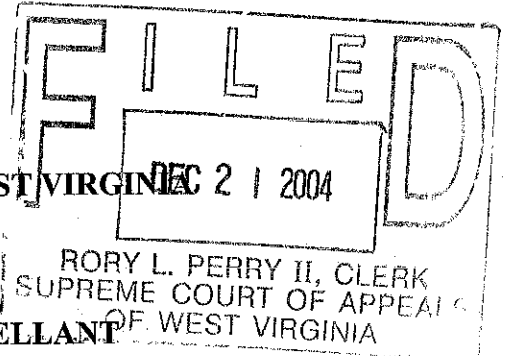


NO. 32055

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WILLIAM R. VIA,

APPELLANT

VS.

**RALPH BECKETT
and JOAN BECKETT,**

APPELLEES.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY

**RESPONSE BRIEF OF APPELLEES,
RALPH BECKETT
AND JOAN BECKETT
By Counsel,
W.F. Richmond, Jr.
304 South Heber Street
Beckley, WV 25801
State Bar #3095**

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POINTS AND AUTHORITY RELIED UPON BY APPELLEES

Vandall v. Casto, 81 W.Va. 76; 93SE 1044 (W.Va.).

Yonker v. Gainam 101 W. Va. 711; 133SE 695 (W. Va. 1926).

Westover Fire Department v. Barker 142; W. Va. 404:95 SE2d 802 (W. Va. 1956).

Gwynn v. Schwartz 9SE 880 (W. Va. 1989).

3A Michie's Jurisprudence Boundaries, Section 16.

3A Michie's Jurisprudence Boundaries, Section 4.

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**BRIEF OF APPELLEES,
RALPH AND JOAN BECKETT**

INTRODUCTORY NOTE

The plaintiff below, William R. Via, will be referred to as "Appellant"; the defendants, Ralph and Joan Beckett, will be referred to as "the Becketts"; Judge John A. Hutchinson, Judge of the Circuit Court of Raleigh County, will be referred to as "the Judge"; the Office of the Clerk of the county Commission of Raleigh County will be referred to as "the Clerk's office".

PROCEDURAL HISTORY

On July 24, 2000, Appellant filed suit in the Circuit Court of Raleigh County alleging that a garage apartment building on Beckett's property encroached on the Appellant's property, without alleging that this garage apartment building was constructed in 1937 or 1938 but requested the Court to award damages to the plaintiff for the encroachment and trespass in the amount of \$10,000.00.

The Becketts on August 4, 2000 filed their answer, which denied all material allegations in the complaint.

Thereafter, the deposition of James E. Wentz, a surveyor by experience but not by education, was taken on July 11, 2002, who had been employed by the Appellant to survey the lots owned by the respective parties.

The deposition of Harold R. Snodgrass, Civil Engineer, who was employed by the Appellant to survey Lot 2, the Lilly lot (Now Appellant's lot), but was listed as an expert witness by the Becketts, was taken on August 8, 2002.

Thereafter, Defendants by Counsel filed their Motion for Summary Judgment on the 19th day of August 2002.

At a hearing scheduled on August 29, 2002, the parties argued the Motion for Summary Judgment and at the conclusion thereof the Court took the Motion and Arguments under advisement and by order dated September 30, 2002, the Court granted the Defendant's motion for Partial Summary Judgment with respect to the location of the boundary line between Appellants' lot (Lot 2) and the Beckett's lot (Lot 1) and left remaining to be disposed of the issue of any encroachment. Although the order directed the Clerk to forward a copy of the order to the respective counsel for the parties, the order was not served on any party.

Thereafter, Appellant hired additional counsel who began filing irrelevant motions unrelated to the issues raised in the Complaint and Answer and subsequently a hearing was scheduled on Appellant's Motions for argument thereon. At the hearing, it was disclosed by the Court to the parties that the September 30, 2002 order had granted partial summary judgment on the boundary line issue and therefore, Appellant's motions

could only relate to the remaining issue of encroachment and or any claim for adverse possession.

