IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

ROBERT HEAVNER,

Petitioner / Defendant Below,

v. **CASE NO. 18-1080**

THREE RUN MAINTENANCE ASSOCIATION, INC.,

Respondent / Plaintiff Below.

PETITIONER'S BRIEF

Appeal Arising from Orders Entered in
Civil Action No.: CC-02-2017-P-412 in the
Circuit Court of Berkeley County, West Virginia

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IV. STATEMENT OF THE CASE

The Petitioner and Defendant below, Robert Heavner ("Heavner"), acquired a parcel of real property by tax deed on July 23, 2014. JA 0045-0046. Neither the Respondent and Plaintiff below, Three Run Maintenance Association, Inc. ("TRMA"), nor any other interested party, petitioned to set aside the tax deed within the three (3)-year statute of limitation period set forth in W.Va. Code § 11A-4-4 (2017). Accordingly, Heavner is indeed the true and legal owner of the subject parcel. Heavner understood that he acquired said parcel subject to any rights of record, including an easement of ingress and egress for the members of TRMA. To that end, Heavner has never obstructed their rights of ingress and egress to their properties. The Circuit Court erred in expanding the use rights of record that the TMRA members are entitled to within the subject parcel. The Circuit Court further erred in finding the Heavner created a private nuisance, thereby penalizing Heavner for simply using and maintaining his lawfully-acquired property.

On December 6, 2017, TRMA filed a Petition for Injunction to Enjoin the Right of Way Obstruction and Suit to Set Aside Respondent's Void Tax Deed. JA 0001-0056. As set forth in the Petition, TRMA is a maintenance association authorized by W.Va. Code § 7-12A-1,

et seq. (2017), formed and recognized on January 21, 2016. JA 0001; JA 0895-0908. TRMA purports to manage and control certain roads and common areas in the Three Run Acres and Three Run Woods subdivisions located in Berkeley County, West Virginia.[1]

Homeowners in both Three Run Acres and Three Run Woods access their homes by turning off of Three Run Road in Bunker Hill and onto Aspen Drive, the only entry- and exit-way into both subdivisions. JA 0002. Once a homeowner turns onto Aspen Drive, they must cross over the Three Run Lake dam and Lake Area. *See* JA 0333, 0333A.[2] This Lake Area is the subject parcel in dispute herein and consists of 4.7283 acres. JA 0045. Heavner unequivocally acquired the Lake Area by tax deed dated July 23, 2014. *Id.* The access across the Lake Area is the subject easement in dispute.

TRMA's Petition sets forth three (3) Counts against Heavner. Count I claimed that the alleged actions of Heavner, namely those taken by him within the subject easement, constituted both a public and private nuisance. JA 005. Count II claimed that Heavner obstructed the subject easement and sought a preliminary injunction therefore. *Id.* Count III sought to set aside Heavner's tax deed as being both void and voidable under applicable law; specifically, that the Lake Area was common area or jointly-owned property and therefore not subject to taxation and that Heavner failed to notify all interested parties when he purchased the Lake Area by tax sale. *Id.*

Along with its Petition, TRMA filed a Motion for Preliminary Injunction to Enjoin Obstruction to Subdivision Right of Way. JA 0057-0061. A hearing was held on this Motion on December 18, 2017. JA 0063-JA135. Following this hearing, the Circuit Court issued an Order Granting Preliminary Injunction, initially finding that TRMA was entitled to a fifty (50)-

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[1] Three Run Acres and Three Run Woods are two (2) separately-developed subdivisions, having been platted separately (Three Run Acres in 1966 – JA 0331-0332; Three Run Woods in 1969 – 0333-0334), and having separate covenants and restrictions and association management until TRMA was formed in 2016. JA 0038-0039, 0041, 0052-0053, 0054, 0059-0061.

[2] Certain JA Exhibits has been designated with an "A" or "B" following the bates stamp. These Exhibits are enlarged versions of the designated Plats.

foot wide easement "for the purpose of constructing and maintaining road access," and finding that Heavner had obstructed that access, although absolutely no evidence was presented that confirmed that Heavner obstructed the road. JA 0136-JA 0138.

