

RECEIVED  
OCT 29 2010  
JEFFERSON COUNTY  
CIRCUIT COURT

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. \_\_\_\_\_

**CORPORATION OF HARPERS FERRY,  
a West Virginia Municipal Corporation,  
Defendant / Appellant,**

v.

**RALPH TAYLOR,  
Plaintiff / Appellee.**

The Honorable David H. Sanders, Judge  
Circuit Court of Jefferson County, West Virginia  
Civil Action No. 07-C-398

FILED  
NOV 9 2010  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**PETITION FOR APPEAL**

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**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

Plaintiff, Ralph Taylor, filed a Complaint seeking a declaratory ruling on or around November 20, 2009, requesting that the Circuit Court determine his rights and responsibilities pertaining to his right to have access to his property by means constructing a road upon a public rights-of-way known as Taylor Street in Harpers Ferry, West Virginia.

Harpers Ferry filed its Answer asserting its right to control its own property and roadways by asserting certain conditions before allowing construction of a roadway on Town property. The Jefferson County Circuit Court held a one-day bench trial on September 15, 2009. The Court entered an order on December 4, 2009 granting Plaintiff the right to build a roadway to access his property without requiring a civil engineer certification.<sup>1</sup> Thereafter, Plaintiff filed a motion to recover his attorney fees and costs which was opposed by Harpers Ferry. The Court entered an order awarding Plaintiff his attorney's fees in the amount of \$21,869.50 and costs in the amount of \$1,613.56. Harpers Ferry filed a motion to alter or amend the award of attorney's fees. The Court entered a final order on June 29, 2010 denying Defendant's Motion to Alter and Amend Judgment Order Awarding Attorney Fees to Plaintiff. It is from this June 29, 2010 Order that the Appellant Harpers Ferry now appeals to this Court.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

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<sup>1</sup> The Town chose not to appeal that ruling to avoid expending Town resources.

Plaintiff below, Ralph Taylor owns four (4) contiguous lots of unimproved real estate, legally described as Lots 1, 2, 3, and 20 of Block Q, ("Plaintiff's Property") within the boundaries designating the corporate limits of the Corporation of Harpers Ferry. [Pltf. Exh. 1]<sup>2</sup> Mr. Taylor's unimproved lots are adjacent to unimproved portions of Ridge Street and Zachary Taylor Street. [Complaint] The unimproved portions of the above-streets were publicly dedicated and accepted by the Corporation of Harpers Ferry and are designated on the 1868 Howell Brown Plat of Harpers Ferry, however, the unimproved portions of these streets known as "Paper Streets" have never been opened or used for vehicular traffic. Rather, the unimproved portions of these streets exist only on paper. [Id.; Councilman Dan Riss testimony at Bench Trial]<sup>3</sup>

On or about December 12, 2005, Plaintiff requested during a Town Council meeting that the Town allow Plaintiff to build a road on the Papers Streets so that a boring truck could traverse the Paper Streets to go upon Plaintiff's property to perform tests to determine the suitability of improving Plaintiff's property. [Pltf Exh 3] The Plaintiff offered to conduct a site visit for members of the Town Council to demonstrate the location of the proposed road he wanted to construct, which site visit occurred sometime in early January, 2006. [Pltf. and Riss testimony] Following the site visit, on January 9, 2006, the Town Council voted to conditionally allow Plaintiff to make certain improvements to the Paper Streets subject to certain requirements, which were to be outlined in a letter (hereinafter "letter agreement") to be drafted by the Mayor, James Addy. [Pltf. Exh. 7]

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<sup>2</sup> References to "Pltf. Exhibits" are to Plaintiff's Trial Exhibits entered into evidence at the Bench Trial in this matter.

<sup>3</sup> Appellant will supplement with specific cites to Bench Trial Transcript after the transcript is prepared.

