

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Robert Heavner,
Defendant Below, Petitioner**

vs.) **No. 20-1010** (Berkeley County CC-020-2017 P-412)

**Three Run Maintenance Association, Inc.
Plaintiff Below, Respondent**

MEMORANDUM DECISION

Petitioner Robert Heavner, the defendant below, by counsel Christopher P. Stroeck, appeals the November 20, 2020, order of the Circuit Court of Berkeley County that (1) awarded respondent Three Run Maintenance Association, Inc. (“TRMA”), the plaintiff below, the fees and costs it incurred in defending itself against petitioner’s prior appeal to this Court, and (2) denied petitioner’s motion to submit a written pro se statement opposing a fee award. Respondent, by counsel Braun A. Hamstead, filed a response in support of the circuit court’s order. Petitioner filed a reply.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

TRMA is a road maintenance association that owns and maintains the roads and common areas in two adjacent subdivisions in Berkeley County, West Virginia: Three Run Acres and Three Run Woods. Petitioner claims that he “unconditionally acquired” certain real property in both subdivisions by a tax deed dated July 23, 2014. In December of 2017, TRMA filed a petition in the circuit court to set aside petitioner’s tax deed as void and voidable, and to enjoin petitioner from obstructing a jointly-used roadway that runs through both subdivisions. Following a December 18, 2017, hearing, the circuit court granted TRMA a preliminary injunction. The circuit court also determined that, based on the title documents of record, TRMA was entitled to a fifty-foot easement through petitioner’s property, which included the roadway through the subdivisions. Following a May 24, 2018, bench trial, the circuit court awarded TRMA a permanent injunction prohibiting petitioner from interfering with the right of TRMA’s members to access and use the development’s common areas. The circuit court also awarded TRMA its attorney’s fees based on petitioner’s bad faith actions prior to and during the litigation.

On September 24, 2018, the circuit court held a hearing pursuant to *Aetna Casualty and Surety Company v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), to establish the amount of TRMA’s attorney’s fees. Petitioner filed objections to TRMA’s claim. On November 2, 2018, the circuit court entered judgment against petitioner for TRMA’s attorney’s fees in the amount of \$23,709.32. Petitioner then appealed the circuit’s court orders to this Court.

In *Heavner v. Three Run Maintenance Association, Inc.*, No. 18-1080, 2020 WL 3072003 (W. Va. June 10, 2020) (memorandum decision), we affirmed the circuit court’s permanent injunction and award of attorney’s fees against petitioner. Regarding attorney’s fees we found that

TRMA’s request for attorney fees and expenses incurred in this appeal [is] well-taken. In view of its success on appeal and the lack of challenge to the circuit court’s basis for the award of fees, we find that TRMA is entitled to recovery of attorney fees and costs incurred in litigation of this appeal. However, . . . the circuit court is better situated to make an appropriate determination of the amount of fees and costs to be awarded and therefore a limited remand is necessary. *See Michael C. v. Teresa D.*, No. 13-1077, 2014 WL 4930191, at *7 (W. Va. Oct. 2, 2014) (memorandum decision) (“The issue of the reasonableness of attorney’s fees is remanded to the circuit court for a hearing to determine the appropriate amount of such an award.”).

2020 WL 3072003, at *10. We remanded the case to the circuit court “for the limited purpose of determining the appropriate award of attorney fees and costs incurred by [TRMA] in defending against [petitioner’s] appeal.”

On September 23, 2020, TRMA filed a “Motion to Approve Post Judgment Attorney’s Fees.” The circuit court set a hearing on the motion for November 10, 2020. Twenty-five minutes before the hearing began, petitioner’s counsel filed an eight-page written statement drafted by petitioner. At the hearing, petitioner’s counsel told the circuit court that the document was offered “at the request of my client . . . if nothing else so the record can be vouched.” The circuit court responded that West Virginia Trial Court Rule 6.01(c) provides that, “[e]xcept by permission or order of the court, no pleading shall be filed less than forty-eight (48) hours prior to oral presentation or argument of a proceeding.” The court then ruled that because petitioner had not offered good cause why the court should accept a document filed in clear violation of Rule 6.01(c), it would not accept or consider petitioner’s submission.

