IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA
CASE NO. 18-1080

Robert Heavner,
Petitioner,
Respondent Below

v.

Three Run Maintenance Association, Inc.,
Respondent
Petitioner Below.

Appeal from Orders Entered
by the Circuit Court of
Berkeley County
(Civil Action CC-02-2017-P-412)

RESPONDENT'S BRIEF

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IV. ERRORS AND OMISSIONS - TRMA'S STATEMENT OF THE CASE

This case arises out of one person's scamming of the Ad Valorem Tax System to take over a residential development's common area and then attempt financial gain by selling it back to the lot owner's association. Petitioner Heavner purchased the 4.7283 acre Lake and Recreation common area of Respondent Three Run Maintenance Association ("TRMA") for $25.00 as a result of an erroneous common area tax assessment. He then demanded $20,000.00 to sell it back to its rightful owner, TRMA. SJA 0013.

The development is located in a rural area of Berkeley County. The subdivision roads, Lake and Recreation Area were dedicated to the lot owners in plats recorded in 1966 (JA 0331-0331A) and 1969 (JA 0333-0333A) referenced in their deeds. The chain of title in Heavner's tax

deed refers to and incorporates the 1969 plat denoting the rights of ways in the development as 50' in width. *Id.* The sole entry into the development crosses over the dedicated Recreation Area at its man-made Lake dam also contained on the plat. Below the dam is the balance of the 4.7283 Acre recreation common area. *Id.*

After surreptitiously waiting the full three year statute of limitations period[1] following acquisition of his $25.00 deed, Heavner appeared at the sole entry way to the development and began blocking off the parking areas along it with railroad ties and rocks. JA 0295-0296. He placed "no trespassing" signs along the Recreation Area. Antagonistic to his own chain of title, Heavner claimed the entry way was only 12' wide. School buses were blocked from loading and unloading school children inside the development, compelling the school children to cross the dangerous public road. Waiting parents had no place to park without blocking the entry road. Heavner then demanded to be paid $10,000.00 for a deed to the common Lake Area. When a yielding lot owner volunteered to submit to his extortion, Heavner then raised his demand to $20,000.00. SJA 0015. TRMA then sought legal counsel and filed the complaint below accompanied by a motion for preliminary injunction. A preliminary injunction was issued by the trial court on December 19, 2017. JA 0136. However, it was not until after TRMA filed a petition for contempt that Heavner complied with the court's order requiring removal of the barriers along TRMA's entry road. JA 0269, 0303.

The subject lots lie to the east above the stream known as Three Run. As indicated above, the lots which are the subject of this proceeding are all accessed by a single right-of-way leading from Three Run Road, "Aspen Drive," which crosses over the dam built over Three Run.

[1] See W.Va. Code §11A-4-4. Heavner evaded his statutory obligation to give written notice of the right to redeem to the Association and to each lot owner holding a vested and recorded interest in the common areas. Then Heavner silently waited for three more years after obtaining his deed to carry out his plan to extort money from the true owners of the common areas.

Aspen Drive then runs up a steep slope to access the lots. From the top of Aspen Drive, one cannot see what is at the bottom where it crosses over the dam. JA 0077.

Two separate "Declarants"[2] were involved in the development of the lots owned by the members of Three Run Maintenance Association ("TRMA"). The real estate from which the lots and the subject Lake and Recreation common area were developed was originally owned by C. J. McDonald and Dorothy McDonald. In 1969, the McDonalds conveyed the land now comprising "Three Run Woods" to Arthur Radin and Beverly Radin. JA 0690. Prior to that conveyance, C. J. McDonald recorded a plat depicting lots and roads as surveyed and platted by E. F. Hickman. Mr. Hickman's initial plat is dated "May, 1966," and recorded as a "Preliminary Plat," for what was referred to therein as "Three Run Acres." JA 0332. The 1966 plat includes a configuration of lots which include those sold by McDonald as lots in Three Run Acres. However, most of the area was reconfigured incident to the transfer of the residue area from the McDonalds to the Radins. This was accomplished in a 1969 plat entitled "Three Run Woods" dated July 31, 1969, by R. M. Bartensein & Assocs. JA 0333. Significantly, the 1969 plat contains a mark through over C. J. McDonald's name and typed below the mark through appears "ARTHUR RADIN." Highly significant to the underlying decision in this case **both the above-mentioned plats depict the existence of the Lake and Recreation Area in question thus leading to the conclusion that the Lake and Recreation area was dedicated to the use of all the surrounding lots, namely, those in the now combined subdivisions of Three Run Woods and Three Run Acres**. It is undisputed that all lots in the combined development were

