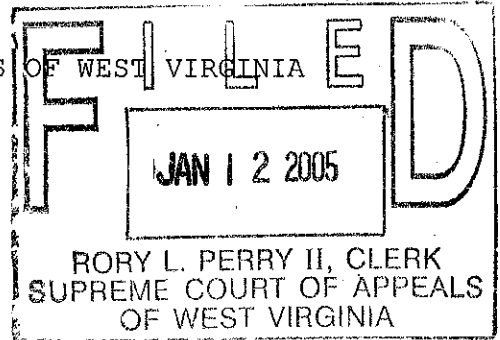


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



BRIAN LAMASTER AND  
VIRGINIA LAMASTER,  
Successors in Title and Interest to  
POBRO, LLC,  
PLAINTIFF below/Respondent

VS.

CASE NO. 32192

ARTHUR R. LAFOLLETTE AND  
RUBY T. LAFOLLETTE, HIS WIFE,  
DEFENDANTS below/Petitioner

APPEAL FROM THE CIRCUIT COURT OF HAMPSHIRE COUNTY

RESPONDENT APPEAL BRIEF

**KIND OF PROCEEDINGS AND NATURE OF  
THE RULING IN THE LOWER COURT**

Respondent now responds to the heretofore filed "Petition For Appeal" arising from a civil case held in the Circuit Court of Hampshire County, West Virginia. Following a Bench Trial before the Circuit Court of Hampshire County on April 1, 2003, a Final Order was signed and entered by the Hampshire County Circuit Court giving Respondent the right to use a certain roadway which crosses the land of the Petitioners.

The Circuit Court did Order as follows:

"1. That the Plaintiff has a prescriptive easement across the road in question, which said prescriptive easement is 7.5 feet wide to 12 feet wide, with an average width of 9 feet, and that the total width of the easement, including any cuts, ditches, culverts, drains, etc., is 15 feet.

2. That both parties shall have the right to maintain a gate across said road in the same location as the one which currently exists.

3. That neither party shall have the right to place additional gates on said roadway, without the consent of the other party.

4. That the Plaintiff shall have the right to use said road for residential and recreational purposes as pertains to the Kelso tract, and for recreational/hunting purposes as same pertains to the Baker tract.

5. Plaintiff will be charged with the maintenance of said roadway, and as such shall have the right to make said road passable by vehicular traffic at all times."

6. That any other claims by each of the parties are rejected, and this case is hereby ended."

Petitioners filed a Petition for Appeal of said Order, setting forth exceptions on March 30, 2004, which said Petition for Appeal was granted by the West Virginia Supreme Court on November 17, 2004.

The Petitioners filed a "Letter Relying on the Original Petition for Appeal" on December 14, 2004, thus giving Respondent until January 14, 2005, to timely file this response.

#### STATEMENT OF FACTS

This case involves a dispute over the use of a road in Hampshire County, West Virginia.

The Respondent POBRO, LLC, was the owner of two parcels of real estate referred to as the Baker tract and the Kelso tract (said parcels have since been sold to Brian and Virginia LaMaster). The road in question goes directly to the 137 ½ acre Kelso tract, from the public road known as Back Creek Road, crossing over Petitioner's 103 acre, 80 pole, parcel of real estate. The roadway in question is shown on the Hampshire County Tax Maps as leading from West Virginia Route 23/3 (Back Creek Road), to the 137 ½ acre parcel of real estate, known as the Kelso Tract, owned by the Appellant. Said roadway is also shown on the plat of record in the Office of the Clerk of the County Commission of Hampshire County, West Virginia, in Deed Book No. 183, at page 276.

From that point on, the facts of the case, which mainly consist of the usage of the roadway, and whether said use was permissive, are disputed.

Primarily, Respondent would state that Paragraph Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Section A, Section II. Statement of Facts of the Case, as set forth in the Petitioner's Petition for Appeal, are mostly irrelevant as to the matter at hand, and the majority of same were not even brought up at trial. These paragraphs deal with the history of the ownership of the Petitioner's land, an unrelated cemetery and access to same, the Respondent's original offer to possibly sell the Kelso and/or Baker tracts unto the Petitioners, and with the negotiations and efforts undertaken by the Respondent to avoid having to sue the Petitioners in order to establish a right of way over the roadway in question.

The Respondent would state that the roadway has been in existence for at least 54 years, that same was used as the primary access to a primary residence located on the Kelsoe tract for 26 years up until 1970, and has been used every year since then for access to the Respondent's real estate. The remaining pertinent facts shall be brought to light during the discussion of the alleged Assignments of Error.

