

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

v.

Civil Action No. 21-C-129
Raleigh County, Judge Robert A. Burnside, Jr.

COOPER LAND DEVELOPMENT, INC.,
an Arkansas corporation, and
JUSTICE HOLDINGS LLC,
a West Virginia limited liability company,

Defendants.

**DEFENDANT COOPER LAND DEVELOPMENT, INC.'S
MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS
MOTION TO REFER ACTION TO THE BUSINESS COURT DIVISION**

Defendant Cooper Land Development, Inc. ("CLD"), by counsel, hereby requests leave to file a *Reply in Support of its Motion to Refer Action to Business Court Division*, attached hereto as Exhibit "A." A *Reply* is necessary to address certain statements and representations made to this Court by the Plaintiff in *Glade Springs Village Property Owners Association, Inc.'s Memorandum Reply in Opposition to Defendant's Motion to Refer to Business Court* filed June 24, 2021 ("Opposition"). CLD grounds this motion on the following salient points:¹

1. The Business Court Division, was created to "improve the expectation of a fair and reasonable resolution" regarding business disputes as contemplated in W. Va. T. C. R. 29.04(a)(2) and related T.C.R.

¹ By way of background, and as set forth in more detail in its Motion to Dismiss, CLD sold its interest in Glade Springs, and has not been the Developer there, since October 2010, almost eleven years ago. Plaintiff's Complaint is untimely and should be dismissed on statute of limitations and other grounds.

2. Here, there is good cause to file a *Reply* because Plaintiff opposed referral to the Business Court Division on the proposition that Judge Burnside intended that this case not be referred to the Business Court. Plaintiff quoted extensively from a 2019 pleading prepared by Judge Burnside wherein Plaintiff characterizes that Judge Burnside “argued” that a similar dispute between Justice Holdings, LLC and Glade Springs Village Property Owners Association, Inc. (“GSVPOA”) should not be transferred. Further, Plaintiff suggests that Judge Burnside could file a consistent pleading were he so inclined. However, buried in more than 1600 pages of attachments, is the actual letter from Judge Burnside regarding THIS case. In that letter, Judge Burnside states that he does not intend to weigh in on the motion to refer in the present case, and would leave the merits of the requested referral to the parties, their counsel, and this Court. *See*, June 23, 2021 Memorandum, Robert A. Burnside, Jr., Circuit Judge, *Exhibit L to Plaintiff's Opposition*.

3. Plaintiff's Response demonstrates forum-shopping and judge-shopping in such a manner that “the expectation of a fair and reasonable resolution” is called into question. Plaintiff has been litigating multiple matters involving Glade Springs for almost two years. Yet, no attempt was made to drag CLD into their mess. Now, after obtaining rulings in an action in which CLD was not present to defend itself, Plaintiff has manipulated its claims, amended its pleadings and split causes of action, in order to impose *ex parte* prejudicial rulings on CLD. If Plaintiff truly has legitimate and timely claims in the above-captioned matter, in no way should it be concerned about referral to the Business Court Division which can address them.

4. CLD is prejudiced by the flurry of ongoing litigation initiated or furthered by Plaintiff. Over the past twenty-two months, Plaintiff GSVPOA has filed three (3) state court Complaints or Counterclaims in Raleigh County regarding the operation, administration, and

governance of the business entities responsible for operating and managing the complex commercial relationships between the following business entities, GSVPOA, EMCO Glade Springs Hospitality, LLC, GSR, LLC, Justice Holdings, LLC and now CLD.² All in all, there are now five (5) lawsuits currently being litigated regarding Glade Springs. GSVPOA successfully moved the original case to the Business Court Division and tried to move the second case to the Business Court Division.³

5. A reply and referral is necessary here, where a litigant turns court rules into legal gymnastics in order to obtain a particular judge.⁴ CLD asks that this Court pay careful attention to the timely and proper request made under W.Va. T.C.R. 29.06.

