

15-1205

BERKELEY COUNTY  
CIRCUIT CLERK

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
2015 JUL 30 PM 2: 27

ARCHIE D. HOUCK,

VIRGINIA M. SINE, CLERK

*Plaintiff,*

v.

Civil Action No. 14-C-220  
Judge Gray Silver, III

GARRY THOMAS,

*Defendants.*

**ORDER**

This matter came before the Court on the 8<sup>th</sup> day of July, 2015 for the previously scheduled pre-trial conference. Mr. Houck was at the pretrial in person and by counsel, Wm. Richard McCune, Jr., and Alex Tsiatsos. Mr. Thomas appeared *pro se*. Former Defendant Russell Way, having been dismissed from this action, shall no longer appear on the caption of this matter.

The Court inquired of the parties how many jurors they thought were necessary. After some discussion, the Court and parties agreed to call 35 jurors. The Clerk noted that a list will be faxed to the parties at 4:00 o'clock on the evening before trial.

The Court inquired as to settlement discussions, and, after some discussion, it appeared to the Court that settlement would not be possible. The Court noted that this trial is scheduled behind an earlier trial Case No. 13-C-578. Accordingly, the July 21, 2015 trial date in this case is cancelled. Trial in this case is now scheduled for September 1, 2015.

The parties estimated three days of trial presentation before submission to the jury. The Court explained to Mr. Thomas the dangers of proceeding *pro se*. Mr. Thomas understood those risks and, nevertheless, indicated his willingness to proceed *pro se*. The Court noted that its practice is to have minimal objections before the jury, and if any more substantive discussions are necessary, to take the matter up in a sidebar conference.

cc: 7/30/15  
Wm. Richard McCune, Jr.  
A. Tsiatsos  
G. Thomas

Mr. Thomas will check with his homeowners insurance to determine whether there is coverage, and he will inform the Court and the parties.

The Court heard additional argument on the Plaintiff's pending motion for partial summary judgment. After consideration of the matter, the Court will at this time deny the motion by separate order. Plaintiff's Motion *in Limine* No. 1 is granted without objection. The jurors shall have a view of the property after the opening statement, and with respect to Motion *in Limine* No. 9, which also deals with the jury view, Plaintiff's counsel will submit a proposed instruction with an explanatory preface for the jury. Mr. Thomas shall not make any alterations to the property prior to the jury view, including staking out portions of the property.

The Plaintiff's second Motion *in Limine* excluding references to unrelated citations is granted over Mr. Thomas' objection. Mr. Thomas shall not make any reference to any alleged citation received by Mr. Houck or the underlying behavior giving rise to that citation concerning Mr. Houck's property.

Motion *in Limine* No. 3, the Plaintiff's motion to exclude any evidence of a previous boundary line adjustment, is granted. If Mr. Thomas can produce new evidence demonstrating the relevance of that adjustment, he must first approach the Court in a sidebar and ask the Court to reconsider this motion.

Motion *in Limine* No. 4, in which the Plaintiff seeks to exclude argument that Mr. Houck's prior use of the disputed right-of-way was permissive is denied; however, the Court informed Mr. Thomas that he would need to put on actual evidence of permissive use, not merely speculation, before he presented any argument or inference that any use of the right-of-way in question was permissive. He is specifically cautioned not to make argument concerning allegations not supported by facts which can be placed in evidence.

Motion *in Limine* No. 5, which was the Plaintiff's renewed motion for partial summary judgment, is denied at this time for the same reason that the motion for summary judgment was denied.

Plaintiff's Motion *in Limine* No. 6 is granted. Mr. Thomas shall not argue or suggest that he was in any manner justified in closing the right-of-way due to Mr. Houck's alleged failure to help maintain the right-of-way, nor shall he present evidence concerning any alleged failure of Houck to maintain the right-of-way in question.

With respect to Plaintiff's Motion *in Limine* No. 7, a motion to exclude statements of deceased former landowner, Mr. Canby, Mr. Thomas agreed that such statements are inadmissible, and the Court granted the motion without objection.

The Court granted Plaintiff's Motion *in Limine* No. 8, and will prevent mention of Mr. Thomas' injured son at trial. The Court and the parties agree that Mr. Thomas' son's injury is tragic, but the Court finds that his condition is not relevant to this case, and neither Mr. Thomas nor his witnesses shall be allowed to mention or otherwise display his son's condition in any manner or in any testimony before the jury.

The Plaintiff made an oral motion under Rule 408 to exclude offers of compromise. The Court granted that motion; however, the Plaintiff will provide a proposed instruction concerning the settlement with Mr. Way that will avoid settlement discussion, but still allow the jury to understand that Mr. Way, a former party to this suit, no longer presents an obstacle or objects to the right-of-way described in Plaintiff's Complaint.

The parties are together or, if necessary, separately, to provide the Court with a brief, four or five-line proposed joint statement of the case by Wednesday, July 15.

Mr. Thomas is to provide the Plaintiff and the Clerk with a copy of his exhibit list by July 15.

Mr. Thomas provided his statement of facts and witness list for the first time at the pretrial conference. Neither party objected to the other side's witness lists.

The Court provided the parties with a copy of its general jury charge. Plaintiff's counsel will combine Plaintiff's instructions into a jury charge, and send a copy to the Court and the Clerk and Mr. Thomas.

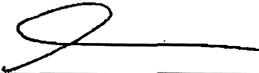
Plaintiff may file an amended verdict form by July 15.

The Court notes for the record the parties' objections to all adverse rulings. Specifically, the Plaintiff's objection to the Court's ruling concerning partial summary judgment, and Mr. Thomas' objection to the adverse Motions *in Limine* and the Plaintiff's objections to the adverse Motions *in Limine*.

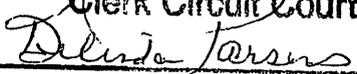
The Clerk is directed to transmit copies of this order to all parties, to counsel for the Plaintiff and to Mr. Thomas. The Clerk is directed to transmit attested copies of this Order to Plaintiff's counsel, McCune & Tsiatsos, PLLC at 115 West King Street, Martinsburg, WV 25401 and to the pro se Defendant, Garry Thomas, at 311 Beards Crossing Road, Hedgesville, WV 25427.

Entered: 7/23/15

*qkz*

  
The Honorable Gray Silver, III, Judge

**A TRUE COPY  
ATTEST**

Virginia M. Sine  
Clerk Circuit Court  
By:   
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

*Plaintiff,*

v.

