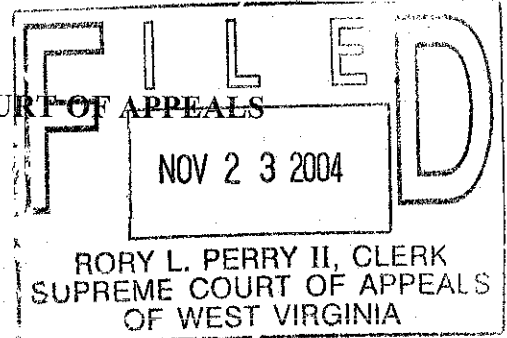


IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston



WILLIAM R. VIA,)
)
 Plaintiff/Appellant,)
)
 v.)
)
 RALPH BECKETT and,)
)
 JOAN BECKETT,)
)
 Defendants/Appellees.)
)
)

Appeal No.: 041290

BRIEF OF APPELLANT
WILLIAM R. VIA

APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

William R. Wooton
 THE WOOTON LAW FIRM
 Attorney at Law
 P.O. Box 2600
 Beckley, WV 25802
 (304) 253-2222
Counsel for Appellant

Table of Citations

<u>Citation</u>	<u>Page(s)</u>
<u>Aetna Casualty and Surety Company v. Federal Insurance Company of New York</u> , 148 W.Va. 160, 133 S.E.2d 770 (1963)	5
<u>Bank v. Catzen</u> , 63 W. Va. 535, 60 S.E. 499 (1908)	18, 19
<u>Belcher, et al. v. Powers, et al.</u> , 212 W.Va. 418, 573 S.E.2d 12 (2002)	18, 19
<u>Blain v. Woods</u> , 145 W.Va. 297, 115 S.E.2d 88 (1960)	13
<u>Graham v. Beverage</u> , 211 W.Va 466, 566 S.E.2d 603 (2002)	5
<u>Keller v. Landis</u> , 176 W.Va. 540, 346 S.E.2d 58 (1986)	16
<u>Lyons v. Fairmont Real Estate Co.</u> , 71 W.Va. 754, 77 S.E. 525 (1912)	22
<u>Maddy v. Maddy</u> , 87 W. Va. 581, 105 S.E. 803 (1921)	19
<u>Masinter v. WEBCO</u> , 164 W.Va. 241, 262 S.E.2d 433, (1980)	5
<u>Matheny v. Allen</u> , 63 W. Va. 443, 60 S.E. 407 (1908)	11, 13, 19
<u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	14
<u>Syl. Pt. 5, Connor v. Jarrett et al.</u> , 120 W. Va. 633, 633, 200 S.E. 39, 40 (1938)	11, 13
<u>Teas v. City of St. Albans</u> , 38 W. Va. 1, 17 S.E. 400, 406 (1893)	11
<u>Vandall, et al. V. Castro, et al.</u> , 81 W. Va. 76 (1917)	21
<u>Westover Volunteer Fire Department v. Barker</u> , 142, W. Va. 404 (1956)	21
<u>West Virginia Pulp & Paper Co. v. J. Natwick & Co, et al.</u> , 123 W. Va. 753 (1941)	11, 19

TABLE OF CONTENTS

Table of Citations.....ii

Procedural History.....3

Statement of Facts.....4

Standard of Review.....5

Summary of Arguments.....7

Argument.....8

I. The Circuit Court of Raleigh County erred in finding that there were no genuine issues of material fact and granting partial summary judgment in that it relied on testimony of Plaintiff's expert witness (surveyor James Wentz), taken out of context from a portion of the witness' deposition, to determine that both surveyors agreed as to the location of the boundary line in dispute.....8

II. On the question of the location of the line dividing the Via and Beckett properties there was credible evidence of the true intention of the common grantor, which evidence supported Plaintiff's position.....15

A. The conflict between this evidence alone and the evidence credited by the Circuit Court constitutes a genuine issue of material fact rendering summary judgment of this issue improper.....15

B. The Circuit Court of Raleigh County erred as a matter of law in not giving the proper weight to the intent of the common grantor.....17

