SUPREME COURT OF KENTUCKY
Case No. 2018-SC-000577



ABBOTT, INC. and THE ESTATE OF JOHNNY BROWN RUSSELL, APPELLANTS,

VS.

On review from Kentucky Court of Appeals
Case No. 2016-CA-000394
Hopkins Circuit Court Case No. 08-CI-00177

SAMUEL GUIRGUIS, DARIN G. TABOR, DIANA P. HERRIN, HOMESTEAD AUTION & REALTY, INC., JAMES E. SPEAKS, DWIGHT E. WEST, Individually and as Executor of THE ESTATE OF BRENDA WEST, MICHAEL RUSSELL, Individually, and as Attorney-in-Fact for BRENDA RUSSELL, PATSY E. HOLLAND, and SHARON RUSSELL,, APPELLEES,

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# BRIEF FOR THE APPELLEE SAMUEL GUIRGUIS

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief for Appellee, Samuel Guirguis, was served by mailing the original to: Clerk, Supreme Court of Kentucky, 700 Capital Ave # 209, Frankfort, KY 40601; and a true copy of the same to: **HON. JAMES C. BRANTLEY**, Judge, Hopkins Circuit Court, Hopkins County Judicial Center, 120 East Center Street, Madisonville, Kentucky 42431; **RICHARD E. PEYTON, ESQ.**, Frymire, Evans, Peyton, Teague & Cartwright, P.O. Box 695, Madisonville, Kentucky 42431-0695; **TODD A. FARMER, ESQ.**, Farmer & Wright, PLLC, 4975 Alben Barkley Drive, Suite 1, P.O. Box 7766, Paducah, Kentucky 42002-7766; **THOMAS E. SPRINGER III, ESQ.** and **CHARLES W. BOTELER, ESQ.**, Springer Law Firm, PLLC, 18 Court Street, Madisonville, Kentucky 42431, **SHERYL G. SNYDER, ESQ.**, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, Kentucky 40202; **SHARON RUSSELL**, 1313 Farris Avenue, Murray, Kentucky 42071; **MICHAEL RUSSELL**, 1313 Farris Avenue, Murray, Kentucky 42071; **PATSY E. HOLLAND**, 1408 Poplar Street, Murray, Kentucky 42071; **MR. SAMUEL P. GIVENS JR.**, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; this 8th day of October, 2019.

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## I. STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Samuel Guirguis, believes that oral argument would not assist the Court in addressing the issues presented regarding the real property disputes in this appeal as well as the standard of review used by the appellate court.

## II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## I. COUNTERSTATEMENT OF THE CASE

Appellee/Plaintiff Samuel Guirguis is the current owner of a parcel of land located in Hopkins County, Kentucky. An abandoned railroad bed crosses Guirguis' property. In 2003, the Paducah and Louisville Railway Company ("P & L Railway") formally abandoned its use of the railway bed with its regulatory agency, the Service Transportation Board, formerly known as the Interstate Commerce Commission. It then removed its ties and rails, and in 2005 P & L Railway purported to sell the railway bed to Appellant/Defendant Abbot, Inc.

The property that adjoins the railway bed had previously been purchased by Appellees/Defendants West and Speaks from Appellant/Defendant the Estate of Johnny Brown Russell. It was West and Speaks who subsequently sold the property to Guirguis. After purchasing the land Guirguis learned that Appellant Abbot Inc, was claiming ownership of the railroad bed. It is the ownership of the railway bed that is at the heart of the lawsuit before the Court.

Abbott's claim of ownership of the railway bed resulted in it being added as a party to this case. It was later discovered that the legal effect of P & L Railway abandoning the railway bed was that the property reverted to the adjacent land owners. Therefore, the deed between P & L Railway and Abbott Inc. was a legal nullity.

