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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Awarding Attorney Fees

Before the Court is the issue of attorney's fees. On July 3, 2018, the Court entered a Final Order in this matter, declaring that "Defendant shall pay Plaintiff the reasonable attorney's fees and costs it incurred in this action." Subsequently, Plaintiff requested $22,359.32 in attorney's fees. On September 24, 2018, the Court held a *Pitrolo* hearing on the issue of attorney's fees. During this hearing, Plaintiff provided a detailed accounting of its attorney-fee expenditures. On October 24, 2018, Defendant filed his objections to Plaintiff's accounting but did not request another hearing on his objections. On October 30, 2018, Plaintiff filed its reply to Defendant's objections. Accordingly, the matter is now ripe for adjudication.

Upon review Plaintiff's accounting of its attorney-fee expenditures, the Court finds that Plaintiff's accounting fully complies with the requirements of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190 (1986). As to the factors the court is required to consider in the award of the fees, the Court agrees with and adopts the Plaintiff's assessment of how the factors should apply with the exception of the degree of success achieved.

Indeed, Plaintiff's request for attorney's fees in the amount of $22,359.32 is facially reasonable. Moreover, the Court notes that Defendant does not object to the reasonableness of the requested fees. Instead, Defendant's sole objection is that Plaintiff is requesting attorney's fees for a claim upon which it did not prevail. After

reviewing West Virginia case law, the Court agrees with Defendant that Plaintiff cannot recover attorney's fees for a claim upon which it did not prevail. *See, e.g., Heldreth v. Rahimian*, 219 W. Va. 462 (2006) (holding that the calculation of attorney fees requires the exclusion of hours spent on unsuccessful claims); *State ex rel. W. Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm.*, 217 W. Va. 102, 106 (2003) ("Apportionment of attorney's fees is appropriate where some of the claims and efforts of the claimant were unsuccessful.").

Accordingly, the issue is how to calculate a proper award of attorney's fees. In this case, Plaintiff asserted three counts against Defendant. Specifically, Count I asserts a nuisance claim. Count II asserts that Plaintiff has an easement through Defendant's land with which he improperly interfered. Count III asserts that Defendant's tax deed is void and should be set aside. Plaintiff substantially prevailed on both Counts I and II. However, Count III was unsuccessful. Therefore, upon review of Plaintiff's accounting of its attorney-fee expenditures, the Court believes the expenditures related to Count III should be culled from Plaintiff's award of attorney's fees. Indeed, the Court believes that the following expenditures relate to Count III and should be culled:

Description:	Rate:	Amount:
AP (attorney's fees): 10/19 – Telephone conference with Assessor re: Assessor's question re: common area (lake).	150.00	15.00
JS (paralegal services): 1/10/18 (Heavner) Processed into client file Respondent's Motion to Dismiss Count III – Setting Aside Respondent's Tax Deed received via efile.	75.00	15.00
AP (attorney fees): 1/10 – Read Heavner's Motion to Dismiss Count III and informed client of same.	150.00	30.00
JS (paralegal services): 1/11/18 (Heavner) Processed into client file Briefing Schedule on Motion to Dismiss received via efile.	75.00	15.00
AP (attorney fees):	150.00	30.00

1/19 – Emailed client re: follow-up to Heavner's Motion to Dismiss and brief explanation of our rebuttal arguments.		
AP (attorney fees): 1/19 – Continued Drafting Response to Defendant's Motion to Dismiss Count III and prepared proposed Order re: same.	150.00	285.00
AP (attorney fees): 1/26 – Began drafting Response to Defendant's Motion to Dismiss Count III.	150.00	45.00
JS (paralegal services): 1/29 Efiled Plaintiff's Response to Defendant's Motion to Dismiss Count III and proposed Order.	75.00	18.75
BAH (attorney fees): 1/29 . . . [R]eviewed and edited response to Motion to Dismiss to assist AFP.	200.00	[130.00]
AP (attorney fees): 1/30 – Telephone conf. with client re: status of case with regard to . . . motion to dismiss.	150.00	[7.50]
JS (paralegal services): 2/9 Processed into client file Respondent's Reply to Petitioner's Response to Motion to Dismiss Count III received via efile.	75.00	15.00
JA (paralegal services): 2/20 Processed into client file Defendant's Proposed Order Granting Motion to Dismiss Count III received via efile.	75.00	15.00
BAH (attorney fees): 2/21 Provided client with follow up strategy to resolve any future problems with Heavner's claim against the Lake and claim to ownership of the land under the access road.	200.00	100.00
JS (paralegal services): 4/24 Processed into client file Defendant's Motion for Summary Judgment filed by C. Stroech via efile.	75.00	15.00
BAH (attorney fees): 4/24 . . . [B]egan review and analysis of Defendant's Motion for Summary Judgment, emailed client to advise.	200.00	100.00
BAH (attorney fees): 4/24 Began preparation of Response to Defendant's Motion for Summary Judgment.	200.00	200.00
JS (paralegal services): 4/25 Processed into client file Supplement to Defendant's Motion for Summary Judgment filed by C. Stroech received via efile.	75.00	15.00
BAH (attorney fees): 4/25 Completed first draft of response to Defendant's Motion for Summary Judgment.	200.00	460.00

JS (paralegal services): 4/25 Formatted and edited Reply to Defendant's Motion for Summary Judgment; Prepared Certificate of Service; efiled Reply and Certificate of Service	75.00	56.25
BAH (attorney fees): 4/27 Completed edits and refinement of Reply to Motion for Summary Judgment.	200.00	280.00
BAH (attorney fees): 5/22 Phone conference with Bill King to resolve Assessor's understanding of issue and resolution.	200.00	120.00
BAH (attorney fees): 5/22 Emailed client to inform of Assessor conversation.	200.00	60.00

Consequently, the Court finds that $2,027.50 in attorney-fee expenditures relate to Count III and should be culled.

The Court further finds that $1,350.00 in attorney-fee expenditures should be culled from Plaintiff's award of attorney's fees. On April 24, 2018, the Court entered an Order awarding Plaintiff $1,350.00 in attorney's fees to cover the costs Plaintiff incurred when enforcing the Court's preliminary injunction. Upon review of Plaintiff's accounting of its attorney-fee expenditures, however, it appears that Plaintiff is again listing the expenditures it incurred when enforcing the Court's preliminary injunction. However, Plaintiff cannot collect these same expenditures twice. Therefore, the Court finds that, in addition to the $2,027.50 in expenditures being culled for relating to Count III, $1,350.00 should also be culled from Plaintiff's award of attorney's fees, leaving Plaintiff with a total award of $18,981.82 in attorney's fees.

