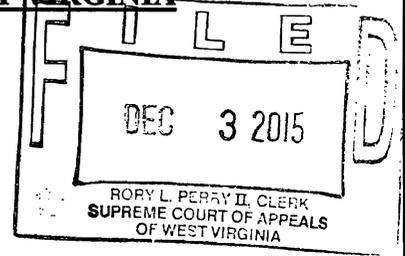


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**TIMBERLAKE ESTATES HOMEOWNERS'
ASSOCIATION, INC.,**

**Plaintiff Below,
Petitioner**



NO: 15-0694

v.

Mineral County Case Number 15-C-13

**TERRY S. MANGOLD AND
CHARLES A. STICKLER,**

**Defendants Below,
Respondents**

**SUMMARY RESPONSE ON BEHALF OF
TERRY S. MANGOLD AND CHARLES A. STICKLER**

APPELLEES

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TABLE OF CONTENTS

I.	Statement of the Case	Page 3 of 16
II.	Argument	Page 5 of 16
III.	Conclusion	Page 16 of 16

I. STATEMENT OF THE CASE

On August 13, 2014, Charles A. Stickler (“Mr. Stickler”) granted a right-of-way to Dr. Terry S. Mangold (“Dr. Mangold”) over “those tracts of land known and numbered as Lots 13, 14, and 15 of Timberlake Estates Subdivision, Section 3” *See Appendix at 45, Deed between Charles Stickler and Terry Mangold at Pg. 1, ¶ 3.* Dr. Mangold purchased this right-of-way so that he could access his hunting property. Said hunting property is owned by Four Knobs, LLC, and is located to the northwest of Timberlake Estates Subdivision (“Timberlake Estates”). *See Appendix at 47, The Plat of Survey for Terry S. Mangold.*

Also, on August 13, 2014, Dr. Mangold purchased a piece of real property from Timothy Boddy and Rachel Boddy. *See Appendix at 49, Deed between the Boddys and Dr. Mangold.* The Boddy’s property immediately borders Timberlake Estates and is located to the northwest of Timberlake Estates, whereas the Boddy’s property also immediately borders Fore Knobs, LLC’s property and is located to the southeast of Fore Knobs, LLC. Dr. Mangold uses the right-of-way that he purchased from Mr. Stickler in combination with the piece of property that he purchased from the Boddys to access the Fore Knobs, LLC property upon which he hunts.

Dr. Mangold made the above purchases because without this right-of-way, it is a fifty (50) minute drive for him to reach the land owned by Four Knobs, LLC. Dr. Mangold would have to drive up Route 50 toward Elk Garden, turn down Pinnacle Road in Sulphur City, and then travel for two miles on a dirt road

so rugged that it takes him approximately thirty-five minutes to travel the final two miles. In contrast, it is only a five (5) minute drive for Dr. Mangold from the right-of-way in Timberlake Estates to the hunting cabin owned by Fore Knobs.

Dr. Mangold, after making these purchases of real property, then began developing this right-of-way for use. On September 26, 2014, the Timberlake Estates Homeowners' Association drafted and submitted a letter to Mr. Stickler threatening legal action, both civil and criminal, should he and Dr. Mangold not cease the development and/or use of this right of way. *See Appendix at 51, the September 26, 2014, Letter from Timberlake Estates Homeowners' Association to Mr. Charlie Stickler.*

On October 26, 2014, Dr. Mangold, who was travelling within Timberlake Estates as an invitee of Mr. Stickler (as well as the deeded owner of a real property interest that is Dr. Mangold's right-of-way), was cited by Sergeant J.M. Droppleman of the West Virginia State Police for Trespassing within the Timberlake Subdivision. *See Appendix at 52 – State of West Virginia Uniform Citation No. 100-1512625.* Dr. Mangold, because of his fear of being cited once again, no longer used his deeded right-of-way to access his hunting property.¹

On December 9, 2014, Dr. Mangold purchased from Mr. Stickler Lot 13 of Timberlake Estates, Section 3. *See Appendix at 55 – December 9, 2014, Deed between Charles A. Stickler and Terry S. Mangold recorded in Mineral County*

¹ Please See *Appendix at 53 - 54.* On February 13, 2015, Mineral County Assistant Prosecutor, Cody Pancake, dismissed Dr. Mangold's trespassing charge in Mineral County Case Number 14-M-1188. Also, Sergeant Droppleman charged Dr. Mangold with Destruction of Property in Mineral County Case Number 14-M-1300. Mr. Pancake dismissed this charge as well.

