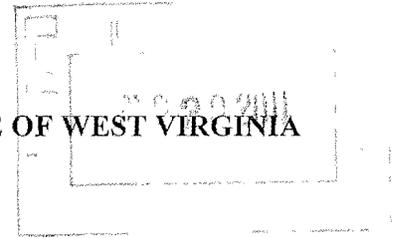


IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA



RODNEY MILLS,

Petitioner/Defendant Below.

v.

No. 11-0254  
(Appealed from the Circuit Court  
of Berkeley County, 09-C-982)

DAN RYAN BUILDERS, INC.,  
a Maryland Corporation,  
RAYMOND ENRIGHT, and  
JACQUELYN ENRIGHT,

Respondents/Plaintiffs Below.

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RESPONSE TO PETITION FOR APPEAL

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Tracey A. Rohrbaugh, Esq. (WV Bar #6662)  
Julie R. Shank, Esq. (WV Bar #10675)  
Bowles Rice McDavid Graff & Love LLP  
101 South Queen Street  
Post Office Drawer 1419  
Martinsburg, West Virginia 25402-1419  
Ph: (304) 263-4202  
Fax: (304) 267-3822  
*trohrbaugh@bowlesrice.com*  
*jshank@bowlesrice.com*

*Counsel for Plaintiff/Respondent*

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## I. STATEMENT OF THE CASE

At all times pertinent to this case, the Respondents, Dan Ryan Builders, Inc. (“DRB”) and Raymond and Jacquelyn Enright (“the Enrights”) (both DRB and the Enrights collectively referred to as “the Respondents”) were the owners of separate tracts of property located in the Stonebridge subdivision, located in Arden District, Berkeley County, West Virginia. SR000023-SR000034. Both DRB and the Enrights purchased the aforementioned property subject to a 50-foot non-exclusive easement granted to Petitioner and his wife by The Harvey Trumbower Development Company by Deed of Easement and Exchange dated July 31, 2003. SR000035-SR000040. The Petitioner is not the owner of the aforementioned easement described in the Deed of Easement and Exchange. DRB and the Enrights are both fifty percent (50%) owners of the property described in the Deed of Easement and Exchange. *Id.*

The Respondent DRB alleges that the Petitioner interfered with DRB’s contractual relations with potential customers by threatening potential buyers of its property. SR000015-SR000016. Both Respondents allege that the Petitioner trespassed onto the Respondents’ property and that Petitioner intentionally destroyed their property while trespassing. SR000016. Additionally, both Respondents allege that the aforementioned conduct amounted to nuisance since the Petitioner’s conduct has resulted in a substantial and unreasonable interference with the use and enjoyment of the Respondents’ property. SR000016-SR000017.<sup>1</sup> In response to the Respondent’s Complaint, the Petitioner filed a counterclaim, alleging that the Respondents blocked his means of ingress and egress on the easement, that DRB presented inaccurate and falsified documents to the Berkeley County Engineering

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<sup>1</sup> This case originally consisted of two (2) Civil Action Nos. - 09-C-973 and 09-C-982. Both cases were consolidated. On October 5, 2011, the Circuit Court ordered all filings to be made in Civil Action No. 09-C-982. See Appendix, Exhibit E, p. 1.

Department, that DRB infringed upon the Petitioner's contractual rights, that DRB diverted water onto the Petitioner's easement and eroded the easement, and that DRB damaged a dam located near the easement. SR000042-SR000048. The Respondents denied all of these allegations. SR000049-SR000053.

In preparing their defense to the allegations made by the Petitioner, the Respondents served their *First Combined Discovery Requests* on February 12, 2010 by United State Mail, postage prepaid. SR000060-SR000092. These discovery requests included nineteen (19) Requests for Admissions. The Petitioner failed to respond to the Respondents' Requests for Admissions. *Id.* On March 29, 2010, the Respondents filed a Motion to Compel Discovery, asking the Circuit Court for an order compelling the Petitioner's answers and responses to the Respondent's Interrogatories and Requests for Production of Documents. SR000093-SR000095. The Petitioner did not respond to the Respondents' *Motion to Compel*, despite the trial court's *Rule 22 Scheduling Order*, which made the Petitioner's response due by April 29, 2010. SR000098.

On June 2, 2010, the Circuit Court granted the Respondents' *Motion to Compel*, ordering discovery responses to be produced within thirty (30) days. SR000096-SR000097. The trial court also found that the Petitioner need not answer the Requests for Admissions, since they were already deemed admitted as a matter of law in accordance with Rule 36 of the West Virginia Rules of Civil Procedure and *Checker Leasing, Inc. v. Sorbello*, 181 W. Va. 199, 382 S.E.2d 36 (1989).<sup>2</sup> SR000096.

On June 7, 2010, the Respondents filed a *Motion for Summary Judgment* based on the Petitioner's admissions. Appendix, Exhibit A. It should be noted that, despite the Court's

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<sup>2</sup> The Petitioner never complied with the trial court's June 2, 2010 Order compelling discovery. SR000001-SR000008.

