FILED
JUN 22 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-1118

HARDY COUNTY COMMISSION; and
J. MICHAEL TEETS, COMMISSIONER and
WILLIAM E. KEPLINGER, JR., COMMISSIONER,
in their official capacity only, Petitioners,

vs.

JOHN A. ELMORE, B. WAYNE THOMPSON,
OVID NEED and BONNIE L. HAGGERTY, Respondents.

Hon. Andrew N. Frye, Jr., Senior Status Judge
Circuit Court of Hardy County
Civil Action 14-C-17

BRIEF OF HARDY COUNTY COMMISSION

Counsel for Petitioner, Hardy County Commission
John W. Cooper (WVSB #822)
COOPER & PRESTON, PLLC
P. O. Box 365
Parsons, WV 26287
t. 304-478-4600
f. 304-478-4601
jcooper@mountain.net

Counsel for Respondents
J. David Judy, III, Esquire
Judy & Judy
P.O. Box 636
Moorefield, WV 26836

Counsel for Petitioners' J. Michael Teets William E. Keplinger, Jr. Individually
John A. Kessler, Esq.
Michael W. Carey, Esq.
David R. Pogue, Esq.
Carey Scott Douglas & Kessler, PLLC
P.O. Box 913
Charleston, WV 25323

Counsel for Petitioner, Steptoe & Johnson, PLLC
Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
P.O. Box 2195
Huntington, WV 25722-2195
and
Bridget M. Cohee, Esq.
Amber M. Moore, Esq.
Steptoe & Johnson, PLLC
1250 Edwin Miller Blvd, Suite 300
P.O. Box 2629
Martinsburg, WV 25402-2629

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 2

PROCEDURAL HISTORY 2

FACTS RELATED TO ISSUES PRESENTS ON APPEAL OF HCC 8

SUMMARY OF ARGUMENT 16

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 17

ARGUMENT 17

A. STANDARD OF REVIEW 17

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN ITS APPLICATION OF THE OPEN GOVERNMENTAL PROCEEDINGS ACT TO THE COUNTY COMMISSION'S PROCEEDINGS WHICH ARE THE SUBJECT IF THIS ACTION. WEST VIRGINIA CODE §7-15-8 (EMERGENCY AMBULANCE SERVICE ACT OF 1975) PRECLUDES THE NECESSITY OF NOTICES, AGENDAS AND PROCEDURES OTHERWISE REQUIRED UNDER THE OPEN GOVERNMENTAL PROCEEDINGS ACT IN WEST VIRGINIA CODE §6-9A-3, §6-9A-4, §6-9A-5 AND BY WEST VIRGINIA CODE §7-1-2. 18

C. EVEN ASSUMING, *ARGUENDO*, THAT SOME VIOLATIONS OF THE OPEN GOVERNMENTAL PROCEEDINGS ACT AND §7-1-2 OCCURRED WITH RESPECT TO THE EARLIER PROCEEDINGS OF THE COUNTY COMMISSION, THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY PERMANENTLY ENJOINING THE COUNTY COMMISSION FROM CONDUCTION FUTURE PROCEEDINGS ON THE SAME SUBJECT MATTER IF SUCH PROCEEDINGS COMPLY WITH THE OPEN GOVERNMENTAL PROCEEDINGS ACT AND §7-1-2 25

D. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ENJOINING THE COUNTY COMMISSION FROM LEGISLATIVELY ENACTING AN EMERGENCY AMBULANCE SERVICE FEE UNLESS

AND UNTIL AMBULANCE SERVICE IS OTHERWISE NOT AVAILABLE TO ALL RESIDENTS OF HARDY COUNTY 26

E. THE CIRCUIT COURT ABUSED ITS DISCRETION BY (A) EXCLUDING EVIDENCE THAT ANY VIOLATION OF THE OPEN GOVERNMENTAL PROCEEDINGS ACT WAS UNINTENTIONAL; (B) BY EXCLUDING EVIDENCE THAT THE COUNTY COMMISSION'S CHALLENGED ACTIONS WERE A GOOD FAITH ATTEMPT TO COMPLY WITH ITS DUTY TO PROVIDE EMERGENCY AMBULANCE SERVICES TO THE COUNTY'S RESIDENTS, INCLUDING EVIDENCE REGARDING DELAYED RESPONSE TIMES AND SCRATCHED CALLS IN REMOTE AREAS OF THE COUNTY; (C) ENCLOSING REMEDIES WHICH EXCEEDED THE PERMISSIBLE REMEDIES FOR VIOLATIONS OF THE OPEN GOVERNMENTAL PROCEEDINGS ACT AVAILABLE UNDER WEST VIRGINIA CODE §6-9A-3(i), §6-9A-6, §6-9A-7(b) 28

F. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES AND LITIGATION EXPENSES TO THE RESPONDENTS IN THE AMOUNT OF $112,000.00, (A) WHICH INCLUDED WORK IN AN UNSUCCESSFUL EFFORT TO HAVE THE TWO COUNTY COMMISSIONERS REMOVED FROM OFFICE; (B) WHICH WERE OTHERWISE AWARDED IN VIOLATION OF THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS FO THE AWARD OF SUCH FEES AND EXPENSES; AND (C) BECAUSE WEST VIRGINIA CODE §7-15-18 TRUMPS REQUIREMENTS OF WEST VIRGINIA CODE §6-9A-3(i), §6-9A-6, AND §6-9A-7(b) 31

CONCLUSION 31

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases

Chrystal R.M. v. Charlie A.L. 194 W.Va. 138, 439 S.E.2d 415 (1995) 18

Cnty. Court of Mingo Cnty. v. Bailey, 97 W. Va. 351, 125 S.E. 253 (1924) 25, 26

Kemp v. Boyd, 166 W. Va. 471, 275 S.E.2d 297 (1981) 3

McComas v. Bd. of Ed., 197 W.Va. 188, 475 S.E.2d 280 (1996) 18, 29

Peters v. Cty. Comm. Of Wood Cty., 205 W.Va. 481, 519 S.E.2d 179 (1999) 18

State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E.2d 353 (1959) 24

State ex rel. Canterbury v. Cnty. Court of Wayne Cnty., 151 QW. Va. 1013, 1024, 158 S.E.2d 151, 159 (1967) 25, 26

Statutes - West Virginia Code

§ 6-6-7 3

§ 6-9A-1 (Open Governmental Proceedings Act)) 1, 2,3, 5, 8, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 30, 31

§ 6-9A-3 . . . . . 1, 2, 5, 8, 18, 22, 28, 31

§ 6-9A-4 . . . . . 1, 13, 18, 19

§ 6-9A-5 . . . . . 1, 18

§ 6-9A-6 . . . . . 2, 16, 17, 20, 25, 28, 31

§ 6-9A-7 . . . . . 2, 28, 31

§ 6-9A-10 19

§ 6-9A-11 23

§ 7-1-2 . . . . . 1, 5, 8, 16, 17, 18, 22, 23, 25, 26, 28, 31

§ 7-15-1 (Emergency Ambulance Services Act of 1975) 16, 17, 21, 22, 24, 26, 28, 29, 31

§ 7-15-2 . . . . . 16, 21, 24, 26

§ 7-15-4 . . . . . 16, 24, 26, 28

§ 7-15-17 . . . . . 2, 4, 24, 26

§ 7-15-18 . . . . . 1, 2, 3, 16, 17, 18, 21, 22, 23, 24, 25, 26

§ 29B-1-1 (Freedom of Information Act) 20

West Virginia Ethics Commission Advisory Opinions
Open Meetings Advisory Opinion, No. 2007-09 23

Hardy County Rules for Conducting Public Meetings, (2004) 8

ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in its application of the Open Government Proceedings Act to the County Commission's proceedings which are the subject of this action. West Virginia Code §7-15-18 (Emergency Ambulance Service Act of 1975) precludes the necessity of notices, agendas, and procedures otherwise required under the Open Governmental Proceedings Act in West Virginia Code §6-9A-3, §6-9A-4, §6-9A-5 and by West Virginia Code §7-1-2. This appears to be a case of first impression as to which section of the Code governs.