According the affidavit of William Donan, at the time the railroad bed was purportedly purchased by Abbot, Inc, no fence existed, but some fence posts remained on the property. Since purchasing the property, Donan states

that has paid real estate taxes, mowed the property every year, and sprayed for vegetation. Donan raised a gate on the east side of the railway bed, but never built or repaired the fence that purportedly divided the railroad bed from the property now owned by Guirguis. (See affidavit of William Donan, Appellant's Brief Appendix C, Record on Appeal p. 1304-06).

After years of litigation, the Circuit Court entered judgment in favor Guirguis, finding that he was the owner of the railroad bed. The Circuit Court specifically found that under the Kentucky Court of Appeals case of *Illinois Central Rail Road v. Roberts*, P & L Railway had only acquired an easement in the railroad bed, which was abandoned as a matter of law. This left the 2005 quitclaim deed between P & L Railway and Abbott, Inc. as a legal nullity. The Circuit Court found that neither P & L Railway nor Abbott, Inc. was entitled to ownership of the railroad bed by adverse possession, and the doctrine of champerty did not bar Guirguis from ownerships of the railway bed.

This order did not explicitly resolve all of the pending claims before the Circuit Court. But with the ownership of the railway bed settled, all other claims were rendered moot, and the Circuit Court entered final judgment.

## II. ARGUMENT

### A. The Court of Appeals and the Circuit court correctly applied the legal rule that an abandoned railroad bed reverts the adjoining land owners, which has been the law in Kentucky for almost a century.

Under Kentucky law, when a railroad bed is abandoned, title vests in the owners of the adjoining property, up to the middle of the point of the abandoned easement. As the property is transferred, the title of the railroad bed

continues with the new grantee. It is undisputed that the railroad bed at issue in this case was abandoned. And it is undisputed that Guirguis is the only adjoining landowner.

"The rule is, that where land bounded on a highway is conveyed without reservation, or language showing a contrary intention, the grantee takes title to the center of the highway, and when the highway is abandoned, or vacated, the land reverts to the grantee discharged of the easement." *Henry v. Bd. of Trs.*, 207 Ky. 846, 847, 270 S.W. 476, 477 (1925). The same rule applies to properties adjacent to a railroad right-of-way. *Id.*

In this case, Guirguis' deed covers property adjacent to an abandoned railroad, and the deed was made without reservation or any contrary intent for the grantor to retain the railroad. Therefore, he, as the grantee, took title to the center of the railroad.

The Court of Appeals decision of *Illinois Central Railroad v. Roberts*, 928 S.W.2d 822, 824 (Ky. App. 1996), which both the circuit court and Court of Appeals relied on in ruling that the railroad bed belongs to Guirguis, is useful in demonstrating how the abandonment of a railroad bed effects the rights of the adjacent landowners.

The facts of *Illinois Central* are very similar to the case currently before the Court. "Sometime in the nineteenth century, the Mobile & Ohio Railroad Company laid a railroad line through Hickman County, Kentucky. The road subsequently came into the hands of Illinois Central. In 1979 Illinois Central formally abandoned "operation" of the road. The rails and ties were removed,

and thereafter Illinois Central attempted to convey by quit-claim deed a certain stretch of the 'right of way.'" *Illinois Cent. R.R. v. Roberts*, 928 S.W.2d 822, 824 (Ky. App. 1996).

As in this case, the record was unclear as to how the railroad was originally created. The court was "not furnished the exact construction date of the road, nor is the record clear as to how the railroad company originally acquired the right to construct the line." *Id.* at 825. And as in this case, despite the unclear record as to how the railroad acquired its rights, the persons who attempted to purchase the railroad right-of-way stated that the railroad had acquired ownership of the property, rather than a mere easement.

The Court of Appeals disagreed and reversed the trial court's judgment that the railroad had acquired ownership of the property. "Where no evidence exists as to the right acquired by a railroad to construct its roadbed, we think it reasonable to presume that as a matter of law a right-of-way easement--and not a fee--was acquired." *Id.* The Court further reasoned that "[w]e view a conclusive presumption in favor of a right-of-way easement as being most tenable where, as here, there are no deeds of original conveyance or any other evidence bearing upon the initial authorization to lay the line. *Id.*

In this case, there is no deed of conveyance, or any other evidence bearing upon the initial authorization to lay the line. Therefore, as in *Illinois Railroad*, there is a presumption in favor of a right-of-way easement.

