

**FILE COPY**

**DO NOT REMOVE  
FILE COPY**

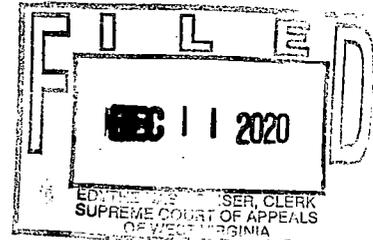
NO. 20-0705

SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

CHARLESTON

---



NR DEED, LLC,

Plaintiff Below, Petitioner,

vs.) No. 20-0705

ROBERT E. SIMMONS,

Defendant Below, Respondent

**APPELLANT'S BRIEF**

Counsel for the Appellant:

David R. Karr, Jr., Bar ID #4547  
Post Office Box 1283  
Charleston, West Virginia 25325-1283  
304.345.3202; fax: 304.345.3201  
dkarr@karrlaw.net

I.	TABLE OF CONTENTS:	2
II.	Table of authorities:	2
III.	Assignments of error:	3
IV.	Statement of the case:	4
V.	Summary of argument:	9
VI.	Statement regarding argument and decision:	11
VII.	Argument:	11
VIII.	Conclusion:	16
II.	TABLE OF AUTHORITIES:	
	<i>West Virginia Code</i> , §11A-3-1	9
	<i>West Virginia Code</i> , §11A-3-10	7
	<i>West Virginia Code</i> , §11A-3-16	13
	<i>West Virginia Code</i> , §11A-3-27	13
	<i>West Virginia Code</i> , §11A-4-2	3, 2, 13
	<i>West Virginia Code</i> , §11A-4-3	3, 12
	<i>West Virginia Code</i> , §11A-4-4	13
	<i>Dan Ryan Builders, Inc.</i> , 239 W. Va. 281 (2017)	15
	<i>Blake v. Charleston Area Med. Ctr., Inc.</i> , 201 W. Va. 46 (1997)	15

### III. ASSIGNMENTS OF ERROR:

A. The circuit court (Hon. Carrie Webster) erred in failing to recognize the preclusive *res judicata* effect upon this case of Judge Louis Bloom's April 30, 2019, denial of Mr. Simmons's request in Case Number 18C-1788 to set aside the particular April 30, 2018, sheriff sale deed Mr. Simmons's property (and that of 16 others) for purposes of allowing NR Deed, LLC to proceed to address the reason the instant suit was filed, namely, to address the residual issues of ejectment and damages (following Judge Bloom's rejection of the attack on the sheriff-sale deed).

B. The circuit court erred in failing to recognize the preclusive *res judicata* effect of Judge Louis Bloom's April 30, 2019, Order granting of the Appellant's motion to dismiss Mr. Simmons' Counterclaim with its necessarily implicit rejection and overruling of the several affirmative defenses asserted by the Appellee in that 2018 answer/counterclaim (including: the equitable doctrines of illegality, based GSRAN-Z's lack of a license to do business in West Virginia; of unclean hands; and of equity abhors a forfeiture) which were all thereby dismissed along with the attack on the sheriff-sale deed, "with prejudice."

C. The circuit court erred in denying the motion for summary judgment and/or the motion for dismissal for failure to state a claim upon which relief can be granted, in light of the complete failure of the record to sustain support for any theory by which Mr. Simmons should be permitted to retain either possession of or title to the particular real estate -- all in default of him putting forth a theory for (much less submission of even a scintilla of evidence for) a right to relief pursuant to either *West Virginia Code*, §11A-4-2, 3 or 4.

IV. STATEMENT OF THE CASE:

A. Procedural history of case:

The dispute between these parties began in August 2018, with the filing of a “Complaint to Quiet Title,” by the Appellant, NR Deed, LLC in Kanawha County Circuit Court Case No. 18-C-788 against the Appellee, Robert E. Simmons, and others [#1045]. The suit sought an order removing the defendants’ claims as clouds on NR Deed’s title; affirmatively adjudging the title in the name of NR Deed, LLC; granting possession of the property to NR Deed, LLC; and directing the Sheriff to assist NR Deed, LLC in evicting Robert E. Simmons from the real estate [#1048 and #1049]. Mr. Simmons in his answer in the 2018 matter entered rather general denials to the factual allegations relating to the validity of the April 11, 2018, sheriff-sale deed (in turn, based on the November 16, 2016, Kanawha County sheriff sale of the real estate). Mr. Simmons’s general defense to the 2018 suit to quiet title and secure possession to NR Deed, LLC included Mr. Simmons’s assertion of four (4) affirmative defenses: Rule 12(b)(6); the doctrine of illegality (the lack of the corporate purchaser of the property to possess a license to conduct business in the State of West Virginia); and the equitable doctrines of unclean hands and equity abhors a forfeiture.

