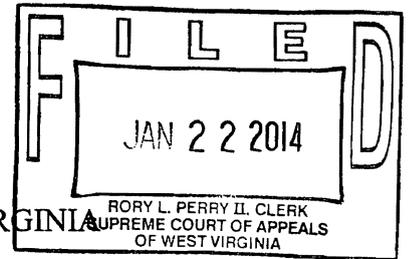


No. 14-0059



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the 13th Judicial Circuit, and
GEORGE A. ROBERTS,

Respondents/Plaintiffs Below.

PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 13-C-280

Submitted by:

Johnnie E. Brown (WVSB # 4620)
S. Andrew Stonestreet (WVSB # 11966)
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Counsel for Thornhill Group, Inc. and Wally L. Thornhill

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
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Judge of the 13th Judicial Circuit, and
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Respondents/Plaintiffs Below.

PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 13-C-280

COME NOW, the Petitioners, Thornhill Group, Inc., and Wally L. Thornhill, individually and as president of Thornhill Group, Inc., by counsel Johnnie E. Brown, S. Andrew Stonestreet, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rule 16 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and respectfully requests that this Honorable Court issue an Order directing Respondents to show cause why a writ of prohibition should not issue barring the Honorable Charles E. King, Judge of the Circuit Court of Kanawha County and the Plaintiff below, George A. Roberts, from the

Circuit Court's *Order Denying Defendants' Motion to Dismiss for Improper Venue*. Thornhill Group, Inc., and Wally L. Thornhill hereby petition this Honorable Court to issue a writ of prohibition prohibiting the Circuit Court from deeming itself a proper venue for the instant civil action; vacating the December 16, 2013, *Order Denying Defendants' Motion to Dismiss for Improper Venue*; directing the Circuit Court to issue an order dismissing the civil action pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure; and directing the Circuit Court to issue an order granting the stay of this civil action in the Circuit Court of Kanawha County, West Virginia during these proceedings. In support hereof, the Petitioners state and aver as follows:

1. This case arises from Plaintiff's former employment with Defendant Thornhill Group, Inc. (hereinafter "Thornhill"). Plaintiff alleges that he was constructively discharged in violation of the West Virginia Human Rights Act, and additionally, that the Defendant breached an employment contract with the Plaintiff.

2. Plaintiff is a resident of St. Albans, Kanawha County, West Virginia, and he was employed as General Manager of Defendant Thornhill at its dealership in Logan County. Defendant Thornhill is a West Virginia Corporation with its principal place of business in Logan County, West Virginia. Defendant Wally Thornhill, Thornhill Group's president and chief officer, is a resident of Logan County, West Virginia.

3. These Petitioners, Defendants-below, timely filed a *Motion to Dismiss for Improper Venue*, which the Circuit Court denied on December 16, 2013.

4. In its *Order Denying Defendants' Motion to Dismiss for Improper Venue*, the lower court ordered that the Circuit Court of Kanawha County is a proper venue for the underlying action.

5. In doing so, it erred by improperly relying on case law which interpreted a statute that has been repealed, along with concluding that the “cause of action arose” from Kanawha County, when in fact, all events alleged occurred in Logan County, West Virginia.

6. Rule 16 of the Rules of Appellate Procedure governs this Writ of Prohibition, along with W.Va. Code § 53-1-1, which specifies that a writ of prohibition “shall lie as a matter of right in all cases of usurpation and abuse of power, when the *inferior court has no jurisdiction of the subject matter in controversy*, or, having such jurisdiction, exceeds its legitimate powers.” See W.Va. Code § 53-1-1 (emphasis added).

7. Under the West Virginia venue statute, West Virginia Code §56-1-1, which is the sole authority on venue since the repeal of West Virginia Code §56-1-2 in 1986, Kanawha County is not the proper venue for Defendant Thornhill Group Inc. or Defendant Wally Thornhill.

8. Kanawha County is also an improper venue for the breach of contract claim, as the cases relied upon by the lower court interpret W. Va. Code §56-1-2, which was repealed in 1986.

9. If this Court applies §56-1-1(a) of the venue statute, the “cause of action arose” from Logan County, not Kanawha County, and thus, Kanawha County is not a proper venue for the present case.