#### **Argument as to Petitioners Assignments of Error**

##### **I**

#### **Section A., entitled "FINDINGS OF FACT AND CONCLUSIONS OF LAW"**

The Petitioners set forth 16 numbered paragraphs, wherein they quote various portions of sentences from the Circuit Court's Final Order, which your Respondent will address on a point by point basis:

1. The location of the roadway in question was never at issue. Which road the lawsuit was filed about was never in question, either.

2. The Final Order indicates that the roadway is shown on the County Tax Maps and that said road is shown on a recorded plat, in order to give definition to the roadway in existence, not to prove that same is a right of way. The document entitled "The Raceys of the Shenandoah Valley" was not entered into evidence at trial.

3. It is true that truly parallel tracts would be the same distance apart indefinitely. However, the tires of a particular vehicle driving on the road may not drive over precisely the same area every single time, and different vehicles have different widths. More relevantly, the Circuit Court needed to know the width of the entire road, over the entire length of the roadway, not just two worn tire tracts at one spot, in order to grant an easement that is not exceedingly vague.

4. Based upon the evidence presented at trial, the trial Court's ruling was accurate. The only evidence presented by the Petitioner in regards to the width of the roadway was that they measured the road in one spot. The Respondent had the entire roadway, including any ditches, culverts, cuts, drains, etc., measured at 50 yard intervals over the entire length of the road, and presented all of this information at trial.

5. The Petitioner quotes a portion of the Final Order indicating that the Plaintiff has the burden of proving that the prescriptive easement exists, which is true. However, the Petitioner responds to this quote by asserting that the use of the roadway was with the permission of the Petitioner, which is a different point.

This is an important point, because during trial, it was obvious that the roadway had been used in an open, continuous, uninterrupted manner, under a bona fide claim of right, without objection by the servient estate owner, for a period well in excess of 10 years. Each of these points was basically acquiesced to by the Petitioners. The only defense the Petitioner had at trial was to claim that the use of the road was with permission. However, in the last few sentences of this paragraph, the Petitioner admits that he has never given permission to the Respondent to use the roadway. He implies that his father may have given permission to use the road. However, this was not brought up at trial, and, in any event, any such testimony would have been barred by the rules of evidence.

Petitioner states that the Respondent cannot prove that the Petitioner's ancestors did not give permission to use the road. They have it backwards. The burden is not on the Respondent to prove he did not receive permission to use the roadway. The burden is on the Petitioner to show that they did give explicit permission. It is not sufficient to say that permission should be implied, simply because the Petitioner did not stop the Respondent from using the road. If this was the case, no prescriptive easement could ever be proven, because the owner of the servient estate could simply say that he thought, in his own mind, that he had given permission to the owner of the dominant estate to use the road, by simply not stopping him. Not stopping one from using a road is not equal to giving them explicit permission to do so.

Not one witness or one piece of evidence was presented which indicated that permission of any kind was ever given to any party. Therefore, the Petitioners defense that the use of the roadway was permissive fails.

6. The Petitioner quotes language from the Final Order which states the road has been used for over 50 years, by both the Respondent, and it's witnesses. This is indisputable. The Petitioner, by their own testimony, indicate that the road has been in existence and used by a variety of people, in a variety of ways, for more than 50 years.

The second part of Paragraph No. 6 alleges error with the Circuit Court's finding that the road was the only road used to access the Kelsoe and Baker tracts for at least 40 years. Said properties may have been accessed by other roads over the years. This has no bearing on whether or not the Respondent proved he had a prescriptive easement over the road in question.

7. The Petitioner acknowledges that the road was used for residential and recreational purposes, and goes on to allege that their predecessors in title gave the Respondent's predecessors in title permission to use the road many years ago. Again, not one witness or one piece of evidence was presented which indicated that permission of any kind was ever given to any party. The Petitioner, when asked specifically on cross examination if he ever gave permission to the Respondent to use the road, replied in the negative. The possibility exists that permission was given to use the road by an ancestor of the Petitioner, but that is far from having evidence presented in a Court of Law that proves it was done. It is not enough to go on assumptions, and in fact, it would have been improper for the trial court to do so.

8. Again, the Petitioner reaffirms that he never gave permission for anyone to use the road, and that the road was in existence for many years. Again, on this specific point, I would refer to the following question posed unto the Petitioner by way of the following Interrogatory which was answered prior to trial:

Q: "Please state completely and fully all representations, statements, declarations, or permission allegedly given or made by the Defendants, their predecessors in title, or any agents, servants, employees, friends or family of theirs which gave any oral or written permission to the Plaintiff, through its members, or its predecessors in title, permission to use the right of way in question."

A: "...No express permission was ever given to the Plaintiff Limited Liability Company or its immediate predecessors in title by the Defendants...."