In conclusion, the Court finds that, because the costs expended on Count III are ascertainable and because Plaintiff did not prevail on Count III, the costs associated with Count III should be culled from Plaintiff's award of attorney's fees. Additionally, the Court finds that the attorney's fees that have already been awarded to Plaintiff to cover the costs Plaintiff incurred when enforcing the Court's preliminary injunction should be

culled as well. Accordingly, it is hereby ORDERED that Defendant shall pay Plaintiff its reasonable attorney's fees and expenses in the amount of $18,981.82.

The objections of all persons adversely affected by this order are noted and preserved.

The Clerk shall transmit attested copies of this Order to all counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Denying Post Final Judgment Motion for Injunction

Before the Court is the Motion for Injunctive Relief filed by Defendant Robert Heavner, with assistance of counsel Christopher Stroech, Esq., on August 16, 2018. In this Motion, Defendant requests that the Court "issue an order enjoining the Plaintiff from denying [him] the enjoyment and use of his property – the Lake Area." In support of his Motion, Defendant alleges that Plaintiffs "block[ed] his only access to the lake area by vehicle" and installed "No Trespassing" signs around the lake area.

This case was previously tried and a final judgment order was entered July 3, 2018. The only issue now before the court is the taxation of costs. The Defendant's motion does not and indeed cannot cite to any provision of the current final order which is violated.

A preliminary injunction is designed to maintain a status quo pending the ultimate disposition of a question of fact and law properly pleaded and before the court. The law requires that the party seeking an injunction demonstrate, among other things, a clear legal right to the injunction pending the outcome of a case or controversy. Pleadings provide a context and limitation for what injunctive relief can be lawfully granted by the trial court. See *Derfus v City of Chicago*, 42 F. Supp. 3d 888, 896 (N.D. Ill. 2014) (court finds that injunctive relief is not available where it is not requested in the complaint).

Upon review, the Court finds that injunctive relief is not appropriate at this time

for several reasons. First, Defendant's Motion is untimely. The Court has already conducted a bench trial and issued a Judgment Order in this case. *See*W. Va. R. Civ. P. 65(a) (explaining that a preliminary injunction requires a trial on the merits of the requested relief). Second, the issue raised in Defendant's Motion was not litigated in the instant action. Further, the circuit court cannot simply issue injunctions which are not prayed for in a complaint, counterclaim or cross claim. The requested relief is foreign to the pleadings joined and finally resolved in this dispute. Therefore, the Court may not conduct any further evidentiary hearings, or another trial, in this case regarding an issue that was not the subject of any of the underlying claims for relief.

In conclusion, Defendant's Motion for Injunctive Relief is denied at this time.

The Clerk shall transmit attested copies of this Order to all counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Denying Motion without Prejudice

On the 31st day of July 2018, the Defendant filed a motion for "clarification" of judgment order entered July 3, 2018. It does not identify what language in the order which requires clarification. It is filed beyond the time for filing Rule 59 motions. The motion furnishes no authority for the relief requested.

The Supreme Court has discouraged the filing of such summary motions in Syllabus Point 3, *Malone v. Potomac Highlands Airport Authority*, 786 S.E.2d 594 (W. Va. 2015) (relating to summary motions to reconsider). It has held that a summary motion filed without supporting authority or setting forth grounds for relief may be denied summarily. The party filing the motion has the burden of establishing the facts entitling him to relief and the law which governs the request and his entitlement to the relief requested. This motion does neither.

The motion is therefore denied without prejudice.

The clerk is directed to send a true and correct copy of this order to counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Judgment Order

This matter came before the Court for a bench trial on May 24, 2018. The Court, having heard all of the evidence and arguments of counsel and having reviewed all of the parties' submissions contained in the record, finds as follows:

FINDINGS OF FACT

1. Plaintiff is a road maintenance association who performs road repairs and snow removal for the Three Run Woods and Three Run Acres subdivisions.
2. In the Three Run subdivisions, there is an area known as Three Run Lake.
3. In 1969, the owners of the Three Run subdivisions, Arthur and Beverly Radin, issued an original plat (the "1969 Plat") of the subdivisions.
4. The 1969 Plat is recorded in the Berkeley County Register of Deeds Office in Deed Book 242, page 450.
5. The 1969 Plat depicts Three Run Lake and several other areas, including a "Recreation Area," as jointly owned premises.
6. The 1969 Plat describes a "road easement" for all of the roads depicted in the Plat. The road easement extends 25-feet on each side of a road's centerline, amounting to a total 50-foot easement. The purpose of the easement is for constructing and maintaining road access.
7. Plaintiff submitted a deed dated May 10, 1977, in which the Radins conveyed an

individual lot in the Three Runs Woods subdivision to a couple. This deed contains the following language:

> THAT for and in consideration of the sum of FIVE ($5.00) DOLLARS, cash in hand paid, and other good and valuable consideration, . . . the said parties of the first part do hereby grant, bargain, sell and convey . . . Lot No. 37 . . . .
>
> THE above described real estate is conveyed subject to the following terms, covenants, agreements and conditions, which shall run with the land: . . .
>
> (12) All facilities which are marked on the plats of the subdivision with shaded diagonal lines, which may include, but are not limited to, lakes, pond, parking areas, picnic areas, restroom facilities and springs, shall become the joint property of all of the lot owners in said subdivision, and all said lot owners shall have equal rights to the use thereof. The developers, however, retain the exclusive right, if they should so desire, to maintain the said facilities on the jointly owned premises.

8. Plaintiff's President, Christopher Loizos, testified that, subsequent to his acquisition of a lot within the Three Run subdivisions, he and other volunteers consistently maintained Three Run Lake and the recreation areas. The volunteers maintained the two outflow points surrounding Three Run Lake, kept the areas free from trash and brush, and used the areas for picnics, general recreation, and fishing.
9. Subsequently, the Three Run Woods Association, Inc., Plaintiff's predecessor, was created. However, covenants contained in the various deeds to the lots failed to imbue the Three Run Woods Association with legal authority to collect any assessments for the maintenance of the common areas. Instead, maintenance of the roads was dependent on the good will of the lot owners. Ultimately, the restrictions of the Three Run Woods Association led to the creation of Plaintiff in 2016. Plaintiff is legally empowered to collect fees from all lot owners.
10. Defendant claims that he is the property owner of the Three Run Lake area.
11. On November 1, 1979, the Radins conveyed to L&L Corporation "[a]ll of the

remaining lots, pieces or parcels of land lying and being in the subdivision of Three-Run-Woods as shown on [the 1969 Plat]."