Thereafter, the Court entered a Bench Trial Scheduling Order. JA 0139-0141. Heavner filed an Answer to the Petition, contesting all allegations therein, and an initial Motion to Dismiss Count III – Setting Aside Respondent's Tax Deed. JA 0142-0148. Heavner argued that neither TRMA, nor any other interested party, filed an action to set aside the tax deed within the three (3)-year statute of limitations period set forth at W.Va. Code § 11A-4-4 (2017). This Motion was fully briefed by the parties.

TRMA then filed a Motion for Partial Summary Judgment as to the Disputed 50 Foot Right Way, claiming that TRMA was unequivocally entitled to a fifty (50)-foot right of way across Heavner's property. JA 0210-0234. In response, Heavner argued that certain documents of record clearly raise disputed issues of fact regarding both the width and scope of use of TRMA's easement. Heavner further argued that certain discovery should be conducted to property evaluate these issues. JA 0235-0241. This Motion was fully briefed by the parties.

Upon review of both Motions, the Court entered an Order Denying Defendant's Motion to Dismiss Count III and Granting in Part Plaintiff's Motion for Partial Summary Judgment. JA 0262-0268. The Circuit Court found that it was inappropriate to dismiss Count III of the Petition, as TRMA alleged that Heavner's deed was both void and voidable, and if void, such a claim would not be barred by the three (3)-year statute of limitations period. *Id.* The Circuit Court further determined, despite clear evidence in title documents of record to the contrary, that TRMA "possesses a 50-foot 'road easement' in Defendant's property as described in the 1969 Plat and that the easement may be used for constructing and maintaining road access." *Id* at JA 0267.

On January 17, 2018, TRMA filed a Petition for Rule to Show Cause, claiming that Heavner had not complied with the previous Order Granting Preliminary Injunction. JA 0269-0277. Although Heavner believed that he had indeed complied with said Order, he then took steps to absolutely ensure that complied with the same, rendering a hearing on TRMA's Motion unnecessary. JA 0280-0281. TRMA filed a related Motion for Attorney Fees, that was thereafter fully brief by the parties. JA 0284-0299. Despite that fact that Heavner had complied with previous Orders, the Circuit Court again ruled in favor of TRMA, awarding fees in the amount of $1,350.00. JA 0300-0305.

After deposing TRMA's president, Christopher Loizos, and thoroughly examining all relevant title documents of record, Heavner moved the Circuit Court for summary judgment on all remaining issues, to include a reconsideration request on the Circuit Court's prior ruling regarding the width and scope of TRMA's easement. JA 0312-0542. Heavner supplemented this Motion with several pertinent deeds of record, relevant to properly defining the width and scope of TRMA's easement. JA 0543-0556. This Motion was fully briefed. The Circuit Court, without permitting the benefit of a reply brief, entered an Order Denying Defendant's Motion for Summary Judgment, stating that it was not persuaded to change its position on width and scope of TRMA's easement and citing that factual development was necessary on the remaining issues in the case. JA 0569-0572.

A bench trial was held on May 24, 2018. JA 0599-0678. Testimony was presented by Brent Hall, II, Vice President of the TRMA, and Christopher Loizos. JA 0609-0668. TRMA offered five (5) Exhibits into evidence.[3] Joint Exhibits 1-19 were offered by the parties and admitted into evidence. JA 0679-0933. The parties were ordered to and did submit proposed orders or findings of fact and conclusions of law. JA 0934-0961.

[3] Upon completion of Petitioner's Brief, counsel realized that he inadvertently did not include TRMA's Trial Exhibits 1-5 in the Joint Appendix. Counsel will file a Supplemental Joint Appendix this week, containing these documents, to be used by the Respondent and Petitioner in any subsequent briefings.

