

**BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

No. 060701 33187

**LYON CHAPMAN and
SCOTT CHAPMAN, individually,
and as members of the Capon Bridge
Resort Property Owners Association, and
NEW TESTAMENT FAITH ASSEMBLY OF GOD CHURCH,
APPELLEES BELOW,
Plaintiffs,**

Vs.

**SYLVIA CATRON,
APPELLANT BELOW,
Defendant**

FROM THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

**APPELLANT BELOW,
Defendant
BRIEF**

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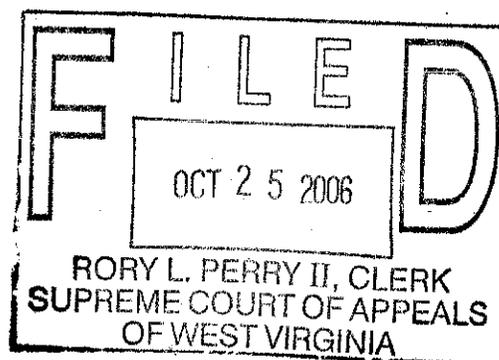


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BRIEF
BY
APPELLANT
FACTS

Glenn E. Thompson, Jr., Conrad R. Harper, and Peter Timoshenko, Trustees for the TTH Land Trust acquired from Coldstream Associates, Inc. by Deed dated January 1, 1979, 105.8191 acres of land situate in Bloomery District, Hampshire County, West Virginia, said Deed duly recorded in the Clerks' Office for the County Commission of Hampshire County in Deed Book No. 227, at Page 768.

In the fall of 1979, the Trustees Glenn E. Thompson, Jr., Conrad R. Harper and Peter Timoshenko subdivided the Tract of land containing 105.8191 acres in to approximately 49 Tracts of land containing approximately two to three acres each, together with Streets serving each Tract and a 40' Right of Way wide Street later known as Mountain Top Road, provided the entrance Street into the Subdivision from Hampshire County Route 15 (Springfield Grade Road). The Subdivision is named Capon Bridge Resort Subdivision.

Charles W. W. Stultz, licensed land surveyor, surveyed, Platted and laid out the Streets and Tracts of Capon Bridge Resort Subdivision. The plat identified as Section Two Capon Bridge Resort Subdivision prepared by Surveyor Charles W. W. Stultz was duly recorded in the aforementioned Clerks Office in Map Book 3, at Page 66.

In addition to the 49 two (2) to three (3) acre Tracts, the developers laid out of the 105.8191 acres, two Tracts, one containing .5318 acres, known as "The Barn Tract" upon which was located a Barn and a Tract containing 5.7482 acres, known as the Assembly of God Tract, upon which was located a lodge or church. The Barn Tract was a corner Tract located on the south side of Mountain Top Road, the Platted entrance road to the Subdivision from Hampshire County Route 15, and on the west side of Hampshire County Route 15. The Church Tract was a corner Tract located upon the north side of Mountain Top road and on the west side of Hampshire county Route 15. The common boundary line between the Barn Tract

and the Assembly of God Tract was the centerline of the Platted 40' Right of Way wide Mountain Top Road the entrance Street or road from Hampshire County Route 15 into the Capon Bridge Resort Subdivision.

Shortly after the completion of the Plat of the Subdivision by Charles W. W. Stultz, Surveyor, and the recording of the plat in the aforementioned Clerk's Office, Glen E. Thompson Jr., Conrad R. Harper and Peter Timoshenko, developers, began selling Tracts in the Subdivision with reference to the recorded Subdivision Plat without reservation.

One of the first Tracts to be sold in the Subdivision, was the Assembly of God, a 5.7462-acre Tract, with the lodge or church, unto New Testament Faith Assembly of God Church, one of the Plaintiffs in this case, by Deed dated July 22, 1981, and duly recorded in the aforementioned Clerk's Office.

The sale of Tracts in the Subdivision moved rather slowly, however, over a period of time, the Defendant in this case, Sylvia Catron, purchased in the Subdivision, Tract 25, 2.0000 acres, Tract 26, 2.0000 acres and Tract 49, 2.1134 acres, by Deed dated August 11, 1997. The three Deeds for the aforesaid Tracts are duly recorded in the aforementioned Clerk's Office. Scott Chapman and Teresa N. Chapman, his wife, purchased Tract 28, 2.8223 acres in the Subdivision. Scott Chapman is a Plaintiff in this case, Lyon Chapman and Danetta Chapman, who are the parents of Scott Chapman, Lyon Chapman, a Plaintiff in this case, purchased Tract 30, 2.1873 acres in the Subdivision.

Peter Timoshenko and Ethel Timoshenko, his wife, Peter Timoshenko being one of the original developers of the Subdivision, by Deed dated May 15, 1984, duly recorded in the aforementioned Clerk's Office, purchased the Barn Tract. After purchasing the Barn Tract, Mr. Timoshenko on occasions began to enter the Barn Tract from Hampshire County Route 15, by making an entrance near the Barn. This entrance is herein after referred to as the "Barn Entrance" to the Subdivision. Mr. Timoshenko also on occasion began to leave the Barn Tract by driving across the Barn Tract to the Platted 40' Right of Way Mountain Top Road Entrance Street to the Subdivision, from Hampshire County Route 15. At times he would also

enter the Barn Tract by entering the Platted 40' Right of Way Mountain Top Road Entrance to the Subdivision from Hampshire County Route 15, drive a few 100 feet up Mountain Top Road, into the Subdivision, and then turned left entering the Barn Tract.