WHEREFORE, for all of the foregoing reasons, defendant Cooper Land Development, Inc. respectfully requests leave to file a Reply brief in support of its motion to refer this civil action to the Business Court Division for all further proceedings and trial and for such other relief as the Court deems appropriate and just.

² These matters include the first case, BCD Case No.: 19-C-357, which also includes claims and counterclaims against several individual directors of GSVPOA; the second case, Case No. 19-C-481; and now the present case, Case No. 21-C-129.

³ Case No. 19-C-481 was not transferred as the plaintiff therein objected, stating that the matter was a straightforward collection matter, the case had been pending for many months and a schedule and trial date were already in place. Fast forward to today, and that matter is still pending and has become quite complex with multiple amended claims and counterclaims.

⁴ While CLD does not question Judge Burnside's fairness herein, Plaintiff's motives and actions are suspicious.

Dated: June 30, 2021

COOPER LAND DEVELOPMENT, INC.

By Counsel



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COOPER LAND DEVELOPMENT, INC.,
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a West Virginia limited liability company,

Defendants.

**DEFENDANT COOPER LAND DEVELOPMENT, INC.'S REPLY IN SUPPORT OF ITS
MOTION TO REFER ACTION TO BUSINESS COURT DIVISION**

Defendant Cooper Land Development, Inc. ("CLD") submits this reply in support of its *Motion to Refer Action to Business Court Division* filed June 4, 2021, and in opposition to *Plaintiff's Memorandum Reply in Opposition to Defendant's Motion to Refer to Business Court* filed June 24, 2021.

The present case demonstrates precisely why the Business Court Division (the "Division") was created: a defendant seeks to refer a complex business dispute to the Division which is already considering a prior case arising from the same property development at issue.¹ This referral is opposed not due to the merits of the Motion (indeed the same plaintiff referred the presently pending Business Court case to the Division) but rather, because this same plaintiff now seeks to game the system and take advantage of rulings from pre-existing, protracted and expanded litigation first initiated in 2019 and presently pending in Circuit Court. The goal is clear: to try to

¹ Indeed, the first-filed case, *GSVPOA v. Emco Glade Springs Hospitality, LLC, et al.*, Raleigh County Civil Action No. 19-C-357, filed August 14, 2019, was transferred to the Division upon the Plaintiff's own motion.



impose on CLD rulings the Plaintiff obtained in front of Judge Burnside in another matter, even though CLD was not a party, had no opportunity to oppose or defend the issues, and is more than twenty years removed from the occurrence and transaction from which the litigation arises. Further, CLD sold its interests in Glade Springs in October 2010, almost eleven years ago.

Plaintiff's opposition to the Division is a transparent attempt to achieve an unfair and unreasonable result, particularly in light of the fact that it has twice moved to refer "Glade Springs cases" to the Division as demonstrated in the table below:

Case Style	Date Filed	Referral Motion	Disposition
<i>GSVPOA v. Emco Glade Springs Hospitality, LLC, et al.</i> Raleigh County Civil Action No. 19-C-357 (Judge Dent)	August 14, 2019	Filed by GSVPOA	Granted
<i>Justice Holdings LLC v. GSVPOA</i> Raleigh County Civil Action No. 19-C-481 (Judge Burnside)	November 6, 2019	Filed by GSVPOA	Denied after Judge Burnside opposed referral motion based upon untimely filing and extensive antecedent discovery and motions practice
<i>GSVPOA v. Cooper Land Development, Inc., et al.</i> Raleigh County Civil Action No. 21-C-129 (Judge Poling, now Judge Burnside)	April 30, 2021	Filed by CLD	Pending

The Expectation of a Fair and Reasonable Resolution

The Division, was created to "improve the expectation of a fair and reasonable resolution" regarding business disputes as contemplated in W. Va. T. C. R. 29.04(a)(2) and related T.C.R. CLD sold its interest in Glade Springs Village eleven years ago. Now, a decade later, Plaintiff