Deed Book 364 at Page 39. Dr. Mangold is now a property owner of a residential lot and a right-of-way in Timberlake Estates.

In regard to Petitioner's Statement of the Case, Respondents dispute that they caused any damage to the roads of Timberlake Estates, let alone extensive road damage, and now that Dr. Mangold is a lot owner within Timberlake Estates, he is subject to the same fees and/or expenses as other property/home owners within Timberlake Estates. Further, Respondents in no way increased the traffic flow within Timberlake Estates except for Dr. Mangold alone using his legally deeded right-of-way. Dr. Mangold has not allowed anyone other than himself to use this right-of-way, and now that Dr. Mangold owns an undeveloped residential lot within Timberlake Estates, to assert that he is somehow increasing traffic and disturbing the peaceful nature of Timberlake Estates is preposterous.

II. ARGUMENT

Even applying the de novo standard of review, one reaches the conclusion that the Circuit Court was correct in its dismissal of this case pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure because (1) Dr. Mangold is/was in no way in violation of the Timberlake Estates Homeowners' Association's restrictive covenants, and (2) the unpublished, per curiam decision of the Fourth Circuit Court of Appeals that is *Patrick Henry Estates Homeowner's Association Inc. v. Geral Miller*, 462 Fed. Appx. 339 (2012), is readily distinguishable from the circumstances in the case at bar.

1. Dr. Mangold and Mr. Stickler have not increased traffic within Timberlake Estates. Also, Patrick Henry Estates Homeowner's Association v. Gerald Miller, 462 Fed. Appx. 339, 2012, is a per curiam, unpublished decision by the Fourth Circuit Court of Appeals that is distinguishable from the case at bar.

Petitioner asserts in its first assignment of error that the facts in the case at bar “change very slightly” from the facts in *Miller*. (See Pg. 8 of Petitioner’s Brief). This statement is an exaggeration. Admittedly, the Fourth Circuit Court of Appeals did make a ruling in *Miller* that the through road in that case was prohibited; however, the Court of Appeals’ ruling was based upon an entirely distinct and separate factual scenario from the case at bar, and its ruling was also based upon the specific wording of the restrictive covenants of the Patrick Henry Estates Homeowners’ Association. Therefore, the Fourth Circuit Court of Appeals did not create a rule of law stating that a through road leading outside of a subdivision is always improper (if so, *Miller* may have resulted in a published opinion). Instead, the Fourth Circuit Court of Appeals made its decision based upon the specific factual circumstances and restrictive covenants in play in the *Miller* case. Moreover, Dr. Mangold and Mr. Stickler have never increased the flow of traffic in Timberlake Estates because never has Dr. Mangold or Mr. Stickler allowed anyone to use this right-of-way.

A review of the *Miller* decision reveals the inconsistencies in the Petitioner’s argument. The Defendant/Appellant in *Miller* planned to develop an apartment complex (Sloan Square) immediately beside another subdivision (Patrick Henry Estates). The Defendant owned lot C-1 in Patrick Henry Estates, and he planned to develop that lot into a road way for the tenants of Sloan Square

to access the apartment complex. In other words, the Defendant planned to increase the traffic in Patrick Henry Estates exponentially by having tenants living in Sloan Square access Sloan Square by first driving through Patrick Henry Estates. (See *Id.* at 341 – 342).