The Court rescheduled the matter for a status conference on December 19, 2003 at which time Appellant had again employed additional counsel. At the hearing both parties advised the Court that based on the Court's granting of Partial Summary Judgment, there was no remaining issue of encroachment as the Beckett's were not claiming any encroachment by Appellant since the Lilly house, (now Appellant's) was built in the 1920's and therefore, the 2.92 feet encroachment of the Lilly house on Appellee's lot pursuant to the Court's establishment of the boundary line between the parties was not an issue as no counterclaim had been brought nor was ever contemplated. Therefore, by final order dated February 26, 2004, the case was dismissed from the docket of the Court by Agreed Order.

STATEMENT OF THE UNCONTESTED FACTS

On May 10, 1995, Appellant acquired two tracts of land, one of which fronted on East Prince Street and the other was immediately behind it and as designated as 15 foot alley from James Ansel Lilly, who inherited the tracts from his mother.

Some time after this purchase the Appellant discovered that the building located on the two tracts encroached on the D.V. Lilly tract (Lot 2) and possibly on the Beckett tract and he employed Harold Snodgrass, Civil Engineer, to survey the property. This survey showed that, in fact, the building on his 2 tracts encroached on both Lilly and Beckett. Appellant then purchased the Lilly lot on which the survey showed the house on the Lilly lot was an encroachment on Beckett's lot as well., The Lilly tract was designated as Lot 2 of the Stansbury, Calloway and Scott, Inc. lands that were conveyed

to N.S. Lilly by deed dated the 11th day of July 1924 in DB 90 at Page 6, which said properly had been purchased by Stansbury, Calloway and Scott, Inc. pursuant to a foreclosure sale pursuant to a Deed of Trust made by Perry A. Cook and wife dated the 25th day of October 1923 in Trust Deed Book T at 267 containing 7400 square feet, more or less. The deed from Stansbury, Calloway and Scott, Inc. dated the 25th day of October 1923 to Perry A. Cook and wife was evidently never recorded but the Deed of Trust made by Perry A. Cook et ux contains the description of said tract as follows:

Beginning at a stake at the intersection of East Neville Street, with East Park Avenue, thence with East Park Avenue, N 10° 30' W 150 feet to a stake; thence leaving said Avenue S 65° 10' W 49 1/3 feet to a stake, a corner to Lot No. 1; thence with the line of Lot No. 1 S 10° 30' E 150 feet to a stake at the edge of East Neville Street and thence with East Neville Street N 65° 10' E 49 1/3 feet to the place of beginning, containing 7400 square feet.

It should be noted that this description is the only description of the tract as all subsequent deeds simply referred back to this description. Also note that the description of this lot as set forth on Page 4 of the Appellant's brief is not the description of the lot in question, as set forth in Trust Deed Book T, at Page 267, as stated, but, is a completely different lot as N. S. Lilly obtained this lot by Deed dated the 11th day of July, 1924, and it stayed in the Lilly family until Appellant purchased it in 1997, and the quoted description is from a Deed dated sometime after 1932. (For convenience, I have attached a certified copy of Trust Deed Book 7, at Page 267 to show the description of Lot 2 {Appellant's lot}).

Stansbury, Calloway & Scott, Inc. was the secured party in the amount of \$5200.00 pursuant to a note executed by Perry A. Cook. Therefore, there must have been a deed from Stansbury, Calloway & Scott, Inc. to Cook of even date which would have

been the 25th day of October 1923, but it was simply never recorded or was not indexed under Cook or Stansbury, Calloway & Scott, Inc. However, this shows that Lot 2 was the Senior out conveyance by Stansbury, Calloway & Scott, Inc. of the 2 lots in question as by Deed dated May 13, 1924, Stansbury, Calloway and Scott, Inc. conveyed Lot 1 of record in the Clerk's office at Deed Book 90 at 251 to Richard Lewis and Elizabeth Lewis, his wife, (Beckett Lot) and it contained the following description:

Beginning at a stake on the Northeast edge of Neville 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 with the line of same a straight line parallel to the line of a lot formerly owned by Tobin Stover, N 10° 30' W 150 feet to a stake on an alley to a right of way, recently conveyed by the party of the first party to Claude Jarrett, thence a straight line parallel to East Neville 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 with his line about 150 feet to the place of beginning.