2. Even assuming, *arguendo*, that some violations of the Open Government Proceedings Act and §7-1-2 occurred with respect to the earlier proceedings of the County Commission, the Circuit Court erred as a matter of law by permanently enjoining the County Commission from conducting future proceedings on the same subject matter, if such proceedings comply with the Open Government Proceedings Act and §7-1-2.

3. The Circuit Court erred as a matter of law by enjoining the County Commission from legislatively enacting an emergency ambulance service fee unless, and until, ambulance service is otherwise not available to all residents of Hardy County.

4. The Circuit Court erred as a matter of law by failing to give preclusive effect to the findings of fact of a three-judge panel in litigation between these same parties involving the same subject matter.

5. The Circuit Court abused its discretion by (a) excluding evidence that any violation of the Open Government Proceedings Act was unintentional; (b) by excluding evidence that the County Commission's challenged actions were a good faith attempt to comply with its duty to provide

emergency ambulance services to the County's residents, including evidence regarding delayed response times and scratched calls in remote areas of the County imposing remedies which exceeded the permissible remedies for violations of the Open Government Proceedings Act available under West Virginia Code §6-9A-3(i), §6-9A-6 and §6-9A-7(b).

6. The Circuit Court erred as a matter of law in awarding attorney fees and litigation expenses to the Respondents in the amount of $112,000.00, which (a) included work in an unsuccessful effort to have the two County Commissioners removed from office; (b) was otherwise awarded in violation of the procedural and substantive requirements for the award of such fees and expenses; and (c) because West Virginia Code §7-15-18 trumps the requirements of West Virginia Code §6-9A-3(i), §6-9A-6 and §6-9A-7(b).

STATEMENT OF THE CASE

Procedural history:

This complex case originated as a two-part Petition (1) which sought removal from office of the two Hardy Commissioners named above, and (2) which sought the invalidation and vacation of formal actions of the Hardy County Commission (HCC) pursuant to the Open Governmental Proceedings Act (OGPA), West Virginia Code, 6-9A-1, et seq. [App. 1] The first challenged action was the adoption and implementation of a "Special Emergency Ambulance Service Fee Ordinance" on August 2, 2013, enacted pursuant to West Virginia Code §7-15-17 (Emergency Ambulance Service Act of 1975).[1] The second was the Commission's August 2, 2013,

[1] The ordinance essentially imposed a monthly fee of $10.00 upon the residents of Hardy County to provide emergency ambulance services to the people of the county.

authorization and the approval of the June 4, 2013, purchase of the Baker building[2] at a foreclosure sale with funds of Hardy County. The two-part Petition was bifurcated on the first day of the trial of the removal action. The removal action retained the original civil action number (13-C-76). [App. 374, 1631-33] The petition seeking invalidation and annulment of actions of HCC were given a new civil action number: 14-C-17. The removal action resulted in a 3-day trial beginning March 17 , 2014. The tribunal denied the removal of the two commissioners by Order entered on May 12, 2014. [App. 451] The issues involving the invalidation and vacation of the ordinance and purchase of the Baker building were excepted from the removal matter and reserved to the circuit court in 14-C-17, later heard by senior status Judge Andrew Frye. The burden of proof in the two proceedings was different: the removal action required "clear and convincing evidence" of wrongdoing as defined in §6-6-7(a), while actions "to invalidate and nullify" only required proof of violations of the OGPA by a preponderance of the evidence. See, e.g., *Kemp v. Boyd*, 166 W. Va. 471, 275 S.E.2d 297 (1981). HCC filed a motion under the doctrine of issue preclusion and res judicata requesting that the circuit court adopt the findings of the three-judge panel that the purchase of the Baker building was premised upon the County Commission's consideration of various options, and after weighing the options, decided that the purchase of the building was the best option for the county. [App. 452, 456] Notably, the Baker building was constructed specifically for housing

---

[2] The Baker building is a 9,000 square foot building centrally located in Hardy County near Baker. It is near an exit along Corridor H which is the primary highway serving Moorefield, Wardensville, and Baker. It was constructed by Mathias-Baker Volunteer Emergency Squad, Inc., a now defunct corporation that provided emergency ambulance service to the Mathias-Baker area of the county until April, 2013. The transcript and record disclose that the parties used several names during the proceedings, but for brevity it will be identified as the "Baker building" or the "building" in this Brief.

ambulance service.

The tribunal denied the removal petition. It found that the County Commission's purchase of the Baker Building put it in the taxpayers' hands; the building has rooms available for other community functions, and is used as a polling place; it is centrally located and ideal for responding to emergencies throughout the county; it also found that pursuing other options to obtain emergency ambulance service would have, nonetheless, required the expenditure of money without guarantees of future use or availability of both a building and equipment. The tribunal also found that the building ensured the residents of Hardy County against future risk of a third party leveraging the building for loans and getting foreclosed upon. The tribunal found that the County Commission appropriately considered various options to bring adequate and consistent emergency ambulance service to Hardy County residents, and the HCC concluded the purchase of the building was in the county's best interest. [App. 457] Likewise, the tribunal found that the enactment of the ordinance imposing the fee for emergency ambulance service was within the authority of the HCC pursuant to West Virginia Code §7-15-17. [App. 457] Both HCC and the Petitioners below sought counsel fees at the conclusion of the removal action. The court indicated that it lacked jurisdiction to award the same to HCC -- as that obligation is reserved to the local governing body, but it specifically found that Petitioners below were not entitled to counsel fees because they had not substantially prevailed. [App. 461] Petitioners below **have not** appealed any part of the removal proceeding.

The second part of the petition (14-C-17), challenging the validity of the building purchase and the fee ordinance was considered by Judge Frye in the Summer of 2014. For judicial economy, the parties subsequently agreed, *inter alia,* that the evidence in the removal

trial would be essentially the same in 14-C-17. Consequently, Judge Frye considered precisely the same testimony and exhibits presented in the removal action along with some limited additional evidence, with a variety of additional pleadings, and with extensive written and oral arguments by the parties. In an order of August 8, 2014, Judge Frye declined to adopt the findings of fact of the removal tribunal to the extent they involved the issues reserved to him in 14-C-17, noting that the jurisdiction of the tribunal was limited to impeachment. Judge Frye made separate findings of fact and conclusions of law holding that the Hardy County Commission unlawfully failed to comply with OGPA, and thus lacked jurisdiction to decide matters related to the purchase of the building and enactment of the ordinance. [App. 677-678, et seq] The court further found the HCC violated OGPA by failing to promulgate rules and failing to give notice sufficient to inform the public of the issues upon which the HCC was deliberating or voting. The Circuit Court invalidated the actions taken at the meetings for which it determined that the notice did not comply with West Virginia Code §6-9A-1 et seq. The Court based its order upon findings, *inter alia,* that HCC and Commissioners Teets and Keplinger had violated jurisdictional notice requirements of West Virginia Code §7-1-2, and thus held that HCC was without jurisdiction to authorize the purchase of the Baker building, or to adopt the fee ordinance. [App. 697-698]. The Circuit Court also found that there were significant violations of §6-9A-3 of the OGPA. [App. 700] It also found that the violations of OGPA represented "a chronic and systemic problem in the manner in which the Hardy County Commission does all of its business." [App. 705] The Court voided the votes authorizing and approving the purchase of the Baker building, voided the vote adopting the special emergency ambulance fee, and ordered the refund of all moneys paid by citizens pursuant to the ambulance fee ordinance. [App. 706]