According to the Court of Appeals in *Miller*,

The district court correctly held that Miller's intended use of Patrick Henry Way to connect his planned Village, located on the 42-acre undeveloped parcel of the Subdivision, to the adjoining existing Shenandoah Springs Development, would overburden the easement and exceed its intended scope. The deed language reserves an easement over the Subdivision roadways for future commercial, educational, civic, social, charitable, or medical developments '*within* the Patrick Henry Estates Subdivision areas.' (Emphasis added). Miller seeks to impermissibly extend the reserved easement through Patrick Henry Way beyond the dominant property—Patrick Henry Estates—into the adjacent Shenandoah Springs Development lot owned by Miller, so as to access the City of Ranson. As the district court correctly found, Miller cannot utilize his reserved easement to access property he owns outside of Patrick Henry Estates. Moreover, we find unimpeachable the court's finding that Miller's intended use of Patrick Henry Way to connect his planned Village to the Shenandoah Springs Development and the City of Ranson would expose the Subdivision to traffic from a major highway, Flowing Springs Road, thereby significantly increasing the roadway traffic and overburdening the easement.

Id. at 343. (Emphasis in original).

In the case at bar, Dr. Mangold has no intention of extending his right-of-way beyond its current location. Unlike the Defendant in *Miller*, Dr. Mangold does not seek to extend his right-of-way outside of Timberlake Estates, increase traffic in Timberlake Estates, or cause a through road. Dr. Mangold's right-of-way extends to the rear perimeter of Lot 15. The rear perimeter of Lot 15 then borders Dr. Mangold's property that he purchased from the Boddys. Dr. Mangold

has no reason to seek the further extension of his right-of-way because his right-of-way borders his property. Also, even if Dr. Mangold sought to extend his right-of-way (which he does not) he could probably do so because the restrictive covenants of the Timberlake Estates Homeowners' Association do not have a requirement that a right-of-way remain "within" Timberlake Estates.

As for increasing the traffic within Timberlake Estates, Dr. Mangold has no intention of allowing anyone other than himself to use this right-of-way. Dr. Mangold plans to install gates over certain sections of his property to prevent anyone else from accessing his property/right-of-way. There is an enormous difference between linking an entire apartment complex to a subdivision, which would obviously increase traffic flow through a subdivision, to a single individual using a right-of-way to access his hunting property.

Petitioner then asserts that Dr. Mangold owns the 500 acres that is Four Knobs, LLC, and that his use of the Four Knobs' property is "understated." (See Pg. 9 of Petitioner's Brief). First off, while Dr. Mangold is a member of Four Knobs, LLC, he is in no way the sole owner. Instead, he is one of several owners. As for Petitioner's assertion that Dr. Mangold's use of the hunting property is understated, Petitioner provides no reasonable basis, fact, evidence, or proof for its suspicion. Petitioner, through this statement, is also contradicting its assertion that the facts in *Miller* "change very slightly" from the case at bar. Again, there is a huge difference between one owner of a right-of-way/property accessing his hunting camp as contrasted to someone increasing the traffic flow in a subdivision exponentially by trying to connect it to another subdivision. Moreover, for

Petitioner to even insinuate that Dr. Mangold is going to develop the Four Knobs, LLC, property into a subdivision and/or development is an assertion that is very much without evidence, substance, or truth. In other words, Petitioner is contradicting its argument while grasping at straws.

Petitioner then argues that the Fourth Circuit found in *Miller* that “the nature of the resulting use is prohibited, not the degree.” (See Petitioner’s Brief at Pg. 9). Petitioner’s argument flies in the face of one of the primary factors that the Fourth Circuit used in deciding *Miller*:

Moreover, we find *unimpeachable* the court's finding that Miller's intended use of Patrick Henry Way to connect his planned Village to the Shenandoah Springs Development and the City of Ranson would expose the Subdivision to traffic from a major highway, Flowing Springs Road, thereby *significantly increasing the roadway traffic and overburdening the easement*.

Id. at 343. (Emphasis added). The above quote obviously speaks to the degree of the use of the road in *Miller*. Therefore, Petitioner’s argument as to what the Fourth Circuit allegedly meant is in no way congruent with what the Fourth Circuit actually said.