This holding is consistent with Kentucky courts' long history of preferring easements over grants in fee simple when railroads take private property for their own use.

In *Rose v. Bryant*, 251 S.W.2d 860 (Ky. 1952), this Court stated "[I]t appears well settled that a deed executed pursuant to condemnation proceedings by a railroad company conveys only an easement in the property, and upon abandonment of the easement, the land reverts to the grantor or his successors in title." *Id.* at 861. In a similar case, the court held that it was general knowledge that much railroad right-of-way was expressly or by operation of law limited to an easement, which had been usually found sufficient for the purposes desired. *Sherman v. Petroleum Exploration*, 132 S.W.2d 768, 771 (Ky. 1939). In quoting from 16 Am. Jur. Deeds § 245, the Court went on to say:

> If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does but imply a grant of the easement forever.

*Id.* at 772.

Under Kentucky law, whenever a highway or railway is abandoned, title vests in abutting property owners on each side to the middle point of abandoned easement. *Potter v. Citation Coal Corp.*, 445 S.W.2d 128, 130 (Ky. 1969). Nor is it necessary "that the description in the deed shall in terms call for the highway, but sufficient if the conveyance be by lot, block or tract number, with

reference to a map or plat, which shows that the property abuts on a highway." *Henry v. Bd. of Trs.*, 270 S.W. 476, 477 (1925).

Because Guirguis is the latest successor-in-interest for both sides of the adjoining property, he took title to the railroad bed when he acquired the property from Speaks and West. Therefore, the decision of the Circuit Court and Court of Appeal should be affirmed.

**B. Numerous courts, both state and federal, have also ruled both that there is a presumption that railroads acquire only an easement, and that upon abandonment the property belongs to the adjoining landowners.**

Kentucky is not the only jurisdiction to have addressed this issue. Courts throughout the country have ruled that public policy favors easements over title in fee simple when a railroad acquires a right-of-way. Courts have nearly unanimously held that railroads possess mere easements, which they then lose when the railway is abandoned. *See e.g. Ross, Inc. v. Legler*, 199 N.E.2d 346 (Ind. 1964) (public policy construes conveyances to railroads for rights of way as easements); *Harvest Queen Mill & Elev. Co. v. Sanders*, 370 P.2d 419 (Kan. 1962) (railroads do not get fee simple title to rights of way); *Brown v. Weare*, 152 S.W.2d 649 (Mo. 1941) (public policy of state is that when railroad acquires right of way it takes an easement); *Pollnow v. State Dep't of Nat. Res.*, 276 N.W.2d 738 (Wis. 1979) (railroad right of way taken by condemnation is an easement).

Furthermore, Kentucky is not the only jurisdiction to determine who owns a railway after it has been abandoned. And once again, courts have been

nearly unanimous that it is the present owner of the adjacent property that owns the abandoned railway.

"At common law, the conveyance of land abutting a highway or street is presumed to carry title to the center of that roadway to the extent that the grantor has any interest therein, unless a contrary intent appears on the face of the conveyance." *Asmussen v. United States*, 304 P.3d 552, 556 (Co. 2013). And a vast majority of state supreme courts that have addressed the issue have extended this presumption from roadways to railways. *Id.* at 558, n. 5. This presumption was created "partly as an expression of public policy to avoid 'a prolific source of litigation' arising from 'narrow strips of land distinct in ownership from the adjoining territory.'" *Id.* at 556.

Other courts have stated the strong public policy reasons for both the presumption of an easement for railroad right-of-ways, as well as the return of the railway to the adjoining property owners.

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple. Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor—that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad

> service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property—more, that is, than a right of way.

*Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158, 1160 (7th Cir. 1992) (internal citations omitted).

Based on the fact that this litigation has gone on for more than a decade regarding a small section of the old railway crossing Guirguis' property, these public policy concerns about "a prolific source of litigation" over "narrow strips of land" is well founded.

### C. The railroad never acquired title of the railway bed by adverse possession, at most they acquired an easement which was later extinguished by abandonment.

The primary case relied upon by Appellant for its argument that the railroad acquired title by adverse possession is *Winston v. Louisville & N. R. Co.*, 160 Ky. 185, 186, 169 S.W. 597 (1914). But the facts of *Winston* are different than the facts before the Court, and any holding in Winston that would allow the railroad to acquire title by adverse possession of a right-of-way has been superseded by *Rose v. Bryant,* 251 S.W.2d 860 (Ky. 1952) and *Sherman v. Petroleum Exploration*, 132 S.W.2d 768, 771 (Ky. 1939).

In *Winston*, the railroad did not claim ownership of a section of track by adverse possession by merely its use of the property to place tracks, as is the case here. "[T]he track was also used for general railroad purposes such as for meeting of trains, placing cars for shipment, discharging freight to consignees in that neighborhood . . . , and for the storage of cars thereon." *Winston v.*

*Louisville & N. R. Co.*, 160 Ky. 185, 186, 169 S.W. 597, 598 (1914). The Court specifically found that the decisive factor was that the railroad used the property for general railroad purposes for a period of about 16 years. *Id.*

In other words, in *Winston* the railroad used the property as a train station. That is not the situation in this case. The railway in this case never used for any general railroad purposes. It was not used for the meeting of trains, placing cars for shipment, discharging freight, or the storage of cars. Therefore, *Winston* is inapplicable.

Acquiring a property by adverse possession when the property is used as a train station, as was the case in Winston, is a very different matter than attempting to acquiring title in fee simple by merely laying tracks, as was the case in *Illinois Cent. R.R. v. Roberts*. And under *Illinois Central*, once the railroad abandons the easement, it reverts to the property owners as a matter of law.

And even *Winston* was applicable, Appellant's interpretation of Winston was superseded by the above discussed cases of *Rose v. Bryant* and *Sherman v. Petroleum Exploration*, which held that railroad right-of-way in ambiguous cases was expressly or by operation of law limited to an easement.

It is for this reason that the Court of Appeals in *Roberts* stated that the legal authorities in Kentucky and the rest of the United States were in agreement that when a railroad is placed on private property, the result is an easement, and the railroad does not take the property in fee simple. As such, it is undisputed that "[t]he preference in favor of easements has enjoyed broad

acceptance as a well-founded rule of construction." *Illinois Cent. R.R. v. Roberts*, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996).

The public policy behind this preference in favor of easements is readily apparent. If a railroad is going to take someone's private property to operate the public good of a railroad, the property should revert back to the property owners whenever the railroad is no longer in operation.

In summation, the railroad in *Winston* used the property for general railroad purposes as a train station, and not merely as a right of way. And even if *Winston* was applicable to the facts of this case, it was superseded by subsequent cases which expressly provided that Kentucky law favors the creation of easements over ownership in fee simple when a railroad crosses private property.

**D. Under Kentucky law, the railroad bed does not need to be included in the deed for it to attach to the adjoining property after abandonment.**

Kentucky law has long recognized "that fixing the road line as a lot boundary does not prevent the grantee from acquiring a fee interest to the center of a street or highway. *Delph v. Daly*, 444 S.W.2d 738, 741 (Ky. 1969). And as discussed above, Kentucky law treats abandoned railway beds similarly to abandoned streets. "The 'main basis' for this rule is that it is unreasonable to suppose that the grantor intended to retain his fee title in the highway area since it is not likely to be of any practical importance to him." *Id.*

Therefore, the mere fact that the deed at issue did not expressly include the railroad bed does not prevent Guirguis from acquiring the fee to the center of the disputed railroad bed. For this reason, Abbott's argument that the

scrivener did not include the railroad bed in no way prevents Guirguis from having acquired a fee simple interest.

