

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**PATRICK HENRY ESTATES
HOMEOWNERS ASSOCIATION, INC.,
A West Virginia corporation,
Plaintiff,**

v.

**Civil Action No. 3:08-CV-175
(BAILEY)**

**DR. GERALD MILLER,
Defendant.**

**PLAINTIFF'S MEMORANDUM OF AUTHORITY IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGEMENT AS TO DEFENDANT'S COUNTERCLAIM**

Applicable Legal Standard

Rule 56 mandates that summary judgment be entered "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *See Celotex Corp v. Catrett*, 477 U.S. 317, at 322 (1986); *see also Medley v. Hawk-Sawyer*, 133 F. Supp. 2d 833, at 886 (N.D. W. Va. 2001). Once the motion for summary judgment has been filed, the non-moving party must demonstrate that its allegations have factual support. "A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Medley, supra; quoting Anderson*, 477 U.S. 242, at 256, 106 S. Ct. 2505, at 2514 (1986).

**CAUSE OF ACTION I
INTERFERENCE WITH BUSINESS**

Pertinent Facts.

The following facts may be deemed pertinent to the Defendant's Counterclaim for Interference with a business relationship involving the further development of Miller's real estate, which adjoins Patrick Henry Estates subdivision, hereinafter referred to as "Subdivision":

1. The real estate within the Subdivision was subjected to that certain Declaration of Road Maintenance Covenants and Restrictions dated October 22, 1981, hereinafter referred to as "Declaration," which was recorded in the Office of the Clerk of Jefferson County, West Virginia, in Deed Book 541, at Page 241, by the original Developer, Shendo Limited Partnership. A copy of the Declaration is attached hereto as Exhibit "A."

2. The Defendant is the successor Developer to Shendo. *See* Defendant's Answer to Request For Admission No. 5, attached hereto as Exhibit "B." It is undisputed that the Defendant became the successor Developer to Shendo Limited Partnership by deed dated December 30, 1986, and recorded in the aforementioned Clerk's Office in Deed Book 613, at Page 71, a copy of which is attached hereto as Exhibit "C."

3. It is also undisputed that the common elements within the Subdivision remain titled to the Defendant and no portion thereof has been conveyed to the Association.

4. The conveyance of the roads and common areas to the Association has been the subject of discussion and demands made upon the developer and successor developer since 1986. *See* Exhibit "D" for copies of Association meeting minutes that refer to such discussions and demands.

5. The latest date for such conveyance of the Common Areas to the Association to have occurred, as set forth in the Declaration, was January 1, 1987.¹

6. As the basis for his subject Counterclaim, Dr. Miller says that he “...is creating a residential apartment site immediately adjacent to the Patrick Henry development, called Sloan Square.” *See* Paragraph 37 of Defendant’s Answer and Counterclaim, Doc. #7.

7. Miller also alleges that the land upon which he plans to build his residential apartment site is situate “immediately adjacent to the Patrick Henry Subdivision...” and says that he “...has proposed the use of lot C1 in the Patrick Henry Subdivision as a residential drive into the residential apartments.” *See* Paragraph 31 of Miller’s Answer and Counterclaim, Doc. #7.

8. Miller says that while the Jefferson County Planning Commission ultimately approved the Community Impact Statement (“CIS”) for Sloan Square, it “...attached conditions that made

¹. *See* Exhibit "A," Article VII, Section 3 of the Declaration, which reads in its entirety:

“Section 3. The Developer may retain the title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.” Despite the above clear language, when asked why he has not yet conveyed the common areas, Dr. Miller says it is because he has not yet finished the development. *See* Exhibits "E" and "F", excerpts from the Deposition of Dr. Miller dated August 12, 2009, pp. 182-184 and pp. 194-195. *See* also, Exhibit "G," from the Deposition of Dr. Miller, Volume II, dated September 15, 2009, pp. 38-39. However, "finishing" for Dr. Miller appears to include the development of lands outside the Subdivision, such as the Sloan Square apartment complex.

the approval an effective denial of the Sloan Square CIS.”²

9. Miller attributes the CIS “denial” to “members of the Association.” *See*

Paragraph 34 of Miller’s Counterclaim, reading:

The members of the association opposed the creation of Sloan Square and were directly responsible for the conditions that effectively deny the CIS, including, without limitation, the Condition that access through Lot C1[of Patrick Henry Estates] has been disallowed under the CIS.

