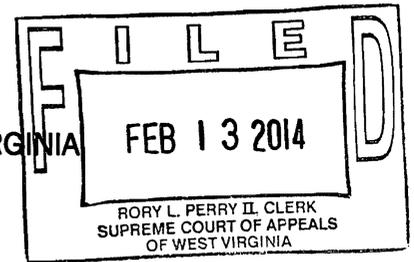


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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.

No. 14-0059

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

Respondents/Plaintiffs Below.

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RESPONDENT GEORGE A ROBERTS' SUMMARY RESPONSE  
TO PETITION FOR WRIT OF PROHIBITION  
From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 13-C-280

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Harry F. Bell, Jr. (WV State Bar # 297)  
Jonathan W. Price (WV State Bar # 10868)  
THE BELL LAW FIRM, PLLC  
Post Office Box 1723  
Charleston, West Virginia 25326  
(304) 345-1700  
(304) 345-1715 Facsimile  
*hfbell@belllaw.com*  
*jwprice@belllaw.com*

*Counsel for Respondent George A. Roberts*

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## I. INTRODUCTION

Comes now Respondent George A. Roberts, by counsel, pursuant to Rule 16(h) of the West Virginia Rules of Appellate Procedure and this Honorable Court's Scheduling Order of January 24, 2014, and respectfully submits his Summary Response to Petitioners' Petition for Writ of Prohibition. For the reasons set forth below, Respondent respectfully requests that the Petition be denied and that the ruling of the Honorable Charles E. King, Jr. in the instant matter be affirmed.

## II. STANDARD OF REVIEW AND JURISDICTION

This Respondent acknowledges the jurisdiction of this Court. However, as the Petition appears unclear on the applicable standard of review, this Respondent respectfully states that in cases involving a trial court's ruling on a motion to dismiss for improper venue, as in the matter *sub judice*, an abuse of discretion standard is to be applied. Syl. Pt. 1, United Bank, Inc. v. Blosser, 218 W.Va. 378, 624 S.E.2d 815 (2005). Under the abuse of discretion standard, this Court has stated that "we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." Wells. v. Key Communs., Inc., 226 W.Va. 547, 551, 703 S.E.2d 518, 522 (2010) (*citing* Graham v. Wallace, 214 W.Va. 178, 182, 588 S.E.2d 167, 171 (2003) (*internal quotation omitted*)). Moreover, "[t]his Court has also noted that '[o]nly where we are left with a firm conviction that an error has been committed may we legitimately overturn a lower court's discretionary ruling. Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overturned unless the reviewing Court is actuated, not by a

desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.” Wells, supra, at 522, 551, *citing Covington v. Smith*, 213 W.Va. 309, 322-23, 582 S.E.2d 756, 769-70 (2003).

### III. STATEMENT OF THE CASE

This Respondent is in substantial agreement with Petitioner’s Statement of the Case from a procedural standpoint, though he disputes the Petitioners’ contention that the Circuit Court “rested its ruling on two cases that interpret a statute that has been repealed.” In fact, the Circuit Court expressly noted that it was aware that the statute, W.Va. Code § 56-1-2 had been repealed, but that this Court had applied similar reasoning in a ruling issued *subsequent* to repeal of the statute.

### IV. ARGUMENT IN RESPONSE

This Respondent takes issue with the Petitioners’ synopsis of the issues presented in their Petition. The Petitioners’ characterization of those issues is obviously skewed toward the Petitioners’ benefit given their conclusory assertions that “the substantial damage occurred in Logan County” and “the lower court improperly relied upon case law interpreting a statute that has been repealed.” However, Petitioners in their Petition have failed to address a number of the Circuit Court’s findings, and also have failed to show that the Circuit Court abused its discretion in making those findings.