The Respondents below filed a timely Motion to Alter or Amend [App. 729], which the Circuit Court denied on August 29, 2014 [App. 877], and, on that same day, the court scheduled a hearing to resolve the outstanding issues in this matter for September 29, 2014. Petitioners below also filed a motion seeking an injunction against HCC to preclude it from taking further action on the fee ordinance [App. 856]. By Order entered August 29, 2014, the Court issued a temporary injunction enjoining Respondents below from taking any votes, or otherwise considering the issues of the fee ordinance or the purchase of the Baker building until a full hearing is held on the matter. [App. 881]

At the hearing on September 29, 2014, (memorialized in a final order entered on October 10, 2014) [App. 1078], Judge Frye not only reaffirmed the August 8th Order, but he also awarded $112,000.00 to counsel for Petitioners below [App. 1084]; he further found that while the fees paid by Hardy County residents under the ordinance had been mostly refunded, the County coffers were still short the funds paid for the Baker building [App. 1093], and the entered a judgment to satisfy the shortfall in the amount of $1,130,000.00, plus interest, against Teets and Keplinger in their individual capacities; he also refused a motion of HCC which sought dismissal for failure to join additional parties (Capon Valley Bank and Jack Walters, a trustee in a deed of trust); finally, the Court made permanent an injunction prohibiting HCC from taking action with respect to the fee ordinance "unless and until ambulance service is not otherwise available to all residents of Hardy County." [App. 1097] Judge Frye noted in the order that a conflict of interest existed between HCC and Commissioners Teets and Keplinger in their individual capacities after the judgment was entered against them. He also ordered Lucas See, Esq., the prosecuting

attorney for the county to represent the HCC, but See later indicated that he was likewise disqualified for ethical reasons.

Thereafter, a notice of appeal was filed by HCC and by Respondents, Teets and Keplinger, through their counsel at Steptoe & Johnson, PLLC. [App. 961] A partial stay of execution had been issued by Judge Frye in the Final Order entered on October 10, 2014, but this Court entered an order staying all proceedings pending appeal. [App. 1607] Petitioners below immediately raised questions in this Court about whether Steptoe & Johnson should be disqualified -- alleging that the firm had a conflict of interest in representing both HCC and in representing Teets and Keplinger in their individual capacities in the present appeal in light of the personal judgment entered against them and in favor of the people of Hardy County. This Court remanded the case to Judge Frye to resolve the conflicts of interest issues. [App. 4404] By Order entered February 19, 2015, Judge Frye concluded that a conflict of interest did existed, and he entered an order which disqualified Steptoe & Johnson, PLLC, ordered it to remit $26,528.80 of the fees it had received from HCC, and appointed the undersigned to serve as Special Prosecuting Attorney for HCC in this and related matters. [App. 4709; 4722-4726]

An Amended Notice of Appeal was filed by the undersigned on behalf of HCC seeking relief from the Orders of August 8, 2014, August 29, 2014, and October 10, 2014.[3] [App. 4751] J. Michael Teets and William E. Keplinger, Jr., have filed an Amended Notice of Appeal through separate counsel. [App. 4894] Finally, Steptoe & Johnson has filed another Amended Notice of Appeal with respect to the portion of Judge Frye's Order of February 19, 2015, on remand, which

---

[3] There were multiple other pleadings and proceedings addressed below which are not referenced in this section, but "too many trees have been sacrificed" already in this case. No doubt some will be addressed by other parties in their respective briefs and replies.

directed it to refund counsel fees it had collected from HCC. [App. 4848] The present appeal challenges the Orders of August 8, 1014 and October 10, 2014.[4]

Facts Related to Issues Presented on Appeal of HCC

The county commissioners who served Hardy County during the relevant time periods of this case were Teets, Keplinger, and A.J. Wade. The county clerk was Greg Ely, who took the minutes of all meetings of HCC and later types them for approval by the commission. [App. 1703] He also prepares notices and agendas for meetings, and makes sure that notices of meetings are published.[5] As it relates to this appeal, the specific details of what will be brought up at a meeting sometimes goes beyond what is contained in the notice published in the local newspaper. The standard agenda notice is typically published two weeks before the scheduled meeting, although the legal requirement is only three days in advance. [App. 1779-1780] The Appointments Sheet is a form on the desk of the Clerk on which Ely and his staff insert names of persons wishing to be heard and/or topics to be considered at the meeting; the information of that sheet can be supplemented up to the time of the actual meeting. [App. 1780-1781] [See, e.g. App. 3894] It is this notice practice which primarily has created the issue of compliance with both §6-9A-3 of the OGPA and with West Virginia Code §7-1-2 in this case.

---

[4] In the separate appeal of Steptoe & Johnson, PLLC, the February 15, 2015, Order is also being challenged by its counsel, to the extent it ordered a refund of fees paid to it by HCC.

[5] There is a standard agenda that lays out the ordinary business that HCC deals with in every meeting and there is an appointments agenda. The standard agenda gets published in the local newspaper as the notice of meeting, but not the appointments agenda. [See, e.g. App. 3893] But if someone reads the published notice or has an interest in a meeting, he may contact Ely and get a copy of both the standard agenda, and the appointment agenda. Ely has been doing it that way since 2005. [App. 1776-1777] Hardy County promulgated *Hardy County Rules for Conducting Public Meetings* in 2004 which have been followed since then.

One incident about which Petitioners below complained, occurred at the December 20, 2011, meeting in response to a request from the Mathias-Baker Volunteer Emergency Squad, Inc. (MBRS)[6] for $300,000.00 in emergency funding. MBRS representatives came before HCC and asked for funding for operations in order to keep its emergency ambulance service in operation. MBRS reported that it had very large outstanding bills (approximately $75,000 for fuel, and a mortgage payment in the vicinity of $100,000). HCC did not know what MBRS practices had been beforehand, but the Commissioners knew that the county had to have ambulance service. There was no mention of any fraudulent billing practices of MBRS to Medicare or Medicaid during this meeting. However, evidence in the proceedings below established that MBRS had entered into an agreement with the United States Attorney's Office in Wheeling to pay fines for fraudulent billing practices. The HCC knew that MBRS had debts approximating $2,700,000, but its representatives did not disclose at the December, 2011, meeting that MBRS had entered into a settlement agreement with the federal government to pay almost $1,100,000 in fines as part of a September, 2011, settlement. [App. 2238] Several respected representatives from businesses in the area spoke in support of the requested funding. [App. 2186] The $300,000 request was approved at that meeting, without extensive information provided to HCC ,and with no formal notice to the public. Neither the standard published agenda, nor the appointment agenda for that

---

[6] Mathias-Baker Volunteer Emergency Squad, Inc., is also sometimes described as Mathias-Baker Rescue Squad, which provided emergency ambulance services in Hardy and Grant County until the end of May, 2013. Hence, to avoid confusion in this Brief and for purposes of brevity in this Brief, the acronym will be MBRS. However, there will also be references to the Mathias-Baker Fire Company, which is an entirely separate entity that began providing ambulance services after MBRS ceased providing emergency ambulance service. Mathias-Baker Fire Company, separate entity now providing emergency ambulance services, will be designated as the "Fire Company" to avoid confusion with references to MBRS or Mathias-Baker Volunteer Emergency Squad, Inc.

meeting indicated that the HCC would consider or approve the grant to MBRS for $300,000.