10. The sole factual claim made against the Association appears in Paragraph 35 of Miller’s Counterclaim, reading:

The Association submitted a petition in opposition to Sloan Square that had the effect of causing the Jefferson County Planning commission to place conditions on the CIS that effectively deny the CIS.

11. For Miller’s “Interference” cause of action, appearing in Paragraphs 38, 39, 40

²Denial of the CIS is not a denial of the proposed project. Under the “Community Impact Evaluation” held before the Planning commission during a regular meeting:

The Planning Commission reviews the sketch Plat an Community Impact Statement. The Planning Commission renders and informal opinion to accept or reject the suitability of the subdivision proposal based on the Sketch Plat, Community Impact Statement, soils study and other support material submitted.

See Article 6 of the Jefferson County Subdivision Ordinance, effective July 18, 1979, as amended, Article 6 1, Subdivision Review Process, subsection 6, entitled “Community Impact Evaluation,” which appeared as Exhibit 11 to the Deposition of Paul Raco and is attached hereto as Exhibit “H.” *See* also subsection 7, following. Subsection 7, in its entirety, reads:

Planning Commission advises the Subdivider, by letter, of its opinion, in order to provide the Subdivider with useful suggestions and with an early indication of the project’s acceptability (or nonacceptability) [sic]. The informal opinion serves as a basis upon which the final Planning Commission decision is reached; subject to new or revised information that may be presented at the final Plat Public hearing. (See Step # 18 [entitled Final Plat Public Hearing .])

and 41 of Miller's Counterclaim, he asserts:

38. Miller had a contractual or business relationship or expectancy related to the apartment site.

39. The Homeowners Association, who is a party outside the relationship or expectancy, intentionally interfered with the aforementioned relationship or expectancy. The Association has, amongst other actions, appeared before the Jefferson County Planning Commission and signed a petition that had a direct effect on the Planning Commissions who effectively denied the CIS for the project by denying adequate access to the project as a condition of "passing" the CIS.

40. The interference has caused harm to Dr. Miller by causing the CIS to be effectively denied.

41. The Homeowners interference caused damages to Dr. Miller in an amount greater than \$75,000 or in such further amount as to be proven at trial.

12. Pleadings aside, two writings were sent to the Planning Commission which are attributable to the Association. Exhibit "I" attached is a Petition drafted by two officers of the Association and sent to the Planning Commission. Exhibit "J" attached is a letter written to the Planning Commission. Finally, the Homeowner Association's Vice-President spoke at a Planning Commission meeting at which the CIS was considered. The Association's protests were focused on the use of its common areas to serve Miller's outside venture. However, for purposes of the motion for summary judgment, the Court may assume, as Miller alleges, that the Association opposed his Sloan Square Apartment project. Dr. Miller has testified that he knows of no other action taken by the Association outside of the Planning Commission hearing process. See Exhibit "K" attached hereto, Deposition of Miller dated August 12, 2009, p.270.

Grounds For Motion

Cause of Action I Fails to State a Claim Upon Which Relief May Be Granted.

On its face, the above Cause of Action for "Interference" fails to state any claim upon which relief may be granted. Clearly, a homeowners association is not liable for what its members may or may not do. Even so, the only allegation against the members is that they "opposed the creation of Sloan Square." The Association's exercise of its First Amendment right to submit a petition in opposition to Sloan Square is not actionable. Moreover, Miller's Counterclaim alleges facts constituting a good faith basis for the Association's petition for in his Counterclaim, Miller reveals his plans to cut a road through a residential lot in the Patrick Henry subdivision to access adjoining lands outside the subdivision.³

Miller's Claim For Interference Damages is Barred Under the *Noerr-Pennington doctrine*.

Miller's claim for Interference Damages is based solely on the fact that the Association exercised its first amendment right to petition its government in opposition to his plans. Plaintiff is constitutionally immune from this claim.

