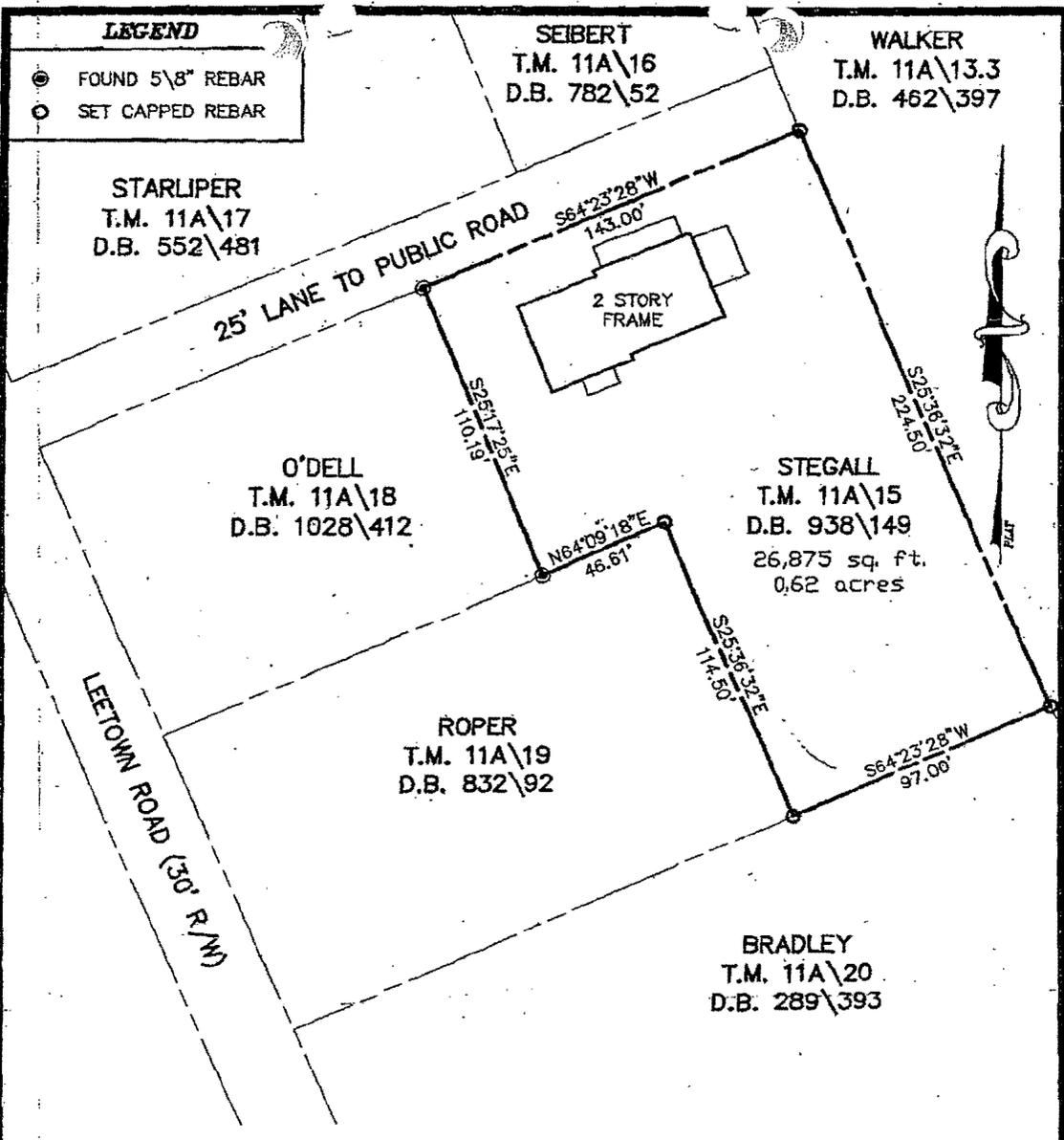
Any further travel on or in this aforementioned Right Of Way by Michael O'Dell and/or any other person(s) at 77 Old Leetown Pike; including girlfriend, spouse, family, and/or visitors; by any means, is deemed trespassing under West Virginia Code §61-3B-3, legal actions will be taken for criminal trespassing, fees, and damages. Any further trespassing is deemed willful trespassing.