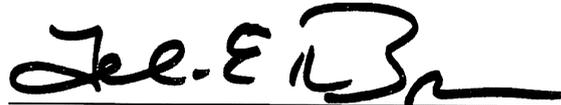
10. The Petitioners hereby incorporate by reference, as if fully set forth herein, their accompanying *Memorandum of Law in Support of Petition for Writ of Prohibition*.

WHEREFORE, for the foregoing reasons, the Petitioners, Thornhill Group, Inc. and Wally L. Thornhill, respectfully requests this Honorable Court:

1. **PROHIBIT** the Circuit Court from deeming itself a proper venue for the instant civil action;
2. **ORDER** the Respondents named herein to appear and show cause why a Writ of Prohibition should not issue to prevent the Circuit Court requiring venue in Kanawha County;
3. **GRANT** the Petition and **ISSUE** a Writ of Prohibition vacating the December 16, 2013, *Order Denying Defendants' Motion to Dismiss for Improper Venue* of the Circuit Court of Kanawha County and directing the Circuit Court to issue an order dismissing the civil action pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.

Respectfully submitted,

THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,
By Counsel:



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No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE PHILLIP M. STOWERS,
Judge of the 29th Judicial Circuit, and
B.A. MCCLURE AND CHERYL MCCLURE,

Respondents/Plaintiffs Below.

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioners, Thornhill Group, Inc., and Wally L. Thornhill, does hereby certify that the foregoing "*Petition for Writ of Prohibition*" was served upon the following counsel of record by mailing a true copy thereof via United States mail:

Harry F. Bell, Jr.
Jonathan W. Price
THE BELL LAW FIRM
Post Office Box 1723
Charleston, WV 25326
Counsel for Plaintiffs

The Honorable Charles E. King, Jr.
Kanawha County Judicial Building
111 Court Street
Charleston, WV 25301
Circuit Court Judge

This 21st day of January, 2014.



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No. 14-0059

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

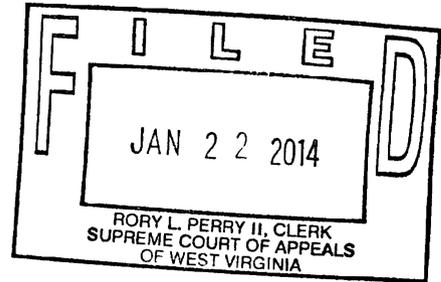
STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
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THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the 13th Judicial Circuit, and
GEORGE A. ROBERTS,

Respondents/Plaintiffs Below.



**MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 13-C-280**

Submitted by:

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TABLE OF CONTENTS

	<u>Page</u>
I. ISSUE PRESENTED	4
II. STATEMENT OF THE CASE	5
III. SUMMARY OF THE ARGUMENT.....	6
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	8
V. ARGUMENT.....	9
A. Standard of Review.....	10
1. No Direct Appeal.....	10
2. Irreparable Damage.....	11
3. Lower Court’s Disregard for Points of law.....	11
B. The lower court’s Order is clearly erroneous as a matter of law.....	11
1. Under the West Virginia venue statute, West Virginia Code §56-1-1, which is the sole authority on venue since the repeal of West Virginia Code §56-1-2 in 1986, Kanawha County is not the proper venue for Defendant Thornhill Group Inc. or Defendant Wally Thornhill.....	11
2. Kanawha County is also an improper venue for the breach of contract claim, as the cases relied upon by the lower court interpret W. Va. Code §56-1-2, which was repealed in 1986.....	13
3. If this Court applies §56-1-1(a) of the venue statute, the “cause of action arose” from Logan County, not Kanawha County, and thus, Kanawha County is not a proper venue for the present case.....	15
V. CONCLUSION.....	18

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Galloway v. Standard Fire Ins. Co.</i> , 45 W. Va. 237, 31 S.E. 969 (1898).....	9, 16, 17
<i>McGuire v. Fitzsimmons</i> , 197 W. Va. 132, 136–367, 475 S.E.2d 132, 136–137 (1996).....	12
<i>Russell v. Pineview</i> , 165 W. Va. 822, 272 S.E.2d 241 (1980).....	7, 9, 13, 14, 15, 16
<i>Wetzel v. Stern Brothers</i> , 156 W. Va. 693, 195 S.E.2d 732 (1973).....	7, 9, 13, 14, 15

STATUTES

	<u>Page</u>
W.Va. Code § 53-1-1	6, 10
W.Va. Code § 56-1-1.....	6, 7, 8, 9, 11, 12, 15, 18
W. Va. Code § 56-1-2 (repealed).....	7, 11, 13, 14, 15

RULES

Rule 16, W.Va.R.App.P.....	6
Rule 19, W.Va.R.App.P.....	8
Rule 12, W.Va.R.Civ.P.....	6, 11, 19

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
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WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the 13th Judicial Circuit, and
GEORGE A. ROBERTS,

Respondents/Plaintiffs Below.

PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 13-C-280

NOW COMES the Petitioners, Thornhill Group, Inc. and Wally L. Thornhill, by and through Counsel Johnnie E. Brown, S. Andrew Stonestreet, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and respectfully submits this *Memorandum of Law in Support of Petition for Writ of Prohibition*. In support of its petition for writ of prohibition, the Defendants state as follows:

I. ISSUES PRESENTED

Whether the Circuit Court of Kanawha County erred in its *Order Denying Defendants' Motion to Dismiss for Improper Venue* by finding that Kanawha County is proper venue for the

civil action, where: (1) the corporate defendant is located in Logan County; (2) the president and chief officer is located in Logan County; (3) all facts that Plaintiff alleges to form his causes of action occurred in Logan County; (4) the substantial damages occurred in Logan County; and (5) the lower court improperly relied upon case law interpreting a statute that has been repealed?

II. STATEMENT OF THE CASE

This case arises from Plaintiff's former employment with Defendant Thornhill Group, Inc. (hereinafter "Thornhill"). *Appendix*, at 6. Plaintiff alleges that he was constructively discharged in violation of the West Virginia Human Rights Act, and additionally, that the Defendant breached an employment contract with him. *Id.*

Plaintiff is a resident of St. Albans, Kanawha County, West Virginia. *Appendix*, at 7. He was employed as General Manager of Defendant Thornhill at its dealership in Logan County. *Id.* Defendant Thornhill is a West Virginia Corporation with its principal place of business in Logan County, West Virginia. *Appendix*, at 7. Defendant Wally Thornhill, Thornhill Group's president and chief officer, is a resident of Logan County, West Virginia. *Id.*

In his complaint, Plaintiff alleges that he suffered loss of employment and lost wages as a result of Thornhill's alleged breach of contract. *Appendix*, at 11. During his employment, Plaintiff worked at Thornhill's dealership in Logan County. *Id.* at 6–7. Further, all facts that Plaintiff alleges to form his causes of action occurred in Logan County, West Virginia, not Kanawha County. *Appendix*, at 6–12. Importantly, no written contract exists; these Defendants never mailed an employment contract to Plaintiff's residence. Moreover, no *employment* contract exists, whatsoever. Although the parties agreed to terms of employment, Plaintiff was an at-will employee.

Plaintiff filed suit on or around February 11, 2013, in the Circuit Court of Kanawha County, West Virginia. Pursuant to West Virginia Code §56-1-1 and Rule 12(b)(3) of the West Virginia Rules of Civil Procedure, Defendants timely filed a *Motion to Dismiss for Improper Venue. Appendix*, at 13. The lower court heard oral arguments on Monday June 3, 2013, and issued an Order on December 16, 2013. *Appendix*, at 1. The Defendants timely filed their *Motion for Stay of Proceedings and Stay of Enforcement of Order*, which is currently pending in the lower court.

In its *Order Denying Defendants' Motion to Dismiss for Improper Venue*, the lower court ordered that the Circuit Court of Kanawha County is a proper venue for the underlying action. *Appendix*, at 4. Notably, in its *Order*, the court relied heavily on the case law regarding proper venue in breach of contract cases, resting its ruling on two cases that interpret a statute that has been repealed. The court stated:

In this matter, venue is appropriate in Kanawha County given (1) Plaintiff's acceptance in Kanawha County of Defendant Thornhill Group's offered employment agreement and (2) that Plaintiff was a resident of Kanawha County at the time that the employment agreement was allegedly breached and his damages would be most acutely felt there.

Appendix, at 4.

Accordingly, the Defendants are filing this Writ, pursuant to W. Va. Code §53-1-1 and Rule 16 of the West Virginia Rules of Appellate Procedure, because lower court erred in finding the Circuit Court of Kanawha County as proper venue for the underlying action.