Civil Action No. 14-C-220  
Judge Gray Silver, III

GARRY THOMAS,

*Defendant.*

2015 SEP -3 PM 3:43  
VIRGINIA N. SINE, CLERK  
BERKELEY COUNTY

ORDER GRANTING PARTIAL RULE 50 MOTION

This matter came before the Court on a renewed Rule 50 Motion made by Plaintiff Archie Houck, by counsel, at the trial of this matter after the close of the Defendant's case in chief on September 2, 2015. Based on the evidence presented, concessions by the parties and other matters appearing more fully on the record, the Court finds and concludes that the Defendant has been fully heard on the issues related to Plaintiff's claim for prescriptive easement and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue with respect to the following the first three elements related to prescriptive easements set forth in Syl. pt. 1, *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010).

Specifically, the Court finds and concludes that the evidence is clear and convincing that Mr. Houck's use of the alleged right of way was adverse for at least the period of 1981 to 1997, and that no reasonable juror could find to the contrary for purposes of accessing his family property. The Court finds and concludes that during that time, if not longer, Mr. Houck's use of the alleged right of way was continuous and uninterrupted, in the manner that any owner of a right of way would use it, as demonstrated by clear and convincing evidence. The Court further notes that Mr. Thomas has conceded this point and that no reasonable juror could find to the

9/3/15

*less than a 10 year period,*

cc

9-3-15

contrary. The Court also finds and concludes that, by clear and convincing evidence, that no

G Thomas  
W R Mc Lane  
A Tsatsos

*And otherwise the*

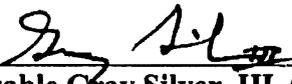
*9/11/11*

reasonable juror could ~~dispute~~ that the owners of the property over which Mr. Houck's alleged right of way travels had actual knowledge of Mr. Houck's adverse use or that a reasonable owner would have noticed the use.

Therefore, the Court GRANTS Plaintiff's Rule 50 motion with respect to those elements. The Motion is DENIED with respect to the final element, relating to the dimensions of the right of way. That issue remains for the jury, and the Court's denial of the motion with respect to that element in no way constitutes a factual finding with respect to that element. The Defendant may not raise the denial of this portion of the motion in any manner in closing argument to the jury or for any other purpose either directly or indirectly.

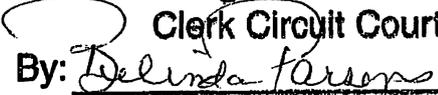
The Court notes for the record the objections of the parties to all adverse rulings contained herein.

The Clerk is instructed to transmit copies of this Order to all counsel and pro se parties of record.

  
\_\_\_\_\_  
The Honorable Gray Silver, III, Circuit Judge

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By:   
\_\_\_\_\_  
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

*Plaintiff,*

v.

GARRY THOMAS,

*Defendant.*

Civil Action No. 14-C-220  
Judge Gray Silver, III

2015 SEP 23 PM 4:14

**JUDGMENT ORDER FOLLOWING JURY VERDICT**

This matter came on for a jury trial on September 1, 2015. The Plaintiff, Archie Houck, was represented by counsel, Wm. Richard McCune, Jr., and Alex Tsiatsos. The Defendant, Garry Thomas, having been previously cautioned by the Court, at a prior hearing, about the complexity of the case and the advisability of procuring an attorney, nonetheless chose to proceed *pro se*. The Clerk called the roll of jurors, and all 35 jurors were present. The parties selected a jury panel of 6 jurors and two alternates. The Court thanked the other potential jurors for their attendance and service before excusing them.

The Court took up the matter of the admissibility of Roy Green's deposition as Mr. Green was unavailable to testify in person. Mr. Thomas did not object. The Court gave its pretrial instructions to the jury.

The parties then gave their opening statements, and the Court gave instructions to the jury concerning the viewing of the property that was to be had. The jury then viewed the property, accompanied by the Court, the parties, counsel for the Plaintiff, and Court security. Upon returning to the courthouse Plaintiff began his case in chief. Plaintiff's first witness was the Plaintiff, Archie Houck. He testified to his family history, his long use of the property and the right-of-way across Defendant's property, his continued use for over 10 years, his adverse use,

the fact that he didn't need permission to use the property, the fact that his right-of-way extended from Beards Crossing Road to his property, the damages he suffered as a result of the fence built by the Defendant and numerous other matters appearing on the record.

Upon motion of the Plaintiff, the Court admitted into evidence Plaintiff's Exhibit 1, which consisted of Plaintiff's exhibit binder; Plaintiff's Exhibit 2, which consisted of the repair estimate from David J. Bowen. At the end of the first day of trial, the Plaintiff finished Mr. Houck's direct examination.

On the second day of trial, September 2, 2015, the Defendant began his cross-examination of Mr. Houck. Mr. Thomas asked to publish to the jury photographs of the property with lines drawn over them. The Plaintiff objected. The Court allowed Mr. Thomas to publish the exhibits to the jury over the Plaintiff's objection. After the Plaintiff testified, Doug Houck testified to his knowledge of the right-of-way, and his and his family's long use of the right-of-way to access the Houck property, the fact that they never accessed the property in any other manner but through the right-of-way across Defendant's property. Similar testimony was heard from David Houck, who testified next. Following that, the Plaintiff called Robert Elliott, Danny Warren and Jay Fox, who testified to similar matters related to Mr. Houck's use of the right-of-way as the only access to his property and to other matters appearing on the record. Mr. Fox also testified to the fact that the Defendant previously tried to block the right-of-way. Mr. Elliott testified that no road existed through his property, which is now the Poffenbarger property, to the Houck property.

Next, the Plaintiff called Galtjo Geertsema. Mr. Geertsema was admitted as an expert witness in the field of land surveying. The Court also admitted into evidence Plaintiff's Exhibit No. 3, Mr. Geertsema's plat of the Evasic-Houck property swap, and Exhibit No. 4, United

States Geological Surface Map from 1950, showing the right-of-way connecting to Mr. Houck's property from Beards Crossing Road. Mr. Geertsema testified that there were no other roads available to access the property but the right-of-way across Defendant's property.

Next, the Plaintiff called Charles Calvin Bayer, a licensed realtor, who testified to his knowledge of the right-of-way and the property and to the listing of the Houck property for sale. He testified to the existence of the right-of-way, the fact that the Defendant Thomas knew of the right-of-way by virtue of its listing. He also testified that rights-of-way, although obvious on the ground, may not appear on tax maps. He also testified to other matters appearing on the record.

The Plaintiff then called Greg Yebernetsky, who was qualified as an expert witness in the field of land surveying, without objection. He testified to his 2015 measurements, to the dimensions of the right-of-way, to the fact that the right-of-way connected to Mr. Houck's property from Beards Crossing Road, that the right-of-way was 799 feet long, with an average of 14 feet wide. He testified to the fact that he met Mr. Houck on the property in 2012 and saw Mr. Houck drive across the right-of-way and park on the Houck property. He also testified to other matters appearing on the record.