Petitioner next posits that Dr. Mangold and Mr. Stickler “violated the very spirit of the planned community by exposing and burdening it with potential traffic of non-residents.” (See Pg. 10 of Petitioner’s Brief). According to Petitioner’s logic, everyone who resides in Timberlake Estates is, in fact, in violation of the spirit of the planned community. Any resident/property owner in Timberlake Estates who invites a guest (or even thinks about inviting a guest) to his/her home is in violation of the spirit of the planned community should those

guests be non-residents of Timberlake Estates. As such, no one in Timberlake Estates should be allowed to invite anyone to their home/property because of the potential of burdening the Timberlake Estates with the traffic of non-residents.

What Petitioner fails to recognize is that Dr. Mangold is the only person who will access his right-of-way. Further, Dr. Mangold is an owner of a residential lot within Timberlake Estates and is no longer a non-resident. Because Dr. Mangold (1) is/will be the only person using this right-of-way, (2) has/will not extend(ed) his right-of-way beyond the borders of Timberlake Estates, (3) has/will not increase(d) traffic of non-residents or cause(d) a through road, and (4) is not going to develop the Four Knobs' 500 acres into a subdivision, Dr. Mangold and Mr. Stickler are not in violation of the so-called spirit of Timberlake Estates. Furthermore, for the reasons stated supra and because the facts as well as the restrictive covenants in the unpublished per curiam case that is *Miller* are distinguishable from the case at bar, the *Miller* case is inapplicable as well.

2. Dr. Mangold is using Lot 13 for residential purposes only.

Petitioner asserts in its second cause of action that Dr. Mangold is not using this right-of-way for residential use; however, Petitioner has not taken the entire text of Restrictive Covenant 2 into consideration. Petitioner, in fact, neither provided the entire text of Restrictive Covenant 2 in its original complaint nor in its brief to this Court. Said restrictive covenant specifically states, "The land hereby conveyed is restricted to residential use only, and no commercial, industrial or manufacturing business, building or enterprise, shall be erected, maintained or operated upon said land." *See Appendix at 57.*

Petitioner failed in its complaint to allege exactly how Dr. Mangold's use of the right-of-way was not residential except to say that Dr. Mangold did not purchase the right-of-way to establish a residence. In its Brief to this Court, Petitioner alleges that "erecting a roadway to hunting lands is certainly not the type of home life activity that is closely related to residential use, especially since Mr, [sic] Mangold's Lot [sic] does not even have a residence erected on it." (See Petitioner's Brief at Pg. 11). However, residential use is not limited strictly to the building of a home. For Plaintiff to provide such a narrow definition of "residential" is misleading, especially when viewed in the context of the entirety of the language within Restrictive Covenant 2.

Dr. Mangold's use of this right-of-way and property is "residential" in that his use involves only recreational activities, such as using the right-of-way to access his hunting property. Moreover, Dr. Mangold's use of this right-of-way/property is residential according to the plain language of the restrictive covenant in that Dr. Mangold's use is not for commercial, industrial, or manufacturing purposes; nor is Dr. Mangold placing a commercial, industrial, or manufacturing business or enterprise upon Lot 13.² In other words, Dr. Mangold's use of the right-of-way is residential and in compliance with this restrictive covenant.

Petitioner then argues that Restrictive Covenant 17 requires Dr. Mangold to build a home upon his lot. Respondent takes exception to this argument because this argument (1) is not within Petitioner's original complaint and (2) was

² As an aside, Dr. Mangold has not made plans to place a home upon Lot 13 as of yet, but he has also not ruled out the possibility either.

not argued below; thus, it should not be heard on appeal, even under de novo review. Should the Court consider this argument, though, Petitioner is taking this restrictive covenant out of context. Restrictive Covenant 17 states, "One residence shall be constructed upon said lot at a cost of no less than SIXTY-FIVE THOUSAND (\$65,000) DOLLARS (the said construction does not include the cost of the lot) adjusted annually for inflation with 1987 as a base year and adjusted thereafter upon the 1987 'Marshall and Swift Housing Index' as is published by Marshall and Swift yearly." *See Appendix at 60.*