After Appellant obtained the Snodgrass survey, discussions were had between Appellant and Beckett. Beckett then requested Snodgrass to place the buildings on the map he had prepared for Appellant and rather than showing that Beckett's garage apartment was encroaching on Lilly, it showed that the Lilly house encroached on Beckett by 2.92 feet. (See Snodgrass deposition, Page 26.)

Thereafter, Appellant employed another surveyor to prepare a second map, and pursuant to the second map brought the suit in this matter.

ISSUE

Was the Circuit Judge clearly wrong in granting Partial Summary Judgment pursuant to Beckett's Motion for Summary Judgment since both original deeds of the

respective chains of title to the boundary line between said two lots call for the line of the other with exactly the same calls and distance?

ARGUMENT

For purposes of this brief, this writer does not believe it is necessary to reiterate the standard of review for Summary Judgment to this Honorable Court, believing that the members of the Court are fully aware of its case law as to the standard of review and the elements which must exist in the record for a Circuit Court to grant Summary Judgment.

Appellant goes to great length to state that his pure speculation of the intention of the makers of the two descriptions, to-wit: Stansbury, Calloway & Scott, Inc. was in 1923 and 1924, unfortunately all of these people are long since deceased and Plaintiff presented no evidence during the litigation of this Civil Action of any person or corporation, which would shed any light upon the intent of Stansbury, Calloway and Scott, Inc. However, Appellant has ignored the fact that the conveyance by Stansbury, Calloway & Scott, Inc. to D. V. Lilly dated May 13, 1924 in Deed Book 90, at Page 6 was the senior out conveyance from the larger tract and there is no ambiguity whatsoever in the description of Lot 2. The description referred to in the aforesaid Deed simply refers back to the description as contained in Trust Deed Book T, at Page 267, which described a parallelogram with East Neville Street on the front and an alley on the rear, the side lines are parallel to East Park Avenue and with the exact same calls and distances only reversed, being the second set of parallel lines and specifically describes a corner to Lot 1 (Beckett Lot) and states "thence with the line of Lot 1, S 10° 30' E 150 feet to a stake on East Neville Street." If intention can be inferred from a description, it is clear

from this description that the Grantor clearly intended Lot 2 to be a parallelogram using East Park Avenue as the outside determining factor as it was not perpendicular to East Neville Street, but turned down a hill at an angle, to-wit: N 10° 30' E and, therefore, the intent is rational based upon the lay of the land and the natural outside boundary created by the avenue. Also, since there is no ambiguity in this description and it is the senior out conveyance, how can the owner of said lot (Appellant) claim he is entitled to claim land outside of his own description based upon an ambiguity in a description in a subsequent Deed not in his chain of title? This is simply unconscionable in logic as well as common sense.

While there is, in fact, an ambiguity in the description of the Lewis' Lot 1, how can it be said to create any claim in Appellant? If one reviews the records in the Office of the Clerk of the County Commission of Raleigh County, with respect to the description of Lot 1 (Beckett's lot) the ambiguity is created by the insertion of "a straight line parallel to the line of a lot formerly owned by Tobin Stover." The peculiar aspect of this phrase is that Tobin Stover formerly owned the Boone tract. Since Tobin Stover had conveyed to Daniel Boone and the beginning corner is described as that owned by Daniel Boone, why would the phrase not have read "a straight line parallel to Daniel Boone" instead of stating "a lot formerly owned by Tobin Stover." This writer believes that this shows, rather than an intent to create a lot which is separated from the adjoining Lot 2 by a pie shaped gap, a clear clerical error because if the phrase is left out the description would read "Beginning at a stake on the northeast edge of Neville 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 with the line of same N 10° 30' W 150 feet to a stake on an alley to a