Before the Mayor issued the letter agreement, Councilman Bob Dubose, who owned property adjacent to the Paper Street, complained that the proposed road, which had been marked by Plaintiff's contractor with survey ribbons, was not within the boundaries of the Paper Streets and would cross over other adjacent property owner's property. [Pltf. Exhs. 8, 11] The Plaintiff replied to the allegations in an email to the Town suggesting that perhaps some deer had disturbed the survey ribbons, but reasserted that the proposed road would not traverse over adjacent landowners' property. [Pltf. Exh. 14] The Mayor drafted the "letter agreement" on January 17, 2006, which Plaintiff received and executed on February 11, 2006. [Pltf. Exh. 23] The first of the requirements listed in the "letter agreement" was that Plaintiff agreed to "determine the trees that are to be damaged or removed as under growth and not dogwood or other valuable wood growth (flag them)." [Id.] Plaintiff also agreed that: landscape would be returned to its original terrain conditions in so far as possible; Plaintiff or his contractors would not traverse other property owners land; and that Councilman Barry Bryan would be present during the work period when necessary. [Id.]

Plaintiff executed the letter agreement indicating he would abide by the above conditions and he sent a separate note indicating that he would "eagerly comply" with the conditions in the letter agreement and that he would advise Councilman Bryan in advance of any work. [Id. and Pltf. Exh. 24] Councilman Bryan emailed Plaintiff on February 17, 2006, and indicated that Plaintiff could proceed with the planned work pursuant to the conditions set forth in the letter agreement. [Pltf. Exh. 25]

On or about April 8, 2006, Plaintiff's contractors began to clear the path for a roadway along the Paper Streets and in the process prepared to cut down several mature trees, which led to an adjacent property owner and council member Bob Dubose calling the police and Mayor to

have the clearing work suspended. The police and Mayor did appear and ordered Plaintiff's contractors to cease all work until further notice because it appeared that Plaintiff was not performing the work in compliance with the terms of the Letter Agreement. [Robert Dubose testimony, Pltf. Exh. 30, Def. Exh. 1 (tree photographs). The Town sent a letter to Plaintiff on April 21, 2006, instructing Plaintiff to stop working on the roadway until the town could investigate the reports that the work being performed was not in compliance with the Letter Agreement. [Pltf. Exh. 34]. The Town Council held a Special Council Meeting on April 25, 2006, to address Plaintiff's alleged non-compliance with the letter agreement. Plaintiff and his contractor appeared at the Special Meeting. [Pltf. Exhs. 37, 41].

Council member Dan Riss testified that as a result of the Special Meeting the Town Council determined that Plaintiff's proposed work plan for construction of a road through the Paper Streets was more extensive than the Council previously understood it to be. [Riss testimony] As a result of the Special Meeting, Plaintiff agreed to provide to the Town's Planning Commission by May 23, 2006, a survey, deed and a detailed description of the proposed work. Plaintiff timely submitted a narrative of the proposed work, and hand-drawn sketch of the proposed road improvement and a topographic survey of the area to the Town's Planning Commission. [Pltf. Exh. 42].

Upon reviewing Plaintiff's submissions of the proposed road improvement, the Town's Planning Commission recommended to the Town Council that before moving forward on Plaintiff's request that Plaintiff obtain a professional engineering drawing from a licensed engineer because the hand-drawn sketches submitted by Plaintiff were inadequate. [Pltf Exh. 46]. Council member Dan Riss testified that because of the severe slope of the proposed roadway, the Town was concerned that Plaintiff's planned road improvement on the Paper

Streets owned by the Town would create an unsafe roadway that could expose the Town to liability if the road was constructed in an unsafe manner. Accordingly, the Town Council required that the road project be certified by a civil engineer to verify the road to be constructed was safe. [Riss testimony] The Town Council accepted the Planning Commission's recommendation and tabled Plaintiff's request until he complied with the request to provide a professional drawings of the proposed roadway certified by a civil engineer. [Id.]