III. SUMMARY OF THE ARGUMENT

The lower court erred in deeming venue proper in the Circuit Court of Kanawha County. Although its analysis is not clear, it concluded that:

[V]enue is appropriate in Kanawha County given (1) Plaintiff's acceptance in Kanawha County of Defendant Thornhill Group's offered employment agreement

and (2) that Plaintiff was a resident of Kanawha County at the time that the employment agreement was allegedly breached and his damages would be most acutely felt there.

Appendix, at 4.

Although largely disregarded by the lower court, the West Virginia venue statute, W. Va. Code §56-1-1, governs as the general rule. For Respondent's (Plaintiff-below) first, second and fourth causes of action – violation of the West Virginia Human Rights Act, unlawful retaliation, and violation of the West Virginia Wage Payment and Collection Act – Logan County, not Kanawha County, is undisputedly the only proper venue.

The corporate defendant's principal office is not located in Kanawha County, and the corporate defendant's president does not reside in Kanawha County, which are the two allowable venues for a corporate defendant. The individual Defendant, Wally Thornhill, resides in Logan County, not Kanawha County. Thus, under the plain language of the applicable statute, Kanawha County cannot be a proper venue, and the lower court erred in finding so.

The lower court ruled Kanawha County was the proper venue in part because, in contract cases, "venue is appropriate in the county where the contract was made, where the contract is breached or where 'the manifestation of the breach – substantial damage occurs.'" *Appendix*, at 3. However, the court erred in applying this rule because the case law relied upon a statute that has since been repealed.

Russell v. Pineview Realty, 165 W. Va. 822, 272 S.E.2d 241 (1980) and *Wetzel County Savings & Loan v. Stern Bros., Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973) can no longer govern proper venue, as they primarily rely upon West Virginia Code §56-1-2, which was repealed in 1986. Consequently, the current venue statute, West Virginia Code §56-1-1 must govern the instant matter.

Lastly, While Defendants assert that §56-1-1(b) relating to corporate defendants must apply, even if the court follows § 56-1-1(a) and allows venue where the “cause of action arose,” Kanawha County is not a proper venue. Simply stated, all alleged events occurred in Logan County. The parties did not enter into an express contract. Even if there was a contract, the proposal would have necessarily been accepted either verbally at the dealership or accepted by Plaintiff’s performance of the job duties, both of which would have occurred at the dealership in Logan County.

Furthermore, the lower court’s conclusion stating that Kanawha County is a proper venue, based upon his alleged damages being “most acutely felt there” is not based in law. Under this conclusion, after a contract dispute, a plaintiff could relocate to any county in West Virginia and the new county would be a proper venue. The statute expressly provides the *residence of the defendant* as a proper venue, but omits the *residence of the plaintiff* as a proper venue. Plaintiff availed himself to Logan County by driving to work at Defendants’ business every day, evidencing that the county is not inconvenient for him. The employment occurred wholly in Logan County.

Therefore, if this Court chooses to apply §56-1-1(a), the cause of action arose from Logan County, not Kanawha County, and thus, Kanawha County is not a proper venue.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests an oral argument, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, which specifies that cases involving assignments of error in the application of settled law are suitable for Rule 19 argument. As shown below, the Petitioner believes that the lower court blatantly misapplied the West Virginia venue statute, W. Va. Code

§56-1-1. The court also relied upon case law that interpreted a statute which has since been repealed. Accordingly, the Petitioner asserts that oral argument will aid the Court in understanding the lower court's misapplication of the law. The minimum time for argument set forth in Rule 19 will be sufficient.

The Petitioner also recommends that the Court issue a memorandum decision to clarify the authority of the venue statute, and to prevent courts from relying on cases that interpret the repealed venue statute.

V. ARGUMENT

At the outset, these Defendants assert that the lower court's analysis is hard to follow. The exact basis on which it concludes that Kanawha County is a proper venue is not clear. It cited multiple rules relating to venue, including: (1) West Virginia Code § 56-1-1(a), that a civil action may be brought where any of the defendants may reside or the cause of action arose; (2) West Virginia Code § 56-1-1(b), that a civil action may be brought in the county where a corporate defendant's office or chief officer resides; (3) contractual venue analysis under *Russell v. Pineview Realty* and *Wetzel County Savings & Loan v. Stern Bros., Inc.*, both of which cannot be relied upon; (4) place of contractual acceptance under *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S.E. 969 (1898); and (5) a "manifestation of the breach – substantial damage" rule.