Mr. Simmons asserted in the 2018 class-action counterclaim that he and sixteen (16) other persons who lost their real estate at the November 16, 2016 Kanawha County Sheriff’s tax sale to Appellant’s predecessor in title for non-payment of taxes (followed by the failure of each to redeem) were all entitled to having the several respective sheriff-deeds (later issued in April 2018) set aside. The bases for the class-action suit setting

aside those several sheriff-sale deeds included the following theories:

1) The existence of a typographical error in the various sheriff-sale deeds of conveyance erroneously naming the corporate grantee as “GSRAN, LLC” instead of the true name of the intended entity which is “GSRAN-Z, LLC;” and the use of this misnomer as a “deceptive scheme designed to misrepresent the identity of the Counterclaim Defendants and avoid registration of a foreign LLC with the West Virginia Secretary of State.”

2) Mr. Simmons and the sixteen (16) other persons losing their real estate at the 2016 sheriff sale and being purchased by an entity erroneously designated as GSRAN, LLC instead of by its correct name of GSRAN-Z, LLC are part of a class of individual members which all share common legal and factual theories for relief so significant that all seventeen (17) should be resolved together.

3) The common theories upon which the proposed class action suit were based included: a) Quiet title: based upon GSRAN-Z, LLC not being licensed to do business in the State of West Virginia (Count I); Slander to title: the recording of the deeds (Simmons’ deed and 44 similar deeds) by GSRAN-Z, LLC a/k/a GRAN-Z was a legal nullity because the actions by the entity in purchasing the various properties were ultra vires and illegal (Count II); and c) Joint venture: that NRD, LLC and GSRAN-Z, LLC a/k/a GRAN-Z worked together in the “furtherance of a joint venture in which each of the acts of the Defendants were pursued with a joint purpose” of generating a profit.

The counterclaim consisting of the class action allegations and request for relief was met with NR Deed’s motion to dismiss. [#1023]

Hon. Louis H. Bloom in his April 30, 2019, Order Granting [Counterclaim] Defendant’s Motion to Dismiss on a January 31, 2019 hearing, recited the procedural history of that former suit (Case No. 18C-788) in his Order dismissing that suit, as follows:

#### PROCEDURAL HISTORY

1. On June 18, 2018, NR Deed, LLC (“NR Deed”) filed a Complaint to Quiet Title (“NR Deed’s Complaint”) against Mr. Simmons, United Bank, and the State of West Virginia in Circuit Court of Kanawha County.

2. On or about October 19, 2018, Mr. Simmons, by counsel, answered NR Deed's Complaint and simultaneously filed Counterclaims against NR Deed, LLC and GSRAN-Z a/k/a GRAN-Z ("GRANS-Z") containing three class action allegations (1) Action to Quiet Title; (2) Slander to Title; and (3) Joint Venture.

3. On November 29, 2018, Counterclaim Defendants filed a Motion to Dismiss and Memorandum of Law in Support of their Motion to Dismiss.

4. On January 28, 2019, Mr. Simmons filed his Response to Counterclaim Defendants Motion to Dismiss.

5. Mr. Simmons's Counterclaims against NR Deed and GSRAN-Z did not include any allegations that Mr. Simmons failed to receive the statutorily required Notice to Redeem.

6. Nor did Mr. Simmons's Counterclaims invoke any of the causes of action of other mechanisms provided by the tax lien statutory that would nullify or set aside the tax deed received by GSRAN-Z.

7. Then, on January 31, 2019, all parties appeared, by counsel, for a hearing on the Counterclaim Defendants' Motion to Dismiss.

See the 2018 case Final Order [#1026].