right of way, recently conveyed by the party of the first part to Claud Jarrett, thence a straight line parallel to East Neville 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, thence with his line about 150 feet to the place of beginning.” This description then would be internally consistent since it calls for the corner of Lot 2 and then describes the line of Lot 2 as being N 10° 30’ W 150 feet. This creates no gap between the two subject lots. It is beyond reason to infer that it was the intention of Stansbury, Calloway and Scott, Inc. to leave a pie shaped gap between these two lots, but that is what Appellant wants this Court to infer. This Supreme Court in Vandall v. Casto, 81 W. Va. 76, 93 SE 1044 clearly states that “calls in a deed for an adjoining 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 degree. (See also Yonker v. Grimm 101 W. Va. 711, 133 SE 695) The Court in Westover Fire Dept. v. Barker, 142 W. Va. 404 (1956) 95 SE2d 807 held that in every case, the lines of a senior grant, which are established in the record as being monumental lines, will prevent an overlap or an interlock. (See Gwynn v. Schwartz 9 S.E. 880, W.Va. 1889.)

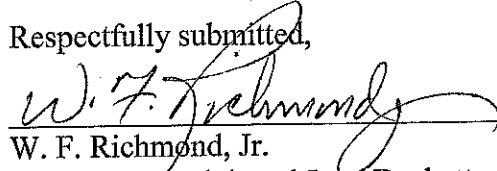
Appellant claims that you should completely disregard the call for the corner of Lot 2 and the description of the exact same line as contained in the senior out conveyance by metes and bounds and instead create the pie shaped gap by creating an undescribed line parallel to the Daniel Boone line based solely upon the discrepancy of the distance of the back line of the alley to the right of way being too short. However, the back line is described “thence a straight line parallel to East Neville Street and 150 feet distant thereto and with said right of way about 49 1/3 feet to a stake in the line fence of Daniel Boone.”

Since the use of the word about shows that the line was not measured but calls for the line to go to the stake in the fence line of Daniel Boone, the stake is an artificial monument which has a higher priority than a distance call. (See West Virginia Pulp & Paper Co. v. J. Natwick & Co., et al 123 W.Va. 753 {1941}).

CONCLUSION

It is respectfully submitted that the Court below faced with the descriptions in the original deeds in the respective chains of title and law as interpreted by this Court was required to grant the Beckett's partial Summary Judgment as there was no material fact to be decided as to the location and description of the line between the respective lots and since Appellant's counsel agreed at the final hearing that the Court's ruling granting Partial Summary Judgment on the location of the true boundary line disposed of all issues in the case since the true line is dispositive on the issue of any encroachment by the Becketts and the Becketts had not counterclaimed alleging any encroachment by Appellant or his predecessors and Appellant had not pled any claim for adverse possession or any part of Beckett's lot, there was no remaining issue to be decided by the Court, therefore, the Beckett's respectfully submit that the Court below was clearly and legally correct and, therefore, the Court's granting of Summary Judgment should be affirmed on this Appeal and Appellees costs and reasonable attorney fees should be assessed against Appellant.

Respectfully submitted,


W. F. Richmond, Jr.
Counsel for Ralph and Joan Beckett

NO. 041290

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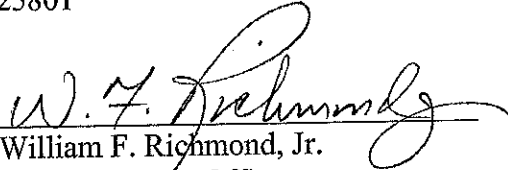
APPELLEES.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY

CERTIFICATE OF SERVICE

I, William F. Richmond, Jr., counsel for Appellees, do hereby certify that the foregoing **BRIEF OF APPELLEES** has been served upon counsel of record as indicated below by mailing a true and exact copy thereof to the following in a properly stamped and addressed envelope, postage prepaid, and depositing the same in the regular course of the United States mail this 20th day of December, 2004.