12. On July 21, 1981, L&L Corporation conveyed their property to OMCO Corporation.
13. On June 2, 2008, the property was conveyed back to L&L Corporation by a quit-claim deed.
14. It appears that the Three Run Lake area was never assessed as a separate parcel until the tax year of 2009.
15. L&L Corporation was listed as the owner of the Three Run Lake area when the property taxes were determined to be delinquent for the years 2009-2014.
16. On July 23, 2014, Defendant purchased a tax deed for $25.00 for the Three Run Lake area.
17. Running through the Three Run subdivisions is a stream known as Three Run. A dam constructed across Three Run created Three Run Lake. The dam lies at the southwest corner of the Three Run subdivisions and the road crossing over it is the sole means of access to and from the interior lots of the subdivisions.
18. In late 2017, Defendant began placing cement pavers/concrete parking blocks and landscaping timbers on/near the above-described road. Defendant also posted "no trespassing" signs around Three Run Lake and a nearby recreation area and directed Plaintiff's officers to prohibit local lot owners from occupying the property. The Court notes that Defendant did not take any action alerting Plaintiff or any Three Run lot owners of his claim to the property until after the three-year statute of limitations for challenging voidable tax deeds expired. See W. Va. Code § 11A-4-4(a) (declaring that there is a three-year statute of limitations to challenge voidable tax deeds).

19. Mr. Loizos testified that Plaintiff complained to Defendant regarding the obstructions. In response, Defendant offered to sell the property to Plaintiff for $10,000. While the offer was pending, Defendant gave Plaintiff's Vice President a lemon tree containing thorns, stating, "I just want this to be a reminder that I'll always be a thorn in your backside." Subsequently, a Three Run homeowner informed Defendant that he was willing to purchase Defendant's property for $10,000 in cash. However, Defendant refused to go with the sale, instead raising the selling price to $20,000.
20. Since Defendant prohibited Plaintiff or any Three Run lot owners from accessing the Three Run Lake recreational area, the area has failed to be properly maintained. Trees and brush are becoming overgrown, jeopardizing the outflows to the Lake. Some flooding has occurred, which Plaintiff alleges is jeopardizing the integrity of the dam supporting the Three Run entry road.
21. At no time prior to the expiration of the three-year statute of limitations was Plaintiff or any lot owner ever notified by any manner or means that Defendant had purchased the Three Run Lake area or that he had any claim whatsoever to it.
22. On December 6, 2017, Plaintiff filed a Petition for an Injunction against Defendant. The Petition asserts three counts. Specifically, Count I asserts that Defendant's actions constitute a public and private nuisance. Count II asserts that Plaintiff has a 50-foot easement across the Three Run Lake area with which Defendant has improperly interfered. Count III asserts that Defendant's tax deed is void and should be set aside.
23. On December 19, 2017, after holding a hearing on Plaintiff's request for a preliminary injunction, the Court found that Plaintiff was likely to prevail on the issue of whether it possesses a 50-foot easement and issued the requested preliminary

injunction, enjoining Defendant from obstructing the easement.

24. On February 20, 2018, the Court granted summary judgment in favor of Plaintiff on the issue of the existence of the purported 50-foot easement. Specifically, the Court determined that Plaintiff possesses a 50-foot "road easement" in Defendant's property as described in the 1969 Plat and that the easement may be used for the purpose of constructing and maintaining road access. The Court reserved ruling on the issues of whether Defendant has improperly interfered with Plaintiff's easement and whether a permanent injunction is warranted.

25. Despite the issuance of the preliminary injunction, Defendant did not remove the obstructions from the 50-foot easement until after the Court entered an Order and Rule to Show Cause on January 17, 2018, directing Defendant to explain why he should not be held in contempt.

26. On May 24, 2018, the Court held a bench trial on the remaining issues contained in the Petition.

27. Because both parties have submitted their proposed findings of fact and conclusions of law, the matter is now ripe for adjudication.

CONCLUSIONS OF LAW

First, the Court will address the issue of whether Defendant's tax deed is void and should be set aside.[1] Initially, Plaintiff argues that Defendant's deed does not convey to him the Three Run Lake area because the Radins previously conveyed the area to the subdivision lot owners through their individual deeds. The Court disagrees. To support its claim, Plaintiff submitted one deed, dated May 10, 1977, in which the Radins conveyed an individual lot in the Three Runs Woods subdivision to a couple. This deed contains the following language:

> THAT for and in consideration of the sum of FIVE ($5.00) DOLLARS, cash in hand paid, and other good and valuable consideration, . . . the said parties of the first part do hereby grant, bargain, sell and convey . . . Lot No. 37 . . . .
>
> THE above described real estate is conveyed subject to the following terms, covenants, agreements and conditions, which shall run with the land: . . .
>
> (12) All facilities which are marked on the plats of the subdivision with shaded diagonal lines, which may include, but are not limited to, lakes, pond, parking areas, picnic areas, restroom facilities and springs, shall become the joint property of all of the lot owners in said subdivision, and all said lot owners shall have equal rights to the use thereof. The developers, however, retain the exclusive right, if they should so desire, to maintain the said facilities on the jointly owned premises.

However, the deed does not contain any language actually conveying the Three Run Lake area to the couple. Instead, the deed appears to be a standard form the Radins used for multiple sales to buyers, indicating that, if the property to be bought contained a common area, then the buyer must allow all other lot owners access to the property. The Court also notes that Plaintiff submitted only one deed to support its claim that the Radins conveyed the Three Run Lake area to the Three Run lot owners through their individual deeds, which is insufficient to persuade the Court of the truth of Plaintiff's claim. Indeed, Defendant provided another deed the Radins sold to a private buyer that did not contain any language regarding joint property or the conveyance thereof.

Because Plaintiff has not proved that the Radins conveyed the Three Run Lake area to the Three Run lot owners through their individual deeds, it appears that the Radins conveyed the Three Run Lake area to L&L Corporation on November 1, 1979. In a deed dated November 1, 1979, the Radins conveyed to L&L Corporation "[a]ll of the remaining lots, pieces or parcels of land lying and being in the subdivision of Three-Run-Woods as shown on [the 1969 Plat]." Therefore, because Defendant ultimately received a quitclaim deed for the property conveyed in the November 1, 1979, deed,

Defendant's deed, if not void, conveys to him the Three Run Lake area.