GSVPOA seeks to unwind the creation of Glade Springs Village, even though the GSVPOA was a party from the beginning of Glade Springs Village in 2001. There are five presently pending Glade Springs cases, involving the individuals now responsible for operating and managing the respective interests of the various business entities at Glade Springs. Whether it is the GSVPOA, Justice Holdings, LLC, GSR, LLC or EMCO Hospitality, these parties have variously accused each other of fraud, violations of Civil Racketeering laws, or other illegal and improper conduct all arising out of the creation, operation, and management of Glade Springs. And they seek punitive damages. Clearly, these are complex, business disputes, that can and should be adjudicated by the Division.

This Court set forth in the Preamble to the Division, at Rule 29.01, that:

In accordance with West Virginia Code § 51-2-15, there is hereby adopted a process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses that includes the establishment of a Business Court Division to handle a specialized court docket within the circuit courts.

The Honorable Christopher C. Wilkes, prepared an overview of the new court division. See, www.courtswv.gov/lower-courts/business-court-division/overview-TCR.html. Judge Wilkes wrote:

Litigation between businesses is at the center of the Business Court Division's purpose. Cases which have a high level of complexity, novel issues, or other issues requiring specialized treatment are likely to land on the Business Court docket if requested. The Business Court Judges recognize that business cases present matters that differ from other types of cases and will attempt to resolve these concerns in a judicious and timely manner.

Id.

In creating this innovative forum, early Division Judges, "believe[d] this development will prove to be a positive change for West Virginia in a variety of ways – much like it has been in

other states that have instituted a business court.” *Id.* If ever there was litigation requiring referral to the Division to sort out “a fair and reasonable resolution,” it is this case.

Since the instant referral motion was filed, Plaintiff has attempted to steer this case to a court where it believes the Defendants will be disadvantaged. First, citing Rule 42(b) of the West Virginia Rules of Civil Procedure, it filed a motion to transfer the case away from Judge Poling’s court and into another court where it believed it had received rulings favorable to its interests and harmful to the Defendants. Second, it reversed its prior course by opposing referral to the Division in this matter after filing its own motions to transfer the first-filed and second-filed actions arising out of the *Declaration of Covenants and Restrictions for Glade Springs Village* to the Business Court Division. Third, Plaintiff’s counsel wrote a letter to Judge Burnside inviting him to reply to CLD’s motion to transfer as he had replied to GSVPOA’s transfer motion in the Justice Holdings matter. *See*, June 23, 2021 Letter from Plaintiff’s counsel to Robert A. Burnside, Jr., Circuit Judge, *Exhibit K to Plaintiff’s Opposition*. And fourth, it argued to this Court that Judge Burnside’s reasoning for opposing transfer in the Justice Holdings matter should apply here, even though in regard to this case, Judge Burnside has said he would not weigh-in on CLD’s Motion in this case and instead allow counsel to communicate their preferences to this Court “because that is a matter that should generally be left to counsel upon their determinations of the best interests of their clients.” *See*, June 23, 2021 Memorandum, Robert A. Burnside, Jr., Circuit Judge, *Exhibit L to Plaintiff’s Opposition*.

As mentioned, Plaintiff has been aggressively litigating the business disputes with multiple parties arising out of the *Declaration of Covenants and Restrictions for Glade Springs Village* for nearly two years. And Plaintiff sought to transfer each of those actions to the Division. The first-filed action is pending in the Division at the request of the Plaintiff. However, Judge Burnside

opposed the Plaintiff's motion in the second-filed action because "that action had been very active during the time the motion was pending." *Id.* Before any motion to transfer was filed, that action had been pending for seven months, had a scheduling order and trial date and the parties had already engaged in extensive discovery and motions practice by the time Judge Burnside opposed transfer.