The Plaintiff then called David J. Bowen, who was qualified, without objection, as an expert in the field of general contracting and home repair. He testified to the damage caused by two years of neglect as a result of Defendant Thomas' erection of the fence. He testified that had Archie Houck been able to visit the property within those two years he could have prevented such damage which was caused by water and termites, and he testified that the repair cost would be at least \$5,331.48.

The Plaintiff then called Lori Houck, who testified to her and her husband's long use of the right-of-way, their enjoyment of the property, the fact that the right-of-way was the only

access to their property, and that there was no other access, to the stress and difficulties caused by this trial, and other matters appearing on the record.

The Plaintiff then put on the testimony of Roy Green by deposition. Plaintiff ended his case in chief. Plaintiff made a Rule 50 motion at the end of his case in chief. The Court denied that motion, and noted the Plaintiff's objection.

The Defendant began his case in chief, and called first his wife, Ms. Victoria Duvall-Thomas. She testified that she and the Defendant purchased the property in 1997, and that she had no knowledge of the use of the right-of-way or other matters related to the property prior to 1997. She testified to other matters both on direct examination and cross-examination appearing more fully on the record.

The Defendant himself then took the stand, and gave a narrative of his testimony. He was cross-examined by Plaintiff's counsel. His testimony and the cross-examination appear on the record.

At the end of the Defendant's case in chief the Plaintiff made a renewed motion under Rule 50. By separate order the Court granted that motion in part, but left for the jury issues concerning the dimensions of the right-of-way.

On the third day of trial, September 3, 2015, the Court made a preliminary ruling that punitive damages would be allowed to be presented to the jury. The Court found there was sufficient evidence to justify submission of punitive damages to the jury due to the intentional nature of the erection of the fence, which the Court found to be an intentional act that the jury could find was designed to block Mr. Houck's use of the road. The Court found that the jury could conclude that Mr. Thomas acted in a reckless, intentional, harmful way, or with criminal indifference to civil obligations. The jury could conclude based upon the evidence that

Defendant Thomas intended to block Plaintiff Houck's access to his property and knew that, by building the fence, he would prevent Plaintiff Houck from accessing his property, thus causing Mr. Houck financial harm.

The Court ruled that, first, the jury would make findings as to liability, compensatory damages, and then, if the jury returned a verdict of liability and awarded compensatory damages, the jury would be instructed subsequently and separately as to punitive damages. The Court instructed the jury concerning the effects of its Rule 50 order granting partial judgment for the Plaintiff. The Court then provided its general charge to the jury, along with the instructions submitted by the Plaintiff, without objection by the Defendant. The Court notes that the instructions contained the following language with respect to an award of attorneys' fees:

"The Court instructs the jury that, in some cases, one party may have to pay another party's attorney's fees. Specifically, if one party acts either in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons, then that party may have to pay the other party's attorney's fees. The law considers a party's actions to be 'vexatious if they are troublesome or annoying and lack sufficient ground.' A party's actions are 'wanton' if they were done intentionally. A party's actions are 'oppressive' if they are unjust, burdensome, harsh and wrongful. A party's actions are 'in bad faith' if they are dishonest in belief or purpose."

The parties then made their closing arguments and the jury began its deliberations. During deliberations, the jury presented a question to the Court concerning the Plaintiff's alleged survey costs. The jury asked who ordered the survey, and why. After reviewing the matter with counsel and Mr. Thomas, the Court instructed the jury that it needs to recall the evidence and rely upon its own recollection of the evidence.

Prior to the jury's verdict, the Plaintiff learned through Alternate Juror Allen Finfrock, who had been discharged just prior to the jury's commencing deliberations, who had chosen to remain in the courthouse, and who approached Plaintiff's counsel, that Mrs. Duvall-Thomas, when the jury was viewing the property, made improper contact with at least one juror, allegedly disclosing to a juror that the alleged reason that Defendant Thomas built the fence was regarding the needs of their disabled son. The Plaintiff requested the Court to go upon the record in order to note Plaintiff's argument that, if Mr. Finfrock's statements were true, this would mean that Defendant Thomas may have violated the Court's prior order granting Defendant's Motion in Limine that Defendant Thomas was precluded from mentioning the Defendant's injured son to the jury. The Plaintiff asked to poll the jury to determine whether any members had been contacted by Mrs. Duvall-Thomas. The Court noted that it would investigate the matter in the context of motion for a mistrial without hearing the verdict, or the Plaintiff could accept the verdict and then consider filing a Rule 59 motion without inquiring of the jurors at this time. Plaintiff noted his objection to the Court's ruling that he could not inquire of the jurors immediately after hearing the verdict, but elected to hear the verdict.

The jury returned its verdict, finding that Mr. Houck had, indeed, established a right-of-way by prescriptive easement across Defendant Thomas' property from Beard's Crossing Road to the Houck property, finding the length of the right-of-way to be 799 feet, and the width to be 14 feet in average. The jury found that Mr. Thomas' actions were intentional, and that he intended to deprive Mr. Houck of the use of his right-of-way and access to his property. Specifically, the jury answered "YES" to the following two questions on the verdict form:

2. Please state whether you find that Garry Thomas intentionally blocked the right-of-way of Archie Houck to the Houck property.

3. Please state whether you find that Garry Thomas, in blocking that road and in keeping it blocked, did so with the intent of permanently depriving Archie Houck from the use of the right-of-way, recognizing that in so doing he was purposely depriving Archie Houck from the use of the right-of-way in question.

The jury awarded Mr. Houck \$5,331.48 in actual damages related to the financial harm of the repair costs caused by the Defendant, and further found that the Defendant's actions met the standard set forth in the Court's instruction such that the Defendant should pay the Plaintiff's attorneys' fees. In light of the Court's instructions and the jury's findings with respect to attorneys' fees, the Court finds and concludes that Defendant acted in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons. The jury awarded no damages for annoyance, aggravation, and inconvenience. The jury form was signed by Foreperson Jess Amick.

Upon the finding of compensatory damages and the finding of intentional conduct, the Court instructed the jury as follows with respect to punitive damages:

"In addition to the instructions that the Court previously provided to you, the Court instructs the jury that damages referred to as 'punitive damages' are used to punish certain defendants for their intentional, reckless or harmful conduct, and to deter other people from behaving in the same way. Punitive damages are also available when the defendant exhibited reckless conduct or criminal indifference to civil obligations.

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

The jury may consider the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware that his

actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by him, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once the defendant's liability became clear to him.