[2] See W. Va. Code § 36B-1-103 (12) defining "Declarant." TRMA wishes to underscore its view that the development existed in 1986 as a "preexisting common interest community" under W. Va. Code § 36B-1-204. Therefore, its common areas, including the Lake Recreation Area, were governed by the provisions § 36B-1-105 (2) prohibiting the separate assessment of the Lake Common Area and its erroneous sale for delinquent taxes which gave rise to Heavner's errant claim of the Lake's ownership.

conveyed with reference to the plats. Accordingly, as explained above, Heavner's title claim derives from the Radins' plat. JA 0333B. As was determined by the trial court, this undisputed fact is determinative of Heavner's rights. JA 0263, 0267, 0969. Any interest Heavner may hold by virtue of his $25.00 phantom deed is subject to the lot owners' use and possession of the Lake Recreation Area. Thus, Heavner stands in the shoes of a defunct developer who retains no interest in the development.

On the 1966 C. J. McDonald Final Plat, north of the dam appear the words: "LAKE AND RECREATIONAL AREA." JA 0331. To the south of the dam and subdivision entry road appear the words "Recreational Area." On the more recent Radin 1969 plat, appear the words "THREE RUN LAKE." To the south of the dam and subdivision road on this plat appear the words: "RECREATIONAL AREA 4.7283 ACRE"[3] JA 0333. It is undisputed that the total Recreation Area includes both the Lake to the north of the dam, the dam and the picnic-gathering place south of the dam.

The 1969 Three Run Woods plat also denotes the lake property at issue as "jointly owned premises." JA 0333A-0333B. Owners of the lots were obligated, under their deeds, to pay a common area maintenance fee of $20.00 per year subject to an increase of not more than $1.00 per year.[4] *See* e.g. JA 0484.

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[3] Heavner points out, at p. 9 of his Brief, that the circuit court effectively found that the 1969 plat designating a 50' easement superseded the earlier 1966 plats as it related to the easement width. Since Heavner's title is based on the 1969 plat, he is estopped from denying the 50' easement. Nonetheless, Heavner theorizes that prior conveyances under the 1966 plats fixed the limits of the roadway over the dam as either a "12' roadway" or a "30' roadway" (depending on which theory Heavner chooses to adopt). *See* p. 10-12 Heavner Brief. Paradoxically, however, in 1969, the developers held fee title to the entire width of the dam over which the roadway ran. Therefore, both McDonald and Radin clearly had the legal right and privilege of permitting the users of the dam common area the full width of the dam surface. In effect, Heavner contradictorily argues that he now has authority to narrow the use of the dam surface but the original developers did not have the authority to widen its use for vehicles. Heavner's mischievous undertaking was and is to prevent *parking* off the side of entry road over the dam. The parking Heavner seeks to preclude is on TRMA's Common Area. Since Heavner no longer disputes that the dam over which the entry road runs is a common area, Heavner is effectively prosecuting this vexatious appeal over a moot issue.

[4] It is the common area maintenance obligation that defines the development as a common interest community (W. Va. Code § 36B-1-103(7), first adopted in 1986)). Therefore, TRMA maintains that the development was a

Proper maintenance of the Lake and Recreation Area is critical to the safety of the adjoining owners whose properties are subject to flooding. Should the outflow points become severely blocked, a breach will eventually occur in the dam stranding the residents from access out of the development. Likewise, access to the residents from the outside by emergency vehicles will be blocked if the Lake dam is not properly protected and maintained.

Covenants contained in the various deeds included the requirement of a road maintenance assessment. However, as indicated above, the amount was established at a paltry $20.00 per year which could only be increased at the rate of $1.00 per year. *Id.* There existed no provision for establishing a home owners association to collect the assessments or maintain the roads and the Lake Recreation Area. *Id.*

Therefore, an entity was established by the lot owners, Three Run Maintenance Association, Inc. However, it lacked legal authority to act except as a volunteer organization dependent on the good will of conscientious lot owners who paid the annual assessments requested of them. JA 0963. Nonetheless, volunteer residents of the development maintained the Lake Recreation Area without compensation. Significantly, the work involved maintaining the two outflow points situate in the Lake dam which are referred to above. The first of these two outflow points is located approximately four (4) feet below the second. The second outflow provides additional security for the dam should the lower of the two become obstructed. The volunteers also kept the recreation area around the Lake free from trash and brush and used the lake area for picnics, general recreation and fishing. JA 0637-0638.