June 2, 2010 Order finding that the Requests for Admission had been deemed admitted as a matter of law, the Petitioner failed to move the Court to excuse his failure to respond. SR000124. Therefore, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, *Dingess-Rum Coal Co. v. Lewis*, and the Court's June 2, 2010 Order finding that the Respondents' Requests for Admissions were admitted by the Petitioner, the Court granted the Respondents' *Motion for Summary Judgment*. 170 W. Va. 534, 537, 295 S.E.2d 25, 28 (1982). SR000119-SR000128. In its July 27, 2010 Order, the court found that there was no genuine issue of material fact as to the Petitioner's liability for the Respondents' claims. Moreover, the court found that the Petitioner's Counterclaim failed as a matter of law. SR000127-SR000128

On August 26, 2011, almost three (3) months after the Circuit Court granted summary judgment, and one (1) business day before the pretrial, the Petitioner filed a *Motion to Set Aside Summary Judgment*.<sup>3</sup> Appendix, Exhibit B. On September 27, 2011, after being fully briefed and hearing oral argument, the trial court denied the Petitioner's *Motion to Set Aside Summary Judgment*. The trial court also held that the case would proceed to a jury trial solely on damages. Appendix, Exhibit E.

On December 14, 15, and 16, 2010, this matter came on for a jury trial on the issue of damages. The jury deliberated, and found for DRB, and against the Petitioner, in the amount of \$22,590.00 for compensatory damages and \$15,090.00 in punitive damages, for a total of \$37,680.00. SR000114-SR000115. The jury also found for the Enrights, and against the Petitioner, in the amount of \$20,472.00 for compensatory damages, and \$25,000 in punitive

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<sup>3</sup> The Respondents' counsel informed Mr. Ford by phone on Thursday, August 19, 2010 that the Court had granted summary judgment to the Plaintiffs, as to both the Plaintiffs' claims and the Defendant's counterclaim. Despite the fact that Petitioner was aware of the Order granting summary judgment since August 19, 2010, he did not file his Motion to set aside the order granting summary judgment for a period of 8 days. Appendix, Exhibit F, p. 2.

damages, for a total of \$45,472.00. *Id.* In its January 10, 2011 *Judgment Order and Order Granting Permanent Injunction*, the trial court applied pre-judgment interest to the special damages from the date of the beginning of the Petitioner's misconduct, June 20, 2009, through December 16, 2010, at a rate of 7% per annum. This equated to a total judgment of \$45,886.39 for the Enrights, and \$39,254.32 for DRB. SR000115. Finally, the Court, entered a permanent injunction against the Petitioner. SR000116-SR000117.

## II. SUMMARY OF THE ARGUMENT

This Honorable Court should affirm the Circuit Court of Berkeley County and reject each of the assignments of error presented in the Petitioner's Brief. First, The Circuit Court correctly found the Petitioner liable for the Respondents' claims and correctly dismissed the Petitioner's counterclaim in its *Order Granting Plaintiffs' Motion for Summary Judgment*. Not only did the Petitioner fail to answer the Respondents' Requests for Admissions in a timely fashion, but he did not answer them at all! Nor did Petitioner move to set aside his admissions. Therefore, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure and *Dingess-Rum Coal Co. v. Lewis*, the trial court correctly entered summary judgment in favor of the Respondents, and permitted this matter to proceed to trial only on the issue of damages.

Next, the trial court correctly exercised its discretion in refusing to allow extrinsic, irrelevant, confusing, and prejudicial evidence that was intended to impeach the Respondent, Dan Ryan Builders. It is important to note that, by failing to answer Respondents' Requests for Admissions, the Petitioner admitted, as a matter of law, that DRB did not submit fraudulent documents to the Berkeley County Planning Commission. This is, however, exactly what the Petitioner was trying to prove at trial, so as to impeach the credibility of DRB. Fortunately, Judge Groh recognized the Petitioner's attempt to circumvent her prior ruling and

prevented the introduction of any such testimony.<sup>4</sup> Third, the Circuit Court properly prohibited Petitioner's proffered expert, Carol Newsome, from testifying, since she was not properly disclosed as an expert witness in accordance with Rule 26(b)(4) of the West Virginia Rules of Civil Procedure. The Petitioner admits that Ms. Newsome gained all of her information about the value of the subject property from outside sources, and made a value determination using only her technical knowledge and skill. This Court has held that this amounts to expert testimony, and must be properly disclosed to the opposing party. Since she was not disclosed as an expert, this assignment of error must be rejected.

Fourth, the trial court correctly held that the Petitioner's *Motion for Disqualification of Counsel* was without merit. The Respondents' counsel had no attorney-client relationship with the Petitioner in drafting a Deed of Easement and Exchange for the easement that was being improperly used by the Petitioner.<sup>5</sup> Moreover, the Respondents' claims against the Petitioner arose from the Petitioner's improper and unlawful use of the easement, not the creation or validity of the easement itself. No one denied the existence or the validity of the easement.

Finally, the Circuit Court committed no error when it permitted Respondents' counsel to refer to various admissions that were made by the Petitioner in her opening statement. The Petitioner admitted, by operation of law, that he personally intimidated interested buyers of Dan Ryan Builders' property. Since the admission was material, relevant evidence, the Circuit

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<sup>4</sup> Even if the Petitioner had not made such an admission, the introduction of such evidence would nonetheless have been prohibited, pursuant to Rules 608(b) and 402 of the West Virginia Rules of Evidence.

<sup>5</sup> The easement was drafted by Michael Keller, an attorney at the law firm of Bowles Rice McDavid Graff & Love LLP. However, as recognized by Judge Groh, Keller did not represent the Petitioner when the easement was drafted. Supplemental Appendix, 1/11/10 Transcript, p. 9.