After citing the above rules, the lower court simply concluded that venue was proper because Plaintiff accepted Defendant's alleged employment agreement in Kanawha County and that Plaintiff was a resident of Kanawha County and his damages would be "most acutely felt there." *Appendix*, at 4. In ruling, the court erred in finding Kanawha County as a proper venue,

as these conclusions have no basis in the applicable law. Below, these Defendants set forth the proper analysis under the venue statute and related case law.

A. Standard of Review

According to W.Va. Code § 53-1-1, a writ of prohibition “shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” See W.Va. Code § 53-1-1 (emphasis added). This Court has stated that:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, 483 S.E.2d 12 (W. Va. 1996).

As show below, the lower court exceeded its legitimate powers in this matter, as the Circuit Court of Kanawha County is not a proper venue.

1. No Direct Appeal

Addressing the first element, the Petitioner cannot directly appeal the matter because there has been no final order, and the matter is not ripe for interlocutory appeal. Without the writ, Petition would be compelled to litigate the case in an improper venue.

2. Irreparable Damage

Second, the Petitioner would be irreparably damaged, because the entire proceedings would take place in the wrong venue; on the other hand, a correction of venue at this stage would further the interests of efficiency and judicial economy.

3. Lower Court's Disregard for Points of Law

As shown below, the lower court's Order shows a disregard for an important procedural point of law by placing weight on the venue statute that had been repealed, while not applying the venue statute currently in effect. Under the fifth element, although this is not likely to be considered an issue of first impression, no case law directly addresses the repeal of W. Va. Code §56-1-2, and the repeal's effect on proper venue.

In its Argument, the Petitioner focuses on the third element: whether the lower court's order is clearly erroneous as a matter of law, as this Court should place "substantial weight" on the third element.

B. The lower court's Order is clearly erroneous as a matter of law.

1. Under the West Virginia venue statute, West Virginia Code §56-1-1, which is the sole authority on venue since the repeal of West Virginia Code §56-1-2 in 1986, Kanawha County is not the proper venue for Defendant Thornhill Group Inc. or Defendant Wally Thornhill.

As set forth above, these Petitioners' Writ of Prohibition is based upon the Circuit Court's December 16, 2013, Order, which dismissed Defendants' 12(b)(3) Motion to Dismiss for Improper Venue.

In its Order, the lower court correctly stated the general venue statute, which is the default rule, which applies unless the parties or causes of action fall under an exception.

Pertinent to the present case:

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose...;

(2) ***If a corporation be a defendant, wherein its principal office is or wherein its mayor, president, or other chief officer resides***; or if its principal office be not in this state . . . wherein it does business; or if [a West Virginia corporate defendant's] principal office [is] located outside of this state and which has no office or place of business within the State, the circuit court of the county in which the plaintiff resides

W. Va. Code § 56-1-1 (emphasis added).

Although not emphasized by the lower court, this statute is the general rule, and it applies in the absence of an express exception in case law. Further, this statute overrides any case law that interprets repealed statutes. *See infra, Argument B(2)*. Pertaining to Plaintiff's first, second and fourth causes of action – violation of the West Virginia Human Rights Act, unlawful retaliation, and violation of the West Virginia Wage Payment and Collection Act – Logan County, not Kanawha County, is undisputedly the only proper venue.¹

Under the West Virginia venue statute, venue is proper against a corporate defendant only if: (1) the corporation's principal office is located in that venue; or (2) the corporation's president or chief officer resides in that venue.

In the present case, Kanawha County does not meet either of those requirements, and thus, it is not a proper venue under the venue statute. Under the corporate defendant analysis, Thornhill Group is a West Virginia Corporation, and thus, the first clause in § 56-1-1(a)(2) applies. Thornhill Group's principal office is located in Logan County, not Kanawha County. Thornhill Group's president and chief officer, Wally Thornhill, resides in Logan County, not

¹ In its Order, the Court analyzed the breach of contract cause of action, and determined that Kanawha County was a proper venue for the remaining causes of action “for reasons of judicial economy and in the interest of avoiding piecemeal litigation.” *Appendix*, at 4.

Kanawha County. Therefore, under the West Virginia general venue statute, Kanawha County is not a proper venue for the corporate defendant. The lower court erred in finding so.