If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant and others.

If you find that Defendant Thomas intentionally obstructed Mr. Houck's access to his property, you, the Jury, may consider punitive damages against Defendant Thomas in this case. In assessing punitive damages, you may consider that the punitive damages should remove any profit which Defendant Thomas may have incurred, and you may consider the reprehensibility of Defendant Thomas's conduct, and assess punitive damages to punish Defendant Thomas for the reprehensibility of their conduct. You may further assess punitive damages in such a sum as you believe would discourage future bad acts by Defendant Thomas or by others similarly situated who might otherwise attempt to conduct themselves in a similar manner in the future."

The Court then allowed the parties to present closing arguments on the issue of punitive damages. After arguments, the jury deliberated and returned with a verdict for punitive damages in the amount of \$15,000 in favor of Mr. Houck and against Mr. Thomas. In light of the Court's instructions and the jury's finding, the Court finds and concludes punitive damages were justified and that Defendant Thomas's actions caused an injury to the Plaintiff's property, that the Defendant's actions were willful, and that the Defendant's actions were malicious. The Court's

post-trial review of the punitive damages award follows further within the body of this Judgment Order.

With respect to attorneys' fees, the exact amount shall be determined by the Court. The Plaintiff's Post-Trial Motion Regarding Attorneys' Fees was filed September 15, 2015. The Court will set briefing thereon by means of a Trial Court Rule 22 Scheduling Order also to be entered as of today's date. Upon completion of the briefing cycle, the Court will schedule a hearing on the attorneys' fee award.

WHEREFORE, it is adjudged and ordered that, based on the verdict of the jury, Mr. Thomas shall pay to Mr. Houck the sum of \$5,331.48 in compensatory damages for the cost of repair, as determined by the jury, with interest accruing as of September 3, 2015, at the legal rate; and the amount of \$15,000 in punitive damages, with interest accruing as of September 3, 2015, at the legal rate.

Upon post-trial review, the Court finds and concludes that punitive damages are permissible and appropriate in this case for the following reasons. First, under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), and its progeny, the Court finds and concludes that the Defendant's tortious actions were malicious, oppressive, or wanton, willful, or constituted reckless conduct or criminal indifference to civil obligations affecting the rights of Mr. Houck, thus authorizing the jury to assess punitive damages against the Defendant.

Second, under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), the Court examined aggravating and mitigating criteria and finds and concludes that punitive damages were permitted and appropriate. Such damages bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. The jury properly considered the reprehensibility and malicious nature of the

defendant's conduct, namely, that the Defendant knew that he was preventing the Plaintiff from accessing his property but did so anyway and without good cause. The jury properly took into account how long the Defendant continued in his actions, namely for the duration of the litigation. The jury also properly heard evidence concerning the Defendant's knowledge that his actions were causing or were likely to cause harm. The Court finds that the evidence showed that the Defendant failed to make reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

The Court finds and concludes that the punitive damages award would discourage future bad acts by the Defendant or others similarly situated.

The Court finds and concludes that, as a matter of fundamental fairness, punitive damages bear a reasonable relationship to compensatory damages. The \$15,000 punitive damages award by the jury is a modest amount in absolute terms, and it bears a reasonable relationship to the \$5,331.48 award of compensatory damages. The Court finds that this award is appropriate based on the costs of the litigation to the Plaintiff (in excess of \$112,000 based on billing records submitted by the Plaintiff in Plaintiff's post-trial submission). The Court finds that \$15,000 is an appropriate amount to encourage fair and reasonable settlements when a clear wrong has been committed.

The Court finds no basis for mitigation. The jury knew all relevant facts with respect to such damages, and the Defendant faces no criminal sanctions or other lawsuits which duplicate the purpose of punitive damages.

Using the \$5,331.48 in repair costs alone, the Court finds that the ratio of punitive damages to compensatory damages in this case is approximately 2.81/1. The Court finds and concludes that that ratio is reasonable and permitted under the rule set forth in *TXO Production*

*Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992) which authorized a 5/1 ratio of punitive damages to compensatory damages in cases where there was no intent to harm. In this case, in light of the jury's finding with respect to the intentional nature of the Defendant's actions, a permissible jury's award could have exceeded the 5/1 ratio. Nevertheless, the 2.81/1 ratio is permissible.<sup>1</sup>

The Court orders that, based on the jury verdict, Mr. Thomas also shall pay Mr. Houck his reasonable attorneys' fees as determined by the Court through the appropriate post-trial motions. As the prevailing party, Mr. Houck is entitled to recover from Mr. Thomas the costs of this litigation. Those amounts shall be assessed by the Clerk.

Following the verdict, Mr. Thomas agreed to reopen the right-of-way within one week, and based on that agreement the Court orders that he shall remove his fence in both places where it blocks the right-of-way no later than September 10, 2015. Pursuant to applicable law, Mr. Houck may use the right-of-way in the manner that he used it prior to Mr. Thomas' fence. *O'Dell v. Stegall*, 226 W. Va. 590, 619, 703 S.E.2d 561, 590 (2010) ("Our law is clear that a right-of-way acquired by prescription for one purpose cannot be broadened or diverted, and its character and extent are determined by the use made of it during the period of prescription. When an easement has been acquired by prescription, the extent of the right so acquired is measured and determined by the extent of the user out of which it originated") (citations omitted). Without Mr. Houck's agreement, Mr. Thomas may impose no restrictions contrary to

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<sup>1</sup> The jury also found that the Defendant should pay the Plaintiff's attorneys' fees. The Plaintiff has represented that those fees and costs exceed \$112,000. To the extent that those fees and costs are compensatory damages, the ratio of punitive to compensatory damages would be approximately 0.12/1. This further justifies the punitive damages award. *See, e.g., Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 737 S.E.2d 640, 646 (2012) (holding that attorneys' fees are compensatory damages under the Consumer Credit and Protection Act and surveying other cases finding that fees are compensatory damages generally).

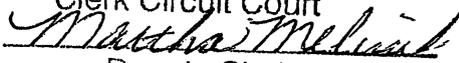
this rule. Moreover, Mr. Thomas is hereby ordered not to harass Mr. Houck with respect to his use of the right-of-way. Any further disputes concerning the right-of-way shall be addressed in a manner according to law.

The Court notes for the record the objection of all parties to any adverse ruling contained herein to the extent that such objections were preserved according to the applicable Rules of Civil Procedure. The Clerk is directed to transmit attested copies of this order to all counsel and *pro se* parties of record.

Enter: 9/23/15

  
\_\_\_\_\_  
Gray Silver, III, Judge  
Berkeley County Circuit Court

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court  
By:   
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

*Plaintiff,*

v.