In order to achieve necessary legal authority to assess and collect reasonable maintenance fees and maintain the development common areas, in 2015, sixty percent (60%) of the lot owners

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"preexisting common interest community" in 2009 when its Lake Recreation Area was first unlawfully separately assessed for ad valorem taxes and subsequently sold to Heavner. W. Va. Code § 36B-1-105.

adjoining the subdivision roads petitioned the Berkeley County Council to become a Maintenance Association under Article 12A of Chapter 7 of the Code of West Virginia. The Petition was approved by Order of the Council in January of 2016. JA 0011.

Matters proceeded as expected until the late summer of 2017, when Heavner appeared and began blocking the entry road to the development and prohibiting lot owners from using their Lake Recreation Area. JA 0640-0641, 0644.

In late 2017, Heavner suddenly began placing "no trespassing signs" around the Lake Area and railroad ties and large stones along the sides of the paved entryway over the dam. JA 0964. He directed the officers of the Association to prohibit the residents from occupying the property. *Id.* He continued to prohibit off road parking after he was given notice that he was blocking school buses from loading and unloading their children along the subdivision entryway and that his actions forced the school children to cross the dangerous Three Run Woods Road. SJA 0012. It is undisputed that Heavner provided absolutely no prior notice of his claim to anyone in the development.

Prior to Heavner's appearance, Petitioner, and its predecessor Association, had maintained exclusive possession of the Lake and Recreation Area, continuously, at least for a period of approximately 30 years, without any interruption, up until Heavner's recent claim. This exercise of possession had been open and obvious. Acting by and through their Association, the residents had historically taken measures to prohibit use of the Lake area by anyone other than the subdivision residents and their guests. They issued fishing permits to residents and prohibited any large water craft from the Lake in order to preserve the dam. JA 0620, 0622.

With the appearance of Heavner, the Association's efforts were promptly undone. Heavner cut trees and brush along the banks of the Lake, jeopardizing the outflows. Heavner failed to properly maintain the outflows and refused to allow TRMA to maintain them causing significant flooding and jeopardizing the integrity of the dam which supports the subdivision entry road. Heavner permitted a large pontoon boat to enter and travel on the small lake. He allowed brush and debris to fall into the lake near the outflow points. And he threatened to place large storage containers, known as "Sea Containers," in the Lake Recreation Area at the entrance to Three Run Woods. JA 0665-0666.

Heavner had contrived to wait just over three years following the acquisition of his tax deed, just past the running of the statute of limitations on setting aside a voidable tax deed, per W.Va §11A-4-4, to make his move. Heavner's unlawful scheme was designed to extort money from the TRMA. He began by demanding the sum of $10,000.00 for a deed to the Lake Area which he had purchased from West Virginia for $25.00. Then, after a resident volunteered to come up with that sum, he raised the ante to $20,000.00. SJA 0015.

The malicious nature of Heavner's actions was made manifest when, in the course of his extortion scheme, he handed TRMA Vice President two lemon trees. One, he said, was for the Vice President, the other for the President, stating words to the effect of, "...see those thorns, every time you look at them you will know that I will always be a thorn in your backside." (JA 0624-0625, testimony by TRMA President Chris Loizes at trial which was left unrebutted by Heavner.)

Despite his choice of words to TRMA in 2018, it is now claimed in his Brief that "Heavner understood that he acquired said [Lake] parcel subject to any right of record, including an easement of ingress and egress for the members of TRMA." Brief, at p. 1. At trial, Heavner

appeared but offered no testimony to rebut the above facts which were provided to the circuit court through the testimony of TRMA's officers.

V. SUMMARY OF THE ARGUMENT

It is unclear what Heavner means with his assertion that the circuit court's orders are inconsistent. Pet. Brief, p. 6. The circuit court has ordered that the Lake Recreation Area, along with the road right-of-ways in the development, constitute common areas for the benefit of the lot owners and the court referred to them as "jointly owned premises." *See* court's final order, JA 0970-0972. Therefore, regardless of any claim to separate ownership of the fee under the entry road, the lot owners have the right to park along the sides of the 20-foot-wide paved entry road. Likewise, the lot owners, acting by and through their Maintenance Association are vested with authority to permit school buses to park and safely load and unload school children there.