Court was entirely correct in permitting the Respondents' counsel to refer to this admission in opening statement and closing argument.

### **III. STATEMENT REGARDING ORAL ARGUMENT**

The Respondents submit that review of the Record should allow this matter to be disposed of without either issuance of a Rule or oral argument. The specific findings of the Circuit Court on each of the Petitioner's Assignments of Error fully illustrate the propriety of the Circuit Court's decision. However, if oral argument is deemed necessary by this Honorable Court, the Respondents submit that the argument should proceed under Rule 19.

### **IV. POINTS AND AUTHORITIES AND LEGAL ANALYSIS**

The five (5) assignments of error outlined in the Petitioner's Brief must be rejected because each one lacks merit. Each assignment of error is outlined below in the order referenced by the Petitioner in his Brief.

#### **A. THE CIRCUIT COURT CORRECTLY REFUSED TO SET ASIDE ITS ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.**

The first assignment of error claimed by the Petitioner is that the Circuit Court did not follow the mandate of *Dingess-Rum Coal Co. v. Lewis* in refusing to set aside its *Order Granting Plaintiffs' Motion for Summary Judgment*. Petitioner's Brief, p. 6. Specifically, the Petitioner argues that there is no evidence of (1) the Petitioner's bad faith; or (2) prejudice from the Petitioner's untimely response to the Respondents' Requests for Admissions, which must be considered in accordance with *Dingess-Rum*. 170 W. Va. 534, 537, 295 S.E.2d 25, 27 (1982). However, for the reasons set forth below, the Petitioner's arguments must be disregarded. The Circuit Court of Berkeley County properly considered *Dingess-Rum* in refusing to set aside summary judgment of the Respondents' claims against the Petitioner as to his liability.

1. **Petitioner acted in bad faith because he failed to answer even *after* receiving the Requests for Admissions.**

The Petitioner's bad faith in failing to comply with the West Virginia Rules of Civil Procedure warrants the Circuit Court's decision to refuse to set aside summary judgment. In fact, the Petitioner misrepresented facts at both the trial court level, and before this Honorable Court, regarding the service and receipt of the Respondents' discovery requests.

The Circuit Court correctly found that the Petitioner received the Respondents' Requests for Admissions. First, the Requests for Admissions, which were contained within the Respondents' First Combined Discovery Requests, were served on February 12, 2010 by first-class United States Mail, to Petitioner's counsel's address of record: 105 N. College Street, Martinsburg. Exhibit F, p. 1-2. Pursuant to Rule 5 of the West Virginia Rules of Civil Procedure, service of discovery documents shall be made upon counsel of record, not upon the party himself if he is represented by counsel, and service shall be made by mailing it to said attorney at his last-known address. W. Va. R. Civ. P. 5. Opposing counsel has no duty to search for an updated address of counsel, and service by mail is complete upon mailing. *Id.*

Moreover, the Respondents' counsel made the Circuit Court aware that the Requests for Admissions were never returned to her as undeliverable. SR000110; SR000105. As the First Combined Discovery Requests were not returned as undeliverable, the Petitioner's counsel presumably received this filing. *Id.* As noted by this Honorable Court, "parties giving notice have the right to rely on addresses provided on pleadings, and are not required to search for the correct address." *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W. Va. 690, 703, 510 S.E.2d 764, 777 (1998) (citing W. Va. R. Civ. P. Rule 5(b) ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney of record the service shall be made upon the attorney unless service upon the party

himself or herself is ordered by the court. Service upon the attorney or upon a party *shall* be made by delivering a copy to him or her, or by mailing it to him or her at his or her *last-known address ....*” (emphasis added)).

The Petitioner’s counsel suggests that, because he did not have staff at his office location from February through April since he was “in the process of moving offices”, he did not receive the Respondents’ *First Combined Discovery Requests*. Petitioner’s Brief, p. 8. In making this argument, he admits that “there may have been a lack of diligence by Petitioner’s counsel in apprizing the counsel for Plaintiff’s [sic] below of the change of address.” *Id.* at 8-9.

There is no excuse for the Petitioner’s counsel’s failure to notify Respondents’ counsel of his new address. This Court has stated plainly that a party’s duty to serve another party does not go beyond sending the papers to the last-known address. Furthermore, this Court has made it clear that attorney negligence, which the Petitioner acknowledges is present, does not justify failure to comply with the rules. *See White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992) (“An attorney’s negligence will not serve as basis for setting aside default judgment on grounds of ‘excusable neglect.’”) Therefore, the Circuit Court correctly refused to set aside its *Order Granting Plaintiffs’ Motion for Summary Judgment*, since the Petitioner undoubtedly received the Respondents’ First Combined Discovery Requests.

**2. The Petitioner cites no case law requiring a party to submit an affidavit of prejudice to uphold an order granting summary judgment.**

Next, the Petitioner argues that the Circuit Court committed error in denying his *Motion to Set Aside Summary Judgment*, because the Respondents did not present evidence of prejudice. Petitioner’s Brief, p. 7. The Petitioner claims that the “bald assertions” of prejudice

are not sufficient to defeat a motion to set aside summary judgment. *Id.* Yet, the Petitioner cites no authority in this State or other jurisdictions to support his argument.