III. Courses and distances descriptions are not monuments simply because they mirror those contained in the deed to adjoining property; only the adjoining property line itself is a monument. If the location of the adjoining property line is disputed, a courses and distances description of the line is not conclusive as to its location when there is other evidence of a higher priority, such as artificial monuments, which conflict with the location of the line as determined by the courses and distances description.....20

Conclusion.....22

PROCEDURAL HISTORY

In June 2000 William R. Via commissioned a survey of his properties located in the city of Beckley, Raleigh County West Virginia. This survey revealed that apartments owned by Ralph and Joan Beckett encroached on a portion of Mr. Via's property. After failing to reach an agreement with the Becketts regarding the boundary between their respective properties, Mr. Via filed suit in the Circuit Court of Raleigh County on July 24, 2000. The Defendants filed a timely answer to the Complaint, and on August 19, 2002 Defendants filed a Motion for Summary Judgment. The Motion for Summary Judgment was heard on August 29, 2002.

Thereafter, September 30, 2002, the Circuit Court entered an Order Granting Partial Summary Judgment. However, due to an error on the part of the Office of the Circuit Clerk, no party to the action was made aware of the entry of this Order.

On January 31, 2003 a hearing was held on Plaintiff's Motion to Join an Indispensable Party. During this hearing the parties became aware that the Court had previously entered an Order granting partial summary judgment as to the location of the boundary between the two properties.

A status conference was held on December 19, 2003. At that time, the parties agreed that the Order Granting Partial Summary Judgment had effectively dealt with all the issues in controversy. Accordingly, a Final Order was entered on February 26, 2004, dismissing the case.

STATEMENT OF FACTS

On May 10th 1996, Mr. Via obtained Via two parcels of real estate from James Ansel Lilly. Thereafter, on June 10, 1999, he acquired an adjoining tract of land from Mary Lou Simpson and commissioned a survey of his entire property. This survey indicated that a building owned by the adjoining property owners, Defendants, Ralph and Joan Beckett, was encroaching on the land of Mr. Via.

The property owned by Defendants, Ralph and Joan Beckett, was obtained from Robert and Evelyn Maples by deed dated December 7, 1972. The lot obtained by Mr. and Mrs. Beckett fronts on East Main Street in Beckley, and the rear of the lot borders one of the parcels obtained by Mr. Via by deed dated May 10, 1996. The eastern side of the Beckett lot shares a common boarder with the lot acquired by Mr. Via by deed dated June 10, 1999. The dispute in this case is over the location of that common boundary line.

The language in the deed description of the Via lot in question is as follows:

“Beginning at a corner of a lot of land conveyed to C. W. Tabor by W. H. Rardin and J.Q. Hutchison, Special Commissioners, by deed dated June 4, 1932, and of record in the Office of the Clerk of the County Court of Raleigh County, West Virginia, in Deed Book No. 113, at page 490, which is 150 feet from East Neville Street (now East Main Street); thence N. 65 10’ E. 111.3 feet, more or less, to a point on the west side of East Neville Street (now East Main Street) after the same has made a turn, and w/ the same N. 10 17’ W. 115.5 feet to another corner of said lot of land conveyed in said former deed; thence turning in a southerly direction and following a straight line to the point of beginning. “

This deed language is taken from the deed from Stansbury, Calloway, & Scott, Inc. to Perry Cook located in Trust Book T at Page 267 because the later deeds in the chain simply referenced back to the description in prior deeds rather than outlining a viable description.

The language in the Beckett deed reads:

“Beginning at a stake on the northeast edge of Neville Street (now commonly known as East Main Street) a fence post and corner to Daniel Boone; thence with said street N. 65 10 E. 47 1/10 feet to a stake, corner to Lot No. 2; thence w/ the line of the same a straight

line parallel to the line of the lot formerly owned by Tobin Stover, N. 10 30 W. 150 feet to a stake on an alley to a right of way, conveyed by Stansbury, Callaway, & Scott, Inc., a corporation, to Claude Jarrett; thence a straight line parallel to East Neville Street (now commonly known as East Main Street) and 150 feet distant thereto and with said right-of-way about 49 1/3 feet to a stake in the line of the fence of Daniel Boone; and thence w/ his line about 150 feet to the place of beginning.”