At best, Heavner's deed vested him with the title of a defunct developer who sold off all interests in a subdivision and retains nothing. Standing in the shoes of the Radins, who recorded a 1969 plat depicting a 50' right-of-way on the roads of this development, Heavner is now estopped from denying the lot owners their rights. *Syl. Pts. 2, 3, Cook v. Totten*, 49 W. Va. 177, 178, 38 S.E. 491, 491 (1901); *Sly. Pt. 2, Elkins v. Donohoe*, 74 W. Va. 335, 81 S.E. 1130 (1914). It is uncontested that: 1) the dedicated easements included the **entire** dam area over which the entry road crosses, and 2) at least some of the Three Run Woods lot owners purchased under the 1969 plat depicting the subdivision roads as 50' in width, as did Heavner. Therefore, Heavner is estopped by deed from interfering in any way with the free use and enjoyment by TRMA's members across and over the only means of access to their lots over the dam. He is further estopped by virtue of his deed from interfering in any way with TRMA's possession and

management of the Lake and Recreation common area which was dedicated to members prior to Heavner's $25.00 phantom deed.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

TRMA suggests that this may be a case appropriate for oral argument under Rule 20 of the R.A.P. as it involves issues of first impression and fundamental public importance.

VII. ARGUMENT: RESPONSE TO ASSIGNED ERRORS

A. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT TRMA POSSESSED A FIFTY (50) FOOT ACCESS EASEMENT SINCE HEAVNER DOES NOT DISPUTE THAT THE ENTIRE DAM AND RECREATIONAL AREA OVER WHICH THE ROADWAY RUNS IS A "COMMON AREA" AND ALL ROADS IN THREE RUN WOODS ARE DESIGNATED AS 50 FEET IN WIDTH IN THE PLAT UNDER WHICH HE CLAIMS TITLE.

1. TRMA Does Not Disagree with Heavner's Standard of Review.

2. In Accord with Heavner's Cited Reference to W. Va. Code § 11A-3-62, Heavner's Title to the Lake Area is, at Best, Fee Ownership Under a Private Common Area That is Dedicated to the Exclusive Use and Enjoyment of the Members of TRMA who Maintain and Control it By and Through Their Association.

Heavner only acquired the title held by L &L Corporation which was subject to such rights as remained with the lot owners of the combined Three Run Woods development. W. Va. Code § 11A-3-62. Heavner does not dispute that the Lake and Recreation Area is a common area as determined by the circuit court. JA 0977. Therefore, it was a common area when Heavner obtained his $25.00 phantom deed to it from the Deputy Tax Commissioner. To the extent that the common area lot owner rights remained titled to the developer in its fiduciary capacity, TRMA became vested with those rights after it was duly authorized to take title by the County Council of Berkeley County by Order entered January 21, 2016. *See* Deed to TRMA, JA 0498. The approved Three Run maintenance Association Document, dated August 1, 2015, reads, in pertinent part: "The objects for which this Maintenance Association…is formed are as

follows: ...(2) To take title to and own, in fee simple, the common areas within the development." JA 0013. By deed, TRMA acquired such fiduciary interests in the common areas as remained with the successors to the developers on August 11, 2017. JA 0498.

Heavner suggests that the development is accessed by a "12' right-of-way" (Pet. Brief, p. 8) but the older plat designation refers to a "12' *roadway.*" Emphasis added. The plat simply implies that the road over the dam is maintained with a surfaced width of 12' width. It is undisputed that the paved portion used at the time of Heavner's claim to possession was 20' in width. It is also undisputed that the members of the Association used the entry way to the full extent of its width over the dam for some 30 years prior to Heavner's arrival without interruption. Heavner asserts that the 1969 plat could not establish the ultimate width of the subdivision easements as 50', but the deeds to the lot owners expressly reserved to the developers the right to modify the covenants. This right was exercised through the covenant contained in paragraph (11) of the Radin deeds declaring the "...lakes, ponds, parking areas, picnic areas... the joint property of all of the lot owners...." *See* e.g. JA 0026. Therefore, Heavner's claim to exclusive use and possession of the dam beyond the 12' (or 30' width depending on which he may ultimately claim) is but evidence of a disingenuous and meritless claim which has thus far failed to extort money from TRMA and its members.

As noted above, Heavner indicates that he may wish to choose a "30' Wide Roadway" theory instead of a 12' wide roadway. *See* Pet. Brief, at p. 9, referring to "...additional evidence obtained through discovery...", at p. 10 referring to a "30' wide roadway" over the same area described as a 12' roadway from which Heavner concludes the **right-of-way** over the dam is 12' in width. The result is an admission by Heavner that he violated the easement when he blocked off all but the 20' wide paved road. No matter which theory Heavner goes with, his discrepant

references merely substantiate the point that the dam was a dedicated common area over which a roadway was to exist. Heavner fails (or simply purposely refuses) to acknowledge the distinction between the width of a road and the dimensions of a common area. TRMA's members are entitled to use the entire dimension of the dam area which includes the road and both sides of the road. As is set forth in the next section, specific uses include reasonable and convenient parking.