Peter Timoshenko died and title to the Barn Tract vested in his wife, Ethel Timoshenko. Mrs. Timoshenko died December 21, 1996 and her estate sold the Barn Tract to Thomas W. Davis, II, by Deed dated October 7, 1997. Ms. Catron then purchased the Barn Tract from Thomas W. Davis II, by Deed dated September 24, 2001. The aforesaid Deeds are duly recorded in the aforementioned Clerk's Office.

Sometime after Mr. & Mrs. Timoshenko purchased the Barn Tract, the exact time is not known, persons attending the Assembly of God activities, began parking some of their vehicles in and on the 40' wide Platted Mountain Top Road near the entrance of the Platted Mountain Top Road on to Hampshire County Route 15. This parking of vehicles on or in the Platted Mountain Top Road resulted in the blocking and encroaching upon the Platted upon Mountain Top Road near its entrance onto Hampshire County Route 15. As a result of this blocking and encroached of Mountain Top Road by vehicles, it became difficult to use Mountain Top Road as an entrance, to Capon Bridge Resort Subdivision from Hampshire County Route 15.

Unable to use the Platted Mountain Top Road as an entrance to Capon Bridge Resort Subdivision from Hampshire County Route 15, persons wanting to enter and leave the Subdivision found it easier to cross the Barn Tract to and from Mountain Top Road to the Barn entrance that had been opened by Mr. Timoshenko, where they would enter Hampshire County Route 15.

Ms. Catron purchased The Barn Tract in September 2001, the crossing of The Barn Tract to the Barn Entrance was used frequently as an entrance to the Subdivision from Hampshire County Route 15.

At the time the three developers of Capon Bridge Resort Subdivision laid out the Subdivision, a common area was created for the Subdivision. It is identified upon the plat of the Subdivision as Lake Area, 4+ acres (common). A Street identified on the Plat of the Subdivision as a 40' Right of Way extended from the Lake Area to the western boundary line on the Barn Tract. The Street was not extended onto the Barn Tract and consequently was not Platted or surveyed on the Barn Tract. Persons wanting to go to the Lake Area would enter the 40' Right of Way Street leading to the Lake Area by crossing the Barn Tract from the Mountain Top Road or by entering the Barn Tract at the Barn Entrance and Crossing the Barn Tract in the vicinity of the Barn Tract to enter the 40' wide Street to the Lake Area road. The exact location of Roadway across the Barn Tract to the entrance to the 40' Right of Way to the Lake area, was never established by survey or Platted on the Plat of the Subdivision, thus persons driving to the lake area would cross the Barn Tract from the Mountain Top Road and from the Barn Entrance crossing the Barn Tract at such locations they deemed convenient to enter 40' Right of Way Lake Road to the lake.

In the early part of 2003, Ms. Catron decided she would like to remodel the Barn and develop the Barn Tract. The crossing of the Barn Tract by persons entering and leaving the Subdivision by the Barn Entrance, people crossing of the Barn Tract to enter the 40' Right of Way Street to the Lake Area would not permit her to utilize the Barn Tract to remodel the Barn and developing the Barn Tract.

Ms. Catron went to the Capon Bridge Resort Property Owners Association, Inc. Annual Meeting, held at 2:00 p.m., Saturday, September 20, 2003. She told the Board of Directors and the members of the Capon Bridge Resort Property Owners Association, Inc., that she would like to utilize the entire Barn Tract. She told those present the use of the Barn Entrance to enter the Subdivision and for entering of the 40' Right of Way Street to the Lake Area, by crossing the Barn Tract would not permit her to utilize the Barn Tract as she planned.

Ms. Catron proposed that the Barn Entrance be closed. The Platted 40' Right of Way Mountain Top Road Entrance to the Subdivision, was after all designated and established by

the Developers as the only entrance to the Subdivision from Hampshire County Route 15. The church had sold the church property and the entrance to the Subdivision by the Mountain Top Road Entrance was no longer being blocked or encroached upon. This entrance to the Subdivision was now open and clear.

In addressing the crossing of the Barn Tract by persons wanting to enter the 40' Right of Way Street to the Lake Area, Ms. Catron said that to remove the necessity of crossing the Barn Tract from the Mountain Top Road and the Barn Entrance to enter the 40' Right of Way Street to the Lake Area, she proposed the following solution:

1. Ms. Catron would at her own expense construct and build a road connecting the Mountain Top Road with the entrance to 40' Right of Way Street to Lake Area. The location of the road would be along and with the common boundary line between Tract 26 and the Barn Tract both properties now owned by Ms. Catron. This would eliminate the necessity of crossing the Barn Tract from the Mountain Top Road to enter 40' Right of Way Street to the Lake Area. This new road would be located entirely on the property of Ms. Catron. Persons wanting to go to the Lake Area would enter the 40' road connecting the entrance to 40' Right of Way Street to the Lake Area and 40' Right of Way Mountain Top Road. This would eliminate the necessity of crossing the Barn Tract to enter the 40' Right of Way Street to the Lake Area from the Mountain Top Road and by the Barn Entrance as it would be closed.