Plaintiff further argues that the Three Run Lake area was improperly subjected to taxation and that, therefore, Defendant's tax deed is void as a matter of law. Upon review of West Virginia tax law, it appears that the Court cannot rule on this issue at this time. Indeed, "[r]elief from an erroneous assessment-commonly referred to as exoneration-may only be granted by the county commission." *Blue Ridge Acres Civic Ass'n, Inc., et al. v. Craig Griffith, State Tax Commissioner, et. al.*, Jeff. Co. Civ. Action No. 11-AA-4 (2012). Accordingly, the proper course of action for Plaintiff, if it believes that the Three Run Lake area was improperly subjected to taxation, would be to initially seek relief from the county commission and, if such relief is denied, to then appeal the county commission's decision to the circuit court. *See id.* ("While the Circuit Court would have proper jurisdiction to review the County Commission's decision on the issue of exoneration, the Court lacks original jurisdiction to grant such relief."); W. Va. Code § 11-3-26 (explaining that a circuit court may only grant relief to applicants who allege improper tax assessments on appeal). Therefore, the Court finds that it lacks jurisdiction to rule on Plaintiff's claim that the Three Run Lake area was improperly subjected to taxation and that, therefore, the Court cannot find at this time that Defendant's tax deed is void as a matter of law.

Next, the Court will address the remaining issues of Count II. In Count II, Plaintiff asserts that it has a 50-foot easement across the Three Run Lake area and that Defendant has improperly interfered with its easement, warranting injunctive relief. On December 19, 2017, the Court found that Plaintiff was likely to prevail on the issue of whether it possesses a 50-foot easement and issued a preliminary injunction, enjoining Defendant from interfering with the easement. Subsequently, on February 20, 2018, the

Court granted summary judgment in favor of Plaintiff on the issue of the existence of the purported 50-foot easement. Specifically, the Court determined that Plaintiff possesses a 50-foot "road easement" in Defendant's property and that the easement may be used for the purpose of constructing and maintaining road access. However, the Court reserved ruling on the issues of whether Defendant improperly interfered with Plaintiff's easement and whether a permanent injunction is warranted until after the bench trial.

At this time, after having heard all of the evidence presented at the bench trial, the Court finds that Plaintiff has met its burden establishing that Defendant has improperly interfered with Plaintiff's easement and that a permanent injunction is warranted. As previously discussed, Plaintiff possess a 50-foot "road easement" in the road in the Three Run Lake area, which it may use for the purpose of constructing and maintaining road access. Defendant, however, has actively tried to prohibit Plaintiff from using its easement. Indeed, Defendant has not contested that, since late 2017 and until the Court issued a preliminary injunction, he placedcement pavers/concrete parking blocks and landscaping timbers on/near the road in the Three Run Lake area. These obstructions have prevented Plaintiff from maintaining road access to the Three Run subdivisions. Therefore, a permanent injunction enjoining Defendant from obstructing Plaintiff's easement is warranted.

Finally, the Court will address the issue of whether Defendant's actions constitute a public and private nuisance. A private nuisance "is a substantial and unreasonable interference with the private use and enjoyment of another's land."*Bansbach v. Harbin*, 229 W. Va. 287, 291 (2012). A public nuisance, on the other hand, "is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 596 (1945). The West

Virginia Supreme Court of Appeals has stated that:

> The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only. Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public.But if the act or condition causes special injury to one or a limited number of persons and substantial permanent damages result which cannot be fully compensated in an action at law, a suit to abate a nuisance so existing may be maintained by a private individual.

Id. (internal citations omitted).

In the present case, the Court finds that Defendant's actions do not constitute a public nuisance. An example of a public nuisance is "purpresture - blocking or obstructing a public road or navigable waterway." Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. Tort L. 1, 9 (2011). Three Run Lake, however, is not a navigable waterway open to the public but is instead, as portrayed by the 1969 Plat, an area intended only for the use of the Three Run lot owners and their guests. The Court also notes that the roadway in the Three Run Lake area is a private road, not a public road, and that the roadway is maintained by Plaintiff, not the State. Therefore, because the alleged injury is confined to the Three Run lot owners and not to the public in general, a private nuisance claim is more appropriate than a public nuisance claim.

Indeed, the Court finds that Defendant's actions constitute a private nuisance. Defendant is prohibiting all Three Run lot owners from accessing, using, and enjoying Three Run Lake by posting "no trespassing" signs around the Lake and by directing Plaintiff to prohibit lot owners from occupying the area. However, Defendant's deed reflects that he is the owner of all land that L&L Corporation previously possessed and L&L Corporation's deed clearly referenced the 1969 Plat, depicting that the Three Run Lake area conveyed to L&L is a common area available for the use and enjoyment of all

Three Run lot owners and their guests. Accordingly, because L&L Corporation took the Three Run Lake area subject to allowing Three Run Lake lot owners to use and enjoy the area, so did Defendant. Therefore, because Defendant has substantially and unreasonably prevented all Three Run lot owners from accessing, using, and enjoying the Three Run Lake area, to which they have a right to use and enjoy, Defendant's actions constitute a private nuisance.

Plaintiff has requested attorney's fees in the instant action. Generally, "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 474 (1992) (explaining that this general rule is known as the "American Rule"). However, numerous exceptions to this rule exist. *Id.* One such exception is the "bad faith" exception, which "allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* Bad faith "may be found in conduct leading to the litigation or in conduct in connection with the litigation." *Id.*The West Virginia Supreme Court of Appeals has held that "fraud falls within the 'bad faith' exception." *Id.* Accordingly, "where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained . . . ." *Id.*

In the present case, the Court finds that an award of attorney's fees is appropriate. It is clear that Defendant acted in bad faith prior to this litigation and in connection with this litigation. To illustrate, Defendant purchased his tax deed on July 23, 2014, for the sum of $25.00. He did not notify Plaintiff or any Three Run lot owner in any manner that he had purchased the Three Run Lake area. Instead, he then waited

three years, after the statute of limitations for challenging voidable tax deeds expired, before placing obstructions in the road on his property and "no trespassing" signs around Three Run Lake, even though a diligent reading of public property records would have established that Defendant had no legal right to do so. When Plaintiff complained about Defendant's actions, Defendant indicated that he would not change his unlawful behavior and instead offered to sell his property to Plaintiff for $10,000. However, when a homeowner came up with the $10,000, Defendant then raised the selling price to $20,000. This very obvious attempt to extort Plaintiff clearly evidences bad faith. Moreover, the Court notes that Defendant did not remove the road obstructions after litigation began until the Court entered an Order and Rule to Show Cause directing him to explain why he should not be held in contempt for violating the Court's preliminary injunction. Therefore, the Court finds that Plaintiff has met its burden of proving bad faith and that an award of attorney's fees is warranted.