On July 3, 2019, the Circuit Court entered the final Judgment Order. JA 0962-0973. Heavner prevailed on many of the issues presented at the bench trial. First, the Circuit Court determined that Heavner's tax deed was not void as a matter of law. JA 0968. Second, the Circuit Court found that Heavner's tax deed was not voidable as a matter of law as any such claim was barred by the applicable statute of limitations. JA 0973. Based upon these findings, it is undisputed that Heavner was and remains the true legal owner of the Lake Area. The Court further found that Heavner's actions, in maintaining and using his land, did not constitute a public nuisance. JA 0970.

Despite these findings, the Circuit Court further found that Heavner's actions, in maintaining and using his land, did constitute a private nuisance. JA 0971. This finding is not supported by the weight of the evidence. Accordingly, the Circuit Court ordered that an award of attorney's fees was appropriate. JA 0971. The Circuit Court issued a permanent injunction "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." JA 0972. This finding was made despite its earlier ruling limiting TRMA's use of the easement to "constructing and maintaining road access." JA 0267. This finding was made despite clear title documents of record to the contrary.

After the final Judgment Order was issued, counsel for TRMA advised that his client now has "the exclusive use and enjoyment" of the Lake Area. JA 0986. It is quite clear that the Judgment Order does not grant TRMA such "exclusive use." TRMA agents then placed "No Trespassing" signs and other impediments in the easement area. In response, Heavner filed both a Motion for Clarification of Judgment Order and Motion for Injunctive Relief. JA 0974-0987. The Circuit Court summarily denied both Motions without complete briefing or hearing. JA 0976, 0988-0999.

TRMA submitted a Motion for Award and Declaration of Attorney Fees. JA 0990-0998. This Motion was fully briefed by the parties, and a *Pitrolo* hearing was held by the Court. JA 0999-1008. TRMA was ordered to and did submit a Detailed Accounting Statement for fees and costs expended.[4] JA 1009-1062. Although slightly reduced, the Circuit Court ultimately awarded fees to TRMA in the amount of $18,891.82. JA 1067-1071.

The Orders of the Circuit Court are inconsistent. The Circuit Court erred in determining that TRMA is entitled to a fifty (50)-foot easement, for essentially any and all purposes. The Circuit Court erred in finding that the actions of Heavner, in simply maintaining and using his property, constituted a private nuisance. The Circuit Court erred in awarding TRMA attorneys' fees in the total amount of $20,241.82, notwithstanding the fact that Heavner prevailed on many of the asserted claims.

For all these reasons, Heavner respectfully requests that this Honorable Court reverse the noted decisions of the Circuit Court.

V. SUMMARY OF THE ARGUMENT

The Orders of the Circuit Court are inconsistent. The Circuit Court erred in determining that TRMA is entitled to a fifty (50)-foot easement, for essentially any and all purposes. The Circuit Court erred in finding that the actions of Heavner, in simply maintaining and using his property, constituted a private nuisance. The Circuit Court erred in awarding TRMA attorneys' fees in the total amount of $20,241.82, notwithstanding that Heavner prevailed on many of the asserted claims.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument will assist the Honorable Court in properly reviewing this matter.

VII. ARGUMENT

[4] The Detailed Accounting Statements at JA 1009-1062 were filed under seal in the Circuit Court and therefore should be filed under seal in this proceeding.

A. THE CIRCUIT COURT ERRED IN FINDING THAT TRMA IS ENTITLED TO USE A FIFTY (50)-FOOT ROAD EASEMENT FOR ANY AND ALL PURPOSES BASED UPON THE DOCUMENTS OF RECORD.

The Circuit Court erred in granting TRMA initial partial summary judgment and finding that TRMA is entitled to a fifty (50)-foot road easement "for the purpose of constructing and maintaining road access." JA 0267. The Circuit Court further erred in granting judgment in favor or TRMA and later finding that TRMA is entitled to a fifty (50)-foot easement for "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." JA 0972-0973. These holdings are inconsistent. More importantly, these holdings are not supported by the evidence, namely, the title documents of record.