Restrictive Covenant 17 is stating that should a residence be built upon a lot within Timberlake Estates (1) only one home may be built on that lot and (2) the home must be of a minimum value. Petitioner's interpretation of Restrictive Covenant 17 is narrow and incorrect. Petitioner's argument would require that someone, such as Mr. Stickler, who owned two or more lots within Timberlake Estates to build a home upon each lot. Such an interpretation is illogical and expensive. Furthermore, Petitioner refutes its new interpretation of Restrictive Covenant 17 on Page 5 of its Brief and Paragraph 24 of its complaint where Petitioner states, "While every lot located within Timberlake Estates Subdivision is subject to restrictive covenants and encumbrances, each lot is subject to a yearly fee for road maintenance of two hundred (\$400.00) [sic] dollars per year if the lot is improved *with a dwelling* and one hundredth [sic] (\$100.00) dollars if the lot is unimproved." (Emphasis added). *See Appendix at 5.*

As such, based upon the substance of Petitioner's Brief and original complaint, Petitioner's interpretation of Restrictive Covenant 17 is narrow and

incorrect. According to Petitioner, Timberlake Estates has delineated clear divisions between lots with and without dwellings to the extent that Timberlake Estates has set different yearly road maintenance fees for these lots. Therefore, the proper interpretation of Restrictive Covenant 17 is that it requires that only one home can be built upon a residential lot within Timberlake Estates, and this home is to be of a minimum value so as to not lower the home/property values of the remaining homes within the subdivision. Finally, should Dr. Mangold be forced to build a home upon Lot 13, this does not negate the use of his right-of-way that extends over Lots 13, 14, and 15. Once again, Dr. Mangold owns both a right-of-way and Lot 13 within Timberlake Estates Subdivision.

3. Dr. Mangold is not in violation of Restrictive Covenant 15.

Petitioner argues as its third and final cause of action that Restrictive Covenant 15 “protects the community from a throughway lot in the community.” (See Pg. 12 of Petitioner’s Brief). Petitioner also argues that the Grantor, which is Timberlake Estates Homeowners’ Association, may grant right-of-ways, while precluding lot owners from doing the same. (See Pg. 13 of the Petitioner’s Brief).

The restrictive covenant at issue states,

Grantor reserves unto itself, its successors and assigns, the right to erect (but not the obligation) and maintain all utility and electric lines, or to grant easements and rights-of-ways therefore, under the right of ingress and egress for the purpose of installing or maintaining the same on, over or under a strip of land ten (10) feet wide along the rear lines of any lot and twenty (20) feet wide along the front of any lot and thirty (30) feet wide along the perimeter of the subdivision. Such utility easements include but are not limited to telephone or electric light poles, conduits, equipment, sewer, gas and water lines. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may

damage or interfere with the installation and maintenance of these utilities.

See Appendix at 59. Nowhere within the language of this restrictive covenant is the statement that only the “Grantor” can deed a right-of-way. Furthermore, nowhere else within the entirety of the remaining restrictive covenants is the language that only the Grantor can deed a right-of-way. The language in this restrictive covenant provides to the Grantor the right to grant easements and rights-of-way so that utility and electric companies have ingress and egress to and from Timberlake Estates to install/maintain said utilities, but the language in this restrictive covenant and all of the other restrictive covenants in no way restricts owners of lots within Timberlake Estates from deeding rights-of-way. Thus, Mr. Stickler was free to grant a right-of-way to Dr. Mangold.