Civil Action No. 14-C-220  
Judge Gray Silver, III

GARRY THOMAS,

*Defendant.*

**ORDER DENYING DEFENDANT'S MOTION FOR RETRIAL**

This matter came before the Court on this 17<sup>th</sup> day of November, <sup>2015</sup> upon Motion by Defendant Garry Thomas for what he terms a "Retrial" and the response thereto by Plaintiff Archie Houck.<sup>1</sup> For the reasons stated below, and for good cause shown, the Court DENIES the motion. The Court finds and concludes as follows.

In his Motion, Defendant Thomas asks for "retrial" based on allegations concerning the admissibility of certain surveying documents produced at trial. The Court finds that the Yebernetsky plat was included in the Plaintiff's exhibit binder and the Geertsema Plat was subsequently admitted.

The Court finds and concludes that Mr. Thomas made no objection to the exhibits along the lines he now proposes, namely the relationship between Plaintiff's counsel and the surveyors. Had Mr. Thomas wanted to raise such issues, he was obligated to raise them at the time. He could have asked either surveyor about his relationship with Plaintiff's counsel. He could have tried to impeach their testimony. He could have objected to the surveys on any permissible ground. He did none of those things.

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<sup>1</sup> Mr. Thomas is cautioned to make sure that he provides copies of all his filings to opposing counsel.

Had Mr. Thomas not intentionally blocked off Mr. Houck's right of way, trial would have been unnecessary. However, having forced Mr. Houck to trial, Mr. Thomas was obligated to put on a defense. The Court expressly and clearly warned Mr. Thomas about the dangers of proceeding *pro se*, but Mr. Thomas nevertheless assumed the risk of representing himself. "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996) (citation omitted)). By failing to object to the evidence at the time, Mr. Thomas has waived any challenge to the evidence now. W. Va. R. Evid 103 (a)(1)(B) (requiring a timely objection to preserve a claim of error with respect to an evidentiary ruling). *Coleman v. Sopher*, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997) ("an objection to evidence must be timely and specific in order to give the trial court an opportunity to address the issue at a time when corrective action may be taken"); *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 316, 496 S.E.2d 447, 458 (1997) ("A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date") (citations omitted);

Mr. Thomas does not cite any standard governing motions for new trials, nor does he allege any of the grounds that would justify a new trial. He has identified no error, prejudicial or otherwise, that has entered the record because he waived any assignment of error when he failed to object to the Plaintiff's exhibits. Mr. Thomas did not raise at trial any of the evidentiary challenges he attempts to raise now. After a three day jury trial, it is simply too late.

His arguments now, besides being waived, must fail on their merits. For example, he seems to argue that exhibits do not comply with certain surveyor standards and are thus "illegal." From this, he seems to infer that the exhibits should not have been admitted and that a new trial

should be ordered. However, the Rules of Evidence govern questions of admissibility and evidence. Syl. pt. 3, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907, 908 (2013). (“The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts”) (citation omitted)). Mr. Thomas has provided no explanation of why surveyor standards have anything to do with either the weight or admissibility of the evidence under the West Virginia Rules of Evidence. The Court found at trial that the documents were admissible and Mr. Thomas (in addition to having waived objections at the time) has provided no argument that would cause the Court to reconsider its earlier rulings.

New trials are not favored under the law. *State ex rel. Meadows v. Stephens*, 207 W. Va. 341, 345, 532 S.E.2d 59, 63 (2000) (“We have often stated that a trial judge should rarely grant a new trial”). This Court will not undo an amply supported jury verdict on the basis of untimely evidentiary objections that would have failed even had they been raised in a timely manner. The Court therefore DENIES Mr. Thomas’s Motion.

The Court notes for the record the objections of the parties to all adverse rulings herein. The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

Entered: 11/17/15

  
\_\_\_\_\_  
The Honorable Gray Silver, III Circuit Judge

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court  
By:   
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

*Plaintiff,*

v.

Civil Action No. 14-C-220  
Judge Gray Silver, III

GARRY THOMAS,

*Defendant.*

**ORDER DENYING DEFENDANT'S REQUEST FOR MISTRIAL OR RETRIAL AND  
OBJECTION TO RULE 50 JUDGMENT**

This matter came before the Court on this 17<sup>th</sup> day of November, 2015 on the "Request for mistrial or retrial and Objection [to] Rule 50 judgment" filed by Defendant Thomas and the response thereto filed by the Plaintiff. For the reasons stated below, and for good cause shown, the Court DENIES the motion. The Court finds and concludes as follows.

In his Motion, Defendant Thomas first asks for a retrial or mistrial apparently on the grounds that he wished he could have had a negotiated settlement with Mr. Houck. As the Court ruled in its pre-trial orders, however, settlement negotiations are not admissible. W. Va. R. Evid. 408(a) ("Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim"). In any event, Mr. Thomas cites no authority and provides no reasoning whatsoever for the proposition that his failure to

settle the case justifies a mistrial or a retrial, as he puts it. Nothing prevented Mr. Thomas from making a settlement offer at any time. He can still make an offer now.

Next, Mr. Thomas seems to try to reargue some of the testimony concerning Mr. Houck's access to his property. But those issues were decided by a jury. The West Virginia Constitution, in Article III, section 13 states "[n]o fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law." Mr. Thomas has not cited or articulated any cognizable standard for post-trial relief with respect to the factual issues in question.<sup>1</sup> Although he appears to ask for reconsideration of the jury's finding (which would suggest a motion pursuant to Rule 59), the Supreme Court of Appeals has repeatedly held that, after a jury verdict, Rule 50 is the proper procedural vehicle. See *Williams v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797, fn. 3 (2003). Under the Rule 50 standard, however, a court must consider "the evidence in the light most favorable to the nonmovant party . . . every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence." Syl. pts. 1 and 2, *Akers v. Cabell Huntington Hosp., Inc.*, 215 W. Va. 346, 348-49, 599 S.E.2d 769, 771-72 (2004). If reasonable minds can differ about the evidence, a Rule 50 motion should not be granted. *Id.*

Mr. Thomas does not allege (much less prove) any of those possible grounds for reconsideration of the jury's finding. There has been no change in the controlling law. No new evidence not previously available has come to light. In fact, Thomas repeats some of the same arguments he made to the jury about Mr. Houck's access. There is no error of law, clear or

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<sup>1</sup> Mr. Thomas's request for a "mistrial" is procedurally impossible at this stage. *Vilar v. Fenton*, 181 W. Va. 299, 299, 382 S.E.2d 352, 352 (1989) ("Prior to the entry of the verdict by a jury, a mistrial is procedurally possible; however, declaring a mistrial after the jury verdict is rendered is improper").

otherwise, and there is no injustice. The jury simply chose to believe Mr. Houck and his witnesses and not Mr. Thomas.