In conclusion, the Court finds in favor of Plaintiff on the private nuisance portion of Count I and on Count II and in favor of Defendant on the public nuisance portion of Count I and on Count III. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that a Permanent Injunction is hereby issued, forever enjoining Defendant from interfering with Plaintiff's 50-foot road easement, which Plaintiff may use for the purposes of constructing and maintaining road access. Defendant may not place cement pavers/concrete parking blocks, landscaping timbers, or any other obstruction, within the 50-foot easement.

It is also ORDERED, ADJUDGED, and DECREED that a Permanent Injunction is hereby issued, forever enjoining Defendant from interfering with the right of the Three Run lot owners, and their guests, to access, use, and enjoy the Three Run Lake area

and any other area identified on the 1969 Plat as a jointly owned premises.

It is also ORDERED, ADJUDGED, and DECREED that Defendant shall pay Plaintiff the reasonable attorney's fees and costs it incurred in this action. However, Plaintiff shall first submit its requested attorney's fees, which shall comply with the requirements of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190 (1986), to the Court within thirty (30) days for Court approval.

The Clerk shall transmit attested copies of this final order to all counsel of record.

[1] At times during the course of this proceeding, Plaintiff noted that Defendant's tax deed was issued with procedural defects. Therefore, to the extent Plaintiff is arguing that Defendant's deed should be considered void as a matter of law due to the procedural defects, the Court finds that Plaintiff's claim is barred by the three-year statute of limitations. *See* W.Va. Code § 11A-4-4 (establishing a three-year statute of limitations for challenging voidable tax deeds). Therefore, assuming *arguendo* that Plaintiff's allegation is true that Defendant failed to provide proper notice upon receiving his tax deed, such a defect is procedural in nature and thus is barred by the statute of limitations.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Denying Defendant's Motion for Summary Judgment

Before the Court is the Motion for Summary Judgment filed by Defendant Robert Heavner, with assistance of counsel Christopher P. Stroech, Esq., on April 20, 2018. On April 25, 2018, Defendant filed a Supplement to his Motion. Plaintiff responded to Defendant's Motion on April 27, 2018. Upon review, the Court will interpret Defendant's Motion as a Motion for Relief from Judgment pursuant to Rule 60 of the West Virginia Rules of Civil Procedure.[1] For the reasons set forth below, Defendant's Motion is denied.

Rule 60 provides that a "court may relieve a party . . . from a final judgment, order, or proceeding for [certain] reasons." W. Va. R. Civ. P. 60(b). These reasons include:

> (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . .
> (3) fraud[,] . . . misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged[;] . . . or
> (6) any other reason justifying relief from the operation of the judgment.

Id.

In the instant Motion, Defendant requests relief from the Court's February 20, 2018, Order, which granted partial summary judgment in favor of Plaintiff in regards to Count II of the Complaint and denied Defendant's Motion to Dismiss Count III of the Complaint. Specifically, Defendant contends that it has newly discovered evidence warranting summary judgment in its favor in regards to Count II of the Complaint, the central issue of which is whether Plaintiff possesses a fifty-foot easement through Defendant's land. Defendant points to several records, including a Description of Resurvey, dated December 7, 1073, and a Deed of a nearby property, dated July 19, 1974. Defendant contends that the identified documents indicate that Plaintiff possesses only a twelve-foot easement, not a fifty-foot easement, through Defendant's land. The documents are a matter of public record and are available to the public at the Berkeley County Courthouse.

The Court notes that "a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 706 (1996). Accordingly, before a court may consider "newly discovered" evidence, the proponent "at a minimum must show that the evidence was discovered since the adverse ruling and that the [proponent] was diligent in ascertaining and securing this evidence[,] . . . [meaning] that the new evidence is such that due diligence would not have permitted the securing of the evidence before the circuit court's ruling." *Id.* at 706 n.25.While the Court believes Defendant's newly discovered documents could have been presented to the Court during its consideration of the original motion for summary judgment, had Defendant used due diligence, the Court will nevertheless

consider the documents presented.

After thoroughly reviewing the newly discovered documents at issue, the Court finds that setting aside its February 20, 2018, Order is not warranted. The setting aside of an order on the basis of newly discovered evidence is only appropriate when the new evidence "is material and controlling and clearly would have produced a different result if present before the original judgment." *Phillips v. Stear*, 236 W. Va. 702, 714 n.34 (2016). In the present case, the Court finds that, had it considered the identified documents, including the Description of Resurvey, dated December 7, 1073, and the Deed of a nearby property, dated July 19, 1974, in its consideration of the original summary judgment motion, the result of the proceedings would have been the same. Indeed, these documents mention a thirty-foot easement, not a twelve-foot easement, and do not pertain to the specific portion of the road through Defendant's land that is currently at issue. Therefore, setting aside the Court's February 20, 2018, Order is not warranted.

Defendant further contends that the Court's February 20, 2018, Order should be set aside because the applicable statute of limitations bars Count III of the Complaint. As discussed in the Court's February 20, 2018, Order, however, Plaintiff is alleging that Defendant's tax deed is void, rendering the statute of limitations inapplicable. Therefore, the Court believes that further factual development regarding the validity of Defendant's tax deed will aid in determining the merits of Count III.

In conclusion, Defendant's Motion requesting relief from the Court's February 20, 2018, Order is denied.

The Clerk shall transmit attested copies of this order to all counsel of record.

[1] In the Motion, Defendant requests that the Court reconsider its February 20, 2018, Order, which granted partial summary judgment in favor of Plaintiff in regards to Count II of the Complaint and denied Defendant's Motion to Dismiss Count III of the Complaint. Defendant contends that, contrary to the Court's previous Order, the Court should grant summary judgment in his favor on the previously ruled upon matters.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Granting Plaintiff's Motion for Attorney's Fees

Before the Court is the Motion for Attorney's Fees filed by Plaintiff Three Run Maintenance Association, Inc., with assistance of counsel Braun A. Hamstead, Esq., on February 27, 2018. For the reasons set forth below, Plaintiff's Motion is granted.