Petitioner continues on to say that Timberlake Estates Homeowners’ Association reserved “the exclusive right to control the front and end lines of each lot contained within the community, as well as the entire perimeter” and that no machinery would be allowed upon the areas designated in Restrictive Covenant 15. (See Pgs. 13 - 14 of Petitioner’s Brief). The Respondents recognize that Dr. Mangold’s right-of-way adjoins the front of Lot 13 and the back of Lot 15. However, the development of this right-of-way by Dr. Mangold does not interfere with the rights of Timberlake Estates. The restrictive covenant states in part, “. . . Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of these utilities.” *See Appendix at 59.*

Dr. Mangold has no intention of placing upon his right-of-way or this easement a structure, planting, or other material that may interfere with the installation and maintenance of any utilities. Admittedly, Dr. Mangold would like to develop the right-of-way so that he can drive a vehicle over it. To do this, he plans on placing either gravel or shale on the right-of-way, not pavement. Should the installation and/or maintenance of a utility be required, this area of Dr. Mangold's right-of-way could be easily excavated or manipulated so as to install something upon it or underneath of it, thus avoiding any interference with an easement. As such, even though Dr. Mangold's right-of-way crosses over the twenty foot area to the front of Lot 13 and the thirty-foot area to the rear perimeter of Lot 15, said right-of-way is in compliance with Restrictive Covenant 15 because this right of way will neither damage nor interfere with the installation and maintenance of any utilities.

In regard to Petitioner's argument about machinery, Petitioner's logic is flawed. A lawnmower is a machine, so according to Petitioner's position, residents of Timberlake Estates could not push or drive a lawnmower over these designated areas. Petitioner also forgets that driveways adjoin the roads within Timberlake Estates to the homes in Timberlake Estates and that these driveways cross over these easements. Petitioner's argument, if applied, could force a resident whose driveway impairs this easement to have to remove his/her driveway and drive over his/her lawn (likely, this would include every resident within Timberlake Estates). Thus, because Timberlake Estates does not have the exclusive right to grant rights-of-way and because Dr. Mangold and Charles

Stickler are in compliance with Restrictive Covenant 15, Dr. Mangold's right-of-way is valid, legal, and appropriate.

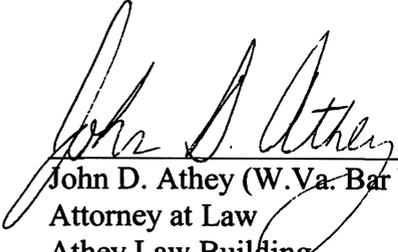
III. CONCLUSION

Respondents Dr. Mangold and Mr. Stickler pray that this Court affirm the decision of the Mineral County Circuit Court. Respondents are in compliance with all of the Timberlake Estates Homeowners' Association's restrictive covenants. Also, the unpublished, per curiam decision of the Fourth Circuit Court of Appeals that is *Patrick Henry Estates Homeowner's Association Inc. v. GERAL Miller*, 462 Fed. Appx. 339 (2012), is readily distinguishable from and not applicable to the case at bar. Therefore, Respondents Terry S. Mangold and Charles A. Stickler pray that this Court deny Petitioner's Appeal and affirm the Order of the Mineral County Circuit Court.

Dated December __/__, 2015.

**TERRY S. MANGOLD AND CHARLES A. STICKLER
DEFENDANTS/RESPONDENTS**

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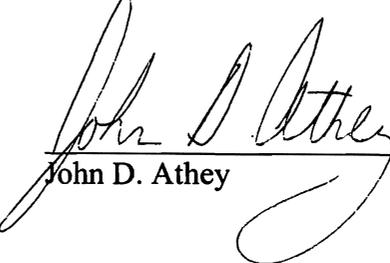
**TERRY S. MANGOLD AND
CHARLES A. STICKLER,**

**Defendants Below,
Respondents**

CERTIFICATE OF SERVICE

I, John D. Athey, Attorney at Law, do hereby certify that I served a copy of the foregoing Defendants/Respondents Terry S. Mangold and Charles A. Stickler's Summary Response, upon the Plaintiff/Petitioner by mailing a true copy thereof, U.S. postage prepaid, on this 1st day of December, 2015, to the following:

Agnieszka Collins (West Virginia Bar # 11092)
P.O. Box 631
Keyser, WV 26726



John D. Athey