3. Heavner Lacks Standing to Object to TRMA's Proper Use of its Easements for Parking.

Heavner appears to alternatively argue, that regardless of the width of TRMA's road easements, its members can only travel over it. Heavner professes to believe that the words on the 1969 plat depicting the 50' right-of-way for "constructing and maintaining road access" means that the residents of the development cannot "...park or stand their vehicles in the easement during inclement weather to drop off or pick up children for (sic) the school bus." Pet. Brief, p. 12. He sardonically suggests that "TRMA's use of the road easement should be limited to ingress and egress only," meaning there may be no parking on it. *Id.* Heavner is wrong as to both the law of road easements and wrong for attempting to insert his view into the matter over which he lacks standing.

As is pointed out, *supra*, Heavner lacks standing to object to TRMA's use of its common areas. At best, he stands in the shoes of a developer who has no interest in the development.[5] Apparently, Heavner would propose that the residents of the multitude of private communities around our State are not permitted to park along their wide streets. On the contrary, the rights of ways in Three Run Woods are there for the use of all residents. They may use the road rights of

[5] In fact, it could be reasonably argued that, as successor developer vested with bare legal title to the common areas, he is obligated to convey them to the Maintenance Association.

ways for parking provided that they do not unreasonably interfere with the use of others. *See Erhard v. Helmick*, No. 11-1595, 2012 W. Va. LEXIS 735 (Oct. 19, 2012) memorandum decision in which this Court found that a road, intended for the use of a party, "...naturally allows them the right to park vehicles on the road in such a way as to not block the vehicular traffic on that twenty-foot wide road. *Id*, at 0739.

None of the cases cited by Heavner support his "no parking allowed" position. In *Cottrell v. Nurnberger,* 131 W. Va. 391, 392, 47 S.E.2d 454 (1948), (cited at p. 11) the Court simply held that an easement could not be created by an oral promise. TRMA makes no such claim. *Russakoff v. Scruggs*, 241 Va. 135, 137, 400 S.E.2d 529, 530 (1991) (cited also at p. 11) is entirely consistent with TRMA's claims. In *Russakoff*, as in the case at bar, the lake area was a servient tract once part of a single tract with the dominant lots of the plaintiffs who claimed an easement over the lake. The plaintiffs had used the lake openly and continuously and demonstrated that there was a legitimate expectation on the part of plaintiffs of the right to access and use of the lake. Therefore, the court found they enjoyed an easement on the lake.

Heavner cites *Hoffman v. Smith,* 172 W. Va. 698, 310 S.E.2d 216 (1983) (at p. 12) for the proposition that an express easement is limited to the "terms and purposes of the grant." In *Hoffman*, cattle gates were to be maintained and kept closed according to the easement. Therefore, the owner of the dominant tract was not permitted to remove the gates. No gates or obstructions existed on TRMA's right-of-way prior to Heavner's arrival, only thereafter by Heavner's illicit doing. *Nishanian v. Sirohi*, 243 Va. 337, 338, 414 S.E.2d 604, 605 (1992) (cited at p. 12) involved the use of a driveway right-of-way. However, the issue was not the related use of the driveway for parking. Prohibited, was the construction of four brick driveway

columns in the private road. Again, the TRMA has not placed obstructions in the right-of-way, but Heavner has.

Likewise, in *Semler v. Hartley,* 184 W. Va. 24, 25, 399 S.E.2d 54, 55 (1990) (cited by Heavner at p. 12), the dominant owners' predecessor in title had obtained a 30-foot wide right-of-way over the servient estate but the servient owners erected an 11 1/2 foot-wide gate across the right-of-way. The court held that the obstruction was not permitted as has the circuit court in the case at bar. *Semler* supports TRMA, not Heavner.

Finally, Heavner unexplainably cites *Hennen v. Deveny,* 71 W. Va. 629, 630, 77 S.E. 142, 142 (1913) for the proposition that, absent ambiguity, the court must look to the words of the easement to determine its extent. The easement in *Hennen* was a 10-foot set back from a church to provide it with light and air. The easement was enforced in favor of its dominant owner as has the circuit court below in the case at bar.