The Beckett and Via lots all share a common grantor, E. Clyde Scott, who obtained the property by a deed from Elizabeth B. Heaberlin and her husband dated August 30, 1918, and of record in Deed Book 64, Page 209, and by deed from J. L. and Lucy Hawley dated October 5, 1918, and of record in deed Book 64, page 312.

STANDARD OF REVIEW

This is a review from a Summary Judgment entered by the trial court. In reviewing summary judgment decisions by the trial court, the standard of

review to be imposed by this Court is as follows:

“A de novo standard is applied to our review of summary judgments. Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). Our review is guided by the longstanding and often quoted premise of syllabus point three of Aetna Casualty and Surety Company v. Federal Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963): “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Id. at 160, 133 S.E.2d at 771. We further note that in our examination of the circuit court's determination of whether there is a genuine issue for trial, this Court draws any allowable inference from the facts in the light most favorable to the losing party. Masinter v. WEBCO, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980).” Graham v. Beverage, 211 W.Va. 466, 566 S.E.2d 603 (2002).

SUMMARY OF ARGUMENTS

I.

The Circuit Court of Raleigh County erred in finding that there was no genuine issues of material fact, and in granting summary judgment, in that it relied on erroneous findings of fact to determine that Plaintiff's expert witness (surveyor James Wentz) agreed that the courses and distances description, N 10 30 W 150 feet is a monument.

II.

The Circuit Court of Raleigh County erred in finding that there was no genuine issues of material fact because in failed to consider credible evidence of the true intention of the common grantor to determine the location of the line dividing the Via and Beckett properties, which evidence supported Plaintiff's position. Furthermore, the Circuit Court of Raleigh County erred as a matter of law in not giving the proper weight to the intent of the common grantor.

III.

The Circuit Court of Raleigh County erred as a matter of law in concluding that identical courses and distances calls in deeds to adjoining tracts are monuments

ARGUMENT

I.

The Circuit Court of Raleigh County erred in finding that there were no genuine issues of material fact and granting partial summary judgment in that it relied on testimony of Plaintiff's expert witness (surveyor James Wentz), taken out of context from a portion of the witness' deposition, to determine that both surveyors agreed as to the location of the boundary line in dispute.

In the section of its Order Granting Partial Summary Judgment entitled "Findings of Fact", the Circuit Court found:

"8. In 2000, Plaintiff hired James Wentz, who completed a map of the lots in question. Mr. Wentz also considered the past deeds but concluded a different boundary line from Mr. Snodgrass because he followed the distance listed in the deeds instead of the call line bearing N 10 30 W 150 feet. *Although Mr. Wentz admitted that the common line in the deeds made that line a monument*, he gave greater weight to the distance calls because they also followed monuments. [Footnotes omitted, emphasis added]

"9. *Both surveyors agree that the call bearing N 10 30 W 150 feet is a monument.*" [emphasis added]

The emphasized portions above are simply incorrect. While Mr. Wentz admitted, as Plaintiff concedes herein, that calls to an adjoining property line are monuments, he never agreed that the courses and distances call N 10 30 W 150 feet is a monument, as is suggested in Finding of Fact No. 9.

The Circuit Court goes on in its Order Granting Partial Summary Judgment to use these erroneous findings of fact to conclude that there is no genuine issue of material fact. This

is first iterated within the circuit court's discussion of Defendant's Motion for Summary

Judgment:

"Therefore, the burden shifts to the plaintiff. Since the plaintiff's surveyor agrees that the common line called for in the deed is a monument, and monuments are given the highest priority by law, the plaintiff has not met its burden. Based upon that agreement, the Court finds that there is no genuine issue of any material fact concerning the boundary line."

The Circuit Court, in the preceding paragraph, makes it clear that its determination that no genuine question of material fact exists is based on its understanding of Mr. Wentz's deposition statements. However, this understanding is incorrect. While Mr. Wentz agreed that calls to adjoining property are monuments, it does not follow that no genuine issue of material fact exists, because there is evidence throughout the record that the location of the adjoining property line in question is the subject matter of the dispute. Mr. Wentz never agreed that the courses and distances description N 10 30 W 150 feet is a monument, let alone the controlling monument in this case. For example, in Mr. Wentz's deposition at Pages 10 – 11, Mr. Wentz clearly shows that he did not consider N 10 30 W 150 feet as a controlling monument:

"Q: Now, in the Trust Deed T at 268 which is the description of the Via lot, it clearly shows that the two lines which are the line between Beckett and Via and the line between what was called East Park Avenue at that time is exactly the same call, North 10 30 minutes West, 150 feet. They would be parallel line obviously. Looking at your map, obviously the two lines on the Via lot are not parallel?"