Mr. Lyon J. Chapman, one of the Plaintiffs in this suit, wrote up the minutes for the September 2003 Annual Meeting. In those minutes, Mr. Chapman stated Ms. Catron wanted to have the Barn Entrance to the Subdivision closed and move the entrance to the Subdivision to the Platted 40' Right of Way Mountain Top Road. This move would necessitate the moving of the pillars from the Barn Entrance to Mountain Top Road Entrance. The minutes also stated Ms. Catron wanted to move the Lake Road approximately 65' feet beyond the Barn. This referred to the road that Ms. Catron would build at her own expense to connect the entrance to 40' Right of Way Street to the Lake Area and the Mountain Top Road. There were no objections noted in the minutes to Ms. Catron's plan to eliminate the necessity of crossing

the Barn Tract to enter the Subdivision and the Lake Area. Mr. Lyon J. Jackson told Ms. Catron that he would cooperate with her in carrying out the plan.

Ms. Catron having the approval of the Capon Bridge Resort Property Owners Association, and there being no objections to her plans from those Lot Owners present at the Annual Meeting or otherwise, began construction in the fall, of the road along the common boundary line between her Tract #26 of land and the Barn Tract. Her son was doing the work. Believing that the Barn entrance to the Subdivision can now be closed and the entrance to Subdivision is now the Platted 40' Right of Way Mountain Top Road, she placed a cable across the Barn Entrance and closing it as an entrance from Hampshire County Route 15 into the Barn Tract.

On January 7, 2004, Plaintiffs Lyon J. Chapman, Scott Chapman, and the New Testament Faith Assembly of God Church, filed suit against Ms. Catron, alleging in the Complaint that Ms. Catron "began work to modify the course of such roads, moving the road servicing Capon Bridge Resort Subdivision and in essence closing the Right of Way that serves the Plaintiffs, the Chapman's and the New Testament Faith Assembly of God Church. All this was done without the permission of the Plaintiffs and contrary to law."

The Court on January 8, 2004, entered a Temporary Restraining Order, ordering Ms. Catron to stop all construction on road connecting Lake Area Street entrance and the Mountain Top Road. She was also ordered to remove the cable at the Barn Tract entrance to the Subdivision and not to obstruct the Barn Entrance to the Capon Bridge Resort Subdivision. Ms. Catron complied fully with the Court Orders.

After the injunction order was entered by the court on January 8, 2004, Ms. Catron began a search to determine if the two roads upon and across the Barn Tract being used as an Entrance Road to the Subdivision and as an entrance to the Street leading to the Lake area had at any time been dedicated by Public Dedicate or Private Dedicate, granted, conveyed, acquired by Prescriptive Use or Platted on any plat.

First she reviewed the recorded Plat of the Capon Bridge Resort Subdivision and found that there were not any Platted roads or Street crossing the Barn Tract. She reviewed the records in the aforementioned Clerk's Office and did not find any recorded evidence that a Street or road across the Barn Tract had ever been granted, conveyed, dedicated by Public Dedicate or Private Dedicate, or public entity.

In March of 2004, Ms. Catron went to the West Virginia Division of Highway Office at Burlington, West Virginia, to see if any permit had been issued by the West Virginia Division of Highways, approving either the Barn Entrance to the Subdivision or the entrance to the Subdivision by Platted 40' Right of Way Mountain Top Road. Mr. Robert A. Amtower, P.E., Assistant, District Engineering & Maintenance, told her, that neither entrance to the Subdivision had been issued a valid Highway entrance permit. The West Virginia Division of Highway at the request of Ms. Catron did a Field Review of the Barn Entrance (South-end) onto Hampshire County Route 15 from the Barn Tract and the Platted 40' Right of Way Mountain Top Road as an Entrance to the Subdivision from Hampshire County Route 15. Mr. Amtower of the Division of Highways advised Ms. Catron that the Barn Entrance did not meet the requirements for sight distance and a valid highway Entrance Permit would not be issued for the Barn Entrance (South-end). Ms. Catron was further advised by Mr. Amtower, that the Platted 40' Right of Way Mountain Top Road Entrance met all the criteria including for sight distance and they would issue a permit to enter the Subdivision by the Platted 40' Right of Way Entrance. The Department of Highways issued the necessary permit for entrance to the Subdivision by the Platted 40' Right of Way Mountain Top Road from Hampshire County Route 15. A small amount of roadwork and a survey was required by the Division of Highway to the entrance. Ms. Catron paid for the survey and the work on April 26, 2004, and an Entrance Permit was issued by the West Virginia Division of Highway approving the Platted 40' Right of Way Mountain Top Road Entrance onto Hampshire County Route 15 and as the entrance to the Subdivision.

The West Virginia Division of Highways continues to refuse to issue an Entrance Permit for the Barn Entrance from Hampshire County Route 15. However, at the present time, by Order of the Lower Court, persons may continue to enter and leave the Subdivision

and Lake Area by the Barn Entrance; drive across the Barn Tract to the Mountain Top Road and to the Lake Area, the Barn Entrance cannot be blocked or obstructed by Defendant. At the present time by Orders of the Lower Court, the West Virginia Division of Highways has refused to issue an Entrance Permit to permit entering to and from the Barn Tract and the Subdivision onto Hampshire County Route 15.