The grant of immunization has come to be called the *Noerr-Pennington doctrine*. The

³Plaintiff Association's petition did not categorically oppose Sloan Square. It opposed the proposed accompanying increased burden upon the defectively constructed streets of Patrick Henry and the proposed conversion of a residential lot into a street for Miller's economic venture on the adjacent property. See Exhibit "I" attached hereto, which has been made an Exhibit to various depositions taken in the case. See also Exhibit "F," Miller's Deposition dated August 12, 2009, p. 194, in which he admits that the streets in Patrick Henry Estates subdivision were defectively constructed. In fact, Dr. Miller opines that the \$20,000 dollars recently expended by the Association to repair an intersection through which traffic to Sloan Square would pass was essentially wasted, as the conditions of said intersection will soon deteriorate due to the insufficient quality of the preexisting road base. See attached Exhibit "L," Miller's Deposition dated August 12, 2009, p. 177-179.

two Supreme Court cases which gave rise to the doctrine are *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, and *United Mine Workers of America v. Pennington*. Another case frequently cited when discussing the *Noerr-Pennington* doctrine is *California Motor Transport Co., et al v. Trucking Unlimited, et al*, 404 U.S. 508, 92 S. Ct. 609 (1972). The court in *California Motor Transport* squarely held that the first amendment rights of petition and

association would be violated if groups could not "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." See *California Motor Transport*, at 510-511. Further, "The policies behind the *Noerr-Pennington* doctrine include preserving an individual's first amendment right to petition government officials and encouraging the free flow of ideas to political bodies in order to ensure intelligent decision making." See *Ottensmeyer v. Chesapeake & Potomac Tel. Co., et al*, 756 F.2d 986, 993, and n.13 (4th Cir. 1985). The actions of the Association in filing a Petition opposing the use of streets which Miller was obligated to convey to them under the Declaration of Covenants, in order to carry out his scheme for development outside the Subdivision, fall squarely within the *Noerr-Pennington* doctrine. Permitting Miller to pursue and/or succeed on this allegation would effectively abrogate the Association's first amendment right to petition the government.

In *Bayou Fleet, Inc. v. Alexander*, 68 F. Supp. 2d 734 (5th Cir. 1999), the District Court for the Eastern District of Louisiana reviewed a case where private citizens and a member of the city council seemingly waged an all-out campaign to put a company out of business. The company (Bayou Fleet) sued the private citizens and the council member for, *inter alia*, civil rights violations under 42 U.S.C. §1983 and antitrust violations under the Sherman Act, 15

U.S.C. §§1 and 2.

Bayou Fleet has accused the ...defendants of lobbying and influencing state and federal officials in private meetings, telephone calls, letters, and public hearings to deny permits, revoke Bayou Fleet's non-conforming use, and enact ordinances and resolutions, all designed to put Bayou Fleet out of business. Pursuit of that goal using the administrative and legislative channels and procedures that the ...defendants did was within their First Amendment rights. Their actions are nothing more than protected First Amendment activity to procure favorable government actions. They have the right to advance their opinions to government officials about Bayou Fleet's ...business, whatever the underlying motive. Indeed, Bayou Fleet ...ha[s] pursued similar actions against the [defendants] such as filing objections to permits and a lawsuit to declare a loss of non-conforming use. Bayou Fleet made lobbying efforts of its own. Bayou Fleet had private meetings with [the member of the city council] to get his support for the project; it garnered support from a United States Congressman. This is traditional political activity. The First Amendment protects "attempts to influence the passage or enforcement of laws," no matter how harmful their incidental impact may be.

Bayou Fleet, Inc., at 744; citing *Noerr*, 365 U.S. at 135, 81 S. Ct. at 528. The court, in

Bayou, ruled:

"...[T]o the extent that Bayou Fleet contends that a corrupt or illegal conspiracy existed, the *Noerr-Pennington* doctrine does not recognize a conspiracy exception."

Supra, at n.10; citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. at 382-83, 111 S. Ct. at 1355-56. The actions of the Association are strictly limited to traditional political activity and complaint participation in the administrative process. The actions of the defendants in *Bayou Fleet* were extreme and arguably malicious in comparison to that of the Association. Yet even the *Bayou Fleet* defendants were immune from suit.