In this case, there is no reason to suppose that any of Guirguis' predecessors in interest intended to keep the railway bed. To the contrary, the 12 tracts described in Guirguis' deed have been used to transfer the entirety of the property from owner to owner for over 100 years.

According to the affidavit of Roger Lynn, a registered land surveyor, the railway bed crosses Guirguis' tracts 6 and 7. Record on Appeal p. 685). Likewise, surveyor Jake Selph concluded that while the description did not completely close mathematically, when Guirguis' tract 1 was actually plotted, it likely went up to or past the railway, thereby including it in the deed.

It is clear from the face of the deeds that all of Guirguis' predecessors in interest never intended to keep any portion of the property after transfer. Therefore, under Kentucky law, Guirguis possesses the fee interest to the center of the railway bed. And as owner of both sided of the adjoining properties, he owns the entirety of the railway bed that adjoins his property.

**E. Abbott Inc. did not adversely possess the railroad bed after the railroad abandoned its easement.**

Abbot has no claim for adverse possession of the railway bed, because any use of the property by P & L Railway resulted in a now abandoned easement. And Abbot has not purported to own the property for the required 15 years to support its own claim for adverse possession.

But even if Abbott had possessed the property for 15 years, it still would not be entitled to ownership of the property by adverse possession.

Likewise, Abbott is not entitled to void Guirguis' deed under the doctrine of champerty. In both cases, Abbott simply does not meet the possession requirements to avail itself of either doctrine.

To begin with, Champerty actions are not looked upon with favor under Kentucky law. "Champerty is a harsh statute. When one attempts to defeat a claimant's title by showing a deed in his chain of title was champertous because there was then an adverse possession of the premises, he must prove the possession was contemporaneous, adverse, hostile, and so open, visible, and notorious, that it would have been brought to the notice of an inquirer or intending purchaser." *Fordson Coal Co. v. Wells*, 245 Ky. 291, 299 (Ky. 1932)

"Sporadic acts of ownership are insufficient to show such possession as is necessary to invoke the champerty statute." *Stephenson Lumber Co. v. Hurst*, 259 Ky. 747, 754 (Ky. 1934). "Cutting down of timber over the course of forty years has been held as insufficient. *Price v. Ferra*, 258 S.W.2d 460 (Ky. 1953). Seeding and fertilizing land and later bulldozing the land, cutting hay every other year, and growing one corn crop was also found insufficient for adverse possession. *Kentucky Women's Christian Temperance Union v. Thomas*, 412 S.W.2d 869 (Ky. 1967).

In this case, no fence or structure separates the railroad bed from Guirguis' property. Even if such a fence once existed, at the time he purchased his property, only a few concrete posts remained. Given the complete lack of remnants connecting any of the posts, there is nothing that would warn a potential purchaser the railroad bed was not included in the purchase of the

remainder of the property. And while Abbott eventually constructed a gate on one end of the railroad bed, it never took any action to barricade or otherwise separate the railroad bed from the remainder of Guirguis' property. Therefore, Abbott's attempts to argue that it established a "well marked boundary" is without merit.

In other words, when Guirguis purchased his property, he had no way to know that Abbott, Inc claimed the railroad bed. The few fence posts merely supported the obvious conclusion that this was a railroad bed that had been abandoned by the railroad and had now reverted back to the rest of the property.

Nor did Abbott, Inc. use the property in such a way that would warn the prospective purchaser that they claimed the railroad bed. In this case, William Donan testified that since 2005, he paid real estate taxes, mowed the property every year, and sprayed for vegetation. (See affidavit of William Donan, Appellant's brief Appendix C). These are entirely the sorts of sporadic acts of ownership that Kentucky courts have consistently rejected as insufficient to support a champerty claim.