The Commission's $300,000 subsidy temporarily delayed, but did not prevent MBRS's eventual financial failure. MBRS went out of business in the Fall of 2012 (though it continued to operate as a volunteer group for several more months). [App. 2188, 2277, 2453] On October 9, 2012, the Commission held an emergency meeting to discuss how to respond to the possible closure of MBRS. [App. at p. 2453] At a subsequent meeting on November 20, 2012, the Commission voted to hire a county medic and to create the Hardy County Emergency Ambulance Authority (hereinafter "EAA"). [App. 2190, 2281-82, 2461-63] Commissioner A.J. Wade made the motion to create the EAA.. The Board of the EAA was appointed by HCC in February, 2013 [App. 2191] HCC made its appointments by having representatives from all sections of county, including representatives from fire and rescue services, and from the business sector. [App. 2190] EAA selected officers and began attending HCC meetings to apprise the commission of the actions the authority was taking. On March 5, 2013, the President of MBRS attended a commission meeting and advised that foreclosure on the Baker building and repossession of its ambulances was expected within 45 to 60 days. He indicated that MBRS had no money and was acting as a volunteer organization only at that time. [App. 2191-2192, 2194] On April 2, 2013, during a meeting attended by EAA officers, the fire chief from the Fire Company spoke with HCC and sought financial assistance from the Commission to help it purchase the Baker building at the upcoming foreclosure sale. [App. 2195] A discussion ensued and Commissioners Teets and Wade thought the EAA should own the Baker building. [App. 2196] The fire chief's request was not approved. Commissioner Keplinger testified that a number of options were considered by HCC with respect to providing ambulance service for the county: if another entity were to

purchase the building, the county would have to lease space from it and would be under a rental obligation with no control over the cost, or the length of the lease; if money were given to an entity like the Fire Company to purchase the building, the commission feared it would place county emergency ambulance service in the same situation that existed at that time if the Baker building were mortgaged; and a third option would be to contract with an organization like Jan-Care, Lamberts' or Star City, but the county would need to provide such an entity with a building out of which to operate, and that building would have to meet all regulatory requirements if running 24-hour service. [App. 2196-2197] HCC was looking for services for the whole county.

The next meeting was on April 16, 2012. EAA officers Jerry Moore and Greg Greenwalt were present at the meeting. EAA sought $2,600,000 from HCC to try to resolve all the county ambulance service problems, but HCC did not approve the request. [App. 2198-2199] Moore then indicated that the Wardensville Rescue Ambulance Service (Wardensville) had advised EAA that it would try to expand its service to include the Baker Mathias area by using volunteers if it were provided with two additional ambulances. [App. 3896] Moore requested an appropriation of $250,000 for the EAA ($150,000 of which was allocated for purchase of two ambulances and an emergency chase unit[7], and $100,000 for operational costs.) HCC approved the request. The published notice for the meeting did not mention the request, and the typed portion of the Appointment list read, "Emergency Ambulance Authority - update and request". [App. 3893-3894]

At the May 7, 2013 meeting, EAA officers again appeared, and the minutes reflect that

---

[7] A chase unit is a vehicle like a Surburban SUV with which a medic may respond to the scene of an emergency and render aid prior to the arrival of an ambulance

EAA provided an update and Commissioner Teets advised that the State is approving $50,000 for equipment or building purpose, and that EAA just needed to submit the bill. Commissioner Teets said it should be used for equipment and ambulances. [App. 3916] At the next meeting on May 21, 2013, EAA officers reported to the Commission that they had purchased the units and would be leasing them to Wardensville. They also requested an executive session to discuss the purchase of real property. [App. 3930] In the proceedings before Judge Fry, Petitioners below complained about lack of compliance with OGPA and failure to secure competitive bids for these acquisitions. Clerk Ely confirmed that there were no competitive bids. [App. 1765-1766] But Ely consulted with the State Auditor's office about whether competitive bids were required in the emergency situation then existed in Hardy County, and he was advised that the normal requirement for competitive bids for purchases in excess of $10,000 was not applicable, because this was a purchase of repossessed ambulances in an emergency situation. [App. 2271] Commissioner Keplinger indicated that the purchase was exempt as an emergency purchase. [App. 2201]

The next meeting was June 4, 2013. The minutes reflect that the HCC authorized EAA to bid on the Baker building. They also reflect that there was a discussion about the history of the problems with emergency ambulance service going back to the $300,000 grant in 2011 and the $250,000 subsidy for the EAA in the recent meeting. Commissioners Teets and Keplinger voted in favor of the motion and Commissioner Wade opposed it. [App. 3943] The same minutes next reflect that there was an executive session with EAA officers regarding a building purchase. Neither the published notice of the meeting, nor the Appointments agenda mentioned the proposed purchase of the Baker building, although handwritten notes on the Appointments

indicated that at 11:15 a.m., the officers of EAA were authorized to purchase the building at Baker and that there had been a request for an executive session. It is not clear from testimony whether the handwritten notes were placed on the Appointments list prior to, during, or after the meeting. [App. 3939] Moore appeared at the foreclosure auction and the only opposing bidder was EA Hawse Health Center (EAH), a significant employer and health care provider, which operated a medical and dental care facility next to the Baker building. EAA was the successful bidder with a bid of $1,130.000. Moore indicated that HCC had given him a range within which he was authorized to bid during an executive session he requested in order not to apprise other bidders of what he could bid. [App. 1992-93 [8]] Under the provisions of § 6-9A-4, an executive session is authorized when matters involving the purchase of real property are discussed. Moore testified that the Baker building was desirable because of its central location in the county, just off Corridor H. EAA could operate from that building and service Moorefield, Mathias, Wardensville and areas in between very quickly. It was particularly desirable for EAA because it was built for EMT services and had living quarters. [App. 1991] EAA made a deposit of $50,000 at the foreclosure sale from its own funds.

After the foreclosure sale, HCC held two public hearings to discuss the planned adoption and implementation of an emergency ambulance service fee for the county. The first was on June 24th and the second on July 15th. Public hearings were not required for enactment of the ordinance, but HCC chose to hold the hearings, because if believed it should advise the public of

---

[8] Moore testified that he was informed by HCC in advance of the sale of the amount which EAH was authorized to bid, and Moore's authority was slightly higher than EAH's authority. [App. 2004]

its intentions. [App. 2295-96[9]] At the July 2, 2013, meeting of the HCC, representatives from EAA inquired of the Commission as to how to proceed with finalizing the purchase of the Baker building. Several options were considered, but a formal decision was not made about what to do. Ovil Need, one of the Petitioners below, spoke in opposition to the HCC going forward with the purchase and indicated that the problem was not about providing ambulance service, but rather about purchasing a building without letting the public know about it. Commissioner Teets replied that in ten years the people of the county would own the building and it would be there to provide ambulance service to the county and that the people would be happy with the decision of the EAA to purchase or lease the building. [App. 3985] The next HCC meeting was scheduled for July 16, 2013, the day after the second public hearing on the ordinance. In the Appointments agenda for that meeting, the emergency fee ordinance and setting the amount were included. [App. 3997] However, at the July 16, 2013 meeting, because of strong negative sentiment expressed at the two public meetings, the Commission voted not to adopt the emergency ambulance fee, and not to go forward with the purchase of the Baker building. [App. 4003] At that meeting, Keplinger stated that he felt the Baker building and the emergency ambulance fee were needed, but he voted with Commissioner Wade not to adopt the fee and not to go forward with the building purchase. [App. 2226-27; 2557]

Each of the meetings which have been discussed above occurred more than 120 days before Petitioners below filed suit to challenge the validity of the actions taken.