Filing a petition and appearing at public hearings to oppose Miller's development was and is well within the first amendment rights of the Association and the *Noerr-Pennington* doctrine insulates these actions from any liability. *Scott v. Greenville County*, 716 F.2d 1409,

1424 (4th Cir. 1983). The United States Court of Appeals for the Eighth Circuit also reviewed a §1983 action against private citizens and city officials who opposed a new development.

These principles exonerate defendants from section 1983 liability for their conduct here, which consisted of demanding a zoning amendment and participating in the spread of false derogatory rumors about appellants' proposed housing project. Appellants here did not allege the individual defendants abused the legislative process by, for example, buying votes with bribes. Nor did appellants allege that they were prevented from answering defendants' charges or making lobbying efforts of their own. We are loathe to interpret section 1983 to proscribe what we thus understand to be traditional political activity.

See Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980).

The Fourth Circuit has specifically dealt with the question of whether or not tortious interference with a perspective economic advantage is activity protected under the doctrine and answered affirmatively. *See IGEN Int'l, Inc. v. Roche Diagnostics, GmbH*, 335 F.3d 303, 311 (4th Cir. 2003). IGEN sued Roche claiming that Roche's continuation of a separate law suit against it amounted to a tortious unfair competition by Roche. The district court permitted the unfair competition claim to go the jury over Roche's *Noerr-Pennington* doctrine defense. The district court found that the *Noerr-Pennington* defense was an untimely made affirmative defense. The jury awarded 4.8 million dollars in compensatory damages and \$400 million in punitive damages. The Fourth Circuit reversed, finding that Roche's petitioning activity was immunized from collateral attack under the *First Amendment*. The Fourth Circuit also found that *Noerr-Pennington* immunity applies to business torts such as unfair competition. It further found that the only exception is for "sham" litigation. Quoting *Prof'l Real Estate Investors, Inc. V. Columbia Pictures Indus.*, 508 U.S. 49, 60, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993), the Court noted that "only if the challenged litigation is objectively meritless may a court examine the

litigant's subjective motivation.'" See *IGEN, supra* p. 312.

In the case *sub judice*, according to Miller, the Association was successful in its administrative challenge to his CIS application. Therefore, the *Noerr Pennington* doctrine provides an absolute defense to the claim against the Association. The Court in *IGEN* noted that even litigation that is deceitful, underhanded, or morally wrong will not defeat immunity unless

it satisfies the objective baselessness requirement, citing *Baltimore Scrap Corp. V. David J. Joseph Co.*, 237 F.3d 394, 398-99 (4th cir. 2001). See *IGEN, supra*, p. 312.

Far less aggressively than in *Bayou Fleet, supra*, *Scott v. Greenville County, supra*, *Gorman Towers, Inc., supra*, and *IGEN Int'l, Inc., supra*, the Association simply engaged in traditional political activity fully protected by the First Amendment and the *Noerr-Pennington* doctrine. Therefore, Miller's claim that the Association is liable for interfering with his business relationship falls squarely within *IGEN Int'l, Inc. V. Roche Diagnostics, supra*, and is barred as a matter of law.

Plaintiff Cannot Demonstrate Any Damages Resulting From The Planning Commission's Granting of Miller's CIS with Conditions.

The Granting With Conditions or Denial of a CIS Is Only An Early Indication Of A Project's Acceptability.

Even if Miller could state a claim for business interference, he has not been denied subdivision approval. As set forth in footnote two above, Miller has merely been given an early indication and an informal opinion by the Planning Commission that unless he finds another access that does not use Patrick Henry Estates Lot C1 to access Sloan Square, his project will be unsuitable. The Planning Commission placed a number of conditions on its approval of the CIS. Of the conditions contained in the CIS approval, Miller points to only

one that would render the development infeasible, namely the condition that he not use Lot C1 of Patrick Henry as access. In his Deposition of August 12, 2009, on p.268, attached hereto as Exhibit "Z," Miller testified as follows:

Q. So C-1 is – not using C-1 for access is a deal breaker?

A. It is.

Q. It looked like the other things that have potential to be resolved but the C -1 is a deal breaker?

A. That is correct.

The fact that Miller lacks sufficient access to his real estate is a fault inherent in the real estate which he purchased and owns. The Association does not cause Miller damages merely because it points out to the Planning Commission that there may be serious limitations in the ability to develop Miller's real estate in the manner in which he has chosen.