In that April 30, 2019, Order on the January 31, 2019, hearing in Case No. 18C-788, Judge Bloom also made findings of fact specific to Ms. Simmons's particular attack on the tax-sale of his own property to NR Deed's predecessor in title, GSRAN-Z, LLC, as follows:

#### FINDINGS OF FACT

8. Mr. Simmons is a natural citizen living at 1029 Midway Drive, Dunbar, Kanawha City, West Virginia.

9. GSRAN-Z is a Delaware LLC with its principal place of business in Georgia and not registered with the West Virginia Secretary of State to transact business in the state of West Virginia.

10. NR Deed is an Indiana limited liability company, with its principal place of business in Georgia, that is registered to transact business in West Virginia.

11. On or about November 16, 2016, Christiana Trust, as Custodian for GSRAN-Z purchased a tax lien encumbering 1029 Midway Drive, Kanawha County, Dunbar, West Virginia (hereinafter "Property") at the Kanawha County Sheriff's annual Tax Sale.

12. On April 11, 2018, the Kanawha County Clerk issued a "Tax Sale Deed" to Christiana Trust.

13. By a deed dated May 14, 2018, Christiana Trust, as Custodian for GSRAN-Z, conveyed the Property to NR Deed.

14. As required by W. Va. Code, §11A-3-10, counsel for Christiana Trust as Custodian for GSRAN-Z prepared a list of persons and entities to be served with the Notice to Redeem, and Simmons was on the list.

See the 2018 Final Order [#1027 and #1028]. On the bases of these findings (and the law recited therein to be applicable to those facts), Judge Bloom ruled that he "hereby ORDERS, ADJUDGES and DECREES that Counterclaim Defendant's Motion to Dismiss is GRANTED and Robert E. Simmons's Counterclaim is DISMISSED with prejudice." [#1030]

The April 30, 2019, Order [#1026 to #1030] dismissing Mr. Simmons's counterclaim did not specifically address the rejection of Mr. Simmons's theories that he (and the other 16 particular unnamed persons referenced in the complaint as losing their properties to the November 2016 Kanawha County Sheriff sale) were entitled to block the sales being confirmed on the bases of the affirmative defenses recited above. However, the four-month period during which Mr. Simmons could have appealed Judge Bloom's general decision (and that court's explicit refusal to accept Mr. Simmons's theory that those affirmative defenses justified a ruling in his favor) expired on August 30, 2019. Mr. Simmons did not appeal the Order in the 2018 case during the period in which an appeal would have been timely.

The ability of Mr. Simmons to appeal Judge Bloom's denial of his original attempt to set aside the sheriff sale expired when the appeal period ended on August 30, 2019 (or four months following the entry of that ruling). Judge Bloom expressly ruled that such dismissal was "with prejudice." [#1030] NR Deed, LLC, with the benefit of a ruling effectively quieting the title to at least any claims which could have been advanced by Robert E. Simmons, filed suit several months later to eject Mr. Simmons from the property and to assess damages against him for his tortious possession of the real estate for the period from the April 30, 2018, recording of the sheriff-sale deed through the date the October 2019 was filed.

Following the August 30, 2019, expiration of that appeal period, namely, on October 30, 2019, NR Deed, LLC filed that new suit (the one to which this appeal is directed) which sought to follow up on the effective quieting of Mr. Simmons's claims to title with a separate claim for relief focused upon the few remaining remedies sought, as follows:

6. The specific relief requested by the plaintiff in this action is an Order ejecting defendant from, and ending the defendant's unlawful detainer of, the relevant real estate. The plaintiff previously filed suit seeking similar and other relief before the Kanawha County Circuit Court. That matter was dismissed without prejudice.

7. The plaintiff also seeks damages in this case; and a declaratory judgment affirming that the circuit court's dismissal of the defendant's counterclaim in that previous case quiets plaintiff's title to the real estate. Namely, the plaintiff seeks in this matter an order declaring the previous dismissal to be *res judicata* to the extent that it specifically dismissed with prejudice the counterclaims against the plaintiff (including an action to quiet title filed by Robert E. Simmons); and by specifically declaring that such dismissal effectively quiets the plaintiff's title to the subject real estate (as against any claim formerly held by the defendant, Robert E. Simmons).

See paragraphs numbered 6 and 7 of the latter complaint, namely, that in 19C-1086.

[#1003].