Moreover, the venue statute demands that, against an individual defendant, a suit be brought in the circuit court in the county where the defendant resides or the cause of action arose. Wally L. Thornhill resides in Logan County, West Virginia, not Kanawha County. All facts that the plaintiff alleges and relies upon to form his cause of action occurred at the Defendant's place of business in Logan County. Any alleged contract – the existence of which the Defendants adamantly deny – would have been proposed and accepted at the dealership in Logan County. No express contract exists, so the Defendant did not mail anything to Plaintiff's residence. *See also, infra Argument B(3).*

Accordingly, under the plain language of the West Virginia venue statute, the lower court erred in ruling that Kanawha County qualifies as a proper venue for the underlying civil action.

2. Kanawha County is also an improper venue for the breach of contract claim, as the cases relied upon by the lower court interpret W. Va. Code §56-1-2, which was repealed in 1986.

The lower court ruled Kanawha County was the proper venue in part because, in contract cases, “venue is appropriate in the county where the contract was made, where the contract is breached or where ‘the manifestation of the breach – substantial damage occurs.’” *Order, Conclusions of Law*, at ¶3 (citing *Russell v. Pineview Realty*, 165 W. Va. 822, 272 S.E.2d 241 (1980)). The court erred in this ruling because the rule no longer applies in West Virginia, and even if the court applied a similar rule, the alleged contract or any alleged damages have no legally relevant nexus to Kanawha County.

First, the court relied on outdated law in its Order. After acknowledging – then disregarding – the West Virginia venue statute, the lower court seemingly relied upon two cases

to arrive at its conclusion: *Russell v. Pineview Realty*, 165 W. Va. 822, 272 S.E.2d 241 (1980) and *Wetzel County Savings & Loan v. Stern Bros., Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973). *Wetzel* interpreted W. Va. Code § 56-1-2, which provided for venue in any county where “the cause of action, or any part thereof, arose, although none of the Defendants reside therein, when the defendant is a corporation.” *Russell* relied upon the *Wetzel* decision and was a per curiam decision. Importantly, W. Va. Code §56-1-2 was repealed in 1986.

Indeed, the legislature intentionally repealed the statute to prevent unfairness to defendants. Upon repeal, venue was limited to the above-referenced general venue statute: if the Defendant was a corporation, venue is only proper where the corporation’s principal office is located or where its president or chief officer resides. The broad language of §56-1-2 cannot apply any longer; therefore, plaintiffs can no longer bring an action in the county where the cause of action arose without a [corporate] defendant residing therein. Simply stated, this Court should not allow an application of the repealed statute; rather, the Court should require that the venue statute currently in effect govern the corporate defendant.

In an attempt to justify its reasoning, the lower court stated:

Although there has been some question that the aforementioned principles set forth in the *Russell* and *Wetzel County Savings & Loan* cases are no longer applicable given the repeal in 1986 of W. Va. Code § 56-1-2 . . . this Court notes that the West Virginia Supreme Court has applied the same reasoning subsequent to the repeal of that statute, recognizing that the divisible and transitory nature of contracts means that venue may be appropriate in more than one county. *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136–367, 475 S.E.2d 132, 136–137 (1996).

Appendix, at 3.

To the extent the *McGuire* case contravenes the plain language of the statute, it should be not followed; the *McGuire* court stated that “venue of a cause of action in a legal malpractice case in West Virginia arises within the county: (1) where the defendants reside; and (2) where

the ‘cause of action’ or part of the ‘cause of action’ arose.” *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136–367, 475 S.E.2d 132, 136–137 (1996). Although it did not give a citation, the court was clearly quoting the repealed statute. Accordingly, the rule should be disregarded, as it clearly contravenes the express intention of the legislature. *See also, infra, Argument D* (arguing that even if this rule or a similar rule applies, the “cause of action arose” from Logan County, not Kanawha County).

Therefore, because the lower court extensively relied upon case law interpreting W. Va. Code §56-1-2, which was repealed in 1986, its *Order Dismissing Defendants’ Motion to Dismiss for Lack of Venue* must be overturned.

3. If this Court applies §56-1-1(a) of the venue statute, the “cause of action arose” from Logan County, not Kanawha County, and thus, Kanawha County is not a proper venue for the present case.