The Respondents are aware of no case law requiring them to show proof of prejudice in order to preserve the trial court's ruling. However, a simple examination of the facts make it readily apparent that the Respondents would have suffered an enormous amount of prejudice if summary judgment had, in fact, been set aside. First, it is imperative to note that the Petitioner filed his *Motion to Set Aside Summary Judgment* on August 27, 2011, just days before the August 31, 2011 Pretrial Conference. Appendix, Exhibit B<sup>6</sup>. Because the Petitioner had admitted all of the material facts of the case by way of his failure to respond to the requests for admissions, the Respondents gave up their opportunity to conduct discovery -- after all, they had already obtained all the admissions they deemed necessary to translate to a judgment in their favor. Furthermore, the Respondents devoted their time and energy (and financial resources) to preparing for a trial on damages only. They did not subpoena witnesses to testify to the liability aspect of the case, having had those issues already determined by the Court. Appendix, Exhibit F, p. 5.

In fact, if the lower court had set aside the *Order Granting Plaintiff's Motion for Summary Judgment* and permitted the liability aspect of this case to be tried, then Respondents would have had to go blindly to trial, without having conducted necessary discovery, and without adequate time to prepare for trial. The Petitioner, on the other hand, would have received enormous benefit, by usurping the Respondents' meaningful opportunity to conduct discovery

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<sup>6</sup> The Petitioner's Motion was received after 3:00 on Friday, August 27, 2010, not August 26, 2010 as reflected on Petitioner's Certificate of Service. Appendix, Exhibit F, p. 2. Furthermore, the Respondents pointed out to the Circuit Court that she informed Mr. Ford by phone on Thursday, August 19, 2010, that the Court had granted summary judgment to the Respondents, as to both the Respondents' claims and the Petitioner's counterclaim. Despite the fact that Petitioner was aware of the Order granting summary judgment since August 19, 2010, he did not file the Motion to Reconsider for a period of 8 days. *Id.* at p. 4.

and prepare for trial, in spite of his own recalcitrance. This would be clearly contrary to the Respondents' right to utilize their Requests for Admissions and the Rules of Civil Procedure to secure the "just, speedy, and inexpensive determination of every action." *See* W. Va. R. Civ. P. 1; *see also Weva Oil Corp. v. Belco Petroleum Corp.*, 68 F.R.D. 663 (N. Dist. W. Va. 1975) ("permitting Weva to respond out of time would prejudice Belco by requiring it to prove matters contained in its requests for admission as evidenced in its Exhibit #13. From the record before this Court, it can be ascertained that while the introduction of such evidence could in all probability be accomplished, the task would be lengthy, laborious and extremely costly to Belco. In considering the weight of prejudice in such circumstances, the court must not treat lightly such burdens when visited upon a litigant, especially when that litigant has properly utilized the Rules of Civil Procedure to advance his litigation toward a ' . . . [j]ust, speedy and inexpensive . . . ' (Rule 1, F.R.C.P.) conclusion.").

Had the Circuit Court set aside the Order granting summary judgment, the Respondents would have suffered extreme prejudice. They needed to have their matter placed in front of the jury, so that they could ensure that the Petitioner's harassment and intimidation would stop. They needed to secure a judgment against the Respondent. It would have been extremely unjust to have set aside the summary judgment order or to have permitted a delay of the trial, all because the Petitioner failed to follow the rules. Therefore, the Circuit Court correctly refused to set aside its *Order Granting Petitioner's Motion for Summary Judgment*.

**3. *Davis v. Sheppe* is not applicable to the case at bar.**

The Petitioner claims that this Court's decision in *Davis v. Sheppe*, 187 W. Va. 194, 417 S.E.2d 113 (1992), directly supports the proposition that attorney neglect does not preclude setting aside an order granting summary judgment for failure to answer requests for

admissions. 187 W. Va. 194, 417 S.E.2d 113 (1992); Petitioner's Brief, p. 8. However, upon closer examination, it is clear that *Davis* does not support Petitioner's argument at all.

*Davis* did not deal with requests for admissions. Instead, this Court dealt with the trial court's dismissal of a plaintiff's case. Specifically, this Court held that, "[a] motion under Rule 60(b) of the West Virginia Rules of Civil Procedure is the appropriate remedy to utilize when a plaintiff's case is dismissed because of the plaintiff's failure to appear for trial." *Id.* at 196 (emphasis added). This Court further noted that, "[f]rom a procedural standpoint, this is preferred to a direct appeal because, in a Rule 60(b) hearing, a record can be developed as to the circumstances surrounding the dismissal. This provides a proper fact basis for appellate review." *Id.* See also *Van Pelt v. Rent-A-Center, Inc.*, 187 W. Va. 483, 485, 419 S.E.2d 896, 898 (1992) (citing *Davis*). In sum, *Davis* dealt with the procedural steps that should be taken by a party in order to properly appeal an involuntary dismissal.

Unlike the *Davis v. Sheppe* case, the instant case was not dismissed. Instead, the trial court properly applied the West Virginia Rules of Civil Procedure in recognizing the Petitioner's admissions, found in favor of the Plaintiffs/Respondents on liability, and the case proceeded to trial only on the issue of damages. Therefore, *Davis* is not applicable to the case at bar and should not be considered by this Court.