B. Statement of the facts of the case:

The Appellee's, Mr. Simmons's, own pleadings below assert that Mr. Simmons only lacked his receipt of that notice of his tax deficiency *prior* to the sale of his property at the 2016 sheriff's tax sale (which he had obtained as a result of his new purchase of the house with a personal injury settlement). Those pleadings by Mr. Simmons further explained that, although he received notice of the right to redeem prior to the time that he was required to redeem, the earlier failure of his receipt of the notice of the tax sale itself is what effectively placed him into a time bind which prevented him from coming up with the funds necessary to redeem.

The Appellant has maintained throughout that its predecessors in title followed the letter of the requirements for the proper issuance to it of the sheriff-sale deed to it pursuant to the provisions of *West Virginia Code*, §11A-3-1, et seq. There really are no other operative facts of the case. The Appellee argues a variety of other unfortunate facts and/or circumstances irrelevant to the analysis appropriate for this case. However, those general allegations, or aspersions, particularly as to the asserted bad character of any entity which would seek to generate a profit by buying tax sale properties at a low price and, in turn, selling them to others at a higher price (most often, after remedying the particular distress presented to the property and/or to the ownership of it) do not really bear on either the set of factual issues or the set of legal issues upon which a court should base its decision in a case such as this.

Succinctly stated, the operative facts of this case are as Judge Bloom found them

to be in his decision on the merits as recited above. (See pages 5 to 7 above.)

V. SUMMARY OF ARGUMENT:

The Appellant presents a simple and straightforward argument. NR Deed, LLC, bought the subject property from GSRAN-Z, LLC, which had purchased it at the tax sale. GSRAN-Z, LLC performed all actions required of it to place the former owner, the Appellee, Mr. Simmons, on notice of his right to redeem. Following its receipt of the sheriff sale deed to the property, in default of Ms. Simmons taking action to successfully benefit and protect his interests from his knowledge of his right to redeem, GSRAN-Z conveyed the property to NR Deed, LLC, which instituted an action to quiet title (the earlier action) and to eject Mr. Simmons from the property.

NR Deed, LLC effectively secured a satisfactory ruling on the quality of its title to the property (at least as it related to Mr. Simmons's claims, which is all that is relevant here) with the total and unequivocal dismissal of Mr. Simmons's suit to set aside the sheriff-sale deed. NR Deed, LLC was required to institute a new suit to eject Mr. Simmons from the property (after the previous suit to evict him was dismissed without prejudice due to NR Deed failing to have a witness present at the hearing to testify to the question of the remedy of ejectment/eviction, etc.). However, in that new suit, Judge Carrie Webster (without even directly drawing into question Judge Bloom's previous order or his reasoning in any manner) announced her intention to allow Mr. Simmons to re-litigate his various claims that he is entitled to either: a) continue residing in the home in spite of the sale of the property to NR Deed, LLC; or b) attempt to obtain a new result at a variance from Judge Bloom's earlier ruling that denied *with prejudice* Mr. Simmon's claim to set aside the sheriff sale deed.

NR Deed, LLC, argues that Judge Webster was required by the legal principle of *res judicata* to enforce Judge Bloom's earlier rulings: a) that the applications of the particular equitable principles advanced by Ms. Simmons were implicitly overruled and denied with the dismissal of the counterclaim with prejudice; and b) that the ultimate validity of the legal title to the property was declared to be in NR Deed, LLC by the express ruling by Judge Bloom which denied Mr. Simmons's request to set aside the subject sheriff sale deed.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

The Appellant perceives the respective parties' positions on the issue of *res judicata* to be so clear that little could be accomplished by oral argument that cannot be gleaned from a review of the opposing briefs: Provided, it is suggested that, to the extent that the Court may be interested in addressing the issue of whether or not the particular, cited equitable principles should then be generally permitted by others to be advanced to attack a sheriff sale deed (namely, executed and delivered pursuant to an expressly statutorily-established revenue-generating process), the Court may wish to set that matter for argument. The Appellant asserts that it would be happy to so argue the law, but notes that the Court need not ever reach that issue in this case in light of the applicability of *res judicata* to require the dismissal of the affirmative defenses and the ratification of the effective quiet-title ruling, all in light of the preclusive effect of Bloom's ruling in the previous case.