Following oral argument, the circuit court issued its November 10, 2020, order awarding post-judgment attorney’s fees to TRMA in the amount of \$19,930.76, as well as fees and costs for optional collection actions in the amount of \$19,196.47. Thus, in total, the circuit court awarded TRMA and additional \$39,127.23.

Petitioner now appeals the November 10, 2020, order.

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and

the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.' *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995) (citation omitted)." Syl. Pt. 2, *Walker v. W. Va. Ethics Com'n.*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 1, *Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 749 S.E.2d 621 (2013).

Petitioner raises three assignments of error on appeal. In his first assignment of error he argues that the circuit court exceeded its authority on a limited remand in awarding additional attorney's fees and costs related to what he terms "optional" collection actions taken by TRMA below. Petitioner maintains that in *Heavner*, the Court made clear that the case was being remanded for the limited purpose of determining the fees and costs respondent incurred in defending against petitioner's appeal. Therefore, he argues that TRMA was not entitled to any fees it may have incurred in collecting or attempting to collect the underlying judgment against petitioner. Petitioner further argues that the Court knew of TRMA's efforts to collect the underlying judgments, as petitioner twice sought a stay of the collection of those judgments before the Court. Finally, petitioner argues that if the Court believed TRMA was entitled to its fees related to the collection of its attorney fees, it would have included guidance on that issue in its memorandum decision. Petitioner concludes that because this Court did not offer such guidance, the circuit court had no authority to consider issues beyond the scope of those specified in *Heavner*. In support of his argument, petitioner cites to *Quicken Loans v. Brown*, 236 W. Va. 12, 777 S.E.2d 581 (2014), in which we said,

Appellate remands are either "general" or "limited." "A general remand broadly remands the case and 'when a cause is broadly remanded for a new trial all of the issues are opened anew as if there had been no trial, and the parties have a right to amend their pleadings as necessary.'" *Id.* at 809, 591 S.E.2d at 735 (quoting *Overton Constr. Co. v. First State Bank*, 285 Ark. 361, 688 S.W.2d 268, 269 (1985)); *see also* 5 Am. Jur. 2d *Appellate Review* § 735 (2014) ("[W]here the appellate court remands for further proceedings without limiting what the proceedings were to be, the trial court on remand has the right to consider and rule on the entire case on remand."). A limited remand "'prohibit[s] relitigation of some issues on remand, or direct[s] that only some expressly severed issues or causes may still be litigated.'" *Frazier & Oxley*, 214 W.Va. at 809, 591 S.E.2d at 735 (quoting *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 366 (Tex. 1985)). "Under a limited remand, the court on remand is precluded from considering other issues, or new matters, affecting the cause." *Id.* (internal quotation omitted); *see also* 5 Am. Jur. 2d *Appellate Review* § 736 (2014) ("Where a remand limits the issues for determination, the court on remand is precluded from considering other issues, or new matters, affecting the cause." (Footnote omitted.)). "[W]hen the further proceedings are specified in the mandate, the district court is limited to holding such as are directed." *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir.1991) (quoting 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶ 0.404[10] (1998)); *see also* 5 Am. Jur. *Appellate Review* § 736 (2014) ("When a case is remanded for a specific act, the entire case is not reopened, but rather the lower

tribunal is only authorized to carry out the appellate court's mandate, and the trial court may be powerless to undertake any proceedings beyond those specified." (Footnote omitted.)). Thus, when the Court orders a limited remand, "the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void." 5 Am. Jur. *Appellate Review* § 736 (2014).

Quicken Loans, 236 W. Va. at 20, 777 S.E.2d at 589.