A: Correct.

Q: How did you arrive at the line you have drawn on the map between Beckett and Via?"

A: Well, as I stated, the Beckett deed does call for that line to be parallel to the former Tobin Stover line which is fixed on the westerly line of Beckett and also the footage from the Boone line calls for 49 and a third feet in the back which wouldn't allow us to make that line parallel to East Main, so we held to the distances rather than using that bearing. Gave it greater weight."

In the section of the Circuit Court's Order Granting Partial Summary Judgment entitled "Final Opinion of the Court" the judge reiterates that these facts are the basis for granting partial summary judgment:

"Accordingly, *since both surveyors agree* that the common line in the deeds is a monument, and monuments are to be given the highest priority when ascertaining a boundary line, there is no genuine issue of material fact concerning that property line." [emphasis added]

Again, it is obvious that the Court's grant of Partial Summary Judgment is based entirely on the supposed "agreement" between conflicting experts.

This agreement is ascertained from the following excerpt from the deposition of Mr. Wentz page 13 ¶¶ 13 – 23 and page 14 ¶¶ 1 – 7:

"Q: And you base your opinion that that's a proper description of the Via lot based solely upon the distance from the one-half inch pipe found on the corner of the Boone and Beckett lot. Is that correct?

A: Largely, yes.

Q: Now, both the original deed from Stansbury, Calloway, and Scott to Lewis and the trust deed from France to Callaway Scott which is the Via property, the original deeds and descriptions, both called for the exact same line, North 10 30 West between the two. Both refer to that line as being the boundary and that's what they say, so that's a natural description and monumented in each deed. Isn't that correct if they call for that line and describe it?

A: Yes.

Q: And both of them are North 10 30 West 150 feet?"

A: Yes."

It is hard to see how the Circuit Court could have ascertained anything from this excerpt because this line of questioning is flawed in several respects. First, the second question is convoluted and contains more than one question, making it unclear as to exactly what

proposition Mr. Wentz was being asked to agree with. Counsel began by stating undisputed facts to which the deponent would agree, and then, as part of the same question, in a non-straight forward and confusing manner, asked a question which calls for a legal conclusion. Was Counsel asking if the original deeds and descriptions both call for the exact same line? Was he asking if both refer to the same line as being the boundary? Was he asking if the courses and distances call is a "natural description"? Obviously, it is impossible to tell which statement in the "question" Mr. Wentz is answering based on his answer of "yes". Second, even if Mr. Wentz was agreeing that the line itself is a monument, the third question does not make it clear that he is agreeing that the course and distance description - North 10 30 West 150 feet - is, in and of itself, a monument as the Circuit Court infers. He only agrees that the boundary line is a description contained in each deed, and that both deeds describe the line as North 10 30 West 150 feet. Third, considering that throughout his deposition – both before and after this question – Mr. Wentz consistently testified that the courses and distances description – North 10 30 West 150 feet – did not accurately describe the location of the line dividing the Via and Beckett properties, the only logical interpretation to be placed on Mr. Wentz's last quoted answer is that he was only agreeing to the fact that this is the way the line is described in both deeds. Even more clear is that at no time during the deposition did Mr. Wentz state that he felt N 10 30 W 150 feet was the controlling call in this case or that N 10 30 W 150 feet was a monument, nor did he answer any question in a manner that would clearly impute this conclusion to him.

Mr. Wentz's above answers do not show, as the Circuit Court Order suggests, any acquiescence to the theory that N 10 30W 150 feet is a monument. On the contrary, Mr. Wentz makes clear throughout the deposition that in his opinion the directional and distance portions of

the description are inconsistent, and, when considering the deed as a whole, he chose to follow the distance portion as opposed to the directional portion.

In discussing the choice of survey method employed by Mr. Wentz, the Circuit Court noted in that section of its **Order Granting Partial Summary Judgment** entitled “Conclusions of Law”:

“The plaintiff is incorrect in the argument that the distance should be used no matter if it could have been the true intention of the parties or the fact that by using the distance instead of the magnetic call that the land closes better.”