Between July 16, 2013, and the next scheduled meeting of HCC on August 2, 2013,

---

[9] Notice of the public hearings was published in the local newspaper. [See, e.g., App. 3966] Public sentiment at the meetings was strongly opposed to the purchase of the Baker building and to the fee ordinance.

Commissioner Keplinger received substantial public comment in support of the purchase of the Baker building and adoption of the ordinance. [App. at pp. 2227-28] At the meeting on August 2, 2013, George Crump and a number of other Hardy County residents appeared in support of the purchase of the Baker building and in favor of the adoption of the ambulance fee. [App. at pp. 2229-31, 2299, 2345-49, 2575-78] As a result, Commissioner Keplinger reversed his position from the previous meeting and made a motion to complete the purchase the Baker building and to adopt the ambulance fee, and the motion passed. Teets and Keplinger voted in favor of both items and Wade voted in opposition. [App. at pp. 2233-34, 2575-78] Notice of this August 2, 2013 meeting was published on July 24, 2013, and the Appointments agenda for this meeting included the following entries: "10:30 George Crump ET ALS EAA Fee" and "11:00 Em. Ambulance Authority update/questions." [App. at pp. 2565, 4244]

On August 20,2013, HCC adopted and signed the ordinance implementing the ambulance fee. The Appointments agenda for this meeting notified the public of the intended actions of the HCC with regard to the ordinance. [App. 4042]

The Orders of Judge Frye entered August 8, 2014, and October 10, 2014, voided the actions of HCC in the purchase of the Baker building and nullified the adoption and implementation of the fee ordinance, compelled the HCC to refund the fees collected between the time of adoption and the Court's rulings, enjoined the implementation of the fee ordinance, unless and until ambulance service is otherwise unavailable in Hardy County, and entered personal judgments against Teets and Keplinger for the $1,130,000 paid for the Baker building. This appeal is taken from the orders entered on August 8, 2014, August 29, 2014 (granting injunctive relief) and October 10, 2014.

SUMMARY OF ARGUMENT

The voiding and nullifying of the purchase of the Baker building are contrary to West Virginia law. The provisions of West Virginia Code §7-15-18 specifically exempt a county commission from any obligation to provide notices, follow procedures, obtain consents or approvals, except as provided in Chapter 7, Article 15 of the Code (Emergency Ambulance Service Act of 1975) ["EASA"] To the extent the OGPA and West Virginia Code §7-1-2 appear to provide conflicting duties, they are trumped by the Act. Moreover, to the extent the findings of fact and conclusions of law in the Circuit Court Orders of August 8, 2014, and October 10, 2014, are based upon conduct of HCC occurring prior to July 8, 2013, those findings and conclusions are barred by the 120 day statute of limitations under West Virginia Code §6-9A-6. Assuming *arguendo*, that the OGPA and §7-1-2 were controlling, the Circuit Court, nonetheless erred as a matter of law by permanently enjoining the County Commission from conducting future proceedings on the same subject matter even if such proceedings comply with the Open Government Proceedings Act and §7-1-2. The lower court's construction of the phrase "otherwise unavailable" under §7-15-4 is contrary to the liberal statutory construction requirements of §7-15-2 and §7-15-18.

The Court erred as a matter of law in failing to give preclusive effect to the Findings of Fact and Conclusions of Law in the Removal Action with respect to Paragraphs 5, 7, 10, 26, 29, 39, 40, and 45. [App. 451 - 462] Moreover, it abused its discretion in excluding evidence (a) that any violation of OGPA was unintentional; (b) that the challenged acts of HCC were a good faith attempt to comply with its duty to provide emergency service to the county's residents including evidence concerning delayed response times and "scratched calls" in remote areas of

the county. Finally, assuming *arguendo* that the Court was correct in invalidating some actions of HCC for violations of OGPA, and was correct in awarding some counsel fees to counsel for Petitioners below, it erred as a matter of law in allowing fees in the amount sought because much of the fees charged were for work performed in the removal proceeding; thus there should have been an allocation and reduction of the $112,000 to account for the division of labor. Moreover, to the extent that §7-15-18 and the statute of limitations of §6-9A-6 prevent relief to Petitioners below, fees should not be allowed to their counsel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case is one of first impression involving the reconciling of the competing language between the provisions of Chapter 7, Article 15 (EASA of 1975) and the provisions of the OGPA and §7-1-2, the matter is of sufficient importance to warrant oral argument. Moreover, the issues raised in the injunctive relief prohibiting a county commission from correcting alleged procedural mistakes in future meetings, and in awarding personal judgments against county officials for such mistakes are of significant importance to the public, and may have a chilling effect upon citizens' willingness to serve as county officials. Such an impact warrants oral argument.

ARGUMENT

A. Standard of Review:

This appeal involves the circuit court's decision to void the purchase of a building and enactment of an ordinance to assess a special emergency ambulance service fee based upon findings that the county commission violated the OGPA, found at §6-9A-1, *et seq.* The court also determined the applicability of EASA (§7-15-1, *et seq).* The standard of review applied to a

question of law or involving interpretation of a statute is *de novo.* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.* 194 W.Va. 138, 439 S.E.2d 415 (1995); *Peters v. Cty. Comm. Of Wood Cty.*, 205 W.Va. 481, 519 S.E.2d 179 (1999). The standard of review for mandamus is *de novo*, although the underlying factual findings are reviewed under a clearly erroneous standard. Thus, the legal prerequisites for rulings are reviewed *de novo,* and the other underlying issues are reviewed for an abuse of discretion or clearly erroneous standard. *McComas v. Bd. of Ed.,* 197 W.Va. 188, 475 S.E.2d 280 (1996). The circuit court's denial of collateral estoppel or issue preclusion is *de novo.*

B. The Circuit Court erred as a matter of law in its application of the Open Governmental Proceedings Act to the County Commission's proceedings which are the subject of this action. West Virginia Code §7-15-18 (Emergency Ambulance Service Act of 1975) precludes the necessity of notices, agendas and procedures otherwise required under the Open Governmental Proceedings Act in West Virginia Code §6-9A-3, §6-9A-4, §6-9A-5 and by West Virginia Code §7-1-2.

This is a case of first impression in deciding which act applies with regard to the notice which must be given to the public when emergency ambulance services in a county are at issue. Judge Frye concluded that the provisions of §6-9A-3 governed the actions of HCC when considering the emergency ambulance service needs of Hardy County and taking actions related thereto.[10] There are exceptions to the notice requirements of this statute and they are found in

---

[10] §6-9A-3 provides in pertinent part as follows:

Proceedings to be open; public notice of meetings.

(a) Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four [§ 6-9A-4] of this article, all meetings of any governing body shall be open to the public.

(b) Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend.

. . .

(d) Each governing body shall promulgate rules by which the date, time, place and agenda of all

§6-9A-4. [11] The OGPA also provides that a private citizen may file an action to challenge

---

regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media.