The venue statute allows venue against an *individual* defendant where any defendants reside or where the cause of action arose. W. Va. Code § 56-1-1(a). While Defendants assert that §56-1-1(b) relating to corporate defendants must apply, even if the court follows § 56-1-1(a) and allows venue where the “cause of action arose,” Kanawha County is not a proper venue.

Plaintiff alleged that the Defendant breached a “verbal employment agreement,” which the lower court determined was accepted in Kanawha County. Furthermore, the lower court stated that because the Plaintiff was a resident of Kanawha County, the damages from the alleged breach of contract would be “most acutely felt there.” *Appendix*, at 3. This conclusion has no basis in law.

As stated above, the *Russell* and *Wetzel* cases cannot provide guidance on the venue issue at hand, as they interpret W. Va. Code §56-1-2, which was repealed in 1986. However, even under the outdated *Russell v. Pineview* analysis, the alleged contract would have been made in

Logan County, that is, the duty necessarily would have come to existence in Logan County. Any alleged breach of violation of any duty would have occurred in Logan County, not Kanawha County; and the manifestation of any alleged breach would have occurred in Logan County, not Kanawha County.² Moreover, Kanawha County was not the “place of acceptance of the [alleged] proposal” and therefore, Kanawha County was not “the place of contract.” *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S.E. 969 (1898).

In *Galloway*, this Court held that “the contract is completed when the proposal of the one party has been accepted by the other, that the place of the contract is the place of acceptance.” *Id.* at 969. In the case, the court noted that when a contract is delivered in the mail, the final address of the accepting party is considered the place of the contract. *Id.* at 970. Thus, for venue purposes, where there is a written contract sent through mail, venue would be proper in the county where the final address is located.

The Defendants adamantly deny any employment agreement. The Defendants merely set forth terms of employment for the at-will employee, which does not constitute a legal employment agreement. No express written contract exists; rather, Plaintiff asserts that the parties entered into a verbal or implied employment agreement.

Moreover, to the extent the lower court relied on *Galloway*, no express contract was mailed to Plaintiff’s home address in Kanawha County. Even if there was a contract, the proposal would have necessarily been accepted either or accepted by Plaintiff’s performance of the job duties, both of which would have occurred at the dealership in Logan County.

² Pertinent to venue, the court stated that “[t]he venue of a cause of action in a case involving breach of contract in West Virginia arises within the county: (1) in which the contract was made, that is where the duty came into existence; or (2) in which the breach or violation of the duty occurs; or (3) in which the manifestation of the breach – substantial damage occurs.” *Russell v. Pineview Realty, Inc.*, 272 S.E.2d 241 (W. Va. 1980). The Defendants assert that *Russell* cannot be relied upon because it includes analysis from a repealed statute. However, even under these elements, Kanawha County is not a proper venue.

Furthermore, the lower court's conclusion stating that Kanawha County is a proper venue, based upon his alleged damages being "most acutely felt there" is not based in law and defies logic. Under this conclusion, after a contract dispute, a plaintiff could relocate to any county in West Virginia and the new county would be a proper venue. The statute expressly provides the *residence of the defendant* as a proper venue, but omits the *residence of the plaintiff* as a proper venue. By implication, if the legislature had intended the residence of the plaintiff to be a proper venue, it would have included the same language.

Plaintiff availed himself to Logan County by driving to work at Defendants' business every day, evidencing that the county is not inconvenient for him. The employment occurred wholly in Logan County. Rather than engage in the lower court's mental gymnastics, which rationalize Kanawha County as a proper venue, the Defendant asserts that because all relevant events took place in Logan, it is the only proper venue in this matter.

Applying the plain language of the case law allows this Court to arrive at a more logical conclusion: the "cause of action arose" from Logan County. Kanawha County is merely the county of Plaintiff's residence, which is not a legal basis for venue.

As referenced above, the lower court cites *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136–367, 475 S.E.2d 132, 136–137 (1996), for the assertion that a cause of action may arise from more than one county, and therefore, that venue may be proper in more than one county. *Appendix, at #.*

The case is distinguishable from the present facts. In *McGuire*, plaintiffs filed a legal malpractice suit against the defendant attorney and his law firm, and notably, the venue issue was specific to a legal malpractice suit. *Id.* at 132. In determining from where the "cause of action arose" for venue purposes, the court separated the two causes of action: the "malpractice

against the lawyer and the underlying suit for which the client originally sought legal services.” *Id.* at 135. In the case, the plaintiffs attempted to solicit the defendant attorneys’ representation in Ohio County, the attorneys’ place of business, for a suit to be filed in Monongalia County, which was proper venue for the underlying suit. *Id.* The court held that either county would be a proper venue for the legal malpractice action because of the uniqueness of the “two causes of action” analysis in legal malpractice suits.