1. Standard of Review

"A circuit court's entry of summary judgment is reviewed *de novo*." *Mace v. Ford Motor Co.*, 221 W.Va. 198, 653 S.E.2d 660 (2007). "When the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, the Supreme Court of Appeals applies a *de novo* standard of review." *Nicholas Loan & Mortg., Inc. v. W.Va. Coal Co-Op, Inc.*, 209 W.Va. 296, 547 S.E.2d 234 (2001).

2. Based upon the title documents of record, TRMA is entitled to a twelve (12)-foot wide road easement.

W.Va. Code § 11A-3-62 (2017) provides as follows:

> §11A-3-62. Title acquired by individual purchaser.
>
> (a) Whenever the purchaser of any tax lien on any real estate sold at a tax sale, his heirs or assigns, shall have obtained a deed for such real estate from the deputy commissioner or from a commissioner appointed to make the deed, he or they shall thereby acquire all such right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by any person who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of section forty-nine of this article or section two, three, four or six, article four of this chapter.

> The tax deed shall be conclusive evidence of the acquisition of such title. If the property was sold for nonpayment of taxes, the title so acquired shall relate back to the first day of July of the year in which the taxes, for nonpayment of which the real estate was sold, were assessed. If the property was sold for nonentry pursuant to section thirteen of this article, or escheated to the state, or is waste and unappropriated property, the title shall relate back to the date of sale.
>
> (b) Any individual purchaser to whom a tax deed has been issued may institute and prosecute actions to quiet title in any such real estate conveyed thereby. Such action may be maintained for all or any one or more of the lots or tracts conveyed.

Heavner unequivocally acquired the subject Lake Area by tax deed dated July 23, 2014. JA 0045. Neither TRMA, nor any other interested party, moved to set aside the tax deed within the required three (3)-year statute of limitations. *See* W.Va. Code § 11A-4-4 (2017). The Circuit Court found, and TRMA did not appeal, that Heavner's deed was neither void nor voidable. JA 0062-0973. Accordingly, Heavner is the true and legal owner of the Lake Area.

As confirmed in W.Va. Code §11A-3-62, Heavner acquired all such rights, title and interest to the Lake Area, as was, at the time of the execution and delivery of the deed. Heavner understands, and has never contested, that TRMA and its members have the benefit of an easement across his property for ingress and egress purposes only. However, both the width and scope of the easement are limited by the express provisions of the title documents of record. Indeed, the Circuit Court relied upon the applicable plats and deeds in making its determination, and TRMA did not present sufficient evidence that it was otherwise entitled to an expanded easement by implication, estoppel, prescription or otherwise. Based upon the express provisions of the applicable deeds and plats, TRMA is entitled to a twelve (12)-foot road easement. The Circuit Court erred in expanding the width of the easement to fifty (50)-feet.

Title documents of record suggest, and TRMA has confirmed, that the Three Run development consists of two (2) separately-developed sections: Three Run Acres and Three Run Woods. Indeed, Three Run Acres was platted and approved in 1966. JA 0331, 0331A. Three Run Woods was platted and approved in 1969. JA 0333, 0333A. As set forth on the 1966 Plat, the "Dam Roadway" is shown as being "12' Wide." The Deed conveying certain property

(Three Run Acres) from McDonald to Radin, dated July 16, 1969, does not contain any express language regarding the Dam Roadway. JA 0335. This Deed does, however, incorporate a Plat that references a "30' Wide Roadway" that runs along the same course and direction as the Dam Roadway. JA 0338, 0338A.

The Circuit Court presumably found that the 1969 Plat for Three Run Woods modified any pre-existing right of way through both sections, including the Dam Roadway. Indeed, the Court found 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." JA 0267. Based upon additional evidence obtained through discovery, and confirmed by the title documents of record, Heavner respectfully suggests that this determination was made in error, without the benefit of complete and accurate information.