Plaintiff next contacted the Town in January 2007 to request permission to remove "two small trees" from the right of way, but did not address the request for a civil engineer certification. [Pltf. Exh. 47] The Mayor responded by letter on February 21, 2007, suggesting that if Plaintiff would provide the information requested by the Town Council, the matter could be resolved. [Pltf. Exh. 48]. The Town Council maintained that it would allow Mr. Taylor to build a road on the Town's property so long as the proposed roadway was certified by a civil engineer to ensure that it was a safe improvement.

Plaintiff never submitted to the Town Council or Planning Commission any drawings or plans of his proposed road improvement certified by a civil engineer as requested. [Pltf. testimony; Riss testimony].

Plaintiff filed a Complaint seeking declaratory judgment on or around November 20, 2009. Harpers Ferry filed its Answer asserting its right to control its own property and roadways by asserting certain conditions before allowing construction of a roadway on Town property. The Jefferson County Circuit Court held a one-day bench trial on September 15, 2009. The Court entered an order on December 4, 2009 granting Plaintiff the right to build a roadway to access his property without requiring a civil engineer certification.<sup>4</sup> Thereafter, Plaintiff filed a

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<sup>4</sup>The Town chose not to appeal that ruling to avoid expending Town resources.

**motion to recover his attorney fees and costs which was opposed by Harpers Ferry. The Court entered an order awarding Plaintiff his attorney's fees in the amount of \$21,869.50 and costs in the amount of \$1,613.56. Harpers Ferry filed a motion to alter or amend the award of attorney's fees. The Court entered a final order on June 29, 2010 denying Defendant's Motion to Alter and Amend Judgment Order Awarding Attorney Fees to Plaintiff.**

**ASSIGNMENTS OF ERROR**

- I. THE CIRCUIT COURT ERRED BY DEVIATING FROM THE AMERICAN RULE WHEN IT AWARDED PLAINTIFF ATTORNEY FEES IN THE ABSENCE OF BAD FAITH OR VEXATIOUS, WANTON OR OPPRESSIVE CONDUCT BY THE CORPORATION OF HARPERS FERRY.**
  
- II. THE CIRCUIT COURT ERRED BY NOT GRANTING HARPERS FERRY THE RIGHT TO AN EVIDENTIARY HEARING ON THE REQUEST FOR ATTORNEY FEES.**

**POINTS AND AUTHORITIES RELIED UPON**

**Statutory Authority**

W. Va. Code § 8-12-5 et seq. ....10

**Case Citations**

*Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).....15

*Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993).....11

*Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).....11

*Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982).....11

*Daily Gazette Co. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985).....12, 14

*Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543  
(1999).....11

*Horkulic v. Galloway*, 222 W.Va. 450, 464-466, 665 S.E.2d 284, 298-300 (2008).....14, 15

*Kincaid v. Morgan*, 188 W.Va. 452, 425 S.E.2d 128 (1992).....13

*Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 52 365 S.E.2d 246, 250 (1986).....11

**DISCUSSION OF LAW**

The Town of Harpers Ferry asserts that the Circuit Court erred by deviating from the American Rule when it awarded Plaintiff attorney fees in the absence of bad faith or stubbornly litigious conduct. More specifically, the Corporation of Harpers Ferry (hereinafter “Harpers Ferry” or the “Town”) from the beginning merely exercised its statutory right to regulate, maintain and control the opening and use of public streets, which is a power expressly granted to municipalities pursuant to W.Va. Code § 8-12-5. Municipalities are expressly granted the power “to provide for the opening and excavation of streets, avenues, roads, alleys, ways, sidewalks, crosswalks and public places belonging to the municipality **and to regulate the conditions under which any such opening may be made.** See W.Va. Code § 8-12-5(2) (emphasis added). Moreover, municipalities are expressly granted the right to regulate the use of streets and roadways and to regulate the width of streets and roadways. Against this clear statutory authority, the trial court not only denied Harpers Ferry the right to regulate the construction and opening of a road on Town property, the Court assessed attorney fees against the Town for exercising its right to do so.