None of Heavner's cited cases enrich his spurious claim. It is nonetheless interesting to note the distinction between a servient owner (or dominant owner) who retains a stake in his continued vested rights (as in his cited cases) and Heavner, who stands in the shoes of a defunct and departed servient developer. By the year 1979, when the Radins signed a deed to any "remaining residue" of their lots under which Heavner's title claim is derived (JA 180), the developers had no remaining interest in the development. They had no remaining stake in any of the real estate. Their acquisition of the land had been to develop it and move on. Heavner cannot cite a single case with similar facts. It is submitted that no case like the one before this Court can be found (or ever should be). That is because Heavner's interests in his $25.00 deed have nothing to do with the ownership of real estate and everything to do with his lemon tree "pain in the backside" gift and his perverse compulsion to prove his ability to "win." This

litigation is about Heavner's bitterness over his failure to extort money from a vulnerable lot owners maintenance association which he now seeks to further deplete of all of its future limited revenue in this vexatious litigation. *See* unrebutted testimony, JA 0616.

4. Heavner's Motion for Clarification of Order and Spurious Motion for Injunctive Relief Filed Subsequent to the Close of the Circuit Court Proceedings are Not the Proper Subject of This Appeal.

Final judgment was entered by the circuit court on July 3, 2018. On July 31, 2018, outside the time for filing a Rule 59 Motion, Heavner filed "Defendant's Motion For Clarification Of Judgment Order." JA 0974. Heavner's complaint was that "Plaintiff believes that it has the *exclusive* right to use and enjoy the subject Lake Area." *Id.* In its Order denying the Motion, the trial court found that Heavner did not "...identify what language in the order ... requires clarification." Aside from the procedural irregularity of Heavner's Motion, a reasonable reading of the court's order is that the court intended that TRMA would have exclusive use and possession of the Lake Area. The court expressly held that it was a "common area available for the use and enjoyment of all Three Run lot owners and their guests." JA 0970-0971. The trial court specifically held that Heavner's title was based on the plats of record, derived from L & L Corporation (which took title from the Radins whose plat designated the Lake as common area for the lot owners). *Id.* It stands to reason that, since the Radins reserved no future development rights and had divested themselves of any and all ownership in the development, they would have no further right to use the Lake Area and therefore Heavner would have no such right. The trial court concluded that Heavner had stated no grounds for relief nor were any supporting authorities set forth in his Motion For Clarification. JA 0976.

Yet the circuit court denied the Motion **without prejudice**. *Id.* Despite the court's clear invitation, Heavner took no action to provide the court with a rule compliant motion stating why he believed TRMA was not entitled to exclusive use and possession of the Lake Area.

Instead, on August 16, 2018, Heavner filed a second spurious motion titled "Motion For Injunctive Relief" in proceedings which already were closed, saving and excepting disposition of the issue of attorney fees. Since no complaint was pending before the court, the trial court denied the Motion. The court also noted that "...Defendant's motion does not and indeed cannot cite to any provision of the current final order which is violated." JA 0988.

Nonetheless, neither of Heavner's post final judgment motions were denied with prejudice. Neither are the proper subject of appeal because neither were properly brought before the trial court for adjudication. Therefore, the subject matter of the motions has not been decided on the merits and is not ripe for appeal. *Coleman v. Sopher,* 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995).

B. THE CIRCUIT COURT CORRECTLY GRANTED THE INJUNCTION SINCE HEAVNER HAD VINDICTIVELY PLACED BARRIERS ALONG THE SIDES OF THE SUBDIVISION ENTRY ROAD, DELIBERATELY BLOCKING OFF-HIGHWAY LOADING AND UNLOADING AND FORCING SCHOOL CHILDREN TO CROSS A DANGEROUS BACK ROAD IN ORDER TO ACCESS THEIR SCHOOL BUS.

1. TRMA Does Not Disagree with Heavner's Standard of Review Statement.

2. The Circuit Court Did Not Err in Granting TRMA a Preliminary Injunction.

Heavner effectively concedes to the appropriateness of injunctive relief issued against him. Heavner does not contest that TRMA is entitled to use of the Lake Recreation Area as a common area over which the subdivision access road runs. In fact, as a claimed successor to the developers who created the easement, he is legally and factually estopped from denying the existence of the common area easement. *See* authority and cases cited by Heavner, at Pet Brief pp. 11-12. Therefore, TRMA has the right to park on the sides of the entry road crossing the Lake Recreation common area. Accordingly, TRMA has the right to an injunction against Heavner's continued insistence that he may obstruct TRMA's use of the sides of the entry road.

This entry road is a road situate on the common area and the common area may be used by TRMA's members as deemed convenient and necessary for the safety, welare and convenience of the residents and their school children.