This Respondent does not dispute that both Petitioners are located in Logan County, West Virginia, while this Respondent resides in Kanawha County. However, Petitioners’ assertions that this Respondent’s “substantial damages occurred in

Logan County” is clearly wrong, as it necessarily implicates a question of fact.<sup>1</sup> Petitioners’ assertion that “the lower court improperly relied upon case law interpreting a statute that has been repealed” is also incorrect, as borne out by decisions of this Court issued following repeal of the statute in question.

The Circuit Court of Kanawha County, West Virginia, is the proper venue for Plaintiff’s claim for breach of contract.<sup>2</sup> This Respondent accepted Petitioner Wally Thornhill’s employment offer in Kanawha County, and also conducted some negotiations with Mr. Thornhill from Kanawha County. Moreover, and as recognized by the Circuit Court, this Respondent’s damages are most acutely felt in Kanawha County. While Petitioners spend most of their effort arguing that the Circuit Court incorrectly relied upon 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), which were decided prior to the repeal of W.Va. Code § 56-1-2, they only grudgingly concede that the Circuit Court expressly noted its awareness of repeal, and that the Circuit Court also cited the case of McGuire v. Fitzsimmons, 197 W.Va. 32, 136-37, 475 S.E.2d 132, 136-37 (1996), which applied the same reasoning set forth in the cases of which the Petitioners complain, a decade after repeal of W.Va. Code § 56-1-2. Petitioners attempt to blunt the effect of the holding in McGuire by arguing that the reasoning applied therein should only be applied in cases involving legal malpractice. However, McGuire is not the only post-repeal case

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<sup>1</sup> As of the date of this Summary Response, there has been no substantial discovery in this civil action. This Respondent has served discovery requests upon the Petitioners, but the deadline for response has not yet passed. Additionally, Petitioners have moved the Circuit Court for a stay pending resolution of their Petition, but upon information and belief, no hearing on that motion has been noticed, and the Circuit Court has not made a ruling.

<sup>2</sup> Although Petitioners deny that a contract of employment existed between the Petitioners and the Respondent, the existence of a contract is a question of fact for jury determination.

to employ the same reasoning with respect to venue in contract cases.

In State ex rel. Galloway Group v. McGraw, 227 W.Va. 435, 711 S.E.2d 257 (2011), this Court again looked to its previous holding in the Wetzel County Savings & Loan case, noting once again that “[t]he venue of a cause of action in a case involving breach of contract in West Virginia arises in 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.” Id. at Syl. Pt. 1. It is important to note that Galloway involved a simple dispute over the division of legal fees, rather than, as the Petitioners describe it, an issue “specific to a legal malpractice suit” in McGuire. Petitioners’ attempt to distinguish the matter at hand from the underlying facts of McGuire therefore fails, and this Court should follow its previous holdings in McGuire and Galloway and deny the Petition.

Petitioners in their argument seem to ignore the Circuit Court’s finding that “[a]lthough some discussions regarding Plaintiff’s employment agreement were conducted in Logan County, Plaintiff negotiated and accepted employment in Kanawha County.” They also disregard this Court’s long-standing recognition that “the place of acceptance of a proposal is the place of contract.” Galloway v. Standard Fire Ins. Co., 45 W.Va. 237, 31 S.E. 969 (1898). Whether Plaintiff’s contract of employment was written or verbal is of no import for purposes of the instant Petition – Plaintiff indicated acceptance from Kanawha County, making venue in Kanawha County appropriate. And while the Petitioners argue that the Circuit Court’s recognition that this Respondent’s damages would be most acutely felt in Kanawha County “defies logic,” it is difficult to see how his damages, which include

considerable loss of income could be felt anywhere more acutely than the county in which he makes his home, and where he has suffered the consequences of the Petitioners' actions against him.