The Town at no time took a position that the Plaintiff could not access his property through the Paper Streets abutting his unimproved lots. Rather, the Town merely required that before Plaintiff could build his own roadway on the Town’s property that he have a civil engineer approve any such roadway to ensure its safety. The Town’s position was not in bad faith, vexatious or wanton or oppressive as a matter of law. Accordingly, the circuit court abused its discretion by awarding Plaintiff his attorney fees.

### Standard of Review

The standard of review this Court should use when considering an award of attorney fees below is whether or not the Circuit Court abused its discretion in making such an award. Syl. Pt. 3, *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959); Syl. Pt. 2, *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982); Syl. Pt. 4, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993); Syl. Pt. 2, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

**I. THE CIRCUIT COURT ERRED BY DEVIATING FROM THE AMERICAN RULE WHEN IT AWARDED PLAINTIFF ATTORNEY FEES AGAINST HARPERS FERRY IN THE ABSENCE OF BAD FAITH OR STUBBORNLY LITIGIOUS CONDUCT.**

**A. The evidence does not support any award of attorney fees as the conduct of Defendant was not in bad faith, vexatious, wanton or oppressive.**

Before deviating from the American rule, the Court must make a finding that Harpers Ferry asserted defenses in bad faith or acted vexatiously, wantonly or for oppressive reasons.

The West Virginia Supreme Court instructs that a trial court should determine whether the losing party advanced a frivolous defense in the face of a clear-defined-unambiguous right. The West Virginia Supreme Court makes clear that “one should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain.” *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 52 365 S.E.2d 246, 250 (1986) (the exception to the American rule is for those parties who use the legal process to oppress or cheat others). Harpers Ferry’s position does not approach any of the conduct that would justify that standard. Rather, this declaratory judgment action was necessitated because there was a good faith dispute regarding the conflict between the Town’s right to control its streets and the scope of Plaintiff’s right to access his property. It was a complicated property issue by all accounts. The Town sought legal advice

from more than one attorney regarding its obligations with respect to Plaintiff's request to construct a road on Town property in an attempt to comply with the law. Harpers Ferry never once took the position that the Plaintiff could not access his property through the Town's property. Rather, Harpers Ferry merely sought to control the manner in which a road was built on the Town's own property because the Town would be liable for the public's use of the roadway during and after its construction. There is no clear statutory or common law authority for Plaintiff to build a road on the Town's property as a matter of law.<sup>5</sup> Conversely, there is clear statutory authority that the town is vested with the power to regulate its roads and streets. Accordingly, the Town should not be punished for seeking to control the process of the construction of a road by a third party on Town property. While ultimately the Court ruled that Plaintiff was permitted to construct a road on Town property without being subject to Town's request for professionally-stamped plans, the Town's position was not frivolous nor was it taken for improper purpose that would justify an attorney fees award.

There are no simply no facts that should cause this Court to deviate from the long-standing general rule in West Virginia that each party bears his own attorney fees absent express statutory, regulatory or contractual authority for reimbursement, also known as the "American Rule." *See Daily Gazette Co. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985). In the present case, there is no statutory, regulatory or contractual authority for reimbursement of attorney fees. This action was not a statutory civil rights claim that would permit the recovery of attorney fees. This action was brought by Plaintiff as a declaratory judgment action requesting that the Court rule upon an unsettled and complicated area of property law – a municipality and landowner's

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<sup>5</sup> The Plaintiff did file a civil rights action alleging due process violations, but instead appropriately filed this action as one for declaratory judgment, which does not involve fee shifting. As such, the Town's liability insurance coverage was not triggered because there was no claim for damages based upon allegedly improper conduct by the Town of Harpers Ferry.

respective obligations and rights with respect to the improvement of previously unimproved paper streets.