By Order dated September 1, 2004, the Lower Court has permanently enjoined Ms. Catron from moving or relocating the roadway (the Lake Road or the Mountain Road) securing the Capon Bridge Subdivision that crosses the Barn Tracts, the Court also in said Order permanently enjoined Defendant from obstructing, blocking or closing the Lake Road or the Mountain Road.

By various Orders entered in this Court by the Lower Court, it has rendered the following Holdings and Decisions:

1. Order entered on September 1, 2004:
 - a. The Defendant, her heirs, or assigns are **PERMANENTLY ENJOINED** from moving or relocating the roadway (the Lake Road or the Mountain Road) servicing the Capon Bridge Resort Subdivision that crosses the "Barn Tract."
 - b. The Defendant, her heirs, or assigns are **PERMANENTLY ENJOINED** from obstructing, blocking, or closing the roadway (the Lake Road or the Mountain Road) servicing the Capon Bridge Resort Subdivision that crosses the "Barn Tract".
2. Order entered August 24, 2005:
 - a. Held the Barn Entrance to be a legal entrance to the Barn Tract.
 - b. Held that Defendant was in Contempt of Court.
 - c. Awarded reimbursement of Attorneys fees to Plaintiffs.
3. Order entered on September 1, 2005.

ASSIGNMENTS OF ERROR

ASSIGNMENT I. The Lower Court erred by holding and finding that Plaintiffs were entitled to reimbursement of their Attorney Fees by the Defendant.

During all of the proceeding of this case, the question of Attorney Fees was never raised or heard by the Court. Plaintiffs never asked or presented any evidence, testimony, or motions to be reimbursed for their Attorney Fees by the Defendant. A hearing was never held on this issue by the Court.

In the case of *Shafer v. Kings Tire Service, Inc.*, 597-S.E. 2d 302 W. Va. (2004), the Court was reviewing the issues of whether or not the Judge had exceeded his judging discretion in awarding Attorney Fees. *Chevy Chase Bank v. McCamant*, 204W.Va. 295, 304, 512 S.E.2d 217, 226 (1998) (per Curiam) (“[W]hen a trial court awards Attorney Fees, it is required to make findings for this Court’s determination of the reasonableness of the award.”). In the absence of adequate findings of fact and conclusions of law, we are unable to intelligently discharge our limited appellate role to determine that the Circuit Court did not abuse its discretion.

In this case Defendant was shocked when the Court’s Ordered her to reimburse Plaintiffs of their Attorneys fees. Defendant does not know if Attorneys fees were paid by Plaintiffs. If so, to whom paid; when paid; what is the amount of the fees that were paid to Attorneys and are the fees reasonable? The Court has abused its discretion by Ordering reimbursement by Defendant to Plaintiffs, their Attorney Fees, if any were paid by Plaintiffs. No hearing of this issue was held by the Court.

ASSIGNMENT II. The Lower Court did commit error when the Court held that Defendant had intentionally and contemptuously disobeyed Court Injunctions Orders.

What Court Injunction Orders were violated by Defendant? How were the Court Injunction Orders violated by Defendant and upon what violations and evidence does the

Court base its findings that the Defendant has intentionally and contemptuously disobeyed the Courts Injunction Order? The Defendant has never been informed or given any of the aforementioned by the Court.

During all processes of the proving of this case, the Lower Court never held a hearing nor informed that she was in violation of a Court Injunction Decree.

Defendant did install a water line across a road to her barn. However, Defendant has witnesses to testify that the surface of the road was returned to its original condition immediately after closing the two feet wide ditch across the road. The ditch was only open approximately two (2) days. The Court apparently held that the digging of a ditch straight across the road was a violation of a Court Injunction Order.

The West Virginia Supreme Court of Appeals in the case of State v. Thornton, 72 S.E.2d 203 Syllabus 2, said "In a prosecution for contempt of court for an alleged violation of an injunction decree, not committed in the presence of the court, the defendant is entitled to be fully plainly informed of the character and cause of the accusation."

As stated above, the Defendant in this case was never fully and plainly informed of the character and cause of the accusation that she had violated an Injunction Decree of this Court.

The first time that Defendant had any knowledge that she was in Contempt of Court was when an Order of the Court was entered on September 1, 2005.

ASSIGNMENT III. The Lower Court erred by finding and holding as set forth in its Order of September 1, 2004, that the Barn Entrance (the South-end entrance as the Court identifies this entrance) was legal to use as an entrance to the Barn Tract and then across the Barn Tract to the Subdivision and the Lake Area from Hampshire County Route 15, despite the fact that the West Virginia Department of Highways had refused to issue an Entrance Permit for the Barn Entrance that it is approved as a legal entrance to the Subdivision and Lake Area from Hampshire County Route 15.

The authority to control and determine when any entrance from real property onto a Public Highway of this State may be used as an entrance from real property onto a Public Highway of this State has been delegated by the Legislature to the West Virginia Department of Highways.

Annotated Code of West Virginia § 17-16-6, states; No opening shall be made in any state or county-district road or highway, nor shall any structure be placed therein or thereover, nor shall any structure, which has been so placed, be changed or removed, except in accordance with a permit from the state road commission or county court, as the case may be.