There is, however, case law in West Virginia which is directly applicable to the instant case. In *Dingess-Rum Coal Co. v. Lewis*, 170 W. Va. 534, 295 S.E.2d 25 (1982), the plaintiff was granted summary judgment over the defendant's claim for adverse possession. The order granting summary judgment was based solely on the defendant's failure to respond to requests for admissions, even in light of the defendant's response to the plaintiff's motion for summary judgment. In making its decision, this Court explained:

We disagree with the appellant's contention that a material issue of controverted fact exists in this case. By admitting that he has no adverse possession claim over the property and that Dingess-Rum has record title to the land, the appellant has conceded his case. The fact that he claims ownership of the land is not enough. He argues that testimony in his deposition indicates that there is sufficient evidence of adverse possession to entitle him to a trial on the merits of his claim. The fallacy of this argument is that he has already admitted, under Rule 36, that he has no adverse possession claim. *Matters contained in requests for admissions may serve as a basis for summary judgment, and in this case those matters which were conclusively established indicate that there is no remaining issue of fact in this case to be tried.*

*Id.* [internal citations omitted] [emphasis added].

In the case *sub judice*, the Respondents served their First Combined Discovery Requests on February 12, 2010 by U.S. Mail. These discovery requests included nineteen (19) Requests for Admissions. SR000060-SR000074. Even after the Petitioner realized that the Respondents' Requests for Admissions were admitted, he did not provide answers. Further, the Petitioner never moved the trial court to excuse his failure to respond and resulting admissions. SR000001-SR000008. Therefore, pursuant to Rule 36 of the West Virginia Rules of Civil Procedure and *Dingess-Rum Coal Co.*, summary judgment was proper. This Honorable Court should find that the trial court was correct in refusing to set aside summary judgment.

**4. The Petitioner incorrectly refers to the trial court's *Order Granting Summary Judgment for the failure to answer requests for admissions* as a "sanction."**

It is important to note that the Petitioner repeatedly refers to the trial court's refusal set aside its Motion for Summary Judgment for the Petitioner's failure to answer the Respondent's Requests for Admissions as a "sanction." *See* Petitioner's Brief, pp. 7, 8. The continuous use of this term demonstrates the Petitioner's fundamental misunderstanding of the Rules of Civil Procedure and the legal principles at issue.

By failing to respond to the Respondents' Requests for Admissions, the Petitioner has admitted that there is no genuine issue of material fact on either the primary claim or his Counterclaim. Rule 36 of the West Virginia Rules of Civil Procedure states, and this Honorable Court has held, that the failure to respond to requests for admissions will be deemed an admission of the matters set forth in each request. W. Va. Rule Civ. P. 36 ("The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter). *See also Checker Leasing, Inc. v. Sorbello*, 181 W. Va. 199, 382 S.E.2d 36 (1989); *Dingess-Rum Coal Co. v. Lewis*, 170 W. Va. 534, 295 S.E.2d 25 (1982). Moreover, "[m]atters contained in requests for admissions may serve as a basis for summary judgment." *Dingess-Rum Coal Co.*, 170 W. Va. at 537, 295 S.E.2d at 28. If a party responds outside of the thirty day time period, his failure to respond in a timely fashion to Requests for Admissions will be excused only when the delay is not caused by a lack of good faith and the untimely response will not prejudice the opposing party. *Id.*

The trial court simply followed well-settled law in finding that the Respondent's Requests for Admissions were deemed admitted. No "sanction" was imposed. Therefore, the Petitioner's reference to the trial court's findings as a "sanction" is fundamentally flawed and inaccurate.

**B. THE CIRCUIT COURT WAS CORRECT IN REFUSING TO INTRODUCE EXTRINSIC, IRRELEVANT, AND PREJUDICIAL EVIDENCE TO IMPEACH A WITNESS.**

Likewise, the Petitioner's argument that the Circuit Court erred by not permitting him to introduce evidence of DRB's alleged submission of fraudulent documents to the Berkeley County Planning Commission has no merit. The Petitioner argues that this evidence was

improperly omitted since it was being offered to impeach DRB. Petitioner's Brief, p. 9-10. Though the name of the witness or witnesses which Petitioner sought to introduce was not mentioned by the Petitioner in his brief, the Respondents believe that the Petitioner is referring to Stefanie Allemong-Miller (Berkeley County's Planning Director). The Court properly excluded the testimony of Ms. Allemong Miller, for multiple reasons. Appendix, Exhibit E, pp. 88-90.

First, by failing to answer Respondents' Requests for Admissions, the Petitioner had already admitted that DRB did *not* submit fraudulent documents to the Berkeley County Planning Commission. Appendix, Exhibit C, pp. 8-9. In keeping with the decision in *Dingess-Rum*, the Court properly excluded this contrary testimony.

Second, even if there had been no such admission, such evidence would *still* have been inadmissible under the West Virginia Rules of Evidence, since it has no probative value, is highly prejudicial, and is irrelevant in this matter involving the Petitioner's illegal use of a right of way. The Court was well within its discretion to exclude this evidence.

Petitioner asserts that he wanted to introduce evidence of DRB's fraudulent conduct as a means of "impeaching" DRB's character. However, Rule 404 of the West Virginia Rule of Evidence provides, in part, that, "[e]vidence of a person's character or trait of character is not admissible for the purpose of providing action in conformity therewith on a particular occasion...." Rule 404 does have a limited exception, however, which allows for the admissibility of evidence of the character of a witness as provided in West Virginia Rule of Evidence 608. West Virginia Rule of Evidence 608(a) states,

[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . . .

W. Va. R. Evid. Rule 608(a).

West Virginia Rule of Evidence 608(b) states,

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, **may not be provided by extrinsic evidence.** They may, however, **in the discretion of the Court**, if probative of truthfulness or of untruthfulness, be inquired into **on cross-examination of the witness** (1) concerning the witnesses' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

W. Va. R. Evid. Rule 608(b) (emphasis added).

Under 608(b), the character of a witness may only be attacked for truthfulness or untruthfulness in the discretion of the trial court on cross-examination. In this civil action, the Petitioner claims that he was entitled to attack the credibility of DRB<sup>7</sup> by showing evidence, through documents and the Petitioner's own witness(es), that DRB allegedly submitted fraudulent documents to the Planning Commission of Berkeley County. *See* Petitioner's Brief, pp. 9-10. Simply put, this is not allowed pursuant to West Virginia law.

The Petitioner's argument fails for two reasons. First, the Petitioner attempted to introduce impeachment evidence through Stefani Allemong-Miller. At trial, when arguing as to why this evidence was admissible, counsel for the Petitioner stated, "I think she's the best person to do it. I don't think there's any possible way for me to really get the evidence in just by simply showing that [referring to the as-built plot plan]." Appendix, Exhibit E, p. 89. However, Rule 608 of the West Virginia Rules of Evidence clearly states that impeachment evidence may only be offered on cross-examination, *not* through extrinsic evidence. Assuming that this evidence was admissible, the proper way to introduce it is through cross-examination of the witness being

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<sup>7</sup> The Petitioner does not specify which DRB witness he intended to impeach. *See* Petitioner's Brief, pp. 9-10.

impeached, not through collateral attack by calling witnesses and offering impermissible extrinsic documents.

Next, this evidence is completely irrelevant in a trial involving the unlawful use of an easement. It is irrelevant and inadmissible under Rule 402 because it has no probative value. W. Va. R. Evid. R. 402. Testimony regarding the alleged submission of fraudulent documents would not have made the existence of any fact regarding the amount of the Respondents' damages more or less probable than it would have without the testimony. A party has no right to present testimony regarding facts which are not of "consequence to the determination of the action." W. Va. R. Evid. R. 401.

Not only would testimony regarding Plaintiff's alleged submission of fraudulent documents have been irrelevant at trial, it also would have been highly prejudicial. There was absolutely no connection between this alleged submission of fraudulent documents and the Petitioner's damages. Again, liability was not at issue in this case. As such, any such evidence would have been inadmissible under Rule 403 of the West Virginia Rules of Evidence. Introduction of evidence regarding an alleged fraudulent act by DRB, which was unrelated to the Petitioner's improper use of the right-of-way, would have served only to waste the Court's time, to harass the Respondents, and to confuse the jury.

The Respondent cites *State v. Wood*, in an attempt to persuade this Court that irrelevant evidence is admissible to attack the character of a witness. 194 W. Va. 525, 532-533, 460 S.E.2d 771, 778 - 779 (1995). Not only is this untrue, but *Wood* holds the complete *opposite* of the Petitioner's representation to this Court. In *Wood*, this Court stated:

Accordingly, we hold that . . . the admission of testimony pursuant to W. Va. R. Evid. 608(a) is within the sound discretion of the trial judge and is **subject to W. Va. R. Evid. 402, which requires the evidence to be relevant**; W. Va. R. Evid. 403, which requires the exclusion of evidence whose “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]” and W. Va. R. Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment.

*Id.* at 778 - 779.

The Petitioner claims that “[t]his Court has held that it is permissible to submit otherwise irrelevant evidence to impeach witnesses and attack credibility.” Petitioner’s Brief, p. 10. However, a close examination of the *Wood* case reveals that it does not say this at all. *All* evidence, even impeachment evidence, must be relevant. *See also State v. Martin*, 224 W. Va. 577, 687 S.E.2d 360 (2009) (holding that the admission of testimony as to opinion and reputation of character is within the sound discretion of the trial judge and is subject to rules requiring the evidence to be relevant, prohibiting the evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and requiring the court to protect witnesses from harassment and undue embarrassment). Therefore, the Circuit Court properly rejected this evidence.

**C. ASSIGNMENT OF ERROR III FAILS BECAUSE CAROL NEWSOME'S TESTIMONY AMOUNTED TO THAT OF AN EXPERT WITNESS SINCE, AMONG OTHER THINGS, SHE HAD NO PERSONAL KNOWLEDGE OF THE PROPERTY AT ISSUE.**

The Petitioner claims that the trial court erred because “the trial court refused to permit said witnesses to testify as she stated that such testimony was not relevant to the issue of damages and also that such testimony would rise to the level of expert testimony and said witness was not disclosed as an expert.” Petitioner’s Brief, p. 10. Though the Petitioner failed either to identify the names of the witnesses he intended to introduce, or to cite to the record to alert the Court or the Respondents to the names of the witnesses that should have been permitted to testify about the value of the property at issue, the undersigned believes that Petitioner is referring to Carol Newsome. For the reasons stated below, Ms. Newsome’s testimony was properly prohibited by the Circuit Court.