9. Petitioner again claims some unidentified ancestor gave permission to use the road, but can produce no writing evidencing same, and offered no testimony whatsoever of any oral permission ever given by anyone.

10. The evidence was clear that the road had been used for residential and recreational hunting over the last 50 plus years. The entire history of the usage of the roadway, as presented in evidence, must be evaluated to determine the character and scope of the prescriptive easement (Footnote No. 4, Grist Lumber v. Brown, 209 W.Va. 530, (2001)). It is not necessary that the easement be in constant and uninterrupted use. Clain-Stefanelli V. Thompson, 199 W.Va. 590, (1997). Further, the Trial Court's Final Order did not give the Respondent the right to use the road for commercial purposes.

11. The Kelsoe and Baker tracts adjoin each other. The road in question accesses the Kelsoe tract. In the strictest legal sense, the roadway is a right of way to the Kelsoe tract for residential purposes. Practically speaking though, once one is on the Kelsoe tract they are bound to use the Kelsoe and Baker tracts as one. The Respondent is now estopped from accessing a home on the Baker tract over the road in question, should he ever build a home on the Baker tract. It is impossible to say the right of way can be used to access the Kelsoe

tract, and not the Baker tract when they have a common owner. In any event, the use of both the Baker and Kelsoe tracts is limited to residential/recreational purposes, when accessed by the road in question.

12. The Final Order of the Circuit Court did not grant the Respondent the right to use the road for even limited commercial activity. The entire history of the usage of the roadway, as presented in evidence, must be evaluated to determine the character and scope of the prescriptive easement (Footnote No. 4, Grist Lumber v. Brown, 209 W.Va. 530, (2001)), and where a change in the use of a right of way is not a change of its character or purpose, but merely one of degree, such as a mere increase in frequency of use, the extent of and the right to use the right of way is not affected by such change. Clain-Stefanelli V. Thompson, *supra*. Additionally, the character and purpose of the easement acquired by prescription is determined by the use made of it during the prescriptive period. Burns v. Goff, 164 W.Va. 301, (1980).

13. There exist two gates on the road. Both the Petitioner and the Respondent have keys to same. Again, there was no evidence presented that showed any permission to use the road went with the exchange or sharing of keys to the locks on these gates.

14. The Petitioner is merely attempting to present new evidence which contradicts what was presented at trial. Also, the trial court ruled that the Petitioner would not have to maintain the roadway in the future.

15. The Petitioner again constantly refers to permission that was never proven at trial. Not only was the permission not proved, the Petitioner himself, at trial and in his brief, explicitly states that he

did not give permission for anyone to use the road. The Petitioner repeatedly claims that his ancestors gave permission to use the road, but never offers any proof of same.

16. The Petitioner states several conclusions of law, and again attempts to introduce evidence which was not admitted at trial.

**Section B., entitled "ORDER"**

The Petitioner sets forth 6 numbered paragraphs, which your Respondent will address on a point by point basis:

1. The Petitioner again refers to some vague ancestor who gave permission to use the road at some time in the past. None of this was admitted at the bench trial. Also, the evidence the trial court had before it regarding the width of the road was overwhelming in favor of the Respondent.

2. Whether or not the Respondent has numerous other ways to access his real estate is not relevant to what was before the trial Court, and it is not relevant to this appeal.

3. The provisions of this paragraph that are not repetitive and otherwise addressed, are irrelevant to the matter at hand.

4. If permission by one of the Petitioner's ancestors was ever given, it does not make sense that this ancestor would give permission for someone to use a part of the real estate they were accessing (the Kelsoe tract) and not the rest of their real estate (the Baker tract). In other words, with all else being equal, one neighbor would generally not say to another, "you may use this road to get to the Kelsoe tract, but you can't go to the Baker tract while you're there."

5. Not one place or time was ever offered where an ancestor of the Petitioner gave permission to use the road. Mere acquiescence is not enough. In fact, in proving a prescriptive easement exists, the owner of the servient estate will almost always know about the use of the road by the dominate estate holder, because the use must be open and without objection by the owner of the servient estate.

6. The trial court requested that briefs be filed by each side at the conclusion of the bench trial, and stated that these briefs could be in the form of a Final Order. The trial court used almost all of the proposed Order/brief of the Respondent, because it was an accurate reflection of the trial, contained appropriate case cites to support the law referenced therein, contained appropriate conclusions of law, and Ordered reasonable results.