Annotated Code of West Virginia § 17-4-47, states: (a) Access to and from state highways from and to real property used or to be used for commercial, industrial or mercantile purposes or from and to real property that is subdivided into lots is a matter of public concern and shall be regulated by the state road commissioner to achieve the following purposes:

- (1) To provide for maximum safety of persons traveling upon, entering or leaving state highways;
 - (2) To provide for efficient and rapid movement of traffic upon state highways;
 - (3) To permit proper maintenance, repair and drainage of state highways; and
 - (4) To facilitate appropriate public use of state highways.
- (e) Any unauthorized access to a state highway may be removed, blocked, barricaded or closed in any manner deemed necessary by the commissioner to protect the public and enforce the policies of this section and sections forty-eight, forty-nine and fifty of this article.

The Court by its Order of August 24, 2005, permitting the continued use of Barn Entrance to enter the Subdivision and Lake Area, despite the fact the West Virginia Department of Highways has refused to issue an Entrance Permit for the Barn Entrance as the entrance doesn't have the necessary sight distance, etc. to permit a safe entrance from the Hampshire County Route 15 into the Barn Tract then to the Subdivision and Lake Area.

The Lower Court gave as its reason to permit the continued use of the Barn Entrance onto and from Hampshire County Route 15, despite the fact that State Highway Commission refuses to issue an Entrance Permit for the Barn Entrance, the following:

(Quote from Order of the Lower Court entered on August 24, 2005)

“Between October 4, 2004, and August 1, 2005, the Defendant, Sylvia Catron, contacted the West Virginia Department of Highways to assist her in obtaining a second, or north-end, entrance to the Subdivision. The District Five Engineer’s testimony was clear that there was no permit for either entrance and requested the Court to change its decision pertaining to the south-end entrance because it had not been permitted by the Department of Highways in 1979 or since. However, it was clear from the testimony that the south-end entrance was not illegal, even though the Defendant and her witness prefer to call it the same. The Court would take judicial notice that there are many entrances upon the Department of Highways roadways in Hampshire County and throughout West Virginia for which no permits have obtained.”

If this Order of the Court is permitted to stand that the Barn Entrance to the Subdivision and Lake Area from the Hampshire County Route 15 may be continued to be used for an entrance to the Subdivision and Lake Area, even though the West Virginia Department of Highways has not issued an Entrance Permit for the Barn Entrance from Hampshire County Route 15, then we should forget Chapter 17-6-6 of the W.Va. Code and Chapter 17-4-47 of the W.Va. Code. We will have turned over to the Courts the authority to determine when an entrance may be used or not used from real property onto a Public Highway of this State. Clearly the Lower Court has abused its Judicial Discretion by overruling Chapter 17-16-6 and Chapter 17-4-7 of the W.Va. Code.

ASSIGNMENT IV. The Lower Court erred by permanently enjoining the Defendant from obstructing, blocking, or closing the roadway (The Lake Road or the Mountain Top Road) serving the Capon Bridge Resort Subdivision that crosses the Barn Tract.

The Lower Court by enjoining the Defendant not to obstruct, block or close the roads crossing the Barn Tract to the Subdivision and Lake Area it has held and found that each Plaintiff has acquired legal Rights of Way across the Barn Tract, over the road that enters the

Barn Tract at the Barn Entrance from Hampshire County Route 15 and crosses the Barn Tract and Connects with the 40' wide Mountain Top Road, the Platted Entrance to the Subdivision from Hampshire County Route 15. Each Plaintiff also has acquired a legal Right of Way to cross the Barn Tract from either the Barn Entrance or the 40' wide Platted Mountain Top Road Entrance and to proceed across the Barn Tract to the Entrance to the 40' wide Street, that begins at a point in the northern boundary line of the Barn Tract, and thence with the 40' wide Street, Platted on the Map of the Subdivision, and thence to the Lake Area (Common) Platted on the Map of the Subdivision.

On January 7, 2004, Lyon Chapman and Scott Chapman, Plaintiffs in this case, filed as an Individuals, their Complaint alleging that the Defendant, Ms. Catron, had or was to begin work to modify the course of such roads and moving the road serving the Capon Bridge Resort Subdivision and in essence closing the Right of Way that serves Plaintiffs.

The New Testament Faith Assembly of God Church also joined the Chapmans, as a Plaintiff, in the Complaint filed by the Chapmans. However, the New Testament Faith Assembly of God Church sometime after the filing of the Complaint in this case, sold its church property and moved from the area. The Court at that time dismissed the church as a Plaintiff in this case.

The first Right of Way each Plaintiff claims he has acquired, is a Right of Way that begins at the Barn Entrance, to Hampshire County Route 15, then enters the Barn Tract crossing it following a well defined road to the 40' wide Mountain Top Road, the Platted Entrance Road to the Subdivision from Hampshire County Route 15 into the Subdivision. This Entrance Road is Platted on the Map of the Subdivision. The Barn Entrance is not Platted on the Subdivision Map. This road between the two (2) Entrances, has always been used by many persons entering and leaving the Subdivision. It has never been used by Plaintiffs, as an exclusive Right of Way for use only by Plaintiffs.