VII. ARGUMENT:

Judge Louis Bloom in his final order in the 2018 case correctly (albeit implicitly) ruled that the affirmative defenses sought to be relied upon by Appellant Simmons were not pertinent to the cause of action. Judge Bloom correctly ruled that the adjudication of a suit to set aside a sheriff sale was controlled by the specific notice provisions contained in the pertinent tax-sale statutes (not by equitable principles). That portion of his ruling was contained in his recitation of the procedural history of the case, as follows:

5. Mr. Simmons's Counterclaims against NR Deed and GSRAN-Z did not include any allegations that Mr. Simmons failed to receive the statutorily required Notice to Redeem.

6. Nor did Mr. Simmons's Counterclaims invoke any of the causes of action or other mechanisms provided by the tax lien statutory that would nullify or set aside the tax deed received by GSRAN-Z.

See the 2018 case's Final Order [#1027]. That is, Judge Bloom summarily rejected the notion that Mr. Simmons could attack the sheriff sale of his property by relying on means other than the statutory mechanism expressly established for that purpose.

The typical means employed by persons who seek to set aside a sheriff-sale deed are contained in *West Virginia Code*, §11A-4-4. The universe of the statutes available to such persons seeking such goals are generally contained in *West Virginia Code*, Chapter 11A (Collection and Enforcement of Property Taxes). In particular, the remedies available to such persons are found in *West Virginia Code*, Chapter 11A, Article 4 (Remedies Relating to Tax Sales). The remedies promulgated by the *West Virginia Legislature* to such persons are classified by separate statutory sections which each address different general circumstances triggering a particular person's loss of their property. The three situations which have been generally statutorily addressed are contained in Sections 2, 3 and 4 of such Article 4, as follows:

§11A-4-2 Right to set aside sale or deed when all taxes paid before sale.

§11A-4-3 Right to set aside deed improperly obtained.

§11A-4-4 Right to set aside deed when one entitled to notice not notified.

These sections generally cover the universe of statutorily-recognized reasons for setting aside a sheriff sale.

*West Virginia Code*, §11A-4-2, of the article sets out the parameters for recovering title to the property in the circumstance in which a tax sale of the property was erroneously held and/or conducted -- namely, in the circumstance in which the tax sale purchaser had actually paid the taxes before the tax sale was held. Notably, even in this circumstance, the former owner will lose their property to the tax sale purchaser (even with an erroneous sale) unless the owner (actually, the former owner) takes action within three years of the sale to file suit to affirmatively set aside the sale. In this matter now before the Court, Mr. Simmons has not alleged either the applicability of *West Virginia Code*, §11A-4-2, or the fact of his paying the delinquent taxes before the sale. To the contrary, Ms. Simmons admits that he did not pay those taxes [#1027]; and admits that he had notice of his failure to pay the taxes before the issuance of the tax sale deed; but claims that the amount of time that was available to him to gather the funds together to remedy the deficiency was insufficient.

*West Virginia Code*, §11A-4-3, of the article sets out the parameters for recovering title to the property in the circumstance in which the tax sale purchaser failed to meet the statutory requirements for placing the former owner on notice of the right to redeem and/or in which the deed was delivered outside of the statutory period when the delivery of a tax-sale deed is permissible (§11A-3-27). In the case of Mr. Simmons's loss of his property, the allegations have not been really made that NR Deed or GSRAN-Z

failed to give notice pursuant to the notice requirements (§11A-3-16). In any event, neither Mr. Simmons nor Judge Carrie Webster below cited to any of these *Code* sections in support of an order setting aside the sale.

*West Virginia Code*, §11A-4-4, sets out the parameters for recovering title to the property in the circumstance in which the tax sale purchaser failed to provide notice to a person who was entitled to receive that notice of the right to redeem. This is the provision of law relating to suits to set aside tax sales that is most frequently litigated. There is a substantial body of state and federal law relating to the minimum steps and actions that must be taken by a sheriff-sale purchaser to assure that all reasonable efforts have been made to place the former owner on notice of his or her right to redeem. In this matter, neither Mr. Simmons nor Judge Webster asserted that the Appellant, NR Deed, LLC or its predecessor in title, GSRAN-Z, LLC, failed to expend all reasonable efforts to place Mr. Simmons on notice of his right to redeem. In fact, as recited above, the record before Judge Webster contains the findings in Judge Bloom's final order on the point, "Mr. Simmons's Counterclaim against NR Deed and GSRAN-Z did not include any allegations that Mr. Simmons failed to receive the statutorily required Notice to Redeem." [#1027]