Furthermore, Miller cannot show that he has suffered any damages because his project has not been denied. To the extent that the preliminary finding in regard to his CIS is viewed by him as a detrimental determination, Miller has done nothing to exhaust his administrative remedies and is barred from asserting a claim for damages. *Nationsbank Corp., et al. v. Herman, et al.*, 174 F.3d 434; 1999 U.S. App. LEXIS 6093 (4th Cir. 1999). No appeal has been filed with the Board of Zoning Appeals as to the CIS. Nor has Miller chosen to proceed with an application for final plat approval, notwithstanding the preliminary nature of the CIS decision.

Miller's Experts Use Circular And Illogical Reasoning In An Attempt To Justify Miller's Claim For Damages.

To support his Interference Damages claim, Miller has hired two experts. The first, former Planning Commission Executive Director Paul Raco, says that the project was feasible

because he believes the Planning Commission should have approved the CIS. Expert Appraiser Rick Pekar says that Miller could have constructed the project with an investment of \$2,500,000, yielding a complex worth only \$2,200,000.

Mr. Raco says that the Planning Commission has no jurisdiction over the use of Lot C-1 in Patrick Henry Estates to access the adjoining subdivision. Mr. Raco appears to base his opinion on precedent that he has set as Planning Director, including an informal verbal statement which he made to a developer. He does not base his opinion on any official action taken by the Jefferson County Planning Commission. Mr. Raco says that his "personal opinion" is that developer Gene Capriotti was allowed to utilize lots within Jefferson Terrace to access his land that's adjacent to the by-pass, so long as it didn't violate setbacks. He also testified that Norborne Glebe subdivision, annexed into the City of Charles Town, was allowed, by him, to convert a lot situate in Jefferson County, into an access road. *See* Exhibit "M" attached hereto, Deposition of Raco, pp. 79-81.

In the case at bar, the Planning Commission body was called upon to look at the issue in the context of further burdening the poorly constructed streets of Patrick Henry Estates. Contrary to its former Director's "personal opinion," it determined that use of lot C-1 to access Sloan Square Apartments in the circumstances proposed by Dr. Miller would not be suitable under the subdivision ordinance.

Appraiser Pekar's Deposition is based on the assumption that the "Sloan Apartment Complex" would be approved by the Planning Commission (contrary to Miller's allegation that he was effectively denied Planning Commission approval). *See* Pekar Deposition, p.15, attached hereto as Exhibit "N." Mr. Pekar also assumes that the project would be completed by July 2009

and that using the “cost approach” to complete it would require an investment of \$2,500,000. However, at completion, the improved real estate would be worth no more than \$2,200,000. The cost would exceed \$2,500,000 because Mr. Pekar did not consider the cost of any access roads to the site. *See* Pekar Deposition, pp. 23-25, attached hereto as Exhibit "O." Although Dr. Miller does not appear to be grateful, it is evident from Mr. Pekar’s opinion that Dr. Miller has been spared the loss of more than \$300,000 by not constructing Sloan Square Apartments. However, even if it were feasible to construct the apartments, no comparison appraisal has been supplied by Dr. Miller that would show the current value of his real estate contrasted with the developed value.

Therefore, as a matter of law, even if the Association were not immune under the *Noerr-Pennington* doctrine. Dr. Miller makes no showing of any damages arising from the Association’s involvement with the Sloan Square Apartment proposal. *See Hinkle Oil & Gas, Inc., v. Bowles Rice McDavid Fraff & Love*, 360 Fed Appx. 400; 2010 U. S. App. LEXIS 132 (4th Cir. 2010) (unpublished opinion but available in publicly accessible electronic database).

**SECOND CAUSE OF ACTION
BREACH OF CONTRACT**

Legal Question Presented.