The Circuit Court’s above conclusion is inconsistent with case law. In West Virginia Pulp & Paper Co. v. J. Natwick & Co, et al. the court holds that “In locating lands the following are some of the rules resorted to, and generally in the order stated: (1) Natural boundaries; (2) artificial marks; (3) adjacent boundaries; (4) courses and distances—course controlling distance, or distance, course, according to the circumstances”. West Virginia Pulp & Paper Co. v. J. Natwick & Co, et al., 123 W. Va. 753, 771 (1941), quoting Teas v. City of St. Albans, 38 W. Va. 1, 17 S.E. 400, 406 (1893). In light of the circumstances in this case - where the distance is more easily reconcilable with the other evidence than the course – it would be appropriate for choosing distance over course, as Mr. Wentz did.

Furthermore, “Finding of Fact” number eight (8) specifically shows that there is a genuine issue of fact—whether there are other monuments that should be given preference over the call for the adjoining tract. The law is clear that “in locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances”. Syl. Pt. 5, Connor v. Jarrett et al., 120 W. Va. 633, 633, 200 S.E. 39, 40 (1938), quoting Matheny v. Allen, 63 W. Va. 443, 60 S.E. 407 (1908). The artificial

monuments referenced by Mr. Wentz throughout his deposition (an old boundary fence, a corner half-inch pipe, an inch pipe at another corner) would take precedence over the adjacent boundary, particularly since it is not an **undisputed** adjacent boundary. In fact, Mr. Wentz not only states that there are other monuments, he states that in his capacity as an experienced Surveyor, he used these other monuments to determine the property line. (See Wentz Deposition Pages 5 – 6).

In its discussion of Mr. Wentz's deposition, the Circuit Court only gives passing mention to the testimony at Pages 16 – 17 beginning at ¶ 13 which show that Mr. Wentz finds there to be other monuments (found artificial marks) whose importance supercedes that of the adjoining boundary line. This line of questioning, which also shows the hesitance of Mr. Wentz to adopt the courses and distances as a controlling monument theory proposed by Defense Counsel, is as follows:

“Q: Now, descriptions in deeds when there are no original natural monuments would take precedence over something found later. Isn't that correct? I mean, you have to start, if you have two pieces of property, they both have the same line described are referred to, you would agree that that line would have to be the boundary line between the two pieces of property, wouldn't it, if there is no discrepancy between the two in both deeds?

A: Well –

Q: And both of them call for – Beckett's chain calls for the corner between Lot 1 and 2 and Via's chain refers to the corner between Lot 1 and 2 and this line is exactly the same, described by metes and bounds exactly the same on both deeds?

A: Well, this survey is based entirely on what we consider to be a monument found on the ground of the original Daniel Boone property, the fence line. And then holding to the deed distances from thereon, going out both streets rather than relying on magnetic bearings.”

The fact that Mr. Wentz chose to use these found artificial marks, as opposed to the metes and bounds description of the adjoining boundary, shows that he held them to be of higher priority. And the priority adopted by Mr. Wentz is the priority specified by this court in numerous decisions. Syl. Pt. 5, Connor v. Jarrett et al., 120 W. Va. 633, 633, 200 S.E. 39, 40 (1938), quoting Matheny v. Allen, 63 W. Va. 443, 60 S.E. 407 (1908); Blain v. Woods, 145 W.Va. 418, 115 S.E.2d 88 (1960);

In making its decision, the Circuit Court quotes this Court as stating that “calls in a deed for an adjacent tract of land are calls for a monument, and where the location of such adjoining tract of land is certain it becomes a monument of the highest dignity.” (emphasis added) While an undisputed (i.e. certain) adjacent boundary is itself a monument, there is no undisputed adjacent boundary in this case. The issue before the Court is the precise location of the line described by the said courses and distances description; given the issue, the courses and distances description of the line cannot be considered a monument, especially not a monument of such high quality as to alleviate all questions of material fact even in light of the other conflicting evidence, including found artificial monuments. Therefore, even if we were to follow the Circuit Court’s conclusion that the experts “agree”, the court has itself applied an erroneous conclusion of law. (See Argument III)