Christopher Loizos, TRMA president, and Rule 30(b)(7) representative of the same entity, testified clearly that Three Run Acres and Three Run Woods are separate and distinct sections. During his deposition, Mr. Loizos identified the individual lot separation as per Three Run Acres and Three Run Woods. JA 0369-0370. Mr. Loizos testified that the Plats of record confirm the separation and distinction of Three Run Acres and Three Run Woods. JA 0377-0378. The restrictions and covenants that are applicable to individual lots vary between the two (2) sections. JA 0380. Mr. Loizos further confirmed that while Three Run Woods formed a homeowners' association in 1996, Three Run Acres was not governed by this association. JA 0391-0392. Indeed, Three Run Acres was not governed by an association of any type until a new maintenance association was formed in 2016. JA 0393. This shared maintenance association, TRMA, was formed for the purpose of maintaining roads and common areas within and across both Three Run Acres and Three Run Woods. JA 0398-0399.

In addition to the testimony of Mr. Loizos, additional documents of record confirm that Three Run Acres and Three Run Woods are separate and distinct sections, with varying

easements of record. A Description of Resurvey, dated December 7, 1973, *after* the 1969 Plat for Three Run Woods was recorded, does identify the "50' wide road running in a northwesterly direction through the subject lots. JA 0500-0501. However, this Description of Resurvey also identifies an "existing 30' roadway" running in a north / south direction, the same roadway identified on the Plat attached to the 1969 Deed. JA 0338A, 0501.

This "30' roadway" is further confirmed by a Deed dated July 19, 1974, *after* the 1969 Plat for Three Run Woods was recorded. JA 0502. This Deed, conveying Lot 48-A in Three Run Acres, clearly delineates the "30' wide roadway" running in a north / south direction along the same route that crosses the Lake Area. JA 0504.

Based upon these documents of record and the testimony of Mr. Loizos, it is now evident that the 1969 Plat for Three Run Woods, cited by TRMA and used by the Circuit Court in determining the width of the road easement, did not modify all right of ways for Three Run Acres. It clearly did not and could not modify the 1969 Plat for Three Run Acres, confirming that the Dam Roadway remains "12' [w]ide." JA 0331.

The 1969 Plat, the only title document cited by TRMA and used by the Circuit Court, does not contain any accompanying deed language that modifies the Dam Roadway in Three Run Acres. The only language referenced by TRMA and the Circuit Court that purports to identify the 50' right of way is on the Plat, at Note 3:

> 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 case totaling 50 ft. in width, is retained for the purpose of constructing and maintain road access. The road easement has a 50 ft. radius in the cul-de-sacs as indicated.

JA 0333B.

The description of a 50 ft. wide easement is "through lots," or "over adjacent lots." On the Plat, "lots" are identified as Nos. "1-49," totaling "67.8501 acres." *Id.* More importantly, the Lake Area is identified separately, without any specific reference to a right of way. *Id.* To the

point, the Lake Area is not included in Lots 1-49, and therefore is not subject to the qualifying language in Note 3. Based upon the clear language of the referenced Plats of record, the only specific reference to a right of way across the dam and Lake Area is the "Dam Roadway" being "12' Wide." JA 0331A.

Most importantly, lots were indeed conveyed to individual lot owners between 1966 and 1969, prior to the 1969 Plat. Once property was conveyed pursuant to the 1966 Plat, the right of ways of record could not be modified (change in width) without the consent of all interested landowners. Please see all Deeds at JA 0545-0556. Between 1966 and 1969, the developer (McDonald) sold several lots within Three Run Acres. These lots were conveyed prior to the 1969 plat; accordingly, the 1969 could not have modified the prior easements of record as asserted by TRMA and adopted by the Circuit Court. This further confirms that TRMA has only a 12' wide right of way across the Lake Area.

For these reasons, Heavner contends that TRMA has only a 12' wide right of way across the Lake Area. The Circuit Court erred in disregarding the 1966 Plat – a Plat that could not have been modified without the consent of all interested landowners, specifically those grantees between 1966 and 1969.

3. Based upon the title documents of record, TRMA is entitled to a twelve (12)-foot easement for the purposes of ingress and egress only.