The Petitioner apparently argues that the trial court erred because it did not allow Carol Newsome, a real estate agent, to testify about the value of the Respondent’s home in order to rebut DRB’s claim of damage to its property. Appendix, Exhibit H, pp. 222-227. However, the Petitioner fails to mention that Ms. Newsome had no personal knowledge of the property. She never listed nor owned the property. Instead, Ms. Newsome was being called to testify for the purpose of offering her expert opinion on the value of DRB’s property -- information she acquired by analyzing listing prices that she collected from the internet. *Id.* at 225.

The Petitioner’s counsel explained to the trial court why he believed that Ms. Newsome was a fact-witness:

She's actually done independent research with respect to the value of the Enrights' house and what it was originally listed for and directly contradicts what Dan Ryan has claimed that it does -- it was listed for. It also goes to the settling of the value at \$333,000. **And with respect to her knowledge and experience, I believe she can, even though she wouldn't be admitted as an expert, testify that there has been a downturn.**

*Id.* at 223 (emphasis added). By the Petitioner's own admission, Ms. Newsome was a realtor with no direct, personal knowledge of the facts and circumstances giving rise to DRB's damaged property. Instead, she was using her "knowledge and experience", and independent research, to formulate an opinion as to the value of DRB's property. *Id.* As such, her testimony is technical and specialized, and rises to the level of an expert witness. However, the Petitioner never disclosed her as an expert in accordance with West Virginia law.

West Virginia Rule of Evidence 702 allows a qualified expert to offer her opinion where her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Furthermore, it has been held that a real estate agent testifying about the value of property is an expert witness providing technical and specialized knowledge. *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994) (in a civil action alleging breach of duty against a broker and civil engineering firm); *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999) (in a condemnation proceeding); *West Virginia Dept. of Highways v. Thompson*, 180 W. Va. 114, 375 S.E.2d 585 (1988) (same).

Pursuant to Rule 26(b)(4) of the West Virginia Rules of Civil Procedure, "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." W. Va. R. Civ. P. 26(b)(4).

However, the Respondent received no Rule 26(b)(4) information from the Petitioner. SR000001-SR000008.

Furthermore, “[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:...(1) A party is under a duty seasonably to supplement that party's response with respect to any question addressed to:...(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.” W. Va. R. Civ. P. 26(e). Of course, the Respondent asked the Petitioner via interrogatory to identify all expert witnesses that would be offered at trial. SR000070, Interrogatory 17. The Petitioner provided no responses to the Respondent’s discovery requests, let alone an expert witness disclosure. Appendix, Exhibit H, 226.

In *Graham v. Wallace*, an expert in a medical malpractice case attempted to testify regarding opinions that were not disclosed during discovery via Rule 26(b)(4) disclosures. 214 W. Va. 178, 588 S.E.2d 167 (2003). The Court, holding that there was unfair surprise, explained the purposes of the discovery process as follows:

“[O]ne of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.” The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

*Id.* at 173-74 (internal citations omitted). The *Graham* court then proceeded to analyze the pre-trial disclosures and found nothing that put the aggrieved party on notice of the expert's new opinions. As such, the Court found that the expert's testimony was an unfair surprise and was prejudicial. *See Id.*

The same situation has occurred in this case. As this Court can see by reviewing the record, there is no mention by the Petitioner of an witness expert disclosure. As such, the Circuit Court did not err in refusing to permit Ms. Newsome to testify during the trial of this matter. She was only offered to provide expert testimony regarding property in which she had no personal knowledge or experience. Therefore, the Court should reject the Petitioner's argument on this issue.

**D. THE PETITIONER'S MOTION FOR DISQUALIFICATION OF COUNSEL WAS PROPERLY DENIED BECAUSE NO CONFLICT OF INTEREST WAS PRESENT.**

Next, the Respondent argues that there is a disqualifying conflict of interest because the undersigned's firm created the Deed of Easement and Exchange for the subject easement in this case. The Petitioner argues that the Respondents have taken a position that is "directly adverse to the creation of the right of way." *See* Petitioner's Brief, p. 12. However, the Petitioner's argument is legally deficient.

Bowles Rice did not have an attorney-client relationship with the Petitioner. Supplemental Appendix, 1/11/10 Transcript, pp. 8-9. In fact, the Petitioner acknowledges that no attorney-client relationship existed. His counsel confirmed this by stating:

No, there was no personal I guess attorney/client relationship where Mr. Mills had went out and hired him, but it was as a result of negotiations between the two parties that this was done. And the fee was paid by Harvey Trumbower Corporation.

*Id* at 9. This, by the Petitioner's own admission, there was no conflict of interest because Bowles Rice never represented the Petitioner - it represented the Harvey Trumbower Corporation.

Moreover, even if Bowles Rice represented had the Petitioner, the subject matter at issue in the present case - the Respondents' allegation of intentional interference with contractual relations, trespass, or nuisance - is entirely distinct from the subject matter and issues presented in drafting the Deed of Easement and Exchange. Accordingly, there is no basis to presume that Bowles Rice gained any confidential information from the Petitioner that could be relevant to this case or used against the Petitioner in any way that violated Rule 1.9 of the West Virginia Rules of Professional Conduct. Therefore, no conflict of interest exists.

In sum, the Petitioner's Motion to Disqualify Counsel was properly denied because the undersigned's law firm never represented the Petitioner. Additionally, even if it did, this matter is not substantially related to the preparation of the Deed of Easement and Exchange, pursuant to West Virginia Rule of Professional Conduct 1.9. The Court should affirm the decision of the Circuit Court of Berkeley County on this issue.