Defendants were entitled to a summary judgment only if there was “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” However, in this case there was evidence of artificial monuments, which would result in a different location for the disputed boundary line. The found artificial marks by law have priority

over either adjacent boundaries or courses and distances in determining the location of a disputed property line. Because the found artificial monuments support the position of Mr. Via, it could be argued that Mr. Via was entitled to Summary Judgment, rather than Mr. and Mrs. Beckett. At a minimum, the presence of found artificial monuments create a genuine issue of material fact as to the location of the property line, and therefore Summary Judgment was improper. The Circuit Court properly quoted this Courts ruling from Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 329 (1995) that “the circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Notwithstanding the Circuit Court’s accurate description of its function at the summary judgment phase, the Circuit Court in this case proceeded to “weigh the evidence”, and did so incorrectly in that all evidence of found artificial monuments were disregarded.

II.

On the question of the location of the line dividing the Via and Beckett properties there was credible evidence of the true intention of the common grantor, which evidence supported Plaintiff’s position.

A.

The conflict between this evidence alone and the evidence credited by the Circuit Court constitutes a genuine issue of material fact rendering summary judgment of this issue improper.

The Circuit Court’s decision effectively holds that when two metes and bounds descriptions in deeds to adjoining properties are the same, the metes and bounds description

itself becomes a monument. This is an illogical conclusion because matching metes and bounds descriptions just as likely, if not more likely, appears as a result of a common grantor's use of the same metes and bounds description obtained for the deed to the senior grant in the deed to the junior grant without checking for errors through a costly and time consuming second survey, than because of confirmed accuracy.

In his deposition, plaintiff's surveyor elaborated on the fact that the grantor's intent is not always clearly evidenced by metes and bounds descriptions. This portion of his deposition, located at Page 17 beginning with ¶ 11, reads as follows:

"Q: But you would agree that when somebody like Stansbury, Callaway and Scott, Inc. who were conveying that property from a larger tract who have obviously surveyed it, that's what they intended to convey is the metes and bounds description in the deeds would it not?

"A: No.

"Q: That's why you give a description isn't it?

"A: Well, yes. Their intentions are not necessarily what is written in the way of those metes and bounds though because they are sometimes flawed by the writer of those descriptions.

"Q: But they're both exactly the same as to the line between the two, both have the same common source and now conveyance of two lots adjoining each other, they describe.

A: Well, they were trying to make these lines parallel it seems. And there's a discrepancy in my mind or a conflict of which side that they're trying to parallel. That street or the Daniel Bone line? And that there is seems to me to be the question, which one is the parallel line. And mine is based on the -coming from the Boon/Tabor side and also when holding the distances given in Mr. Beckett's deed, it will hold to a parallel line with the Boone/Tabor line."

A trace of the deeds in the chains of title to the Via lot and Beckett lot reveal the common grantor's intent to subdivide his lot into three equal tracts. It appears that the N 10 30 W 150 feet

language was simply carried through the deeds inadvertently. This is evidenced, not only through the language of the deeds themselves and the placement of the remaining monuments, but through the results that acceptance of each of the two interpretations would yield. The Plaintiff's interpretation of the deed (based on Mr. Wentz's survey and consistent with the evidence of grantor's intent) would yield three parallel lots (consistent with the parallelism language in the Beckett deed and the artificial monuments found) with equal road frontage of 49.33. To accept the Defendant's interpretation, on the other hand, would essentially shift a large portion of the neighborhood. It would extend part of the Via lot into the road; it would leave Mr. Via's business and his house encroaching on Mr. Beckett's property; it would leave Mr. Beckett's building encroaching on Mr. Via's Property; and it would leave a substantial pie shaped gap unclaimed.

There are numerous plausible explanations for why the metes and bounds description might not accurately reflect the grantor's intent. For example, in Keller v. Landis, 346 S.E.2d 58 (W.Va. 1986) this Court upheld a Circuit Court's granting of directed verdict based on the fact that the Defendants had failed to rebut evidence that the metes and bounds descriptions were incorrect because of changes in magnetic north. This may or may not be an issue in this case, however, because the Circuit Court chose to call the metes and bounds description a monument of the highest dignity and failed to give any consideration to grantor's intent, Mr. Via never got to present his evidence as to what the grantor's true intentions were.