Notwithstanding the width of the right of way, and based upon all recorded documents, TRMA's use of the road easement should be limited to ingress and egress only.

There are a number of ways an easement can be created – by express grant or reservation, by implication, by estoppel or by prescription. *Cottrell v. Nurnberger*, 131 W.Va. 391, 47 S.E.2d 454 (1948); *Russakoff v. Scruggs*, 241 Va. 135, 400 S.E.2d 529 (1991). "Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant." *Hoffman v. Smith*, 310

S.E.2d 216 (W.Va. 1983). "The use of an easement must be restricted to the terms and purposes on which the grant was based." *Nishanian v. Sirohi*, 243 Va. 337, 414 S.E.2d 604 (1992).

Where an easement has been granted by deed, the ordinary rule which governs construction is that the rights of the parties must be ascertained from the words of the deed, and the extent of the easement cannot be determined from any other source. Where the language of the deed is ambiguous, the Court can consider the language employed in the light of the circumstances surrounding the parties and the land, at the time the deed was executed, and if parol evidence is introduced in aid of interpretation, the question of meaning should be left to the trier of fact. *See* generally *Hoffman*, 310 S.E.2d 216 (W.Va. 1983); *Semler v. Hartley*, 399 S.E.2d 54 (W.Va. 1990); *Hennen v. Deveny*, 71 W.Va. 629, 77 S.E.2d 142 (1913).

Based upon prevailing law, and the documents of record referenced herein, TRMA's use of the road easement should be limited to ingress and egress only. TRMA has failed to provide any document of record that expands the scope of the Dam Roadway. Mr. Loizos testified that members of both Three Run Acres and Three Run Woods intend to park or stand their vehicles in the easement during inclement weather to drop off or pick up children for the school bus. However, the 1966 Plat refers to this right of way as a "[r]oadway" only. JA 0331A. Even Note 3 on the 1969 Plat identifies that the purpose of the right of ways is for "constructing and maintaining road access." JA 0333B. TRMA's use would be limited to road access only, not the ability to park or stand their vehicles within this area or otherwise use the Lake Area for any other purpose.

The Circuit Court recognized the limited express language in the subject Plats in its initial Order Granting Partial Summary Judgment in favor of TRMA. Specifically, the Circuit Court determined that TRMA 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." JA 0267. Notwithstanding this initial finding, in its final Judgment

Order, the Circuit Court expanded the scope of the easement without sufficient evidence. Specifically, the Circuit Court determined that "the Three Run lot owners, and their guests" have the authority to "access, use, and enjoy the Three Run Lake area and any other area identified on the 1969 Plat as a jointly owned premises." JA 0972-0973. The findings of the Circuit Court are inconsistent and not supported by the weight of the evidence. The fact that several lot owners occasionally used the Lake Area for recreational purposes does not confirm that TRMA should be entitled to an expanded easement.

For these reasons, the Circuit Court erred in finding that TRMA possesses the right to use the Road Easement and Lake Area for any and all purposes.

4. Based upon the width and scope of the road easement, the Circuit Court erred in failing to clarify the Judgment Order and enjoin TRMA's expanded and claimed exclusive use of the Lake Area.

Following the entry of the Judgment Order, TRMA and its members took certain actions in an effort to the claim an *exclusive* right to use and enjoy the Lake Area. TRMA's counsel sent an email to the undersigned counsel, claiming that Heavner's "ownership is no longer relevant to the exclusive use and enjoyment of the Association and subject to the rules and control of same as exercised by the Association now in possession." JA 0986. Indeed, TRMA agents posted "No Trespassing" signs on the property, directed at Heavner. JA 0977. TRMA Board Members advised Heavner not to enter the Lake Area. *Id.* TRMA agents have moved certain timbers belonging to Heavner from where he had them stored to where he typically parks his vehicle, blocking his only access to the Lake Area by vehicle. *Id.*

In an effort to prevent the claimed exclusive use and possession by TRMA, Heavner filed both a Motion for Clarification of Judgment Order and Motion for Injunctive Relief. JA 0974-0987. The Circuit Court, without the benefit of complete briefing or hearing, denied both Motions. JA 0976, 0988-0989.