As this Honorable Court is well aware, W.Va. Code § 56-1-1(a)(1) states that venue is appropriate, *inter alia*, in the county where a cause of action arises.<sup>3</sup> Critically, this Court also has recognized that W.Va. Code § 56-1-1(a)(2) does not trump § 56-1-1(a)(1), but rather that “venue of an action against a corporate defendant lies in the county where the cause of action arises, in addition to those locations specified in W.Va. Code § 56-1-1(a)(2). Banner Printing Co. v. Bykota Corp., 182 W.Va. 488, 491, 388 S.E.2d 844, 847 (1989). In this matter, the Circuit Court rightly determined that the this Respondent’s cause of action for breach of contract arose in Kanawha County because he accepted the Petitioners’ offer in Kanawha County, and because his damages from Petitioners’ breach of contract would be most acutely felt in the county in which he makes his home. Accordingly, the Petition should be denied.

Finally, this Respondent notes with some curiosity Petitioners’ argument that because he drove to work in Logan County every day, venue in Logan County is not inconvenient for him. This argument is ironic, given that the Petition fails to address the Circuit Court’s observations that the Circuit Court of Kanawha County has been the venue for previous actions involving Thornhill entities, including Patricia Jarrell, et

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<sup>3</sup> W.Va. Code §56-1-1(a)(7) notes that “[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit. As the Circuit Court noted, both judges of the Circuit Court of Logan County are likely to recuse themselves should this case be heard in Logan County, given those judges’ actions in previous cases involving Thornhill entities. Should this Court determine that venue in Kanawha County is improper, and should the judges of the Circuit Court of Logan County recuse themselves, venue in a neighboring circuit would be appropriate.

al. v. Thornhill Superstore, et al., Civil Action No. 03-C-1762 and Matthew Burton v. Thornhill Group, et al., Civil Action No. 08-C-726. Additionally, the Circuit Court noted that “[Petitioners] conduct extensive business with citizens of Kanawha County, West Virginia, and operate a dealership in Kanawha County, West Virginia.<sup>4</sup> The Circuit Court also noted the Plaintiff’s representation that Respondent Thornhill Group targets Kanawha County residents with various direct mail campaigns and other advertising.<sup>5</sup> Taken as a whole, these facts suggest that litigating this matter in Kanawha County would not be burdensome for the Petitioners.

**V. CONCLUSION**

For the foregoing reasons, this Respondent respectfully requests that the Court deny the Petition, and hold that venue is appropriate in the Circuit Court of Kanawha County.

**RESPONDENT,  
GEORGE A. ROBERTS,  
PLAINTIFF BELOW,  
By Counsel,**



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Harry F. Bell, Jr. (WV State Bar # 297)  
Jonathan W. Price (WV State Bar # 10868)  
**THE BELL LAW FIRM, PLLC**  
Post Office Box 1723  
Charleston, West Virginia 25326  
(304) 345-1700  
(304) 345-1715 Facsimile

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<sup>4</sup> A review of records maintained by the West Virginia Secretary of State indicates that Thornhill Automotive, Inc., doing business as Thornhill Acura, is domiciled in Kanawha County, West Virginia. The Secretary of State’s records identify Petitioner Wally Thornhill as President and Director, respectively, of that corporation. Upon information and belief, Petitioners have spent approximately \$2.5 million establishing the Kanawha County dealership.

<sup>5</sup> Upon further information and belief, Petitioners’ spending for advertising and other media promotions in Kanawha County exceeds any amount expended in Logan County.

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WALLY L. THORNHILL,  
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No. 14-0059

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

Respondents/Plaintiffs Below.

CERTIFICATE OF SERVICE

I, Jonathan W. Price, counsel for Respondent/Plaintiff Below George A. Roberts, hereby certify that I caused the foregoing **RESPONDENT GEORGE A ROBERTS' SUMMARY RESPONSE TO PETITION FOR WRIT OF PROHIBITION** to be served upon all parties and counsel of record by hand delivery, this the 13<sup>th</sup> day of February, 2014.

Johnnie E. Brown, Esquire  
S. Andrew Stonestreet, Esquire  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301

Honorable Charles E. King, Jr.  
Circuit Court of Kanawha County  
111 Court Street  
Charleston, WV 25301

  
Jonathan W. Price