A copy of receipt of this document and a copy of this document will be on file with the local enforcement authorities having jurisdiction, in the event that willful trespassing occurs.

Sincerely,



Robert Stegall



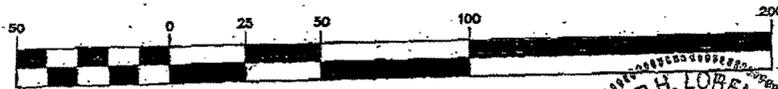
PLAT OF RESURVEY

PLAT SHOWING RESURVEY OF TAX MAP 11A PARCEL 15,
 STANDING IN THE NAME OF ROBERT & VIRGINIA E. STEGALL, AS RECORDED IN THE
 OFFICE OF THE COUNTY CLERK OF JEFFERSON COUNTY IN DEED BOOK 938\149,
 LOCATED IN MIDDLEWAY DISTRICT, JEFFERSON COUNTY, WEST VIRGINIA.

DWG # 5011

DATE 8/20/08

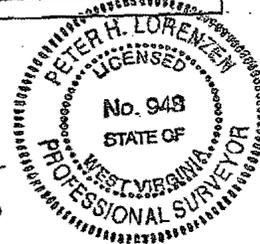
GRAPHIC SCALE



(IN FEET)
 1 inch = 50 ft.

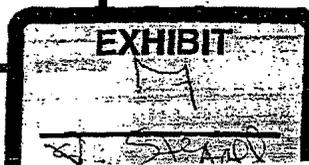
SURVEYED BY:

PETER H. LORENZEN P.S.
 SUMMIT POINT, W.V. 728-6093



O'Dell Addendum

B





Lane Entry @ South End - "A"

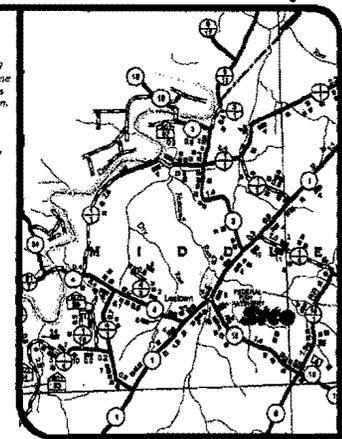
Lane @ North End - "B"

C. E. & M. S. Sturjiver
DB 280 P 212
D7 TM11A-1 P17

S. Siefert
DB 702 P 52
D7 TM11A-1 P16
See D1 103 P 86
Road Maintenance
DB 621 P 005

NOTE: Lane Extends to the lands of Leetown Villa (TMP 12 & 13.3) which terminated its Lane Access use in Subdivision Notes PB 24 P.6. See Note 5g hereon.

Photo "B"



Location Map

Scale: 1" = 1 mile
North =

R. & V.E. Stegall, JT.
DB 938 P 149
D7 TM11A-1 P15
Septic Tank DB 929 P 698
By J. W. Hardy &
V. E. Stegall
Road Maintenance
DB 621 P 005

E. S. Roper
DB 832 P 92
D7 TM11A-1 P19
Lot 4 by Isaac H. Strider

Fred W. Gates, WVPS# 659 Date



Approximate Location of two .25' line Drain Field Easement DB 929 P 698 Per JCHD Initial Records

Notes:

- OWNERSHIP** of surveyed part of Isaac H. Strider's Lot 5 (1898) lies in MICHAEL J. O'DELL and LINDA A. O'DELL as joint tenants in common, by deed dated October 2, 2004, conveyed from ALLEN D. MUTZLER and MELANIE J. BROWNSWORTH recorded among the Jefferson County, West Virginia, Land Records in Deed Book 1028 on Page 412, being District 7, Tax Map 11A-1 Parcel 18 containing 16,732 square feet or 0.384 of an acre of land.
- BOUNDARY** (shown by dark green line with two dots):
 - This parcel was a part of the Isaac H. Strider lands obtained by him in 1890 in Deed Book V Page 170.
 - The surrounding parcel descriptions all share a common north-south and fit together in agreement geometrically.
 - Several conveyances cite their origin as being the work of James K. Hendricks, County Surveyor.
 - A plot of these divisions cited in the creation deeds was not found within the scope of this research as being part of the Land Records.
 - Parcel descriptions appear to be referring to a plot but were created on the Land Record individually as they were sold by each new deed as was practice at that time.
 - Long standing yard fences and recovered adjacent corners appear acceptably consistent with the documented lines of record in the recorded deeds.
 - This work adjusts the southeasterly/northeasterly line of lot corners of the Lot 5 northeasterly 46' Outside so as to allow the Lot 3 historic footage width of 110 feet within scope lines and consistent with recovered corners. See Offset distances shown to recovered corners.
 - This work also sets the historical Lot 3 lot width to 110 feet as a correction to the 102 feet apparent type shown in DB 1028 P 412.
- COMMONLY USED 25 FOOT WIDE LANE**
 - Lane is first described in 1895 conveyance recorded in Deed Book 103 Page 86.
 - No document found in this research suggests or indicates any adjacent land has exclusive use or is excluded from this lane's use.
 - In 1898, Isaac H. Strider sold the half acre Lot 5 for the active use of the German Baptist Brethren Church Trustees needing public access.
 - Lot 5 was placed 44 feet from a prior outcropping grade in 1893 to the northwest. This allowed limited later access space between parcels of record.
 - Access to adjacent lots appears over gravelled area limits as shown hereon.
 - An independent lane maintenance agreement recorded in DB 621 P 005 in 1988 appears to obligate the prior owners, their heirs and assigns, of Tax Map Parcel 13, 16 and 15 to future maintenance of the lane. No exclusive nor inalienable use rights of this lane are indicated therein.
 - Tax Map Parcel 13 unilaterally terminated use of this lane for the access of its lands during the creation of Leetown Villa Final Plat recorded among the Jefferson County Land Records in Plat Book 24 at Page 9 by general now limiting access to Pupils Court and Note 6 requiring access only over interior subdivision road.
- EXCHANGE OF RIGHTS ON THE LAND RECORD**
 - Lot 5 owners conveyed its northeasterly 46 feet of land (110' wide) to the owners of the land immediately northeasterly thereof as a boundary line adjustment in 7 July 1999 as recorded in Deed Book 920 at Page 291.
 - The Remaining 132 feet by 110 feet wide part of Lot 5 obtained a Deed of Easement in 20 July 1999 as recorded in Deed Book 929 at Page 698. This easement was granted for the purpose of installation, repair and modification of sewage disposal lines and drain field for the benefit of the remaining portion of Lot 5 along with rights for ingress and egress of all loads over, under, along and through a portion of the grantor's property. Specific admonition location of the septic is not indicated in the deed and DB 929 P 698.
 - Placement of septic is shown hereon as delineated in the Jefferson County Health Department installation inspection records. Actual placement was not actually seen during this survey. See Health Department records. Some difference with field measurements was observed as noted.
 - Current owners of Lot 5 have indicated the location of the septic tank and well.
- CORNERS** are set as noted hereon. CRES = Copied 5/8 inch rubber set. CRFB = Copied rubber Found. RFB = Rubber Found. BFB = Iron Bar Found. BIF = Iron Pipe Found.
- PHOTO VIEWS** above are indicated approximately by photo letter and direction arrow.

Boundary Survey of P/O Lot 5, Issac H. Strider Lands P/O DB 86 P 400
Conveyed in 1898 to the Trustees of the German Baptist Brethren Church
Being now the homesite lands of

Michael J. and Linda A. O'Dell
Deed Book 1028 Page 412;
D7 TM11A-1 P18

Situate along the northeasterly margin of West Virginia County Route 15 at a point approximately 315 feet southeasterly from its intersection with West Virginia County Route 1; being in Middleway District, at Leetown, in Jefferson County, West Virginia

Plat:
10990J
Date:
3 April 2009
Scale:
1" = 20'
Tax Map: 11A-1
Middleway
Computer Entry: F.G.

Gates Associated, Inc.
153 Venice Way (Rts. 45)
Shepherdstown,
West Virginia, 25443
Phone: 1-304-878-6124
Email: gpl@gatesassociated.com

O'Dell Addendum C