Moreover, Harpers Ferry at no time asserted a defense in this matter that could be labeled vexatious, wanton or oppressive that could not be supported by a good faith argument, which would be a necessary finding to order recovery of attorney fees where there is no other authority for doing so. *Kincaid v. Morgan*, 188 W.Va. 452, 425 S.E.2d 128 (1992). Again, this case involved the balancing of the Town's right to control and regulate its streets with Plaintiff's access to his property. Harpers Ferry simply imposed the requirement that Plaintiff provide a professionally-stamped drawing of the proposed road that he intended to build on the Town's own property. Even though the Court ultimately ruled that Harpers Ferry's requirement was too onerous – the requested requirement was certainly not vexatious, wanton or oppressive.<sup>6</sup>

**B. The alleged misconduct identified to justify an award of attorney fees stems from the conduct of a non-party – Robert Dubose.**

The trial court seems to have erroneously relied on the alleged misconduct of a third-party to justify an award of attorney fees against the Town of Harpers Ferry. It appears this was Plaintiff's trial strategy all along. Most all of Plaintiff's evidence presented during the bench trial focused not on the legal right of Mr. Taylor to build a road on Town property, but instead on the alleged misconduct of former council member Robert Dubose who opposed certain aspects of Mr. Taylor's plan. Plaintiff made this the theme of his case even though the case was brought as a declaratory judgment action to clarify the complicated and competing property interests of the Town and the Plaintiff.

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<sup>6</sup> The complicated nature of this dispute is further highlighted by Plaintiff's post trial motion for further relief to help clarify the rights and obligations of the parties going forward.

Plaintiff argued that Plaintiff's request to build a road on Town property was tainted because a single council member owned property adjacent to the Paper Streets. Mr. Dubose recused himself from the consideration of the request, however, he continued to address the Town Council as an interested person to oppose certain aspects of Plaintiff's proposed roadway on Town Property. Even if Plaintiff's claims that Mr. Dubose improperly involved himself in Plaintiff's request to build a road on Town property, there is no evidence in the record that the Town of Harpers Ferry sanctioned Mr. Dubose's alleged misconduct. On the contrary, the testimony of Council Member Dan Riss suggested that most all of the Town Council members disagreed with Mr. Dubose's position. Because Mr. Dubose's conduct was not relevant to the issue before the Court (whether the Town was permitted to put conditions on Plaintiff's proposed construction of road on Town property) there is no record of whether Mr. Dubose was acting in his official capacity or in his individual capacity as a citizen of the Town and adjacent landowner when he engaged in the alleged misconduct that has served as a basis for an award of attorney fees against the Town of Harpers Ferry. Harpers Ferry should not be penalized for the conduct of a former council member who was not named as a party to the underlying dispute and who acted in his individual capacity.

**II. THE CIRCUIT COURT ERRED BY NOT GRANTING THE DEFENDANT THE RIGHT TO AN EVIDENTIARY HEARING ON THE REASONABLENESS OF THE AMOUNT OF ATTORNEY FEES.**

When considering a request for attorney fees based on an allegation of bad-faith conduct by a party to the litigation, the trial court is required to conduct an evidentiary hearing to determine whether there is evidence of obduracy by a party to the litigation. See generally, *Horkulic v. Galloway*, 222 W.Va. 450, 464-466, 665 S.E.2d 284, 298-300 (2008)(remanded for a full evidentiary hearing on the appropriateness of an attorney fees award); see also, *Daily*

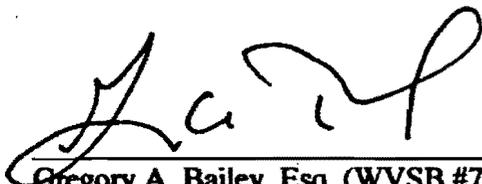
*Gazette Co., Inc., v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985)(remanded on other grounds, instructions to establish a record of vexatious, wanton or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for application, extension or modification of existing law). More specifically, the Court instructs that “a proper factual record demonstrating obduracy must be established.” *Id.* 222 *W.Va. at 465*. The Court in *Horkulic* ruled that it was inequitable to award attorney fees against a party without a full evidentiary hearing where that issue had not previously been litigated. *Id.* 222 *W.Va. at 465*. In the present case, the parties did not litigate the issue of conduct justifying attorney fees because the issue of attorney fees was not before the court during bench trial for declaratory judgment relief. In fact, the Plaintiff did not even raise the issue of attorney fees and expenses until after Defendant concluded its case in chief. The Court permitted, over Defendant’s objection, the Plaintiff to testify via telephone regarding his expenses incurred after he had left the courtroom and after the Defendant concluded its case. The Town has a due process right to present evidence that its conduct and defense in this matter was not obdurate because that issue was not before the Court during the bench trial of this matter.<sup>7</sup>