FINDINGS OF FACT

1. On December 6, 2017, Plaintiff filed a Petition for an Injunction against Defendant Robert Heavner. In the Petition, Plaintiff alleges that it possesses a fifty-foot easement in Defendant's land, which includes"[road] access to the Three Run Woods and Three Run Acres subdivisions," two communities for which it performs road repairs and snow removal. Plaintiff further alleges that Defendant has been obstructing its road easement through the placement of cement pavers/concrete parking blocks and landscaping timbers.
2. On December 6, 2017, Plaintiff filed a Motion for a Preliminary Injunction against Defendant, requesting that the Court issue a preliminary injunction enjoining Defendant from obstructing its fifty-foot easement.
3. On December 19, 2017, the Court issued an Order Granting Plaintiff's Motion for a Preliminary Injunction. In this Order, the Court declared that Plaintiff "present[ed] documentation, including an original plat of the development, describing a 50-foot-wide

easement 'retained for the purpose of . . . road access'" and that Plaintiff "is likely to succeed on the merits." Therefore, the Court ordered Defendant to "remove the cement pavers/concrete parking blocks and the landscaping timbers in dispute" within fourteen days.

4. On January 10, 2018, Plaintiff sent a letter to Defendant's counsel, informing him that, while Defendant had moved the road obstructions further back from the road, the obstructions remained "well within" its fifty-foot easement. Plaintiff requested that Defendant fully comply with the Court's preliminary injunction within five days.
5. On January 17, 2018, Plaintiff filed a Petition for Rule to Show Cause, alleging that the road obstructions in dispute remained within its fifty-foot easement.
6. That same day, the Court issued an Order and Rule to Show Cause instructing Defendant to explain why he should not be held in civil contempt for violating the Court's December 19, 2017, Order.
7. Subsequently, Defendant complied with the Court's December 19, 2017, Order and removed the obstructions from the fifty-foot easement.
8. On December 27, 2018, Plaintiff filed the instant Motion for Attorney's Fees, contending that it "should not be put to bear the cost of enforcing this Court's Preliminary Injunction Order against Defendant[ ]." Specifically, Plaintiff requests $1,350.00 in attorney's fees. To support its request, Plaintiff attached a detailed Declaration of Attorney's Fees to its Motion.
9. On March 13, 2018, Defendant filed a response to Plaintiff's Motion for Attorney's Fees, arguing that he acted in good faith and that an award of attorney's fees is unwarranted.
10. On March 16, 2018, Plaintiff filed a reply, disputing that Defendant has acted in good

faith.

11. The matter is now ripe for adjudication.

CONCLUSIONS OF LAW

"[A]ttorney'sfees and costs may be awarded to the prevailing party . . . [in a] civil contempt proceeding . . . ." *United Mine Workers of Am. v. Faerber*, 179 W. Va. 77, 78 (1987). However, a request for such an award must be reasonable. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 195 (1986). The West Virginia Supreme Court of Appeals has set forth a test for determining whether a request for attorney's fees is reasonable. *Id.* at 195-96. Specifically, the Supreme Court of Appeals has declared that:

> [T]he test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The . . . following list of factors [is] relevant to the calculation of reasonable attorney's fee awards: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (internal citations omitted).

In the present case, the Court finds that Plaintiff should be awarded its attorney's fees and costs. Defendant argues that an award of attorney's fees and costs is unwarranted because he acted in good faith. To support his argument, Defendant alleges that he initially believed that he only needed to "[move] the cement pavers and landscaping timbers back from the road." However, the Court's December 19, 2017, Order explicitly instructed Defendant to remove the road obstructions entirely from the fifty-foot easement at issue.

To illustrate, in its Motion for a Preliminary Injunction, Plaintiff alleged that it possessed a fifty-foot road easement in Defendant's land and requested that the Court enjoin Defendant from obstructing its fifty-foot road easement. Subsequently, in its December 19, 2017, Order issuing a preliminary injunction, the Court declared that Plaintiff was likely to succeed on the issue of whether it possesses a fifty-foot road easement and directed Defendant to "remove the cement pavers/concrete parking blocks and the landscaping timbers in dispute" from the fifty-foot easement. Therefore, Defendant was clearly informed that he had a legal obligation to remove the disputed road obstructions from the fifty-foot easement at issue.

Despite the Court's clear directives, however, Defendant failed to timely remove the disputed road obstructions. Moreover, Defendant did not remove the disputed road obstructions until the Court became involved and issued an Order and Rule to Show Cause, despite Plaintiff informing Defendant's counsel of Defendant's noncompliance. For these reasons, the Court finds that Defendant has acted in bad faith and that Plaintiff is entitled to the attorney's fees and costs it incurred in enforcing the Court's preliminary injunction.

Plaintiff is requesting attorney's fees in the amount of $1,350.00. Because neither party has demanded an evidentiary hearing or identified factual disputes requiring such a hearing, the Court hereby considers Plaintiff's request for attorney's fees ripe for consideration. *See Corp. of Harpers Ferry v. Taylor*, 227 W. Va. 501, 505-06 (2011) ("A party entitled to a hearing on the issue of attorney fees is burdened to demand such a hearing.").

To support its request of $1,350.00 in attorney's fees, Plaintiff has submitted a detailed Declaration of Attorney's Fees. Upon a thorough review of the Declaration and

the test set forth by the West Virginia Supreme Court of Appeals in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190 (1986), the Court finds that Plaintiff's request for $1,350.00 is reasonable. The Declaration provides that the rate charged for Plaintiff's counsel's services is $200 per hour. This rate appears reasonable and customary for an attorney's services in Berkeley County, West Virginia. The Declaration further provides the following breakdown of fees:

> Communications with Client . . . pertaining to [Defendant's] failure to comply $150
>
> Letter to [Defendant's] attorney seeking compliance within 5 days . . .$50
>
> Preparation of Petition for Rule to Show Cause and Proposed Order $400
>
> Client follow up communications pertaining to continued non-Compliance $50
>
> Motion advising Court of final compliance and request for attorney fees $200
>
> Phone Calls to [Defendant's] attorney seeking to resolve attorney fees claim $50
>
> Legal research and preparation of Motion for Attorney Fee Award and proposed Order $450
>
> Total $1,350

These task descriptions are sufficiently specific and support Plaintiff's contention that the time expended in support of the enforcement of the Court's preliminary injunction was reasonable and necessary. The Court also notes that, from its ability to observe, Plaintiff's counsel has exhibited the skill and proficiency to support an award of attorney's fees at the requested rate and for the requested amount of time. While no other pertinent information has been made available to the Court, the request for

attorney's fees is sufficiently modest and does not to require any additional support. Consequently, the Court finds that the costs requested are reasonable and were necessary to the enforcement of the Court's preliminary injunction.

In conclusion, Plaintiff's Motion for Attorney's Fees is granted. Accordingly, it is hereby ORDERED that Defendant pay Plaintiff the reasonable attorney's fees and costs it incurred in the enforcement of the Court's December 19, 2017, Order issuing a Preliminary Injunction, which total $1,350.00.