We find that the circuit court did not exceed its authority on remand regarding its calculation of the attorney's fees and expenses respondent incurred in the defense and enforcement of its judgment order. The order on appeal was entered by the circuit court for the express purpose of carrying out those rights judicially established in *Heavner*. In that decision, we did not limit the trial court's jurisdiction in any manner. Instead, we gave the circuit court the authority to award attorney's fees incident to petitioner's baseless appeal. Petitioner does not contest the circuit court's authority to enforce its judgment order. Thus, petitioner's argument -- that the circuit court could not impose sanctions incident to the enforcement -- is a *non sequitur*. Petitioner simply attempts to impute to the Court a ruling it did not make, *i.e.*, that the trial court was stripped of a portion of its judgment enforcement authority because the Court did not address that authority.

Petitioner attempts to support his "lack of jurisdiction" argument with the Court's decision in *Quicken Loans*. However, the facts of that case are quite different from those in this appeal. In *Quicken Loans*, we entered a mandate requiring each party to pay their own fees and costs. However, on remand, the trial court failed to comply with that ruling and erroneously ordered Quicken Loans to pay the plaintiff's costs and fees. That award was in direct conflict with the Court's mandate. Conversely, in the instant case, while our remand order directed the circuit court to address the fees and costs incurred by TRMA on appeal, we said nothing about the fees and costs TRMA's incurred in enforcing the circuit court's judgment order. On remand, the circuit court's award of attorney's fees and costs incurred enforcing a valid judgment was entirely consistent with this Court's mandate requiring petitioner to bear TRMA's fees and costs defending against petitioner's appeal.

Here, the circuit court had the authority to enter the award to TRMA, and petitioner does not challenge the circuit court's finding that petitioner acted in bad faith or that the amount of the award was improper. Accordingly, we find no error.

In his second assignment of error, petitioner argues that the circuit court erred in awarding respondent an "excessive amount" of additional fees and costs under *Pitrolo*. Specifically, petitioner contends that the fees TRMA seeks for defending against petitioner's initial appeal were not reasonable because the number of hours charged, 76.52 hours, was excessive and the issues raised on appeal were substantially the same issues raised below.

We find that the circuit court did not abuse its discretion in determining the reasonable amount of TRMA's legal fees and expenses incurred in the prior appeal. Petitioner does not argue that the trial court erred in its application of the factors set forth in *Pitrolo* in calculating TRMA's attorney's fees. Those factors are:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Pitrolo, 176 W. Va. at 191–92, 342 S.E.2d at 157, Syl. Pt. 4.

Petitioner fails to provide the Court with any basis to determine that the trial court's factual findings under *Pitrolo* were wrong or that it abused its discretion in its award of attorney's fees. Moreover, although petitioner complains about the number of hours respondent's counsel spent on the prior appeal, the trial court is not limited to awarding fees based on the number of hours reasonably spent times the billed rate. In fact, the number of hours or the "lodestar" is "no more than an approximation of the final award to be determined." *Rice v. Mike Ferrell Ford, Inc.*, 184 W. Va. 757, 761, 403 S.E.2d 774, 778 (1991). Instead, the final award is based on a range of factors encompassed within the *Pitrolo* analysis. Accordingly, we affirm the trial court's calculation of attorney's fees.

In petitioner's third and final assignment of error, he argues that the circuit court erred in refusing to accept his supplemental pro se statement which was filed twenty-five minutes before the relevant hearing. West Virginia Trial Court Rule 6.01(c) provides that "[e]xcept by permission or order of the court, no pleading shall be filed less than forty-eight (48) hours prior to oral presentation or argument of a proceeding." On this record, we find that the circuit court did not err in refusing to accept petitioner's untimely submission, especially given that he was represented by counsel.

Accordingly, for the foregoing reasons, we affirm November 20, 2020, order awarding respondent the fees and costs it incurred in defending itself against petitioner's prior appeal.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Evan H. Jenkins
Justice William R. Wooton