Moreover, as is pointed out *supra,* Heavner's 12-foot claim is but the sham foundation used by him in his extortion ploy. As the trial court noted (*see* JA 0266-0267, 0972-0973), Heavner's (alleged) title claim is based on reference to a plat designating the subdivision right-of-ways as 50 feet in width. If Heavner owns anything, he owns what is leftover by a successor developer with no development rights. As such, he is legally estopped from denying the validity of the court order which enjoins him from blocking the entry road and interfering with TRMA's members' use of any portion of the common area of the dam where the road crosses. *See Elkins v. Donohoe,* 74 W. Va. 335, 335, 81 S.E. 1130, 1130 (1914) .

After threatening TRMA with his lemon trees, demanding $20,000.00 extortion from TRMA, placing no trespassing signs along the Lake and damaging the dam's structural integrity, Heavner would stand before this Honorable Court stating that the trial court's injunction against him is unsupported by the evidence. *See* Pet. Brief, p. 15. TRMA respectfully points out that the Petitioner on appeal is the same individual who sat silently through trial in this case leaving uncontested the sworn testimony of President Chris Loizos and Vice President and Treasurer Brett Hall as to all the above damning proven facts against him.

3. Given That Heavner Placed No Trespassing Signs Around the Lake and Deliberately Jeopardized the Integrity of the Lake and the Safety of the Residents With it, the Trial Court's Permanent Injunction Was Warranted and Critical to the Health, Safety and Welfare of TRMA's Members.

As pointed out immediately above, TRMA's unrebutted trial evidence overwhelmingly supports issuance of the permanent injunction, regardless of whether Heavner blocked off the entire entry way. Heavner's actions in placing no trespassing signs on TRMA's property,

jeopardizing the physical integrity of the lake and dam and forcing school children to unnecessarily cross a dangerous highway was supported by clear and convincing evidence. In fact, the evidence supporting the permanent injunction was uncontradicted.

C. HEAVNER'S MEAN-SPIRITED INTERFERENCE WITH THE VESTED PROPERTY RIGHTS OF TRMA'S MEMBERS LACKED ANY SOCIAL UTILITY WHATSOEVER AND ENDANGERED THE HEALTH AND WELFARE OF TRMA'S MEMBERS WARRANTING THE COURT'S PRIVATE NUISANCE FINDING.

1. TRMA Does Not Disagree with Heavner's Standard of Review Statement.

2. Because Heavner Unreasonably and Intentionally Interfered with TRMA's Property Rights Without any Social Utility supporting his Acts the Trial Court Correctly Determined Heavner's Actions Constituted a Private Nuisance.

Heavner cites two cases to support his argument that the unrebutted and clearly proven facts do not support the court's private nuisance ruling. His cases underscore the legal axiom that where the activity unreasonably interferes with another's use of his land the activity constitutes a private nuisance

In *Bansbach v. Harbin*, 229 W. Va. 287, 728 S.E.2d 533 (2012) (cited at Pet. Brief p. 16), there existed no physical interference with any portion of plaintiffs' lands. Instead, the neighbors used their farm land in a manner offensive to plaintiffs by placing offensive signs and junk on it and making offensive gestures and statements directed at plaintiffs. Meanwhile, plaintiffs logged the neighbors' daily activities and photographed them. The *Bansbach* court upheld the trial court finding that that type of conduct was simply not what nuisance laws were aimed at remedying.[6] *Id,* at 293, 539.

In the case at bar, the private nuisance finding is firmly grounded in the use of TRMA's interest in real estate, namely the common areas of Three Run Woods. This private nuisance did

[6] The *Bansbach* court pointed out that what constitutes a nuisance in one area will not constitute a nuisance in another (presumably referring to West Virginia farms where junk regularly is permitted to accumulate).

not arise from offensive words, gestures or even Heavner's lemon tree stunt. This nuisance is based on Heavner's intentional blocking of TRMA's members from their parking area located on their common area (which they had been using far beyond the period of the statute of repose). W. Va. § 55-2-1. This nuisance is based on the fact that, after Heavner took possession of the Lake, he caused it to become a health and safety hazard in a private community and subjected the community to flooding. Moreover, Heavner's motive to use TRMA's land for the illicit purpose of extorting money, manifests of the lack of any social utility whatsoever that might justify Heavner's interference with TRMA's property rights.