The Clerk shall transmit attested copies of this Order to all counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Denying Defendant's Motion to Dismiss Count III and Granting in Part Plaintiff's Motion for Partial Summary Judgment

Two motions are before the Court. The first is the Motion to Dismiss Count III filed by Defendant Robert Heavner, with assistance of counsel Christopher P. Stroech, Esq., on February 8, 2018. The second is the Motion for Partial Summary Judgment filed by Plaintiff Three Run Maintenance Association, Inc., with assistance of counsel Braun A. Hamstead, Esq., and Andrew F. Pahl, Esq., on January 12, 2018. For the reasons set forth below, Defendant's Motion to Dismiss Count III is denied and Plaintiff's Motion for Partial Summary Judgment is granted in part.

FINDINGS OF FACT

1. Plaintiff is a road maintenance association who performs road repairs and snow removal for the Three Run Woods and Three Run Acres subdivisions.
2. In the Three Run subdivisions, there is an area known as Three Run Lake.
3. In 1969, the owners of the Three Run subdivisions issued an original plat (the "1969 Plat") that identified Three Run Lake as land jointly owned by all Three Run lot owners.
4. The 1969 Plat describes a "road easement" for all of the roads depicted in the Plat. The road easement extends 25-feet on each side of a road's centerline, amounting to a total 50-foot easement. The purpose of the easement is for constructing and

maintaining road access.

5. The 1969 Plat is recorded in the Berkeley County Register of Deeds Office in Deed Book 242, page 450.
6. On July 23, 2014, Defendant purchased a tax deed for property in the Three Run communities, including the Three Run Lake area.
7. The tax deed lists the prior owner of the property as L&L Corporation.
8. L&L Corporation obtained the property from OMCO Corporation via a deed dated June 2, 2008, which is recorded on in Deed Book 908, page 27. In this deed, the description of the property references the 1969 Plat.
9. In late 2017, Defendant began placing cement pavers/concrete parking blocks and landscaping timbers on/near the road in the Three Run Lake area.
10. On December 6, 2017, Plaintiff filed a Petition for an Injunction against Defendant. The Petition asserts three counts. Specifically, Count I asserts that Defendant's road obstructions constitute a public and private nuisance. Count II asserts that Plaintiff has a 50-foot easement across the Three Run Lake area with which Defendant has improperly interfered. Count III asserts that Defendant's tax deed is void and should be set aside.

CONCLUSIONS OF LAW

The Court will first address Defendant's Motion to Dismiss Count III. In Count III, Plaintiff asserts that Defendant's tax deed is void and requests that the Court set aside the deed. To support this request, Plaintiff alleges that the Berkeley County Assessor's Office improperly subjected the Three Run Lake property to taxation. Plaintiff reasons that the Three Run Lake property should have been excluded from taxation because it acted as a common area for all Three Run subdivision lot owners. Plaintiff further

alleges that the Assessor's Office "erroneously assessed the [Three Run Lake] property as belonging to OMCO Corporation and L&L Corporation [instead of the Three Run subdivision lot owners]" and that both corporations are "defunct entities."

In the Motion to Dismiss, Defendant argues that Count III must be dismissed because the applicable statute of limitations has expired. In other words, Defendant is arguing that Count II should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure because Count III fails to state a claim upon which relief can be granted. Regarding motions to dismiss filed under Rule 12(b)(6), the West Virginia Supreme Court of Appeals has stated:

> [T]he purpose of a motion under Rule 12(b)(6) . . . is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. Thus, . . . this Court [has] held that the trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Roth v. DeFeliceCare, Inc., 226 W. Va. 214, 219 (2010) (internal quotation marks and citations omitted).

The parties do no dispute that W. Va. Code § 11A-4-4(a) provides the applicable statute of limitations for challenging the transfer of property via a voidable deed. *See*W. Va. Code § 11A-4-4(a) (establishing a three-year statute of limitations). Instead, the issue is whether the tax deed Defendant purchased is voidable, in which case the statute of limitations would apply, or void, in which case the statute of limitations would not apply. *See, e.g.*, *Shaffer v. Mareve Oil Corp.*, 157 W. Va. 816, 829 (1974) (declaring that the three-year statute of limitations set forth in W. Va. Code § 11A-4-4(a) does not

apply to void deeds).

In the present case, the Court finds that it would be inappropriate to dismiss Count III at this time because Plaintiff is alleging that Defendant's tax deed is void and thus is not subject to the three-year statute of limitations. Defendant is arguing that Count III should be dismissed because he purchased a valid, or at least voidable, tax deed that is subject to the three-year statute of limitations set forth in W. Va. Code § 11A-4-4. However, because a motion to dismiss is at issue, the Court must construe all of Plaintiff's allegations in the Petition as true. Construing Plaintiff's allegations of a void tax deed as true, the Court must find that Plaintiff's claim is not subject to the three-year statute of limitations and that Plaintiff has thus pleaded a claim upon which relief can be granted. Therefore, because Defendant has failed to establish that there is no set of facts that Plaintiff can prove that would entitle it to relief, the Court finds that Count III should not be dismissed at this time.

Next, the Court will address Plaintiff's Motion for Partial Summary Judgment. In this Motion, Plaintiff asserts that it is entitled to summary judgment on Count II of the Petition. In Count II, Plaintiff alleges that it possesses a 50-foot road easement in Defendant's land and that Defendant has improperly interfered with its use of the easement. Accordingly, Plaintiff requests that the Court issue a permanent injunction prohibiting Defendant from interfering with its use of the road easement in the future.

Rule 56 of the West Virginia Rules of Civil Procedure governs motions for summary judgment. More specifically, Rule 56 provides that "[a] party . . . may, at any time, move . . . for a summary judgment in the party's favor as to all or any part [of a claim]." W. Va. R. Civ. P. 56(b). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . [if] the moving party is entitled to a judgment as a

matter of law." W. Va. R. Civ. P. 56(c). When "determining whether a genuine issue of material fact exists, [a court must] construe[ ] the facts in the light most favorable to the [non-moving] party." *Kelley v. City of Williamson, W. Virginia*, 221 W. Va. 506, 510 (2007).

In the present case, regarding the issue of whether the purported road easement exists, the Court finds that no material facts are in dispute.[1] Indeed, the parties do not contest the following material facts. There is a 1969 Plat of the Three Run subdivisions.[2] The 1969 Plat details the following express "road easement:"

> The lot property lines extend to the centerlines of roads as shown and noted. A 25 ft. wide easement over adjacent lots, or a 50 ft. wide easement through lots, in each totaling 50 ft. in width is retained . . . . The road easement has a 50 ft. radius in the cul-de-sacs as indicated.[3]

The 1969 Plat explicitly states that the purpose of the road easement is for "constructing and maintaining road access." The 1969 Plat was recorded, putting all future Three Run property owners on notice of the road easement. The road that is the subject of this litigation is depicted on the 1969 Plat.