The second Right of Way each Plaintiff claims he has acquired, is a Right of Way across the Barn Tract beginning at the Barn Entrance to Hampshire County Route 15 or

beginning at the 40' wide Mountain Top Road Entrance, then crossing the Barn Tract. The purpose of this Right of Way, is to cross the Barn Tract from the Barn Entrance or from the 40' wide Mountain Top Road Entrance, then proceed across the Barn Tract to the Entrance to the 40' Street Entrance, located at a point in the northern boundary line of the Barn Tract, and then proceeding up to the Lake Area, a common area with a Lake, set aside by the developers for common use by all lot owners and their guests. This Right of Way providing access to the Entrance to the 40' wide Street to the Lake Area, from either the Barn Entrance or the 40' wide Mountain Top Entrance to the Subdivision, follows the defined road that connects the Barn Entrance and 40' wide Mountain Top Entrance to the vicinity of the Barn, located on the Barn Tract, then across the Barn Tract near the Barn to the Entrance of the 40' wide Street and on to the Lake Area. This Right of Way is and has always been used by Subdivision Tract owners and their guests going to or leaving the Lake Area. Plaintiffs and Defendant also have used this Right of Way as Tract owners in the Subdivision.

The Plaintiffs in Paragraph four (4) of the Complaint filed in this case states that each has used the roads as shown and despite on the attached Plat (the Map of Capon Bridge Resort Area) attach their respective properties. Such use has been open notorious and in excess of thirty (30) years.

It is clear from this language that each Plaintiff is claiming that he has acquired by Prescriptive Use, the two (2) Easements and Rights of Way across the Barn Tract owned by Defendant. One Right of Way is the road between the Barn Entrance and the 40' Mountain Top Road Entrance to the Subdivision and the road across the Barn Tract used as a means of ingress and egress to the Lake Area.

In Paragraph five (5) of their Complaint filed in this case, each Plaintiff claims he has acquired the Road Ways as shown on the attached Plats, have long been established by Dedication and used to be general access road for Capon Bridge Resort Subdivision and its property owners. It is clear from this language that each Plaintiff is claiming that he has acquired by Dedication each of the aforesaid two (2) Easements and Rights of Way across the Barn Tract owned by Defendant.

Lyon Chapman and Scott Chapman, Plaintiffs, each has the burden to prove by clear and convincing proof, that each Plaintiff has acquired by Prescriptive Use or by Dedication, or by both, each of the two (2) aforesaid Rights of Way they claim they have the exclusive right to use and control, across the Barn Tract owned by the Defendant.

Justice Maynard in the *Clain-Stefanelli v. Thompson* 486 S.E.2d 330 (W.Va. 1997), stated the following:

1. *It is also well-settled that "[t]he burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof."* *Syllabus Point 1, Berkeley Development Corp. v. Hutzler*, 159 W.Va. 844, 229 S.E.2d 732 (1976).

In the *Clain-Stefanelli* case, Justice Maynard has also set forth the requisites necessary to be proved by clear and convincing proof by an individual to acquire a private way by Prescriptive Use. Justice Maynard states the following:

1. *It is well-settled that "The open, continuous and uninterrupted use of a road over the lands of another, under bona fide claim of right, and without objection from the owner, for a period of ten years, creates in the user of such road a right by prescription to the continued use thereof. In the absence of any one or all of such requisites, the claimant of a private way does not acquire such way by prescription over the lands of another."*

The Plaintiffs have failed to prove the required requisites necessary to have acquired a Right of Way by Prescriptive Use. The Plaintiffs never introduced testimony or evidence to support their claim that they have the two (2) acquired Rights of Way across the barn Tract by Prescriptive Use.

In Plaintiff's Complaint, each Plaintiff also claims that he has acquired the two (2) Rights of Way by Dedication. However, the Plaintiffs again never introduced any testimony or evidence to prove their respective claim that each has acquired the two (2) Rights of Way by Dedication.

The Lower Court held six (6) hearings in this case that were taken down by the Court's Reporter. All six (6) hearings have been transcribed and are a part of the record of this case.

The first hearing was held in this case was heard on January 8, 2004, to consider Plaintiff's Motion For A Temporary Injunction to require Defendant to stop any construction work on any road on the Barn Tract and not to block or obstruct the usage of any road on the Barn Tract. The Lower Court Granted Plaintiff's Motion. Neither plaintiffs nor Defendant was present at this hearing, only counsel for Plaintiffs.

The second hearing was held on January 22, 2004, with appearances by counsel for Plaintiffs, Donald P. Cookman, counsel for Defendant, Loudoun L. Thompson, Plaintiff, Scott Chapman and Defendant Sylvia Catron.

The purpose of this hearing was for Plaintiffs and Defendant's counsel to outline to the Court the issues in this case. After hearing, counsel for Plaintiffs and Defendant, the Court said to have better understanding of the issues he wanted personally to visit and observe the area and ground where the issues in this case have arisen. That day the Court, counsel for Plaintiffs and Defendant together with Plaintiff, Scott Chapman and Defendant, Ms. Catron visited the Capon Bridge Resort Subdivision, and in particular, the Barn Tract Area. The Court did not take any testimony from either Plaintiff or Defendant during its visit.

On October 4, 2004, a third hearing was held by the Court, with counsel for Plaintiffs and Defendant present. The purpose of this hearing of a Motion by Defendant, was to permit Defendant to continue construction of the road across Defendant's Barn Tract and her Lot #26 of the Subdivision. The Judge refused to lift the Injunction.