In *Gasho v. Lowe*, the Court found that the following facts were insufficient to support a champerty claims:

> Gasho had been claiming the property since he purchased it at the tax sale, and had been paying taxes thereon. He said that on complaint of persons in the neighborhood he had had a tree cut down on the lot, that he had planted a few fruit trees on it and had placed a "For Sale" sign on it. The question is: Did these circumstances constitute such adverse possession on the part of Gasho as to make the deed

> from Dr. Seifried to Lowe champertous? We think not. Gasho's claim to the property and the circumstances just discussed do not constitute such adverse possession as to make the deed to Lowe champertous.

*Gasho v. Lowe*, 282 Ky. 518, 522 (Ky. 1940).

This case is also similar to the case of *Vaughan v. Holderer*, where the Court held that "the fact that her father paid taxes on the property and that she cut the grass over a number of years does not constitute adverse possession that will ripen into title." *Vaughan v. Holderer*, 531 S.W.2d 520, 522 (Ky. 1975). This is because:

> The evidence of record does not show that appellee has ever occupied and possessed lot number seven in an open and hostile manner against the claim of all other persons. Lot number seven joined her property with no visible boundary marking. The fact that her father paid taxes on the property and that she cut the grass over a number of years does not constitute adverse possession that will ripen into title. *Kentucky Women's Christian Temperance Union v. Thomas*, Ky., 412 S.W.2d 869 (1967). The fence which was erected between lots numbers six and seven did not enclose the property and the record title holder was never cut off from access to or use of his property by act of the appellee.

*Vaughan v. Holderer*, 531 S.W.2d 520, 522 (Ky. 1975)

In this case, as in *Vaughan*, Guirguis was never cut off from access to the railroad bed from the remainder of his property. Because Donan occasionally cut the grass, sprayed weeds, and paid taxes is not sufficient to constitute adverse possession that will ripen into title.

All of the actions taken by Abbott in this case have consistently been rejected as insufficient to support an adverse possession claim. Therefore,

even taking all of its claims concerning its use of the disputed railroad bed as true, Abbott's evidence is legally insufficient to support a champerty claim. Abbott simply did not use the property in a way that was "contemporaneous, adverse, hostile, and so open, visible, and notorious, that it would have been brought to the notice of an inquirer or intending purchaser." *Fordson Coal Co. v. Wells*, 245 Ky. 291, 299 (Ky. 1932). Instead, these acts fall squarely into the category of "sporadic acts of ownership [that] are insufficient to show such possession as is necessary to invoke the champerty statute." *Stephenson Lumber Co. v. Hurst*, 259 Ky. 747, 754 (Ky. 1934).

Abbott next argues that it can make a claim for adverse possession and champerty under color of title, "in which case substantial activity on the land is not required." (Appellant brief p. 24). However, this is simply untrue under Kentucky law.

"So, where one has a deed, but not from the true title holder, yet enters under it, claiming adversely, his deed is admitted as evidence, not of title, but of extent of possession'. *Gatliff Coal Co. v. Lawson*, 247 S.W.2d 375, 377 (Ky. 1952).

"A potential disseisor who enters under bare color of title is no better off than one who enters without color and marks a distinct line around that which he intends to occupy. Each, if he acquires any rights, must receive them because of the nature of his dominion over the land for the statutory period." *Id.*

> The adverse possession necessary to create title does not consist of mental conclusions or intentions, but it must have for its basis the existence of physical facts, such as making an improvement upon the land,

> or doing other acts upon it, as will openly evince a purpose to hold a dominion over it in hostility to the title of the real owner, and such as will give notice to the real owner that the purpose is to hold it in hostility to his title.

*Id.* at 377-78. In other words, even if Abbott had a "duly recorded deed", it still must provide physical facts such as improving the land that will openly evince its purpose to hold dominion over the land. And the courts below correctly held that Abbott's sporadic activities upon the railroad bed did not meet the substantial activity necessary under Kentucky law to ever ripen into fee simple title.