The Second Cause of Action of the Counterclaim is based on contract theory. In this Count, the Successor Declarant theorizes that, because the Association claims that the Declarant was required to maintain the common areas until the common areas are transferred to the Association, the Association owes him for the assessments which it has collected. The question appears to be one which must be resolved under the “four corners” of the governing contract

document—the Declaration. Even if one were to view the governing contract language as ambiguous, neither party can offer parole evidence as to intent. Dr. Miller claims that he knew nothing of the Declaration until years after he acquired full ownership of the Declarant along with the remaining unsold lots in Patrick Henry Estates. *See* Deposition of Miller dated August 12, 2009, pp. 144-145, attached hereto as Exhibit "P." To the extent that the manner in which the development proceeded has bearing on the application of the Declaration in discerning the respective rights and obligations of the parties, those facts have been established through discovery and are not in dispute.

Operative Contract Language From the Declaration.

Article IV of the Declaration is entitled “Assessments.” Section three (3) thereof reads, in its entirety:

The Developer shall be responsible for the original construction of the streets and common areas in the subdivision. Upon completion of the streets and common areas, the same shall be dedicated and conveyed to the Association. It shall be the further responsibility of the Developer to maintain the streets, and all other common properties, as herein defined, until such time as these amenities are dedicated and deeded to the Association.

Article VII is entitled “Property Rights and Rights Of Enjoyment of Common Property.”

Section three (3) thereof reads, in its entirety:

The Developer may retain the title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.

Factual Sequence of Development.

The Declaration for Patrick Henry Estates was recorded on October 22, 1981. The

Declaration defines the "property" by referring to "Section A." A master plat of the entire development was filed with the Jefferson County Planning Commission and approved by it on October 22, 1981. *See* Exhibit "A-2" to Deposition of Robert Pratt, a copy of which is attached hereto as Exhibit "Q." The final plats for Section B and Section D were approved on January 6, 1977. Subsequently, the Section A final plat was approved on October 2, 1980. A revised

Section C Plat was approved on August 17, 1990. *See* Plats for Sections, A, B, C and D, attached hereto as Exhibits "R, S, T and U" respectively. Sections E, F and G remain undeveloped. Those undeveloped sections appear on file with the Jefferson County Planning Commission in sketch plats depicting lots and streets. *See* Klein Deposition, pp.38-39, attached hereto as Exhibit "V." However, the real estate comprising Sections E, F and G has been annexed into the City of Ranson and Miller proposes a new design for the land comprising these sections which he proposes to "annex" into the "Village of Shenandoah Springs situate in the City of Ranson. *See* Deposition of Richard Klein, pp. 24-25, attached hereto as Exhibit "W."

Therefore, Miller has abandoned the original scheme as set forth in the Master Plat and the plats of the Patrick Henry Estates Sections E, F and G to the extent that he need only comply with the subdivision and zoning requirements of Ranson, and not those of Jefferson County, and he has altered the configuration of the lots and streets within those three sections.

Dr. Miller does not allege that he has made a demand of the Association for reimbursement of any work which he has done on the common areas. In responding to inquiry as to the amount that he has expended on the common areas, he estimates an amount of \$4,000. Dr. Miller does not dispute that the Association recently expended some \$20,000 for repair of one section of road. *See* Deposition of Miller dated August 31, 2010, pp. 19-20, attached hereto as

Exhibit "X."

Argument--Failure To State A Claim

The plain language of the Declaration contemplates that at such time as the construction of common areas have been completed, the Declarant will convey their ownership to the Association, but in no event shall the conveyance occur later than January 1, 1987. However, notwithstanding the clear "drop dead date" contained in the Declaration, Dr. Miller theorizes that he is not required to convey the common areas to the Association because the development is not complete.⁴

Similarly, Dr. Miller theorizes that although it is his responsibility "...to maintain the streets, and all other common properties...until such time as these amenities are dedicated and deeded to the Association....," he opines that the operative language merely makes him the contractor responsible for the work. Dr. Miller says, "If they [the Association] want it maintained they have to pay for it." See Miller Deposition dated August 12, 2009, p. 205, attached hereto as Exhibit "Y." In effect, says Dr. Miller, unless the Association pays him, he does not have any responsibility for maintenance of the streets and other common areas even though he continues to refuse to convey them to the Association.