Moreover, by failing to make a Rule 50 motion during trial, Mr. Thomas has waived the right to present it now because, pursuant to rule, there is no motion to renew. See Rule 50(a) (2) (“Motions for judgment as a matter of law may be made at any time before submission of the case to the jury”) and (b) (discussion *renewed* Rule 50 motion after verdict).

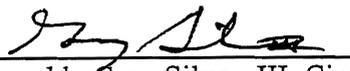
Mr. Thomas next repeats some of the same arguments he made concerning surveyor evidence admitted on behalf of the Plaintiff during trial. Again, he seems to argue that certain plats were not approved for recording purposes by the planning commission and that the contractor who testified on behalf of Mr. Houck did not have proper licensing and insurance. From this, he seems to infer that the exhibits and testimony should not have been admitted and, astonishingly, that a new trial should be ordered. That argument is without merit. As the Court knows, the Rules of Evidence govern questions of admissibility and evidence. Syl. pt. 3, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907, 908 (2013). (“The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts”) (citation omitted). Mr. Thomas has provided no explanation of why standards for recording plats or insurance or licensing requirements for a contractor have anything to do with either the weight or admissibility of the evidence under the West Virginia Rules of Evidence.

Finally, Mr. Thomas objects again because witnesses did not attend trial after he tried to serve them with subpoenas. Mr. Thomas does not provide the subpoenas or the responses thereto as part of his motion, but accepted the risk of such problems when he decided, despite the Court’s warnings, to proceed pro se.

Therefore, and for the reasons stated above, the Court DENIES Defendant Thomas's motion.

The Court notes for the record the objection of the parties to all adverse rulings contained herein. The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

Entered: 11/17/15

  
\_\_\_\_\_  
The Honorable Gray Silver, III, Circuit Judge

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By: \_\_\_\_\_  
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ARCHIE D. HOUCK,

*Plaintiff,*

v.

Civil Action No. 14-C-220  
Judge Gray Silver, III

GARRY THOMAS,

*Defendant.*

2015 DEC 10 AM 10:46  
VIRGINIA BERKELEY COUNTY  
CLERK OF COURT

**ORDER GRANTING PLAINTIFF'S POST-TRIAL MOTION REGARDING  
ATTORNEYS' FEES**

This matter came before the Court on motion by Plaintiff Archie Houck, by counsel, asking the Court to award him attorneys' fees and legal costs following the September 3, 2015 jury verdict in this matter establishing Mr. Houck's entitlement to such fees and costs. The Court has considered the opposition to this motion filed by Defendant Gary Thomas, by counsel. The Court further held a hearing on this matter on November 17, 2015. For the reasons stated below, after considering the affidavits, submissions, arguments and evidence of the parties, and for good cause shown, the Court GRANTS the motion. The Court finds and concludes as follows.

**I. Factual Background**

*926 III*

The plaintiff filed this case claiming that the defendant intentionally and wrongfully blocked the plaintiff's right of way, a right of way which the plaintiff claimed that he ~~had~~ <sup>And</sup> his family have used for over ninety years.

Based on depositions taken, including the depositions of individuals who testified that the defendant knew of the plaintiff's need to use the right of way but blocked it anyway, the court

allowed the jury to be instructed on the standard for fee shifting based on a party's intentional acts. Specifically, the Court instructed the jury that:

“in some cases, one party may have to pay another party's attorneys' fees. Specifically, if one party acts either in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons, then that party may have to pay the other party's attorney's fees. The law considers a party's actions to be “vexatious if they are troublesome or annoying and lack sufficient ground. A party's actions are “wanton” if they were done intentionally. A party's actions are “oppressive” if they are unjust, burdensome, harsh and wrongful. A party's actions are “in bad faith” if they are dishonest in belief or purpose. If you find that Defendant Thomas acted in bad faith, vexatiously, wantonly or for oppressive reasons, then you may order him to pay Mr. Houck's attorneys' fees.”

Jury Charge. *See, e.g.,* Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d 246, 247 (1986) (“[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as “costs,” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons”); *Newcome v. Turner*, 179 W. Va. 309, 312, 367 S.E.2d 778, 781, fn. 5 (1988) (defining “vexatious” with respect to legal actions in fee shifting context); 22 C.J.S. Criminal Law § 52 (“The words ‘wanton,’ ‘wantonly,’ and ‘wantonness’ mean the doing of an act intentionally”); Black's Law Dictionary (Deluxe 7th ed. 1999), p. 1121 (defining “oppression” as “the act of an instance of unjustly exercising authority or power”); *Masinter v. WEBCO Co.*, 164 W. Va. 241, 251, 262 S.E.2d 433, 440 (1980) (defining oppressive conduct by corporations as conduct which is “burdensome, harsh and wrongful conduct”) (citations omitted); Black's Law Dictionary (Deluxe 7th ed. 1999), p. 134 (defining “bad faith” as “Dishonest of belief or purpose”).

On September 3, 2015, the jury returned its verdict in this case, specifically answering “YES” to the following question on the verdict form: “Please state whether, pursuant to the instructions of the Court, you find that Defendant Garry Thomas acted either in bad faith or

vexatiously or wantonly or intentionally or for oppressive reasons such that you find that Plaintiff Archie Houck is entitled to the reasonable attorneys' fees that he incurred in this case."

In its post-verdict judgment order, the Court noted that it heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck's use of the right of way as the only access to Mr. Houck's property, but Thomas closed the right of way anyway. See Judgment Order, pp. 2-4. Moreover, as the Court noted: "[t]he jury found that Mr. Thomas' actions were intentional, and that he intended to deprive Mr. Houck of the use of his right-of-way and access to his property. Specifically, the jury answered "YES" to the following two questions on the verdict form:

2. Please state whether you find that Garry Thomas intentionally blocked the right-of-way of Archie Houck to the Houck property.

3. Please state whether you find that Garry Thomas, in blocking that road and in keeping it blocked, did so with the intent of permanently depriving Archie Houck from the use of the right-of-way, recognizing that in so doing he was purposely depriving Archie Houck from the use of the right-of-way in question."