In default of asserting the applicability of any of these particular mechanisms available in the statutorily established procedures for setting aside a tax sale of real property, Mr. Simmons in his answer/counterclaim to NR Deed's ejectment action before Judge Webster asserts the applicability of several affirmative defenses as a shield to the Appellant's receipt of the remedies obviously available to it under the law, namely, to the Appellant's taking possession of the real estate that they acquired from the tax sale. The

record in each of the underlying Kanawha County Circuit Court cases, however, is devoid of any citation to authority supporting the notion that any of the cited affirmative defenses are applicable to this circumstance or are available to a litigant seeking to set aside a sheriff sale. Nor does logic support the notion that they are so available in any measure.

Significantly, these affirmative defenses which are advanced by Mr. Simmons are essentially the same affirmative defenses that were advanced in the pleadings before Judge Bloom and which were summarily rejected by him without even footnote mention. These affirmative defenses include: the failure to state a claim on which relief can be granted; the illegality of the transaction by which the tax deed was issued; the equitable doctrine of unclean hands; the equitable doctrine of equity abhors a forfeiture; and the fact that Mr. Simmons had taken it upon himself to pay the Appellant's 2017 non-delinquent real estate taxes before the Appellant paid them.

There is little that needs to be said about the applicability of the doctrine of *res judicata* to the respective rulings of the two lower courts in the two parallel cases below discussed above. The 2017 case of *Dan Ryan Builders, Inc.*, 239 W. Va. at 281, 803 S.E.2d at 521, controls the matter before this Court and provides a succinct means of analyzing the two rulings for purposes of reaching the decision necessary for the resolution of this appeal. That is, for a claim to be barred by *res judicata* the analysis is, as follows:

"three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be

such that it could have been resolved, had it been presented, in the prior action." [Emphasis added.]

Syl. Pt 2, *Dan Ryan Builders, Inc.*, citing Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41, (1997).

#### VIII. CLOSING

Robert E. Simmons and Mountain State Justice may not approve of what NR Deed, LLC does (it generally applies its own labor and its own capital to West Virginia land for the generation of income, to itself and to the school fund) but the latter should at least be able to acknowledge that many of those who mix land, labor and capital in our United States economy do perform a worthwhile function, no matter how unseemly the notion may strike the drafter of the counterclaim's attack on NR Deed's particular contribution to West Virginia's revenue-collection process. While he said it scores of years before Karl Marx and Frederick Engels began preaching of the evils of Capitalism, we all should know that Thomas Jefferson plowed labor and capital into his own land. One can cite to a quote of the drafter of the Declaration of Independence, "The democracy will cease to exist when you take away from those who are willing to work and give to those who would not."

#### VIII. CONCLUSION:

The Appellant asserts the record is clear that the question of the Appellant's title to the real estate was settled by Judge Bloom's order of April 30, 2019. Appellant therefore request that the matter be remanded to Judge Webster with directions for her to proceed to address Appellant's requests to proceed to secure its possession of the real estate and to pursue damages for its loss of use of the real estate since the delivery of the deed (or at

least since the filing of the most recent complaint before Judge Webster.

IX. CERTIFICATE OF SERVICE:

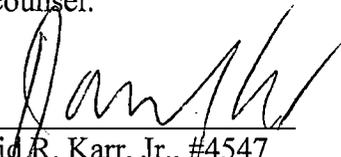
The undersigned counsel certifies that service by mail to each of the counsel of record for the Appellee before the Kanawha County Circuit Court in Case No. 19-C-1086 will be served by mail delivered to the U.S. Postal service on or before December 11, 2020.

WHEREFORE, the respondents request that the petition for appeal be denied; that the judgment of the circuit be affirmed; and that this Court grant all other relief proper under the circumstances.

Respectfully submitted,

APPELLANT, NR DEED, LLC

By counsel:

  
\_\_\_\_\_  
David R. Karr, Jr., #4547  
Counsel for Plaintiff/Appellant  
Post Office Box 1283  
Charleston, WV 25325-1283  
(304) 345-3202; fax: (304) 345-3201