The next case cited by Heavner addresses the matter of balancing equities and underscores the fact that no equities exist that weigh in favor of Heavner's side of the equation. In *Hendricks v. Stalnaker*, 181 W. Va. 31, 380 S.E.2d 198 (1989) (cited by Heavner at p. 16) this Court was called upon to balance the equities between two land owners who needed private wells and septic systems for their respective lots. Learning that their neighbors were seeking a permit to place a septic system near the parties' common property line, the neighbors had a private well dug near that same spot. Under the health department's set back requirements for a septic system's drain lines, the neighbor was then unable to obtain a permit for a conventional septic system. Balancing the interests of the competing landowners, the court held that the installation of the water well by the landowner was not an unreasonable use of the land. Therefore, the well did not constitute a private nuisance. Specifically, the court held that both a water well and a septic system were necessary to use their lands for housing and that neither party had an inexpensive and practical alternative. Thus, the adjoining landowners failed to show that the balancing of interests favored their septic system.

In the case at bar there exist no equities to be balanced between Heavner and TRMA. At best, Heavner's claim is that he holds title to the Lake Area by standing in the shoes of a defunct developer who has conveyed joint use of the land to all lot owners in the development. Heavner is not one of the lot owners. He has no use for or of the common area. Therefore, Heavner has no legitimate use of the land to balance against the use rights vested in TRMA members.

D. THE CIRCUIT COURT DID NOT ERR IN AWARDING TRMA ATTORNEY FEES TOTALLING $20,331.82 SINCE HEAVNER DID NOT CONTEST THE REASONABLENESS THEREOF BUT ONLY CLAIMED OFFSET FOR THOSE IMMATERIAL MATTERS ON WHICH HEAVNER CLAIMS VICTORY.

1. TRMA Does Not Disagree with Heavner's Standard of Review Statement.

2. The Total Award of Attorney Fees, $20,331.82, is Modest Under the Circumstances and Based on the Matters for Which TRMA Prevailed.

As is reflected in Heavner's Brief, his objection to the attorney fee award is limited to the claim that "TRMA should only be entitled to those fees/costs as related to the claims upon which TRMA prevailed." Pet. Brief, p. 18. *See also* trial court's "Order Awarding Attorney Fees." JA 1067. Accordingly, it appears that Heavner does not assert that the trial court erred in its award of attorney fees unless and except this Court should reverse the entire trial court's decision. Pet. Brief, p. 18. Since this Court should not reverse the trial court's decision, the attorney fee award stands.

In order to limit litigation expenses, TRMA purposefully waived any claim to damages in this proceeding. TRMA avoided a jury trial by seeking only injunctive relief. *See* JA 0948 ¶ 37 (Petitioner's Proposed Findings of Fact and Conclusions of Law) and *see Weatherholt v. Weatherholt*, 234 W. Va. 722, 769 S.E.2d 872 (2015) and *City of Charles Town v. Witteried*, (memorandum opinion) 17-0310, 2018 W. Va. LEXIS 352 (May 11, 2018) holding that no right to trial by jury exists in equity. Accordingly, Heavner was spared substantial damages claims, as well as additional claims for attorney fees, incident to a prolonged jury trial. TRMA sought to

focus on the protection of its common areas and easements in an efficient manner. Yet, after concluding a bench trial at which Heavner did not even take the stand or otherwise present any testimony to rebut the claims against him, Heavner has filed what TRMA believes to be a meritless appeal.

TRMA respectfully submits that this appeal further manifests Heavner's mean-spirited purpose of injuring TRMA and its members by exploiting their limited resources, resources which should have been available for common area maintenance. Despite TRMA's best efforts, these proceedings have exploited all current financial resources of the recently established TRMA leaving it with an outstanding debt for road work. *See* unrebutted testimony of TRMA Treasurer, JA 0616-0617. It is submitted that the filing of this appeal is but a manifestation of Heavner's intent to further exploit the resources of TRMA and its legal counsel with a meritless appeal. This appeal reflects Heavner's mean-spirited mission to carry through with his "lemon tree promise." It will be a case demonstrating the failure of the civil justice system to ultimately administer justice unless and except fee shifting is implemented throughout the proceeding, including this appeal.

VIII. CONCLUSION

The trial court committed no reversible error. TRMA prays that the decision below not be reversed. However, to prevent rewarding Heavner's mean-spirited actions and to counterbalance the hardship Heavner has imposed on TRMA in this equity proceeding, TRMA prays that it be afforded a means of recouping its attorney fees and expenses incurred in this appeal. Therefore, TRMA requests that it either be permitted to submit a declaration of its attorney appeal fees and expenses to this Honorable Court or, on limited remand, to submit a declaration of fees and expenses to the circuit court below.

Respectfully submitted this 12th day of April, 2019.

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