. . .

(h) In the event of an emergency a governing body may call an emergency meeting.

(1) The governing body of a state executive branch agency shall electronically file a notice for an emergency meeting with the Secretary of State, as soon as practicable prior to the meeting. Any other governing body shall notice an emergency meeting in a manner which is consistent with this article and the Ethics Commission Committee on Open Governmental Meeting's opinions issued pursuant to the authority of section ten [§ 6-9A-10] of this article, as soon as practicable prior to the meeting.

(2) The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

(i) Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

[11] The pertinent provisions of § 6-9A-4 provide as follows:

§ 6-9A-4. Exceptions.

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

. . .

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia Freedom of Information Act does not become subject to disclosure as a result of executive session;

. . .

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

actions taken by a public body which violate the act.[12] At first blush, it would appear that the OGPA is controlling in a court challenge to the actions of a county commission. The record in this case disclosed several instances where notice and agendas appeared less than specific with regard to formal action which was taken: approving the request for $300,000 by MBRS in December, 2011; approving $250,000 for EAA in April, 2013, to purchase ambulances and a chase vehicle; and authorizing EAA officers to bid $1,130,000 at a foreclosure sale in June, 2013, to purchase an emergency ambulance building. However, even if the OGPA were applicable to emergency ambulance services, each of these challenged actions was barred by the 120 day statute of limitations of §6-9A-6, because suit was not filed by Petitioners below until

---

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the Freedom of Information Act as set forth in article one [§§ 29B-1-1 et seq.], chapter twenty-nine-b of this code.

[12] § 6-9A-6 provides in pertinent part as follows:

Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues.

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made.

. . .

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article.

. . .

In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this article, it is a violation of this article for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.

November 4, 2011. The only real challenges relating to notice and agenda which were not barred by the statute of limitations of OGPA occurred at the August 2, 2013, and August 2013 meetings when HCC voted to complete the purchase of the Baker building and to approve a special emergency ambulance fee and adopt an ordinance implementing the same pursuant to EASA.[13]

When EASA comes into play, notice requirements of OGPA are superceded. The friction between OGPA and EASA becomes apparent when one examines the provisions of §7-15-18 and §7-15-2. These sections specifically mandate that EASA is to be liberally construed and §7-15-18 exempts county commissions from having to comply with other requirements of notice. Indeed, §7-15-18 provides as follows:

> Article constitutes complete authority; liberal construction; severability.
> This article shall constitute full and complete authority for the provision of emergency ambulance service within a county by a county commission and for the creation of any authority and carrying out the powers and duties of any such authority. The provisions of this article **shall be liberally construed** to accomplish its purpose and **no procedure or proceedings, notices, consents or approvals shall be required in connection therewith except as may be prescribed by this article.** [boldface emphasis added]

§7-15-2[14] establishes the legislative findings which gave rise to EASA. The significant phrases

---

[13] Petitioners below also complained that the ordinance was amended without proper reading and publication and the applicability of the fee amounts were changed without proper notice later in the Fall of 2013, but the crux of the challenged actions dealt with the purchase of the building and the approval of the fee and adoption of the ordinance.

[14] §7-15-2 provides as follows:
Legislative findings and declaration of policy.
The legislature hereby finds and declares:
(a) That a significant part of the population of this State does not have **adequate** emergency ambulance service;
(b) That the establishment and maintenance of **adequate** emergency ambulance systems for the entire State is necessary to promote the health and welfare of the citizens and residents of this State;
(c) That emergency ambulance service is not likely to become available to all the citizens and residents of this State unless specific requirements therefor are provided by law;

(d) That emergency ambulance service is a public purpose and a responsibility of government

in this section are "adequate emergency ambulance service", "adequate emergency ambulance systems", and "shall liberally be construed". Judge Frye and the Petitioners below seemingly ignored the importance of emergency ambulance service being "adequate" in their discussions of the jurisdiction of a county commission to adopt a special emergency ambulance fee ordinance. More importantly, they chose not to apply the clear language in §7-15-18, which provides that no procedure or proceedings, notices, consents or approvals shall be required in connection therewith except as may be prescribed by this article. It is noteworthy that the original versions of EASA and OGPA were enacted in the same year – 1975. As quoted above, §6-9A-3 requires open meetings "[e]xcept as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted . . . ." Clearly, the language of §7-15-18 which relieves county commissions from requirements of notices, approvals, etc., is just such a statute which "expressly and specifically otherwise provides". Consequently, EASA trumps OGMA on matters involving emergency ambulance service to counties. A county commission is exempt from the narrow restrictions of §6-9A-3, *et seq.* Although §7-1-2 does not contain language similar to what is found in §6-9A-3, the "safe-harbor" language of §7-15-18, nonetheless provides on its face that notice requirements are unnecessary.[15] Judge Frye's analysis of which

---

for which public money may be spent; and

(e) This article is enacted in view of these findings and **shall be liberally construed** in the light thereof. [boldface emphasis added]

[15] §7-1-2 provides as follows:

Sessions.

The county court [county commission] of each county shall hold four regular sessions in each year at the courthouse thereof, at such times as may be fixed upon and entered of record by the court. It may also hold special sessions, whenever the public interests may require it, to be called by the president with the concurrence of at least one other commissioner; and the commissioner, if any, not concurring therein, must have at least twenty-four hours' notice of the time appointed for such special session. A notice of

meetings were regular meetings as opposed to special meetings was highly critical of HCC's procedures. Ordinarily, HCC did provide notices with more advance notice than required even for special meetings under §7-1-2, but contrary to Judge Frye's conclusions, in those instances where the notice arguably may have fallen short of the requirements of the section, HCC did not lose its jurisdiction to act because of the exemption created by §7-15-18 when dealing with emergency ambulance service.[16] The Legislature recognized the difficulties in providing adequate emergency ambulance service in this rural, mountainous state, and decided that to protect the welfare and health of her citizens, the State placed a greater premium on getting critically ill or seriously injured persons to hospitals than on imposing rigorous notice requirements on county commissions and county emergency ambulance authorities trying to supply such services to their citizens. The circuit court adopted the argument that a county does not have a duty to provide emergency ambulance service unless such service is otherwise unavailable in the county. HCC agrees that Fraley's, Wardensville, and the Fire Company provide emergency ambulance service in Hardy County. The problem is that because of the rural nature of Hardy County, its large size, and the frequent "scratching" of calls for emergency

---

the time of such special session, and of the purpose for which it will be held, shall be posted by the clerk of the court, at the front door of the courthouse of the county, at least two days before such session is to be held. If such commissioner, after due notice thereof, shall willfully fail to attend such special session, he shall forfeit not less than five nor more than twenty dollars.

[16] As a further justification for the notices provided by HCC, an ethics opinion of the West Virginia Ethics Commission provides that meeting agendas may be made available by posting on a bulletin board or providing copies at a designated location on a counter or table in a public place which can be accessed by the general public during normal working ours. *Open Meetings Advisory Opinion,* No. 2007-09. § 6-9A-11 authorizes the West Virginia Ethics Commission to adopt advisory opinions upon which governing bodies may rely for notice requirements.

ambulance service because no volunteers are available to respond to the call, "adequate emergency ambulance service" did not exist. Moreover, Petitioners below suggested that the HCC duty to provide ambulance service only existed when sufficient funds existed in the levy to fund it. What they overlook is the fact that there is nothing in the statute which says a county cannot act to protect its citizens, even if the statutory duty of §7-15-4 were not present. It has full power to provide emergency ambulance service under EASA regardless of whether the duty mandated under §7-15-4 is present. The creation of the EAA and the enactment of a special emergency ambulance service fee provide a funding mechanism to provide adequate emergency ambulance services to the county.[17] The language of §7-15-18 is clear and unambiguous and the legislative intent is plain, so no interpretation or statutory construction of its meaning is necessary. Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). Under a *de novo* review, HCC would ask this Court to retain the breadth of the exemptions for county commissions created by §§7-15-2 and 7-15-18.