TRMA now believes and behaves as if it has obtained the exclusive right to and possession of the Lake Area. Notwithstanding TRMA's road easement and other presumed rights to use the Lake Area, it remains Heavner's property, and he most certainly has the right to use, maintain and enjoy the same, so long as he does interfere with the rights of use retained by TRMA.

B. THE CIRCUIT COURT ERRED IN GRANTING TRMA BOTH PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND RELATED ATTORNEYS' FEES AS HEAVNER HAS NEVER OBSTRUCTED THE SUBJECT ROADWAY.

The Circuit Court erred in granting both preliminary and permanent injunction relief and awarding related attorneys' fees as Heavner never obstructed the twelve (12)-foot road easement. In fact, there is insufficient evidence that Heavner actually prohibited access to the Lake Area to TRMA and its members.

1. Standard of Review

"In reviewing the exceptions to the findings of facts and conclusions of law supporting the granting of a temporary or preliminary injunction, the appellate court will apply a three-pronged deferential standard of review: it reviews the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, it reviews the circuit court's underlying factual findings under a clearly erroneous standard, and it reviews questions of law de novo. *State ex rel. E.I. Dupont De Nemours and Co. v. Hill*, 214 W.Va. 760, 591 S.E.2d 318 (2003).

2. The Circuit Court erred in granting TRMA a preliminary injunction as Heavner never obstructed the roadway.

At the hearing on TRMA's Motion for a Preliminary Injunction, the Circuit Court heard limited evidence from Christopher Loizos, TRMA President. JA 0066. Loizos testified that Heavner placed certain railroad ties and concrete pavers along the side of the paved roadway leading across the dam and Lake Area and into the subdivision. JA 0073-0075. He further testified to piles of rock and dirt being placed in the shoulder area alongside the

road. JA 0073. Importantly, Loizos confirmed that the paved portion of the roadway is approximately twenty (20)-feet wide. JA 0075. **There is absolutely no evidence in the record below that Heavner obstructed the twenty (20)-foot roadway at any time (emphasis added).**

Loizos testified that the alleged obstructions, namely the railroad ties and timbers, prevented TRMA members from parking upon the easement. JA 0078. He also stated that the railroad ties and timbers could damage a vehicle if it slid off the road. JA 0080. Finally, he complained about white lines that Heavner painted on the roadway, although these painted white lines did not obstruct traffic. JA 0084.

Heavner and undersigned counsel advised the Court that Heavner placed the railroad ties and timbers along the sides of the paved road for the safety of others. JA 0095. As owner of the Lake Area, he was concerned that vehicles would slide off the road and either into the lake or shoulder. *Id*, JA 0107-0108.

Otherwise, TRMA did not produce any evidence that Heavner had obstructed the roadway or actually prevented its members from coming upon the Lake Area at the hearing on TRMA's Motion for a Preliminary Injunction. The Circuit Court erred in finding otherwise.

3. The Circuit Court erred in granting a permanent injunction as Heavner never obstructed the roadway and there was insufficient evidence that he prevented TRMA members from actually coming upon and using the Lake Area.

The Circuit Court erred in granting a permanent injunction following the bench trial as there was insufficient evidence that Heavner obstructed the roadway or otherwise actually prevented TRMA members to come upon the Lake Area, assuming they have any rights to do so. At the bench trial, Brett Hall, TRMA Vice-President, did not provide any evidence that Heavner obstructed the roadway or prevented TRMA members from coming upon the Lake Area. JA 0609-0635. Similarly, Mr. Loizos offered testimony at the bench trial, but did not state that Heavner obstructed the roadway or otherwise prevented TRMA members from coming upon the Lake Area. JA 0635-0668. Based upon the weight of the evidence, the Circuit Court erred in

granting an injunction against Heavner, thereby permitted TRMA members to use the Lake Area for any and all reasons.