The fourth hearing was held on March 17, 2005, with only counsel fro Plaintiffs and Defendant present, to discuss the filing by Plaintiffs of their Petition alleging Defendant was in Contempt of Court and clarification of the Lower Courts prior Orders and Ruling.

The fifth hearing was held on June 5, 2005, to discuss the Entrance of a Joint Order presented by counsel for Plaintiffs and Defendant.

The sixth hearing was held August 1, 2005. The Plaintiffs had filed a Petition For Contempt and Clarification of Prior Orders. Plaintiffs in this Petition alleged the following:

1. That by previous Orders of this Court the Defendant was Ordered to not interfere with the roadway accessing the Subdivision known as Capon Bridge Resort
2. That despite such Orders the Defendant continues to interfere with the Plaintiffs use of such roadway. Further, she has continued to interfere with the maintenance of such road.

The only testimony and evidence present at the hearing was the Defendant and her witnesses. The Plaintiffs did not testify, did not have any Witnesses to testify, and did not present any evidence to prove the allegation set forth in Plaintiff's Petition, that Defendant was in Contempt of Court for violation of certain Orders of the Court, namely interference with the roadway accessing the Subdivision and interference with Plaintiffs use of such roadway. Plaintiff's testimony and her witness testimony proved conclusively that Defendant had not violated any Orders of the Court, yet the Court held Defendant was in Contempt of the Court Order.

CONCLUSION

The Plaintiffs have failed to prove by clear and convincing proof that each has acquired the right to use the present roads across the Barn Tract by Prescriptive Use. They have failed to prove the requirements that are necessary to acquire a Right of Way by Prescriptive Use. The road across the Barn Tract has been used for years by all of the owners of Tracts in the Subdivision and their guests as access to and from the Subdivision to the public road and to access the common Lake Area and by Plaintiffs and Defendant has also used these roads numerous times.

The Plaintiffs have not presented any evidence or testimony in this case to prove that they have each has acquired Rights of Way across the Barn Tract by Dedication. Plaintiffs state that the roadway as shown on the attached plats have long been established by Dedication and use to be the genuine access road for Capon Bridge residents and its property owners. However, the present roads across the Barn Tract were not Platted on the Map of the Subdivision.

All roads Platted on a Subdivision Plat by the developer(s) are dedicated for use by all property owners in the Subdivision and their guests. This is a Private Dedication.

The case of Cook v. Totten, a W.Va. case, dated March 16, 1901, sets for the procedure that must be followed to have the Platted Road of a Subdivision dedicated for use by the purchase of a Lot in the Subdivision.

Syllabus one (1) of the Cook v. Totten case states the following:

1. If a land owner lays off a Tract of land into lots, streets, and alleys for a town or an addition thereto, has a map made thereof and recorded, and sells lots with reference thereto without reservation, he cannot withhold from such lot purchasers the use of such streets and alleys until the Dedication thereof is accepted by the public authorities, but such lot purchasers are entitled to the immediate use of all such streets and alleys necessary to the complete enjoyment of their property.

However, in this case, there were not any streets, roads, or alleys Platted upon or across the Barn Tract by the developers of the Subdivision. The Plat of the Subdivision shows the Barn Tract as a Vacation Tract with a Barn located on the Tract.

Therefore, we do not have in this case what is known as a Private Dedication. We also have in this state what is known as a Public Dedication. A Public Dedication occurs when some Public Authority accepts the road as a Public Highway.

In *Holland v. Flanagan*, 81 S.E. 2d908 (May 24, 1954), where the Court states the following:

1. Though it may have been used interruptedly as a passageway for ten years or more by the public generally, with the knowledge and consent of the owners of the land, such use does not constitute the way a public highway, not having been recognized by public authority as such.

See also *Monk v. Gillenwater*, 87 S.E2d 537, where the Court states the following:

1. Mere user will not make a road a public road, even though such use is with the knowledge and concession of the owner, in the absence of some action constituting an acceptance of the road as such by public authorities.

The Plaintiffs have not introduced in this case any testimony or evidence that they have acquired a Right of Way by Public Dedication.

Another issue in this case is relocation of the Lake Area Road across the Barn Tract. The present road to the Lake Area crosses the Barn Tract in the vicinity of the Barn located on the Barn Tract. As stated in the Facts of this case, Defendant at her own expense will construct and relocate this road to the Lake Area by constructing a new road across her land connecting the 40' Mountain Top Road, the main Entrance to the Subdivision and the entrance to the 40' wide Street that provides access to the Lake Area.

There are not many cases when a permanent relocation of an established Right of Way is an issue before the Court.

In the case of Fairfax County Park Authority v. Atkisson, 445 S.E.2d 101 (Va. case) the Court considered the relocation of an easement by the owner of the Servient Estate. In this case the relocation of the easement now located on the Dominant Estate would be upon relocation be located upon Plaintiffs land that is not a part of Dominant Estate, where the Easement is now permanently located.