**RELIEF PRAYED FOR**

For the reasons set forth herein above, Defendant requests that this Court reverse the decision of the Circuit Court awarding Plaintiff attorney fees and costs.

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<sup>7</sup> Moreover, the Court is required to ascertain the reasonableness of the amount of attorney fees pursuant to the twelve (12) factors set forth in Syl. Pt. 4 of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).



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**CORPORATION OF HARPERS**  
**FERRY**  
**Appellant, By Counsel**

G. Bailey 11110

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**RALPH TAYLOR,  
Plaintiff,**

**v.**

**Civil Action No. 07-C-398**

**CITY OF HARPERS FERRY  
A West Virginia Municipal Corp.,  
Defendants.**

**RECEIVED**

**JUN 29 2010**

**ORDER**

**JEFFERSON COUNTY  
CIRCUIT COURT**

THIS MATTER came on this 29<sup>th</sup> day of June, 2010, upon the Plaintiff's the Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees to the Plaintiff filed by the Defendants and upon the Plaintiff's Responsive pleadings; upon the appearance of Ralph Taylor, by J. Michael Cassell, Esq.; upon the appearance of the City of Harpers Ferry, by Gregory Bailey, Esq.

This Court conducted a Bench Trial in this matter on September 15, 2009 during which the Court heard the testimony of various witnesses and admitted into evidence various exhibits. The Court heard the testimony of Mr. Robert DuBose who was a Town Council Member throughout the proceedings conducted by the Town Council of Harpers Ferry pertaining to Mr. Taylor's request to construct an access road to his property. The Court further heard the testimony of Mr. Daniel Riss who was a Council Member who remains on the Council through the present. The Plaintiff presented the testimony of Barry Bryan by video deposition. Mr. Bryan was a Council Member during the proceedings conducted by the Council regarding Mr. Taylor. Mr. Bryan was the Council Member designated to act as the contact person for the Council in these proceedings.

The Court reviewed the pleadings and the Defendant's Motion to Alter or Amend the judgment of this Court awarding attorney's fees to the Plaintiff.

The Court finds that the Complaint alleges official misconduct in Paragraphs 6, 7, 8, 9, 10, 12, 13, and 16. The Complaint requests an award of attorney's fees and costs. Therefore, the Town of Harpers Ferry had notice that the Plaintiff had a claim for official misconduct and attorney's fees from the beginning of this case.

The Court entered an Order on December 4, 2009. The Order was filed in the Clerk's Office on December 7, 2009. The Order resolves all substantive issues between the parties with regard to Plaintiff's right to gain access to his property and the official misconduct of Mr. Robert DuBose and the Town Council of Harpers Ferry.

In Conclusion of Law No. 46 on page 34 the Order filed on December 7, 2009, the Court concludes as follows:

"The Court further concludes that the misconduct of Councilman DuBose tainted the entire process from beginning to end. This misconduct deprives Mr. Taylor of Due Process of Law in violation of his Constitutional Rights."

The Court also made the following Conclusion of Law at page 23 of the same Order in Conclusion of Law No. 21:

"In the present case, the Town's actions substantially and unreasonably deprive Mr. Taylor of access to his property by denying him access to a public street. The deprivation is illegal and unconstitutional. The conditions required of Mr. Taylor by the Town are unreasonable to the point of denying access because of the adsorbent associated costs."