The courts below made two distinct holdings regarding adverse possession. The first was that because the railroad only acquired an easement which was later abandoned, Abbott could not satisfy the 15-year statutory period to claim adverse possession.

The courts below also separately held that Abbott's possession of the property was such that it would never ripen into fee simple. And as discussed at length above, Abbott's possession was insufficient as a matter of law to claim adverse possession or champerty. For this reason, the Court of Appeals correctly affirmed the Circuit Court's holdings regarding adverse possession and champerty.

### F. The Circuit Court did not abuse its discretion when it denied Abbott's motion to recuse, a change in the law is unnecessary, and the result would be the same under a *de novo* standard of review.

The courts of this commonwealth have consistently applied an abuse of discretion standard when reviewing motions to recuse. See e.g. *Grubb v. Smith*, 523 S.W.3d 409, 428 (Ky. 2017) ("We review recusal decisions for

abuse of discretion."); *Dunlap v. Commonwealth*, 435 S.W.3d 537, 587 (Ky. 2013) ("we review a trial judge's denial of a motion to recuse for abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Dunlap v. Commonwealth*, 435 S.W.3d 537, 587 (Ky. 2013). KRS 26A.015(2) only requires recusal when a judge has "personal bias or prejudice concerning a party . . ." or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e).

This Court has consistently held that "[j]udges of this Commonwealth have a 'duty to sit' absent valid reasons for recusal. *Commonwealth of Kentucky, Revenue Cabinet v. Smith*, 875 S.W.2d 873, 879 (Ky. 1994). "The burden of proof required for recusal of a trial judge is an onerous one." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). "There must be a showing of facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.'" *Id.* "The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal." *Bissell v. Baumgardner*, 236 S.W.3d 24, 28-29 (Ky. App. 2007).

A brief review of the letters submitted by Appellant in support of its request for recusal shows that nothing in the letters rise to a level that would require recusal by the trial judge. Every communication submitted by Judge Brantley or his attorney were efforts to deescalate any tension, and to prevent

any future problems. Every communication shows that the judge did not want the situation to go any further. The judge made it clear he had no intention of having any argument with a neighbor.

These facts are not "of a character calculated seriously to impair the judge's impartiality and sway his judgment." *Stopher*, 57 S.W.3d at 787. Instead, they are "the mere belief that the judge will not afford a fair trial." *Bissell,* 236 S.W.3d at 28-29. And because there was insufficient evidence to require recusal, the trial judge had a duty to sit.

Appellants main argument appears to be that a change of the standard of review is required, from abuse of discretion to *de novo*. However, it has cited no cases where a Kentucky judge has been allowed to stay under an abuse of discretion standard, which would have been required to recuse under a *de novo* standard. Furthermore, it has cited no cases where a Kentucky judge has improperly denied recusal and was not overturned by the appellate courts.

The issue then is whether a change of law is even needed, as there does not seem to be any pressing need for a change in law. However, even if the Court applies a *de novo* review, the result would be the same. There is simply insufficient evidence to justify the recusal of the trial judge. Furthermore, even if the Court finds recusal was required, the issue would be moot if it rules that Guirguis is entitled to ownership of the railroad bed as a matter of law.

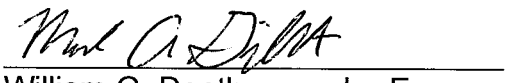
It also must be noted that this case has been litigated for almost a decade. And with this extensive record, Abbott has cited no instances of bias against it. Furthermore, as the judge correctly noted, he had no prior knowledge

of any of facts that were part of the litigation. He never expressed any prejudice against any party, and never expressed any indication of prejudging the facts or the law. Therefore, the denial of the motion to recuse was not an abuse of discretion, as Appellant has failed its onerous burden of proving the recusal was required.

## III. CONCLUSION

For these reasons, Appellee Samuel Guirguis respectfully requests that the Court affirm both the Circuit Court and Court of Appeals in their entirety.

Respectfully Submitted,



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