The Court in this case stated the following:

1. *"[W]hen a way is once located it cannot be changed by either party without the consent of the other."*

In our case the facts are completely different from the Fairfax County Park Authority v. Atkisson case. First, the Plaintiffs have not proved that each has an exclusive right to use the road to Lake Area. Therefore, Plaintiffs do not have an interest in the road and are not parties that may object to the relocation of the road to the Lake Area from the vicinity of the Barn. Any person desiring to go to the Lake Area will still have a good open road to access the Lake Area. Persons wanting to go to the Lake will not be damage or inconvenience by relocation of the road by Defendant. The relocated road will be located with the common boundary lines of Lot #26 and the Barn both owned by Defendant, the Servient Estate will remain the same.

Therefore, this Court should permit based upon the Facts of this case, the road to the Lake to be relocated by the Defendant. Relocation of the road will be beneficial to the Defendant and will not be detrimental in any way to those persons wanting access to the Lake Area. In relocating of the road by Defendant will not in any way interfere with or damage 40' Street to the Lake Area or the 40' Mountain top Road.

The Lower Court in its Order of September 1, 2004, made the following Findings of Fact:

Paragraph 11. That the roadway, as it presently exists, has been the entrance to the property since the inception of the Capon Bridge Resort Subdivision.

This Statement of Fact is not correct. The road across the Barn Tract was not used until after the Church purchased its Tract. This was several years after the Subdivision was laid out by the developer.

Paragraph 14. That the use of the roadway across the "Barn Tract" has been for access to the Resort Properties as was anticipated when the Right of Way was granted across the "Barn Tract."

This Statement of Fact is not correct. A Right of Way across to the Barn Tract for access to the Subdivision was never granted. The developers established as the entrance to the Subdivision, the 40' Mountain Top Road. This entrance is Platted on the Plat of the Subdivision as the main Entrance to the Subdivision. There were never streets or roads Platted on the Barn Tract. There was not any need for an entrance to the Subdivision across the Barn Tract except the Entrance to the 40' Street to the Lake Area was at the north boundary line of the Barn Tract. However, the developer of the Subdivision never Platted upon the Barn Tract a road to this Entrance.

Paragraph 19. That the roadway across the "Barn Tract" is a common easement for all parties in the Capon Bridge Resort Subdivision.

This Statement of Fact is not correct. There was never any evidence or testimony presented in this case that a common easement was created or established across the Barn Tract. Plaintiffs did not introduce any testimony or evidence to prove there was a Dedication road or a road acquired by Prescriptive Use across the Barn Tract for common use by all parties of the Subdivision.

Paragraph 20. See facts relating to Paragraph 11.

Paragraph 22. That Summary Judgment is appropriate in this case.

Summary Judgment is not appropriate in this case. All of Findings of Facts in this case by the Lower Court were not founded upon evidence or testimony presented by Plaintiffs or any other persons. Plaintiffs never presented any evidence or testimony at any time during the periods that this case was before the Lower Court. There were many Genuine Issues of Fact that require evidence to resolve the Issues of Fact.

Finally, the Lower Court cited in the Rose et al. v. Fisher et al., 130 W.Va. 5,537, 42 S.E.2d 249, 252 (1947), to support and justify the Findings of Fact and the decision of the Lower Court rendered in this case. In the Rose case the W.Va. The Supreme Court of this State just reaffirmed the decision rendered in Cook v. Totten. The Court did not consider the question of Dedication of roads across a vacant Tract not located in the Subdivision, yet was owned by the developer of the Subdivision.

The Lower Court's Finding of Facts and Decisions in this case were clearly erroneous and the Final Judgment constitutes an abuse of discretion.

In the case of Strahn v. Lantz, 456 S.E.2d 12 (W.Va. 1995), the Court states the following:

1. *Applying these principles to the facts of this case, we are of the opinion that the Circuit Court's findings were clearly erroneous and the final judgment constitutes an abuse of discretion. This Court has never directly addressed the factors necessary to show termination of a prescriptive easement by abandonment.*

The Plaintiffs in this case never presented any evidence or testimony to the Lower Court to prove their claims that they have acquired by Prescriptive Use or by Dedication these Rights of Way.

The Lower Court denied all Motions filed by the Defendant. The only facts of this case were presented to the Court were presented by counsel from Plaintiffs and Defendant. During their various appearances before the Court. The only hearing before the Court was the

hearing upon the Petition charging Defendant was in Contempt of Court. The only evidence was presented by Defendant and her witnesses. Many of the rulings and decisions of the Lower Court were not justified, as they were not founded upon any evidence.

RELIEF PRAYED FOR

1. That decisions of the Lower Court be reversed and this case be remanded to the Circuit Court of Hampshire County, directing that an Order Dismissing this case With Prejudice be Entered.

Respectively submitted this 24th day of October, 2006.

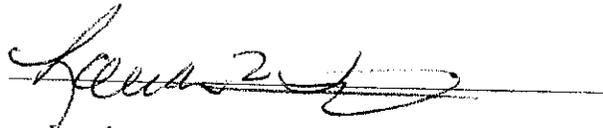
SYLVIA CATRON, Appellant
By Loudoun L. Thompson



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CERTIFICATE OF SERVICE

I, Loudoun L. Thompson, counsel for the Defendant, do hereby certify that I filed the original and 9 copies of this Brief with the Clerk of the West Virginia Supreme Court of Appeals, by UPS Next Day Air, this 24th day of October, 2006. I served upon Donald P. Cookman, counsel for Plaintiffs, by hand delivering a true copy of this Brief on this the 24th day of October, 2006.



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