Judgment Order, pp. 6-7. The Court also noted that the jury "further found that the Defendant's actions met the standard set forth in the Court's instruction such that the Defendant should pay the Plaintiff's attorneys' fees." *Id.* at 7. The Court then concluded that "[i]n light of the Court's instructions and the jury's findings with respect to attorneys' fees, the Court finds and concludes that Defendant acted in bad faith or vexatiously or wantonly or intentionally or for oppressive reasons." *Id.*

The Judgment Order was entered September 23, 2015. Following the verdict, however, on September 11, 2015, Mr. Houck filed a post-trial motion for the attorneys' fees, providing a detailed breakdown of billing entries and asking for a specific amount of fees pursuant to the jury's general award. Mr. Houck's motion, which included supporting affidavits, discussed the

relevant factors under Syl. pt. 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986) (“Where attorney’s fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney’s fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases”).

Mr. Thomas did not challenge the attorney fee award until he filed his response to the plaintiff’s motion for a specific fee amount on October 8, 2015. Utilizing the counting rules under W. Va. R. Civ. P. 6, the response was filed 11 days after the Judgment Order,

## **II. Discussion of Law**

For the reasons found by the jury and set forth in the Court’s Judgment Order, the Court finds that there is no genuine dispute that Mr. Houck is entitled to an award of attorneys’ fees. The record demonstrating the intentional nature of Mr. Thomas’s actions is ample. The Court heard evidence from multiple witnesses demonstrating that Mr. Thomas knew of Mr. Houck’s use of the right of way as the only access to Mr. Houck’s property, but Thomas closed the right of way anyway. As set forth in the Court’s Judgment Order, under the circumstances, controlling West Virginia law authorizes awards of attorneys’ fees in such cases as an exception to the American Rule. Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d

246, 247 (1986) (“[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as “costs,” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons”).

Mr. Thomas’s Response does not address these findings and conclusions by the jury and the Court. Instead, he states that because Mr. Houck’s earlier summary judgment motion was denied, “the suit is not frivolous.” Mr. Thomas argues that attorneys’ fees should not have been awarded against him because his defense survived summary judgment. But whether or not a court grants summary judgment is not the standard for fee shifting. As stated above, Mr. Thomas’s intentional actions – overwhelmingly proven by the evidence – justified the award of attorneys’ fees against him under the applicable case law. Therefore, under *Sally-Mike Properties v. Yokum* the Court’s judgment that attorneys’ fees should be awarded against Mr. Thomas was correct as a matter of law.

Moreover, it is now too late for Mr. Thomas to challenge Mr. Houck’s general right to attorneys’ fees. That right was decided by the jury in its verdict of September 3, 2015, and adjudged by the Court in its Judgement Order Following Jury Verdict of September 23, 2015. While Mr. Thomas now suggests that the jury verdict may only be “advisory” (Response, p. 1), the Court’s findings and conclusions in its Judgment Order were not advisory. They represent the Court’s reasoned and final judgment. Although it was not always easy to decipher Mr. Thomas’s previous pro se filings (some of which were not served on counsel), it appears Mr. Thomas did not ask the Court to alter or amend that judgment with respect to Mr. Houck’s entitlement to attorneys’ fees within the 10 day period provided by Rule 59 of the West Virginia Rules of Civil Procedure. Therefore, any challenge to Mr. Houck’s right to attorneys’ fees must now fall under Rule 60. *See Savage v. Booth*, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996)

“If a motion is filed within ten days of judgment, the motion is treated as a motion to alter or amend judgment under Rule 59(e). Alternatively, if it is filed more than ten days after entry of judgment, we look to Rule 60(b) to provide the basis for analysis of the review”).

Although he is making his arguments in a response rather than a motion, Mr. Thomas is effectively seeking relief from the judgment (entitling Mr. Houck to an award of attorneys’ fees) more than 10 days from the date of the judgment – thus he is making a Rule 60 argument. However, Mr. Thomas has not articulated the Rule 60 standard, nor has he attempted to make any arguments under the Rule. Accordingly, Mr. Thomas’s challenge to the judgment must be denied. *See Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W. Va. 692, 706, 474 S.E.2d 872, 886 (1996) (“A circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it. In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled”).

Mr. Thomas next argues that the amount of attorneys’ fees sought by Mr. Houck is too high because some of the charges relate to work necessitated by Thomas’s former co-defendant, Russell Way, and those charges should not be Mr. Thomas’s responsibility. Although Mr. Thomas has not challenged any specific billing item, Mr. Houck’s counsel has voluntarily removed charges identified as being for work performed solely with respect to Mr. Way in the amount of \$2,940, and another \$18.75 that was erroneously included on the billing statement.

At the hearing in this case, the Court heard testimony from Richard McCune, who is Mr. Houck’s lead attorney, concerning the remaining charges. Mr. McCune testified the litigation work before the Way settlement would have been the same regardless of the number of defendants. According to Mr. McCune’s testimony, that work was necessary to marshal the facts

and the law to prove Mr. Houck's right of way whether there was only one defendant or a dozen defendants. The evidence further showed that following the settlement, Mr. Houck incurred the bulk of the charges and those charges are attributable in large part to the continuing actions of Mr. Thomas who refused to take down the fence despite being provided with overwhelming evidence that it should be taken down.<sup>1</sup>

Mr. McCune then provided testimony with respect to the elements set forth in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986).

With respect to the first element, the evidence demonstrated the time and labor required, which was set forth on the fee and cost statement provided to the Court as modified by Mr. McCune's testimony. Up to the date of the hearing on November 18, 2015, Mr. Houck's counsel's office billed a total of 695 hours for a total amount of \$120,513.75. Senior partner, Mr. McCune, billed his time at \$240/hr. Mr. Tsiatsos's time as junior partner was billed at \$180/hr. Para-professional time was billed at \$75/hr. The Court finds that proof of time spent is well-documented, and that the time spent and the rates are reasonable and customary given the circumstances.<sup>2</sup>

Additionally, Mr. McCune's unopposed and uncontradicted testimony established an additional \$4,726.51 in costs. Evidence demonstrated that Mr. Houck's counsel attempted to avoid certain expert and other costs. Given the length and nature of this case, such costs are also reasonable.

With respect to the second *Pitrolo* element, the novelty and difficulty of the questions, the Court finds and concludes that while right of way disputes are not novel, litigating such

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<sup>1</sup> The Court notes that the evidence also showed that Mr. Thomas himself relied on Mr. Way's efforts in this case. Even in this briefing, Mr. Thomas relies on Mr. Way's defense at summary judgment to argue that his own defense was not frivolous.