As a general response to the Petitioner's assignments of error, Respondent will acknowledge that it is entirely possible that one of the Petitioner's ancestors gave permission to the Respondent's predecessors in title to use the road. However, it is equally as possible that no permission was ever given by anyone. There is no one living today that can testify as to what happened in the past, either for or against the granting of permission. The trial court was limited to what evidence was presented, and made an accurate ruling based on same. The Petitioner assumes that his ancestors gave permission, but could very easily be surprised to hear different, if anybody was still living who could speak as to what the status of the Respondents use of the road was.

## II.

In response to the Petitioner's claims of fraud, negligent misrepresentation, and unjust enrichment, your Respondent would state the following:

All of the accusations that the Respondent conspired against the Petitioner in any way, or pressured him to sign a right of way are wholly unfounded. Short of filing a law suit, it would have taken the signature of the Petitioner to acquire a right of way over his land. Any papers which the Respondent requested the Petitioner sign, were provided to him to review at his leisure, and with the assistance of council, should he desire same. Contained in correspondence wherein the Respondent was trying to negotiate a written easement, the Respondent offered to pay \$2,000.00 to the Petitioners to buy a right of way, in order to avoid going to court! If anything, the Respondent bent over backwards to avoid having to file suit.

It is clear from the letters attached to the Petitioner's brief that the Respondent never promised to sell the land to the Petitioner. The Respondent is free to sell his land to whomever he wishes, absent a written contract to sell same to another.

Further, around June 23, 2003, the Petitioner placed a large culvert across the road, under the guise of repairing the roadway. With that being the case, the Respondent has not been able to use the road since that time. No repairs have been made to the road, however, some dirt was piled up against the culvert to make it more difficult to move. The Respondent took the Petitioner back to Court for Contempt on this issue on December 1, 2003, and again on January 28, 2004, at which time the

Petitioner was Ordered by the Circuit Court to remove the obstacle by May 1, 2004. The culvert has not been removed to this day, in direct contravention of the Circuit Court's Order. A picture of said culvert is attached hereto.

#### **CONCLUSION**

Appellant would state that the Findings, Conclusions and Orders heretofore entered in the Circuit Court of Hampshire County, West Virginia, and now being appealed, should be upheld as same are correct. The Appellant has not demonstrated unto the Supreme Court that the Trial Court erred in any way. It is obvious from the record that the Circuit Judge were aware of all facts and circumstances surrounding the road, and that the lower court did not act in an arbitrary or capricious manner and that there was no abuse of discretion in making these findings, which under the circumstances are logical, fair and equitable.

#### **RELIEF PRAYED FOR**

Respondent urges the Honorable West Virginia Supreme Court of Appeals to find and determine that the Circuit Court of Hampshire County, West Virginia, has neither erred nor abused its discretion its Final Order in this case, and uphold all prior rulings as set forth in the April 1, 2003, Order of the Circuit Court of Hampshire County.

BRIAN LAMASTER AND  
VIRGINIA LAMASTER, HIS WIFE  
SUCCESSORS IN INTEREST TO  
POBRO, LLC  
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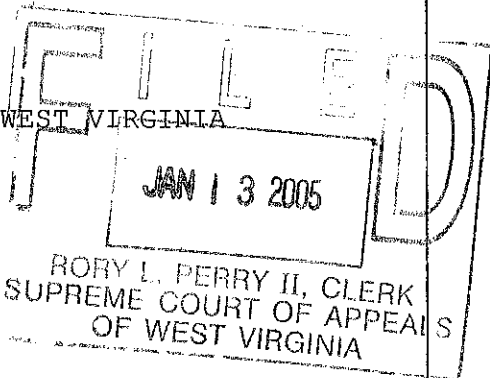
**CERTIFICATE OF SERVICE**

I, William C. Keaton, Counsel for Respondent, do hereby certify that I have served the foregoing Appeal Brief upon the Appellant by mailing a true copy thereof to the Appellant at their mailing address of RR 1, Box 214, High View, West Virginia, 26808, by U. S. Mail, postage prepaid, on this the 11th day of January, 2005.

Wm C Keaton

William C. Keaton

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**ADDENDUM TO RESPONDENT APPEAL BRIEF**

**STANDARD OF REVIEW**

"The Supreme Court reviews the Circuit Court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Grist Lumber v. Brown, 209 W.Va. 530 (2001).

BRIAN LAMASTER AND  
VIRGINIA LAMASTER, HIS WIFE  
SUCCESSORS IN INTEREST TO  
POBRO, LLC  
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**CERTIFICATE OF SERVICE**

I, William C. Keaton, Counsel for Respondent, do hereby certify that I have served the foregoing Addendum to Appeal Brief upon the Appellant by mailing a true copy thereof to the Appellant at their mailing address of RR 1, Box 214, High View, West Virginia, 26808, by U. S. Mail, postage prepaid, on this the 12th day of January, 2005.



William C. Keaton