**E. THE PETITIONER ADMITTED THAT HE PERSONALLY INTIMIDATED BUYERS.**

Finally, the Petitioner assigns as error statements made in the opening and closing arguments by Respondents. *See* Petitioner's Brief, p. 13. Specifically, he claims that it was error for the trial court to permit the Respondents' counsel to state that the Petitioner intentionally intimidated potential buyers of DRB property. However, this argument fails because the Petitioner not only admitted that he intimidated potential buyers viewing DRB's property, but he also admitted to willful, wanton, and reckless conduct in causing damage to the Respondents' property.

The Petitioner has admitted the following statements that relate to DRB's interference with contractual relations claim: "Admit that you entered upon Dan Ryan's lot and directed potential buyers off Dan Ryan's lot in a threatening way to move their vehicles off of the easement." Appendix, Exhibit C, p. 7. The Petitioner could not have introduced evidence to prove otherwise, as he has already admitted that he threatened potential buyers of DRB's property. Therefore, any issue that might have been disputed regarding DRB's interference with contractual relations claim has been admitted as true by the Petitioner, as a matter of law. As such, this assignment of error fails.

Moreover, the Petitioner's argument that the Circuit Court's error lead to an award of punitive damages is likewise unconvincing. The Petitioner admitted that he "acted wantonly, willfully and maliciously, and caused damage to the Respondents' property." Appendix, Exhibit C, p. 8. The Circuit Court instructed the jury of this admission. Appendix, Exhibit H, 1/16/10 Transcript, p. 15. The Petitioner did not assign error to the Circuit Court's jury instructions. Therefore, for the sake of argument, even if the trial court erred in allowing closing argument about the Petitioner's intentional conduct, the jury still was properly instructed to consider the Petitioner's admissions of willful, wanton, and malicious conduct causing damage to the Respondent's property. The Petitioner has already admitted these facts. Therefore, the matter of the Petitioner's wanton, willful and malicious behavior was properly established, and was a proper basis for an award of punitive damages.

## V. CONCLUSION

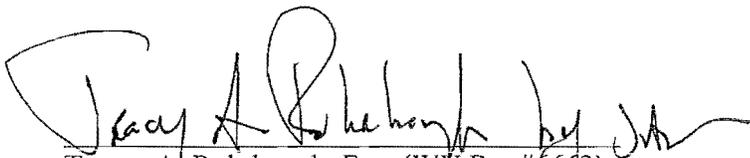
This Honorable Court should affirm the Circuit Court of Berkeley County and reject each of the assignments of error presented in the Petitioner's Brief. First, the Circuit Court was correct in finding the Petitioner liable for the Respondents' claims and dismissing the

Petitioner's counterclaim in its *Order Granting Plaintiffs' Motion for Summary Judgment*. Next, the trial court correctly exercised its discretion in refusing to allow extrinsic, irrelevant, confusing, and prejudicial evidence that was intended to impeach the Respondent, DRB. Third, the Circuit Court properly prohibited Carol Newsome from testifying, since she was not properly disclosed as an expert witness in accordance with Rule 26(b)(4) of the West Virginia Rules of Civil Procedure. Fourth, the trial court correctly held that the Petitioner's *Motion for Disqualification of Counsel* has no merit, since (1) Bowles Rice never had an attorney-client relationship with the Petitioner -- this by *explicit* admission by both the Petitioner and his counsel, and (2) the instant matter, arising out of the unlawful use of an easement, is entirely different from the creation of an easement. Finally, the Petitioner admitted that he personally intimidated interested buyers of Dan Ryan Builders' property. Therefore, the Circuit Court was entirely correct in permitting the Respondents' counsel to refer to this admission in opening and closing statements.

For the foregoing reasons, the Respondents respectfully request that the decisions of the Circuit Court of Berkeley County be affirmed.

**RESPONDENTS,**

**By Counsel**



Tracey A. Rohrbaugh, Esq. (WV Bar #6662)

Julie R. Shank, Esq. (WV Bar #10675)

Bowles Rice McDavid Graff & Love LLP

101 South Queen Street

Post Office Drawer 1419

Martinsburg, West Virginia 25402-1419

Ph: (304) 263-4202

Fax: (304) 267-3822

[trohrbaugh@bowlesrice.com](mailto:trohrbaugh@bowlesrice.com)

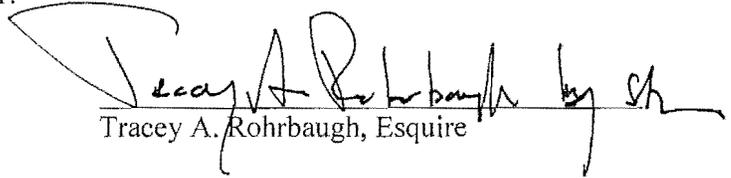
[jshank@bowlesrice.com](mailto:jshank@bowlesrice.com)

**CERTIFICATE OF SERVICE**

I, Tracey A. Rohrbaugh, hereby certify that a true and exact copy of the foregoing **RESPONSE TO PETITION FOR APPEAL** has been served by United States mail, postage prepaid, upon the following individual:

Kenneth J. Ford, Esquire  
100 Mahogany Court  
Martinsburg, West Virginia 25404

This 29<sup>th</sup> day of August, 2011.

  
Tracey A. Rohrbaugh, Esquire