The lower court’s statement that the *McGuire* court “recognized that the divisible and transitory nature of contracts means that venue may be appropriate in more than one county” is incorrect. *Appendix*, at 3. This statement misses the entire point of the *McGuire* case. The certified question addressed the specific two-case scenario of legal malpractice suits, and even so, the analysis is not inconsistent with this Petitioner’s assertions. In *McGuire*, like in the present case, the venue is proper where the underlying cause of action arose, or where the defendant’s business is located. In the present action, Logan County meets both criteria, and Kanawha County meets neither.

Therefore, if this Court chooses to apply §56-1-1(a), the cause of action arose from Logan County, not Kanawha County, and thus, Kanawha County is not a proper venue.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioners, Thornhill Group, Inc. and Wally L. Thornhill, respectfully requests this Honorable Court:

1. **PROHIBIT** the Circuit Court from deeming itself a proper venue for the instant civil action;

2. **ORDER** the Respondents named herein to appear and show cause why a Writ of Prohibition should not issue to prevent the Circuit Court requiring venue in Kanawha County;
3. **GRANT** the Petition and **ISSUE** a Writ of Prohibition vacating the December 16, 2013, *Order Denying Defendants' Motion to Dismiss for Improper Venue* of the Circuit Court of Kanawha County and directing the Circuit Court to issue an order dismissing the civil action pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.

Respectfully submitted,

THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

By Counsel:



Johnnie E. Brown, Esquire (WVSB# 4620)
S. Andrew Stonestreet, Esquire (WVSB #11966)

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Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the 13th Judicial Circuit, and
GEORGE A. ROBERTS,

Respondents/Plaintiffs Below.

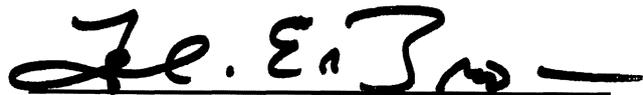
CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioners, Thornhill Group, Inc. and Wally L. Thornhill, does hereby certify that the foregoing "*Memorandum of Law in Support of Petition for Writ of Prohibition*" was served upon the following counsel of record by mailing a true copy thereof via United States mail:

Harry F. Bell, Jr.
Jonathan W. Price
THE BELL LAW FIRM
Post Office Box 1723
Charleston, WV 25326
Counsel for Plaintiffs

The Honorable Charles E. King, Jr.
Kanawha County Judicial Building
111 Court Street
Charleston, WV 25301
Circuit Court Judge

This 21st day of January, 2014.



Johnnie E. Brown, Esquire (WVSB# 4620)
S. Andrew Stonestreet, Esquire (WVSB #11966)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.,

Petitioners/Defendants Below,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the 13th Judicial Circuit, and
GEORGE A. ROBERTS,

Respondents/Plaintiffs Below.

VERIFICATION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 13-C-280

NOW COMES the Petitioners, Thornhill Group, Inc. and Wally L. Thornhill, by and through Counsel Johnnie E. Brown, S. Andrew Stonestreet, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to West Virginia Code § 53-1-3 and hereby verifies, under oath, that upon information and belief, the material facts as stated in the Petition for Writ of Prohibition are true and accurate.

Respectfully submitted,

THORNHILL GROUP, INC.
A West Virginia Corporation;
WALLY L. THORNHILL,
Individually and as president of
THORNHILL GROUP, INC.

By Counsel:

Johnnie E. Brown

Johnnie E. Brown, Esquire (WVSB# 4620)

S. Andrew Stonestreet, Esquire (WVSB #11966)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC

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Charleston, WV 25301
(304) 344-0100

STATE OF West Virginia

COUNTY OF Kanawha, TO-WIT:

I, Kimberly L Withrow, a Notary Public in and for the State and County aforesaid, do hereby certify that Johnnie E. Brown, whose name is signed to the above, has this day acknowledged the same before me in my said State and County.

Given under my hand this 21st day of January, 2014.

My commission expires March 20, 2016

Kimberly L Withrow
Notary Public