---

[17] § 7-15-17 provides as follows:

A county commission may, by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee, which shall be known as the "special emergency ambulance service fee." The proceeds from the imposition and collection of any special service fee shall be deposited in a special fund and used only **to pay reasonable and necessary expenses actually incurred and the cost of buildings and equipment used in providing emergency ambulance service to residents of the county. The proceeds may be used to pay for, in whole or in part, the establishment, maintenance and operation of an authority**, as provided for in this article: Provided, That an ambulance company or authority receiving funds from the special emergency ambulance fees collected pursuant to this section may not be precluded from making nonemergency transports. [boldface emphasis added]

C. Even assuming, *arguendo*, that some violations of the Open Government Proceedings Act and §7-1-2 occurred with respect to the earlier proceedings of the County Commission, the Circuit Court erred as a matter of law by permanently enjoining the County Commission from conducting future proceedings on the same subject matter if such proceedings comply with the Open Government Proceedings Act and §7-1-2.

Judge Frye issued permanent injunctive relief in the Order of October 10, 2014, which prohibits HCC from adopting or enacting an ordinance unless and until ambulance service is otherwise unavailable in the county. Moreover, it appears from that Order that the Court made permanent the temporary injunction it had issued on August 29, 2014, which prohibited HCC from taking any further action regarding the purchase of the building, short of starting the entire process again. Ordinarily, a court lacks the authority to enjoin the legislative or governmental functions of a county court. *Cnty. Court of Mingo Cnty. v. Bailey*, 97 W. Va. 351, 125 S.E. 253 (1924); *State ex rel. Canterbury v. Cnty. Court of Wayne Cnty.*, 151 W. Va. 1013, 1024, 158 S.E.2d 151, 159 (1967). HCC recognizes that the court has authority to grant injunctive relief for violations of the OGPA pursuant to §6-9A-6. The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of OGPA. The commission also concedes that under that section, a court may issue a prospective injunction order which requires that subsequent actions of the body be taken, or that decisions be made, in conformity with the provisions of the OGPA. But there is nothing in the statute which authorizes a circuit court to enjoin subsequent legislative or governmental corrective actions by a county commission so long as these actions comply with the notice and public meetings requirements of the act. Were such prospective injunctive remedies available , a circuit court could bring a public body to a standstill in its ability to govern. The adoption of a special emergency ambulance service fee is clearly a legislative function afforded to a county

commission by §7-15-17. Unless there is a specific injury or harm to complainants as opposed to a general harm which would affect all citizens, an injunction will not lie to limit the governmental functions of a county commission. See, Syl. Pt. 2, *Bailey, supra.* See also, *State ex rel. Canterbury v. County Court,* 151 W. Va. 1013, at 1024; 158 S.E.2d 151 (1967)

As discussed previously, the circuit court applied a very restrictive interpretation of the phrase "adequate emergency ambulance service" in his holding. The provisions of §§7-15-2 and 7-15-18 paint a very broad brush for liberal interpretation to promote adequate emergency service. The circuit court simply ignored the requirement that interpretation of the article must be given a liberal construction. The legislative declaration that "adequate" emergency ambulance service is needed throughout the state is clearly infused into §7-15-4, which declares that a county commission is duty bound to provide such service unless it is otherwise available in the county. So long as HCC adopts the ordinance in compliance with the OGPA, the court is without authority to enjoin it from correcting any earlier violations with respect to notice. Similarly, so long as HCC gives the requisite notice and holds a public meeting, the circuit court is without authority to prohibit it from ratifying the purchase of the Baker building.

D. The Circuit Court erred as a matter of law by enjoining the County Commission from legislatively enacting an emergency ambulance service fee unless and until ambulance service is otherwise not available to all residents of Hardy County.

For the same reasons articulated above, the Court misconstrued the clear meaning and legislative purpose of EASA. §7-15-4 must be read in *pari materia* with §§7-15-2 and 7-15-18 to understand the meaning of "where such service is not otherwise available". The phrase is included to assist determination of when the county commission has an affirmative **duty to act**, but it is not a limitation on **the power of the body to act** affirmatively to provide emergency

ambulance services to all of the residents of the county if it chooses to do so. The commission determined that adequate emergency service was not available to all residents. It is authorized by EASA to have full power and authority over emergency ambulance service in the county. HCC determined that adequate service did not exist and created the EAA. It determined that the Baker building was the best facility to handle emergency ambulance service in the county. It found that when a 911 dispatcher sounds the alarm in remote parts of the county, the call is sometimes scratched. (When a call comes from one part of the county, the dispatcher sounds the alarm to an ambulance service in that area, but because the Mathias Baker, Capon Springs and Wardensville areas are served primarily by volunteer responders, it is often difficult to staff an ambulance. When no response is received within six minutes, a second alarm is sounded and if no one responds from the squad serving that area, the dispatcher scratches the alarm for the initial squad and starts the process anew with a more distant squad. This results in inability to provide adequate service.) Adequate emergency ambulance service contemplates immediate response. [App. 2152-2154] With a stroke, a heart attack, or a severe injury, time is precious. The patient needs immediate emergency attention by a medic or an EMT and he needs immediate transportation to a medical facility to receive additional medical care. A problem exists in Hardy County involving availability of volunteers. This problem significantly impairs supplying adequate emergency ambulance service. [App. 2333, 2340, 2347, 2348, 2359] The creation of EAA, the purchase of a large centrally located ambulance center, and the adoption of the fee ordinance were and are the proper solutions to the lack of adequate service, but the court below discounted these factors because there are ambulance squads in existence in the county.

The role of the circuit court is not to second guess the legislative findings of the

commission. If the requirements to adopt the ordinance were that ambulance service must be otherwise unavailable in the county, we would be returning to the days when ambulance services were rendered by the local funeral home. In 1975, the Legislature decided that this State and its county commissions should make adequate emergency ambulance service an integral part of health care. EASA was enacted to meet this need, and it vested the county commission with "full and complete authority for the provision of emergency ambulance service." The circuit court in the present case failed to apply a liberal construction to the requirement that there be "adequate" emergency service when it applied §7-15-4 to the problems faced by HCC commencing in December, 2011. It supplanted the fact finding made by HCC with the version proffered by Petitioners below. The commission recognized the problems, created the EAA and took responsible actions authorized by EASA to resolve them. The injunctive relief issued by the Court clearly exceeded the limits necessary to insure compliance with OGPA and §7-1-2 and constituted an abuse of discretion. HCC seeks relief from this Court to permit it to restore the fee and fully implement the purchase of the Baker building.

E. The Circuit Court abused its discretion by (a) excluding evidence that any violation of the Open Government Proceedings Act was unintentional; (b) by excluding evidence that the County Commission's challenged actions were a good faith attempt to comply with its duty to provide emergency ambulance services to the County's residents, including evidence regarding delayed response times and scratched calls in remote areas of the County; (c) imposing remedies which exceeded the permissible remedies for violations of the Open Government Proceedings Act available under West Virginia Code §6-9A-3(i), §6-9A-6 and §6-9A-7(b).