In this case, the Court found that there was ample evidence of official misconduct on the part of Councilman DuBose and the entire City Council which would support the Plaintiff's Motion for Attorney's Fees and Costs. In Conclusion of Law No. 36 on pages 28 and 29 of the Order filed December 7, 2009, this Court

summarizes a systematic and persistent effort by Councilman Dubose and others to wrongfully deprive Mr. Taylor of access to his property. This Court also found that there were no Ordinances, policies, requirements, or any other guidelines enacted by the Town of Harpers Ferry pertaining to the use of the unimproved streets by a landowner to gain access to his property. (See Findings of Fact No. 40 and 42, page 12 of this Court's Order filed December 7, 2009)

The Court further found that the Town had failed or refused to consult with or retain any design or construction professionals or engineering persons to determine what might be necessary and reasonable to require of Mr. Taylor in light of his request to gain access to his property. (See Findings of Fact No. 26, page 9 of the Court's Order) In addition, the Court makes reference to the Plaintiff's Trial Exhibit Binder which contained numerous emails which demonstrate the misconduct of Councilman DuBose and others.

The Town of Harpers Ferry participated with counsel in all proceedings in this matter. The Town of Harpers Ferry had a full opportunity to cross-examine the Plaintiff's witnesses and present evidence to rebut the allegations of misconduct presented by the Plaintiff.

Pursuant to the Court's Order filed December 7, 2009, the Plaintiff filed a Motion for an Award of Attorney's Fees and Costs on December 23, 2009.

The Court entered a Rule 22 Scheduling Order on December 28, 2009 providing to the Town of Harpers Ferry an opportunity to respond to the Plaintiff's Motion for Attorney's Fees and Costs. After the parties fully briefed the issues

pertaining to attorney's fees, the Court entered an Order granting Plaintiff's Motion for Attorney's Fees and Costs.

At every phase of the proceedings in this case, the Town of Harpers Ferry fully participated and had every opportunity to present evidence and legal arguments in opposition to the Plaintiff's case in chief and the Motion for Attorney's Fees.

The Town of Harpers Ferry had a full opportunity to participate in the Bench Trial and the in the post Trial Motions. The cases cited by the Plaintiff are distinguishable on their facts in that the Trial Court in the cited cases failed to provide an opportunity for the participation of the party against whom the attorney's fees were granted.

Finally, the Court concludes that the Town Council of Harpers Ferry participated in the effort conducted by Councilman DuBose who wrongfully deprived Mr. Taylor of his Constitutional Rights. The evidence demonstrated that Mr. DuBose expressly stated that he intended to wrongfully deprive Mr. Taylor of access to his property. The Council understood that Mr. DuBose intended to act out on this wrongful purpose and did nothing to prevent it. In fact, the Court concludes that the Council actively supported this pattern of misconduct perpetrated by Mr. DuBose.

Accordingly, it is hereby ADJUDGED and ORDERED that the Defendant's Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees to the Plaintiff is hereby denied. The objections and exceptions of the parties are noted to all adverse rulings.

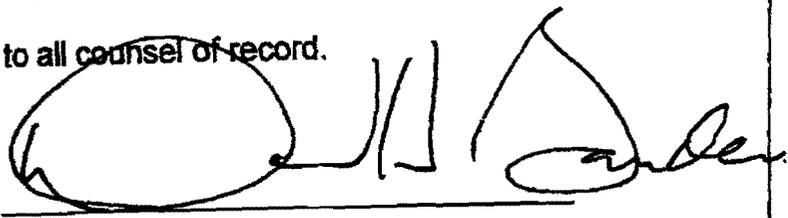
The Clerk shall enter the foregoing as of the day and date first above-written and shall transmit attested copies to all counsel of record.

2 cc's

M. Cassell

G. Bailey

6-30-10



Hon. David H. Sanders  
Judge of the Circuit Court of  
Jefferson County, West Virginia

Submitted by



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A TRUE COPY  
ATTEST:

LAURA E RATTENNI  
CLERK, CIRCUIT COURT  
JEFFERSON COUNTY, W VA.

BY B. Chalk  
DEPUTY CLERK