Since that time, Judge Burnside has made certain findings and conclusions in the second-filed action that Plaintiff believes are favorable to its legal position in *this case* with respect to application of the Uniform Common Ownership Interest Act, W. Va. Code §36B-1-101, *et seq.* ("UCIOA") to Glade Springs Village without CLD ever having an opportunity to defend, submit evidence or argue in opposition to those findings. Now Plaintiff seeks to saddle CLD with those *ex parte* findings by trying to keep this case out of the Division. Plaintiff's tactics are gamesmanship, claims manipulation and forum shopping. Plaintiff's effort is contrary to "the expectation of a fair and reasonable resolution" contemplated in W. Va. T. C. R. 29.04(a)(2).

The Declaration and the Creation of Glade Springs Village

Each of the Glade Springs cases filed in state court arise out of the common occurrence of how Glade Springs Village was created, managed and operated. And both Judge Dent and Judge Burnside have been addressing UCIOA and the documents that created and govern the operation of Glade Springs Village. Both judges have been addressing the responsibilities of GSVPOA, pursuant to these documents, and the law. It is disingenuous for Plaintiff to claim that one of these judges has more expertise than the other. Rather, Plaintiff simply likes the rulings of one judge over the rulings of the Business Court judge.

So, Plaintiff resorted to Rule 42(b) of the West Virginia Rules of Civil Procedure, to try to select Judge Burnside, and cites Rule 42(b) here. But Plaintiff's interpretation is incorrect. Rather

than support Plaintiff's desired outcome, the express language of Rule 42(b) supports the transfer of this case to the Business Court Division. In its recently filed Rule 42(b) motion, Plaintiff cited the Rule, in pertinent part:

When two or more actions arise out of the same transaction or occurrence are pending before different courts, ..., **the court in which the first such action was commenced shall order all the actions transferred to it or any other court in which any such action is pending.**

W.Va. R.Civ. P. 42(b) (emphasis added).

Contrary to Plaintiff's argument, the **first such action** filed August 14, 2019 is *GSVPOA v. Emco Glade Springs Hospitality, LLC, et al*, Raleigh County Civil Action No. 19-C-357, (Judge Dent, presiding Judge; Judge Lorensen, resolution Judge).² Plaintiff argued that a Rule 42(b) transfer was "mandatory" under the West Virginia rules. And it is unquestionable that these matters "arise out of the same occurrence," the creation of Glade Springs Village by the Declarant and GSVPOA, as well as the operation and management of Glade Springs Village thereafter. Accordingly, pursuant to the Plaintiff's argument and authority, and consistent with Plaintiff's prior motions to refer, the present case should be transferred to the Division.

Accordingly, consistent with the rules of procedure, and the intent of this Court in creating the Division, this business dispute should be referred and transferred to the Division to "improve the expectation of a fair and reasonable resolution" as contemplated in W. Va. T. C. R. 29.04(a)(2) and related T.C.R.

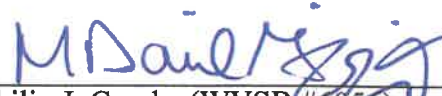
WHEREFORE, for all of the foregoing reasons, defendant Cooper Land Development, Inc. respectfully requests entry of an order referring this civil action to the Business Court Division for all further proceedings and trial and for such other relief as the Court deems appropriate and just.

² The second-filed action, *Justice Holdings LLC v. GSVPOA*, Raleigh County Civil Action No. 19-C-481, was filed November 6, 2019.

Dated: June 30, 2021

COOPER LAND DEVELOPMENT, INC.

By Counsel



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CERTIFICATE OF SERVICE

I, M. David Griffith, Jr., counsel for Defendant Cooper Land Development, Inc., hereby certify that on the 30th day of June 2021, service of the foregoing ***“DEFENDANT COOPER LAND DEVELOPMENT, INC.’S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS MOTION TO REFER ACTION TO THE BUSINESS COURT DIVISION”*** has been made upon the following via U.S. mail, addressed as follows:

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