If the court determines that a violation of OGPA has occurred, it has several available remedies it may impose under §§6-9A-3, 6-9A-6, and 6-9A-7. It can invalidate the actions. It can compel compliance or enjoin noncompliance with the provisions of the act. It can annul an

act. It may issue an injunction and order that subsequent commission actions be taken or decisions be made in conformity with the provisions of OGPA. If a person who violates OGPA does so willfully and knowingly, he may be charged with a misdemeanor and fined for the offense. Finally, the court may award counsel fees and litigation expenses to the petitioner unless it finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust. But OGPA does not provide for expansive prospective injunctions to prohibit a governmental body from correcting problems that resulted in the annulment of an action and taking the desired governmental action. Nor does the statute authorize imposing a personal judgment against an official of the public body for the value of an expenditure made by the body. Permitting an award of $1,130,000 against a commissioner who has not personally benefitted from the mistake will have a chilling effect upon the willingness of qualified citizens to serve as county commissioners or in other public positions. There are adequate remedies available to correct the mistakes. HCC is aware of *McComas v. Bd. of Ed. of Fayette Cty.,* 197 W. Va. 188; 475 S.E.2d 280 (1996) in which the court required a board of education to go through the entire process again to correct violations which involved consolidation of schools. *McComas* was a mandamus action and it is distinguishable from the present case because of the detailed procedures required for consolidation and closure of public schools. The provisions of EASA specifically exclude such detailed notice provisions. Additionally, in the case *sub judice,* there is no justifiable basis for prohibiting a county commission or an EAA to purchase and own real estate for purposes of providing emergency ambulance service. To the contrary, the act specifically authorizes the commission or an ambulance authority to own and maintain real and personal property.

Assuming for sake of argument that a violation of OGPA occurred, and the purchase of the Baker building was correctly invalidated, there is absolutely no reason why HCC should be enjoined from scheduling a subsequent meeting with proper notice and agenda, and correct the earlier infraction by vote of ratification of the purchase of the Baker building. Similarly, there is no reason why the ordinance could not be reinstated in subsequent meetings after proper notice, agenda, and reading of the fee ordinance. There was no reason why the court excluded evidence concerning the lack of adequate service in remote areas of the county. Inexplicably, the court refused to order the addition of Capon Valley Bank and its trustee on the MBRS deed of trust as additional indispensable parties to the action since they were integral participants in the sale of the Baker building which was invalidated.

The court also excluded evidence that the violations were unintentional. Notices were published and appointment agendas were kept in accordance with the Commission's belief that they complied with OGPA under a binding ethics commission opinion. In determining whether the actions of HCC were substantially justified, or that special circumstances existed which made an award of counsel fees unjust, the court should have considered whether the actions were taken in good faith, whether any commissioner benefitted personally from the violation, whether the challenged actions were a good faith attempt to comply with its duty to provide emergency ambulance services to the County's residents, and whether evidence from remote areas of the county where calls for emergency ambulance service had been scratched or delayed should have been admitted. Each of these factors were relevant both on the counsel fees issue and on the necessity and scope of the prospective injunction which the court issued. The circuit court's injunctions exceeded its authority and constituted an abuse of discretion.

F. The Circuit Court erred as a matter of law in awarding attorney fees and litigation expenses to the Respondents in the amount of $112,000.00, (a) which included work in an unsuccessful effort to have the two County Commissioners removed from office; (b) which were otherwise awarded in violation of the procedural and substantive requirements for the award of such fees and expenses; and (c) because West Virginia Code §7-15-18 trumps the requirements of West Virginia Code §6-9A-3(i), §6-9A-6 and §6-9A-7(b).

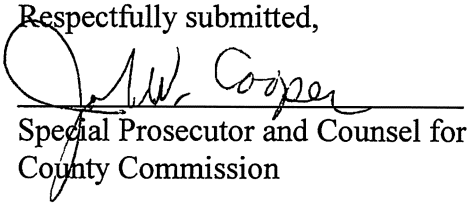
The award of counsel fees in this case was an abuse of discretion because §7-15-18 exempts the commission from the notice requirements of OGPA and §7-1-2. But even if EASA did not trump OGPA, the amount awarded was excessive because much of the time spent by counsel was devoted to the removal proceeding which the Petitioners below had lost. Indeed, the Order of the tribunal specifically found that the Petitioners below were not entitled to counsel fees. HCC does not contest the hourly rate or the amount of time which counsel devoted to the two separate petitions. Nor does it suggest that the proof in the removal proceeding was not related to the proceedings to invalidate the purchase of the Baker building and the fee ordinance. But, as a matter of fairness under the applicable provisions of §6-9A-7, the court had an obligation to apportion and allocate the fees and expenses so that counsel was not compensated for work in a proceeding which he lost. The Court's failure to do so was an abuse of discretion.

CONCLUSION

HCC prays that this Honorable Court will reverse the Orders entered on August 8, 2014, August 29,2014 and October 10, 2014, in accordance herewith; that it will dismiss the Petition to invalidate the purchase of the Baker building and to invalidate the fee ordinance, and find that the actions taken in regard to these matters was proper. Should the Court determine that violations of OGPA and/or §7-1-2 occurred which warranted the invalidation of its actions, HCC prays that the injunctive relief be modified to permit it to correct such deficiencies and adopt the

fee ordinance and ratify the purchase of the Baker building simply by complying with the provisions of said statutes regarding notices, agendas, and publishing of the ordinance. With respect to the award of counsel fees, HCC would ask that the matter be reversed and denied. But if this Court concludes that any counsel fees should be awarded, HCC prays that the matter be remanded to the circuit court with instructions to adjust the amount downward from $112,000 and to apportion and allocate the time in a manner commensurate with the services devoted primarily to 14-C-17, deducting an appropriate sum for the time devoted to the removal action. Although HCC takes no position in this brief on the propriety of the substantial judgment against Commissioners Teets and Keplinger, it would observe that imposing such a remedy will have a substantial chilling effect upon the willingness of citizens to seek office as county commissioners or to serve in other similar governmental positions.

Respectfully submitted,



Special Prosecutor and Counsel for Hardy County Commission

CERTIFICATE OF SERVICE

I, John W. Cooper, undersigned counsel for Petitioner Hardy County Commission, do hereby certify that I have caused a true an exact copy of the foregoing ***Brief of Hardy County Commission*** with a CD containing the Appendix to be served this 19th day of June, 2015, by first class United States mail, postage prepaid, upon the following:

J. David Judy, III, Esquire
Judy & Judy
P.O. Box 636
Moorefield, WV 26836
Counsel for Respondents

John A. Kessler, Esq.
Michael W. Carey, Esq.
David R. Pogue, Esq.
Carey Scott Douglas & Kessler, PLLC
P.O. Box 913
Charleston, WV 25323
Counsel for Petitioners' J. Michael Teets William E. Keplinger, Jr. Individually

Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
P.O. Box 2195
Huntington, WV 25722-2195

and

Bridget M. Cohee, Esq.
Amber M. Moore, Esq.
Steptoe & Johnson, PLLC
1250 Edwin Miller Blvd, Suite 300
P.O. Box 2629
Martinsburg, WV 25402-2629
Counsel for Petitioner, Steptoe & Johnson, PLLC

John W. Cooper (WVSB #822)
COOPER & PRESTON, PLLC
P. O. Box 365
Parsons, WV 26287
t. 304-478-4600
f. 304-478-4601
jcooper@mountain.net