C. THE CIRCUIT COURT ERRED IN DETERMINING THAT CERTAIN ACTIONS OF HEAVNER CONSTITUTED A PRIVATE NUISANCE, BASED UPON THE EVIDENCE ADDUCED DURING THE PROCEEDINGS AND THE APPLICABLE LEGAL STANDARD.

The Circuit Court determined that the alleged actions of Heavner did not constitute a public nuisance. However, the Circuit Court went to find that his actions constituted a private nuisance, presumably against TRMA. Based upon a review of all testimony heard at the preliminary hearing and at the bench trial, the Circuit Court erred in making this finding. Heavner is the true and legal owner of the Lake Area, and he was simply seeking to maintain, use and protect his property.

1. Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court made a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329 (1996).

2. The Circuit Court erred in finding that Heavner's actions, in maintaining, using and protecting his property, constituted a private nuisance against TRMA.

"A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." Syl. Pt. 2, *Ransbach v. Harbin*, 229 W.Va. 287 (2012). "An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm." Syl. Pt. 2, *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989).

Heavner's actions, in using and protecting his property, did not constitute a *substantial and unreasonable* interference with TRMA's access to the Lake Area. As previously stated herein above, Heavner did not block the paved the portion of the roadway at any time. Neither Hall nor Loizos testified to the contrary. Hall testified that Heavner gave him two (2) lemons trees and stated that he would always "be a thorn in your side." JA 0624-0625. Hall further testified that Heavner would park his vehicle in the Lake Area or drive his vehicle through the neighborhood. JA 0625. Hall testified that someone, although he was unable to identify the individual, cut brush back in the Lake Area that ultimately ended up clogging the overflow flow drain for the dam. JA 0626. The Circuit Court found that these actions constituted a *substantial and unreasonable interference* and resulting private nuisance. JA 0970-0971. Even if the same were true, these actions do not constitute a private nuisance, as defined by applicable law.

D. THE CIRCUIT COURT ERRED IN AWARDING TRMA ATTORNEYS' FEES TOTALING $20,331.82, BASED UPON THE APPLICABLE LEGAL STANDARD.

The Circuit Court initially awarded TRMA attorney fees in the amount of $1,350.00 following its Order Granting Preliminary Injunction and Rule to Show Cause. JA 0300-0301. Following the bench trial, the Circuit Court awarded additional attorney fees to TRMA in the amount of $18,981.82. JA 1071. A total attorney fee award of $20,331.82 is excessive and not based upon the weight of the evidence.

1. Standard of Review

This Court should apply an abuse of discretion standard of review to an award of attorney's fees. *Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 310, 599 S.E.2d 730, 733 (2004).

2. The Circuit Court erred in awarding attorneys' fees to TRMA in the total amount of $20,331.82.

Reviewing the Judgment Order, it is clear that Heavner prevailed on several claims. The

Circuit Court properly found that Heavner's tax deed was neither void nor voidable. The Circuit Court further Heavner's actions did not constitute a public nuisance. TRMA should only be entitled to those fees / costs as related to the claims upon which TRMA prevailed. See *Heldreth v. Rahimian*, 219 W.Va. 462 (2006), holding, in part, that a trial court "should take note that the most critical of all the factors looked to in determining a statutory award of attorney's fees is the degree of success obtained."

It is clear that the Circuit Court erred in granting TRMA a fifty (50)-foot easement across the dam area. Once this Court confirms the same, it further becomes clear that Heavner's actions were not unreasonable nor in bad faith. Heavner was simply maintaining, using and protecting his property. He is the true and legal owner of the Lake Area. TRMA failed to produce sufficient evidence that Heavner substantially and unreasonably interfered with any rights it may have to the Lake Area. For these reasons, the Circuit Court's Order awarding attorneys' fees to TRMA in the amount of $20,331.82 should be reversed.

VIII. CONCLUSION

WHEREFORE, for the reasons set forth herein, the Petitioner requests that this Honorable Court reverse the decisions of the Circuit Court, as more specifically set forth herein.

Respectfully submitted,

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Petitioner, By Counsel

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