<sup>2</sup> The difficulties caused by Mr. Thomas, necessitating the amount of hours, are discussed below.

disputes on behalf of plaintiffs is difficult in light of recent case law requiring plaintiffs to prove such rights of way by clear and convincing evidence. *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010). The evidence showed that this case involved interviewing dozens of witnesses regarding prior use, numerous visits to the property, consulting on many occasions with surveyors and researching various issues related to easement law. The fact that the defendant decided to proceed pro se also added to the difficulty. The Defendant often did not file appropriate and timely documents, and with respect to documents actually filed, Mr. Houck's counsel often received documents that required objection or other actions that would have been unnecessary had the documents been filed by counsel. The Court expressly cautioned Mr. Thomas about the importance of having his own counsel. Mr. Thomas, as was his right, chose to proceed without counsel. Had Mr. Thomas obtained counsel, it is likely that his counsel would have impressed upon Mr. Thomas the need to remove his fence and to settle the case.

With respect to the third element, the skill requisite to perform the legal service properly, the Court finds and concludes that the attorneys had the requisite skill to perform this work. Mr. McCune has been a skilled and successful litigator, often litigating land disputes, for more than 40 years. Mr. Tsiatsos has practiced for 8 years and has demonstrated his skills before local judges. Mr. Thomas's counsel conceded this point.

With respect to the fourth element, the preclusion of other employment by the attorney due to acceptance of the case, the uncontradicted evidence showed, and the Court finds and concludes, that Mr. Houck's counsel's office currently has several dozen active litigation files, including several large-scale billable hour cases that counsel could have worked on had they not litigated this matter to trial.

With respect to the fifth element, the customary fee, the Court finds and concludes that the hourly rates (set forth above as \$240/hr. for Mr. McCune's time, \$180/hr. for Mr. Tsiatsos's time and \$75/hr. for paraprofessional time) are customary. Those were the rates charged to all billable hour fixed rate cases by Mr. Houck's counsel at the time this case began in 2013.

With respect to the sixth element, whether the fee is fixed or contingent, the Court finds and concludes that the fee in this case was fixed at the rates stated above. However, due to his limited resources, Mr. Houck was unable to stay current with his payments. Therefore, as a practical matter, counsel would have been unlikely to have been compensated had Mr. Houck not prevailed in this matter.

With respect to the seventh element, time limitations imposed by the client or the circumstances, the Court is familiar with the time burdens and deadlines involved in a jury trial, and how those limitations require the complete focus of counsel to the exclusion of all other matters, professional and personal. The evidence showed that Mr. Houck's counsel's firm is a two-attorney firm and that both attorneys were forced to stop all other work to get ready for trial. The Court finds and concludes that this element, too, weighs in favor of the requested compensation.

With respect to the eighth element, the amount involved and the results obtained, the Court finds and concludes that the focus of the case was equitable relief – reopening the right of way and fee shifting as a result of the Defendants' intentional actions. Two years of litigation resulted in \$120,513.75 in fees and \$4,726.51 in legal costs. The Court finds and concludes that the results were excellent. Not only did counsel establish by clear and convincing evidence that ~~the~~ the right of way should be reopened, but, on counsel's motion, the Court ~~granted~~ <sup>granted</sup> Rule 50 relief on

3 out of 4 of the prescriptive easement elements. Counsel also obtained the rare results of fee shifting and punitive damages against a pro se party in a right of way case.

With respect to the ninth element, the experience, reputation, and ability of the attorneys, the Court finds and concludes that counsel have sound reputations within the legal community and that they had the experience and ability to obtain a desirable result for their client.

With respect to the tenth element, the undesirability of the case, the evidence shows, and the Court finds and concludes, that this was an undesirable case due to the difficult prescriptive easement standards and due to the fact that the client would ultimately be unable to fully compensate counsel for the time spent in this case. Right of way disputes are often difficult and contentious, and the prospects of fee shifting and punitive damages seemed remote initially.

With respect to the eleventh element, the nature and length of the professional relationship with the client, although there was no professional relationship prior to this case, the relationship between Mr. Houck and counsel has now lasted for over two years, the duration of this litigation. Mr. McCune testified that Mr. Houck has expressed his satisfaction concerning the results obtained.

With respect to the twelfth and final element, awards in similar cases, reports of fee shifting in prescriptive easement cases appear to be uncommon. However, in other context, fees have been awarded in much greater amounts and at higher rates. *See, e.g., Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 328, 737 S.E.2d 640, 662 (2012) (awarding \$495,956.25 and expenses in the amount of \$100,243.64, for a total of \$596,199.89 in consumer credit action); *CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, at \*23 (W. Va. May 30, 2014) (finding \$350.00 hourly rate reasonable) cert. denied sub nom. *CashCall, Inc. v. Morrissey*, 135 S. Ct. 2050, 191 L. Ed. 2d 956 (2015)).

**III. Conclusion**

Based on the foregoing findings of fact and conclusions of law, the Court concludes that Mr. Houck is entitled to be reimbursed for the attorneys' fees and costs he incurred. Mr. Houck has established his right to attorneys' fees and costs, and he has met the required elements *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191-92, 342 S.E.2d 156, 157 (1986) for proving that the fees and costs which were put into evidence before the Court are appropriate and reasonable.

The Court therefore ORDERS that the Defendant Garry Thomas, shall pay the amount of \$120,513.75 in attorneys' fees and \$4,726.51 in legal costs to the Plaintiff Archie Houck. Interest on these amounts shall run at the legal rate from the date of this Order.

With respect to attorneys' fees and costs incurred in this matter by Mr. Houck following the date of the last fees and costs submitted to the Court, Mr. Houck may petition the Court for supplemental fee applications.

The Court notes for the record the objection of the parties to all adverse rulings contained herein.

The Clerk is directed to transmit attested copies of this Order to all counsel and pro se parties of record.

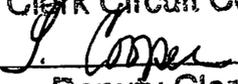
Entered: 12/8/15

**The Clerk shall retire this matter from the active docket and place it among cases ended.**

  
\_\_\_\_\_  
The Honorable Gray Silver, III, Circuit Judge

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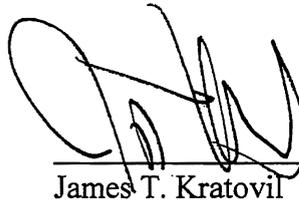
Virginia M. Sine  
Clerk Circuit Court

By:   
\_\_\_\_\_  
Deputy Clerk

**CERTIFICATE OF SERVICE**

I, James T. Kratovil, Esquire, counsel for Defendant, hereby certify that I served the foregoing *Notice of Appeal* upon counsels for Plaintiffs, by mailing a true copy thereof to the below listed addresses on this the 16<sup>th</sup> day of December, 2015:

William Richard McCune, Jr., Esq.  
Alex A. Tsiatsos, Esq.  
McCune & Tsiatsos, PLLC  
115 West King Street  
Martinsburg, WV 25401



James T. Kratovil