Defendants were entitled to a summary judgment only if there was "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." However, in this case there was evidence that the common grantor's intent is not served by

applying the courses and distances call N 10 30 W 150 feet. Because evidence submitted of the common grantor's intent support the position of Mr. Via, it could be argued that Mr. Via was entitled to Summary Judgment, rather than Mr. and Mrs. Beckett. At a minimum, the evidence that the common grantor's intent is not served by the interpretation advanced by Defendants and accepted by the Circuit Court shows there was a genuine issue of material fact as to the location of the property line. Evidence was presented tending to show that the metes and bounds description was inconsistent with the intent of the common grantor and evidence concerning why this discrepancy existed and how it should be resolved (i.e. concerning possible survey flaws that would lead to an inaccuracy or the movement of magnetic north) could have been presented at trial proving that Mr. Wentz's map of the property is consistent with the grantor's intent. Therefore Summary Judgment was improper.

B.

**The Circuit Court of Raleigh
County erred as a matter of law in
not giving the proper weight to the
intent of the common grantor.**

It appears that the Circuit Court's reasoning for finding that no material question of fact existed despite the evidence of the common grantors intent adverse to the courses and distances call stems from the Circuit Courts misinterpretation of (1) the law concerning that relevance of calls to adjoining property as opposed to matching courses and distances calls in deeds to adjoining property (See Argument III) and (2) the law concerning the importance of evidence of a common grantor's intent.

In Belcher, et al. v. Powers, et al., 212 W.Va. 418, 573 S.E.2d 12 (2002), this Court held that the intent of the common grantor is entitled to great weight. Holding that identical metes and bounds description of a line common in both deeds is despositive of the location of the line is not an effective means of following the grantor's intent and it is certainly not the law. However, that is in essence the ruling appealed from. Such a position is certain to yield a result contrary to the common grantor's intent when an erroneous survey was relied upon for both deeds, as was likely the case here. As *Belcher* case holds, "in construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith". *Id.* at 420, 14. In this case the Circuit Court erred in failing to consider the found artificial monuments, the clear evidence of the near even division of all the common property, and the argument concerning parallelism with the parcel adjoining the Becket property on the other side.

Belcher was not the first case in which the Court sanctioned the use of evidence of grantors intent. In Bank v. Catzen, 63 W. Va. 535, 60 S.E. 499 (1908), the Supreme Court of Appeals of West Virginia used evidence of the grantors clear intent as opposed to technical deed language to determine the legal boundaries of two adjoining properties. In that case the Court ruled that:

"the term 'eastern on-half', in a deed conveying one-half of a tract of land, in the absence of admissible parol evidence disclosing different intention, would mean the eastern half, formed by a line to be run due north and south through the tract; but, it appears that before the deed was executed a division into two parts, supposedly equal in area, had been made by a line, having a different bearing,

actually marked on the ground by stakes and fences, according to which possession had been held for a number of years, and the parties have since held possession according to such line, the words must be taken to mean the eastern one-half as so laid off and held in severalty". Bank at Syl. Pt. 4.

Furthermore, case law is clear that the Supreme Court of Appeals of West Virginia will not sanction a result that is clearly wrong simply due to strict adherence to technical deed language. In Matheny v. Allen, 63 W. Va. 443, 447 (1908), the Court held that "whenever a call is irreconcilable and incongruous with the other calls of a grant by which the survey may be located, and which call appears to have been inserted by mistake, it may be wholly rejected and disregarded". Then, in West Virginia Pulp & Paper Company v. J. Natwick & Company, et al., 123 W. Va. 753 (1941), this Court again elaborated during a discussion of preference of call types that "neither rule, however, occupies an inflexible position, for when it is plain that there is a mistake, an inferior means of locating may control a higher".