William Wooten
Attorney at Law
210 Main Street
Beckley, WV 25801


William F. Richmond, Jr.
Richmond Law Office
304 South Heber Street
Beckley, West Virginia 25801
WV Bar ID #3095

TDB T Page 267

TO : TRUST DEED

STANSBURY, GALLAWAY & SCOTT, INC.

THIS DEED made this the 25th day of October, 1923, by Perry A. Cook and Macie Cook, his wife, parties of the first part, and R. M. French, trustee, party of the second part,

W I T N E S S E T H : That for and in consideration of One Dollar (\$1.00), cash in hand paid, and in further consideration of the premises, the said parties of the first part do hereby grant and convey unto the said party of the second part, with covenants of general warranty of title, all the surface of that certain lot or parcel of land, located in the City of Beckley, Raleigh County, West Virginia, on East Neville Street, and bounded and described as follows:

BEGINNING at a stake at the intersection of East Neville Street, with East Park Avenue thence with East Park Avenue N 10 30 W 150 feet to a stake; thence leaving said Avenue S 65 10 W 49-1/3 feet to a stake, a corner to Lot No. 1; thence with the line of Lot No. 1 S 10 30 E 150 feet to a stake at the edge of East Neville Street, and thence with East Neville Street N 65 10 E 49 1/3 feet to the place of beginning, containing 7400 sq. ft.

All mineral and mineral rights heretofore conveyed are hereby expressly reserved from the operation of this conveyance.

IN TRUST NEVERTHELESS to secure Stansbury, Callaway & Scott, Inc. in the payment of one negotiable promissory interest bearing note, in the sum of \$6200.00, executed by the said Perry A. Cook, and payable to Stansbury, Callaway & Scott, Inc., at the Bank of Raleigh, at Beckley, Raleigh County, West Virginia, in 60 days after date, and to further secure any and all renewals of the said note, either in part or in whole, and it is expressly understood and agreed that the said Perry A. Cook is to be allowed to renew said note, every 60 days on the curtailment of the said note, in the sum of \$150.00 payment, with the interest and discount due on said note, and the parties of the first part further agree to carry insurance on the property hereby conveyed in, at least, the sum of \$4000.00, with a loss payable clause in said policy of insurance in favor of Stansbury, Callaway & Scott, Inc. as its interest may appear in case of fire.

Now if default is made in the payment of the said note, or any renewal thereof, either in part, or in whole, or if the parties of the first part should fail to carry the insurance as set forth above, then the said R. M. French, trustee, shall when so requested to do by the said Stansbury, Callaway & Scott, Inc., or any holder of the said note, or any renewal thereof, either in part or in whole, sell the property hereby conveyed at the front door of the Court House of Raleigh County, West Virginia, at public auction to the highest bidder for cash in hand on day of sale, but before making such sale he shall advertise the same as is required.

Witness the following signatures and seals:

STATE OF WEST VIRGINIA, PERRY A. COOK (SEAL)
COUNTY OF RALEIGH, to-wit: MACY COOK (SEAL)

I, Hugh A. Dunn, a Notary Public of the said County of Raleigh, do hereby certify that Perry A. Cook and Macie Cook, his wife, whose names are signed to the writing above, bearing date on the 25th day of October, 1923, have this day acknowledged the same before me in my said County.

Given under my hand this 25th day of October, 1923.

HUGH A. DUNN, NOTARY PUBLIC

My commission expires Nov. 18th 1924

WEST VIRGINIA,
RALEIGH COUNTY COURT CLERK'S OFFICE, OCTOBER 26, 1923
The foregoing INSTRUMENT OF WRITING, together with the certificate of acknowledgment thereon, was this day presented in said office and admitted to record.