Defendant purchased the Three Run Lake area pursuant to a tax deed. The tax deed lists the prior owner of the property as L&L Corporation. L&L Corporation obtained the property from OMCO Corporation via a deed dated June 2, 2008, which is recorded in the Register of Deeds Office. When OMCO Corporation transferred its interest in the property to L&L Corporation, it described the transferred property by referring to the recorded 1969 Plat.

In addition to finding that no material facts are in dispute, the Court further finds that Plaintiff is entitled to judgment as a matter of law regarding the issue of whether the purported road easement exists. Indeed, the application of the law to the undisputed

facts on this issue is clear. When Defendant purchased his tax deed, he obtained a type of quitclaim deed. *See*W. Va. Code §§ 11A-3-27 & 11A-3-30. A quitclaim deed conveys any interest the grantor holds in the property to the grantee. *See*"Deed," Black's Law Dictionary (10th ed. 2014). Accordingly, because Defendant's grantors took the property subject to the easement described in the 1969 Plat, Defendant's interest in the property is subject to that same easement. Therefore, the Court summary holds that Plaintiff possesses a 50-foot "road easement" in Defendant's property as described in the 1969 Plat and that the easement may be used for the purpose of constructing and maintaining road access.

Regarding the issues of whether Defendant improperly interfered with Plaintiff's easement and whether a permanent injunction is warranted, the Court finds that summary judgment is not appropriate. Indeed, upon due deliberation, the Court believes that further factual development may aid in the correct application of the law as to these issues.

In conclusion, Defendant's Motion to Dismiss Count III is denied and Plaintiff's Motion for Partial Summary Judgment is granted in part. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff possesses a 50-foot "road easement" in Defendant's property as described in the 1969 Plat and that the easement may be used for the purpose of constructing and maintaining road access. The issues of whether Defendant has improperly interfered with Plaintiff's easement and of whether a permanent injunction is warranted will be addressed at the bench trial on May 24, 2018.

The exceptions of any party aggrieved by this Order are noted and preserved.

The Clerk shall transmit attested copies of this order to all counsel of record.

[1] Defendant argues that "[s]ummary judgment is improper at this stage as no discovery has yet been conducted." The Court disagrees. The completion date for discovery is approximately one month away, and the facts of the case appear to be established.

[2]Defendant attempts to create an issue of fact by referencing a 12-foot easement depicted on a 1966 Plat. However, the 1969 Plat is controlling. To illustrate, C.J. McDonald owned the Three Run subdivisions in 1966 but sold the property to Arthur and Beverly Radin on July 16, 1969, via a deed that the Radins recorded. This recorded deed reflects that the Radins held fee simple title to the Three Run area before issuing the 1969 Plat.

[3]Although Defendant argues that the 1969 Plat provides for easements over the roads in privately-owned "lots" but not over the roads in "jointly owned" common areas, it is clear from the plain language of the 1969 Plat that it creates an easement over all of the then-existing roads in the Three Run area.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

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In the Circuit Court of Berkeley County, West Virginia

Three Run Maintenance Ass'n, Inc., Plaintiff,	)	
vs.)	)	Case No. CC-02-2017-P-412
Robert Heavner, Defendant	)	

Order Granting Preliminary Injunction

Before the Court is the Motion for Preliminary Injunction filed by Plaintiff Three Run Maintenance Association, Inc., with assistance of counsel Andrew Pahl, Esq., on December 6, 2017. In the Motion, Plaintiff alleges that it has a 50-foot easement in Defendant Robert Heavner's land, which includes"[road] access to the Three Run Woods and Three Run Acres subdivisions," two communities for which it performs road repairs and snow removal. Plaintiff further alleges that Defendant is obstructing its road access to the Three Run communities through the placement of cement pavers/concrete parking blocks and landscaping timbers. Plaintiff requests that the Court issue a preliminary injunction enjoining Defendant from obstructing the 50-foot easement.

On December 18, 2017, the Court held a hearing on Plaintiff's Motion. Plaintiff appeared at the hearing through its President, Christopher Loizos, and its vice president Brett Hall, and through counsel Mr. Pahl. Defendant appeared in person and through counsel Christopher Stroech, Esq. Both parties presented testimony and exhibits. The court heard argument and made findings of fact and conclusions of law more fully set forth on the record. In brief, the court found as follows:

Rule 65(a) of the West Virginia Rules of Civil Procedure governs preliminary

injunctions. Rule 65(a) provides that, before a preliminary injunction can be issued, notice must be given to the adverse party and a hearing held on the matter. When deciding whether to issue a preliminary injunction, a circuit court must consider four factors. Specifically, a circuit court must consider:

> (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n, 183 W. Va. 15, 24 (1990); *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 756 (2002). The burden is on the party seeking the preliminary injunction to establish that an injunction is warranted. *Camden-Clark*, 212 W. Va. at 760.

Upon review of the evidence and testimony provided at the hearing, the Court finds that Plaintiff has met its burden of establishing that a preliminary injunction is warranted in the instant case. Plaintiff has shown that it is likely to succeed on the merits by presenting documentation, including an original plat of the development, describing a 50-foot-wide easement "retained for the purpose of constructing and maintaining road access." Plaintiff has also shown that the communities it serves are facing irreparable harm and that an injunction would be in the public interest through Mr. Loizos's testimony. To illustrate, Mr. Loizos testified that Defendant's obstruction of the road interferes with school bus traffic and increases the risk of danger to children getting on and off a school bus. Finally, Plaintiff has shown that Defendant is not likely to suffer any harm if an injunction is issued.

In conclusion, the Motion for Preliminary Injunction is GRANTED. Accordingly, it is ORDERED that Defendant remove the cement pavers/concrete parking blocks and the landscaping timbers in dispute and fill in the hole adjacent to the road that is

currently covered by wooden planks. It is ORDRED that the noted obstructions be removed within 14 days of the hearing and that the referenced hole be filled within 14 days of the hearing. It is further ORDERED that Plaintiff post an injunction bond in the amount of $100.00 in accordance with W. Va. Code § 53-5-9.

The court set the matter for a bench trial and a separate scheduling order will issue.

The Clerk shall enter this written order dated as directed below and shall transmit attested copies to all counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.