The rulings of this Court make clear that the underlying policy behind those decisions is the search for a just result. To achieve that end this Court has consistently ruled that trial courts must consider the deed as a whole, and try to ascertain the clear intent of the grantor. In Maddy v. Maddy, 87 W. Va. 581, 105 S.E. 803 (1921) this Court held that "In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." (See also Belcher, id.) It seems that the Circuit Court of Raleigh County, in its effort to sort through the technical rules and come to an expedient conclusion of this case, has neglected to consider the thread which runs throughout the line of property law

decisions of this court – the clear policy articulated in our case law, that courts should reach a just conclusion consistent with the other deed calls and the grantor’s intent. The decision in this case deviates from that policy, and will cause chaos. It will lead to several claims of adverse possession, lines will be moved, property use will be lost, and the efficient use of land in the neighborhood will be hindered. This is a clear case of a mistaken call, repeated in several deeds, which is inconsistent with the intention of the grantor, and which is in conflict with found artificial monuments, and the use of the land by current and past owners.

III.

Courses and distances descriptions are not monuments simply because they mirror those contained in the deed to adjoining property; only the adjoining property line itself is a monument. If the location of the adjoining property line is disputed, a courses and distances description of the line is not conclusive as to its location when there is other evidence of a higher priority, such as artificial monuments, which conflict with the location of the line as determined by the courses and distances description.

In that portion of its Order Granting Partial Summary Judgment entitled

“Conclusions of Law” the Circuit Judge opined:

“In concluding that the line is a monument, which is a conclusion of law, and that monuments are to be given the highest priority, thus leaving no issue of fact for a jury to decide...In this case, there is no dispute that the common line called for in both deeds to the lots is a monument because they reference the corner of the other lot and the line that runs from it as the property line. The Supreme Court has stated that when using adjacent boundaries, the “calls in a deed for an adjacent tract of land are calls for a monument and where the location of such adjoining tract of land is certain it becomes a monument of the highest dignity.” Therefore, the N 10 30 W 150 feet line is a monument as is given the highest priority.”

With all due respect, the Circuit Court has misapplied the above-quoted holding. The quoted language is from Vandall, et al. V. Castro, et al., 81 W. Va. 76 (1917), and was also quoted in this Court's opinion in Westover Volunteer Fire Department v. Barker, 142, W. Va. 404 (1956). In both of these cases, the Court holds that calls in a deed for an adjoining tract are calls for a monument. However, in both cases the boundary with the adjoining property was not in dispute. In fact, in both cases the deed actually listed the adjoining tract line as a boundary to the property in question. For example, in the Vandall v. Castro, 81 W. Va. 76 (1917) the deeds described the tract as joining the "Petty tract" and elaborated that the closing line of the tract in question was a line of the "Petty tract". This Court then held that because a non-disputed line of an adjoining property was listed as a common line of the property in question, the call indicating that the line ran with the line of the "Petty tract" became a monument.

The property description to the Via property does not contain a call to the line of an adjoining tract whose boundaries are not in dispute. Both the Via deed and the Beckett deed contain identical courses and distances description – N 10 30' W 150 feet. The location of the line described by that call is the subject of the dispute. There is a material question of fact as to the location of this line.

In this case the Circuit Court ruled that if the courses and distances description in a senior deed is identical with the courses and distances description in the junior deed, and if there is a property dispute, the courses and distances description itself becomes a monument. That is not the rule in West Virginia. The rule, articulated in the series of decisions of this Court, including those relied on by the Circuit Court, is that when a deed description uses an adjoining, **undisputed** property line as part of the description of property, then that adjoining undisputed


property line itself becomes a monument. However, when two properties share a courses and distances description of the line which is their common boundary, and the location of that boundary line is in dispute, clearly the courses and distances description of that line is not a monument. Thus, because there are found monuments and evidence of the location of past monuments, the courses and distances description as well as the call to the adjoining property line are secondary and do not control the location of the boundary between the two properties. Lyons v. Fairmont Real Estate Co., 71 W.Va. 754, 77 S.E. 525 (1912) (If there is inconsistency between the calls in a deed for courses and distances, on the one hand, and, on the other, an artificial monument, or its ascertained location when it has been removed or destroyed, the latter prevails.);

CONCLUSION

For the reasons set out above, Appellant, William R. Via hereby respectfully request this Court to reverse the Partial Summary Judgment Order in favor of Plaintiff and remand this case for further proceedings in which all evidence is heard and given its proper weight.

William R. Via

By Counsel


WILLIAM R. WOOTON
WV State Bar ID No. 4139
THE WOOTON LAW FIRM
PO Box 2600
Beckley, WV 25802-2600