However, the issue on the Association's Motion For Partial Summary Judgement is simply whether or not the Association owes Dr. Miller money for maintenance of common areas which Dr. Miller was required to perform under the Declaration. The plain language of the Declaration

⁴However, as pointed out above, it is clear that Dr. Miller has abandoned the original scheme of development for Sections D, E, F and G. Dr. Miller has annexed these sections into the City of Ranson and plans to proceed with a new configuration of the lots and streets and make these sections a part of an adjoining development known as Shenandoah Springs.

provides that the Declarant, Dr. Miller is "responsible" or obligated to provide the maintenance. The development scheme that presents itself from the two quoted paragraphs has the developer maintaining the common areas until they are completed at which time they are to be conveyed to the Association. Under no circumstances was this process to extend beyond January, 1987.

It should be noted that even if Dr. Miller's curious interpretation of the Declaration has merit, his counter claim for maintenance damages is not more than \$4,000. *See* Deposition Of Miller dated Aug. 31, 2010, p. 19-20, attached hereto as Exhibit "Z."

Since Dr. Miller has not performed under the contract, but rather is in breach of the contract agreement as set forth in the Declaration, and since the Association is not in material breach thereof, the Association cannot be held liable in damages for breach of contract.

THIRD CAUSE OF ACTION BREACH OF FIDUCIARY DUTY

In his third cause of action, Miller alleges that the Association's failure to pay to him the monies collected in dues or assessments constitutes a violation of the requirement that the assessments be used only for road maintenance. Under Section 3, Article IV, the Declarant was to maintain the common areas for a relatively short period of time - not beyond January 1, 1987- whereupon the Association would use the assessments to maintain them. The Declaration provides that the collected funds must be used as follows:

Exclusively for the purpose of promoting the recreation, health, safety, and welfare of the residents and other persons owning and using lots in Patrick Henry Estate Subdivision and in particular for the improvement and maintenance of properties, services and facilities devoted to this purpose

The Declaration specifically authorizes the Association to use the assessments for purposes "...similar to the foregoing." *See* Exhibit "A." Miller's loose interpretation leads him to conclude

that the above quoted section of the Declaration created a fiduciary duty on the part of the Association to pay Miller the assessments it collected. However, the fact that Miller was responsible for maintaining the common areas until conveyed to the Association, and the fact that the Association collected the Assessments, does not, in itself, create a fiduciary responsibility for the Association to pay Miller to maintain the common areas. Miller does not allege or offer proof that the Association spent the money for a use not authorized by the Declaration. Nor does Miller make any showing that he has suffered damages as a result of the Association's failure to pay him to maintain the common areas.

As a matter of law, Miller can neither show that the Association breached a fiduciary duty when it failed to pay over the assessments to him nor that he has suffered any damages from that failure. Mere speculation that a party has lost an economic advantage by reason of a breach of a fiduciary duty will not create a genuine fact issue on the question of proximate cause. *Hinkle Oil & Gas, Inc., v. Bowles Rice McDavid Fraff & Love*, 360 Fed Appx. 400; 2010 U. S. App. LEXIS 132 (4th Cir. 2010) (unpublished opinion but available in publicly accessible electronic database).

Therefore, the Court should dismiss Dr. Miller's Counterclaim in its entirety.

PATRICK HENRY ESTATES HOMEOWNERS
ASSOCIATION, INC., Plaintiff
By Counsel

/s/ Braun A. Hamstead, Esquire
Braun A. Hamstead, Esq. (WVSB #1568)
Richard A. Sussmann, Esq. (WVSB #10535)
Counsel for Plaintiff
HAMSTEAD & ASSOCIATES, L.C.
113 Fairfax Blvd.
Charles Town, WV 25414
Telephone: 304-725-1468
Fax: 304-725-1321

X:\PatrickHenryHOA 6780\Miller Suit\Pleadings\Plaintiff's Mem of Authority In Support of Motion For partial summary judgment
9-28-10.wpd