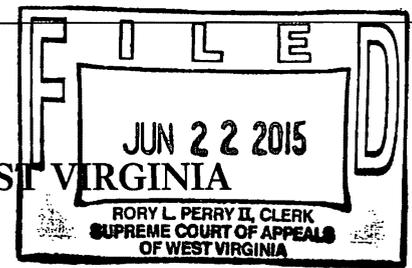


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1118

**J. MICHAEL TEETS, COMMISSIONER; WILLIAM E. KEPLINGER, JR.,
COMMISSIONER; and HARDY COUNTY COMMISSION,
Respondents Below, Petitioners,**

vs.

**WENDY J. MILLER, JOHN A. ELMORE, B. WAYNE THOMPSON,
OVID NEED and BONNIE L. HAGGERTY,
Petitioners Below, Respondents**

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

BRIEF OF PETITIONER

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I. ASSIGNMENT OF ERROR

1. The Circuit Court erred as a matter of law by ordering *sua sponte* that Petitioner, Steptoe & Johnson PLLC (“Steptoe & Johnson”) must return attorney fees earned in representing the Petitioners, J. Michael Teets (“Commissioner Teets”), William E. Keplinger, Jr. (“Commissioner Keplinger”), and the Hardy County Commission prior to the Order disqualifying Steptoe & Johnson, which was done without notice, hearing, and in excess of this Court’s remand order.

II. STATEMENT OF CASE

Steptoe & Johnson PLLC was retained by the West Virginia Counties Risk Pool upon the filing of a Petition seeking the removal Commissioners Teets and Keplinger from the Hardy County Commission.

In addition to the removal action, the Petition sought to invalidate the “Special Emergency Ambulance Service Fee Ordinance;” the ambulance fee implemented by the Ordinance; and the purchase of the Baker Building which was an object of the Ordinance.

Steptoe & Johnson’s role representing the two Commissioners and the Hardy County Commission is the same role that the current Special Prosecutor, John Cooper, is now serving following the disqualification of Steptoe & Johnson by Senior Status Judge Andrew Frye.

In the final order denying the removal of the two Commissioners, the tribunal appointed by this Court to resolve the removal action considered the Respondents’ evidence and found no evidence of misappropriation of funds or other wrongdoing that would warrant removal from office. App. 451-462.

The tribunal found that there was no evidence that the county funds expended by the County to purchase the building were paid to the benefit of any person or entity other than the security holder, Capon Valley Bank; that the building was sold pursuant to foreclosure and it now belongs to the County; and that the purchase price was supported by the evidence in the record of the building's value, an appraisal. App. 451-462.

Likewise, the tribunal found that there was no evidence of either willful or negligent misappropriation against the two Commissioners, and it is without dispute that the two Commissioners, acting as a quorum of the body, took official action in an effort to comply with their duty in a matter in which the county had an interest, and in the discharge of a duty imposed or authorized by law and in good faith. App. 451-462.

Thus, under Syllabus Point 2 of *Powers v. Goodwin*, 170 W. Va. 151, 291 S.E.2d 466 (1982), had the two Commissioners retained private counsel, instead of relying upon counsel retained and paid by the County Commission's insurance company, they would have had the right to reimbursement of their attorney fees and litigation expenses from the County.

This is because, under Syllabus Point 5 of *Powers*, "The public as a whole has an interest in seeing duly elected officials continue in office and where members of a county commission are made defendants in a removal proceeding as a result of actions taken or omitted in the good faith discharge of their official duties, they are entitled to reimbursement for their attorneys' fees."

Instead of incurring the additional expense of separate counsel for two Commissioners sued in their official capacities, the County's taxpayers benefited through joint representation by counsel selected and paid by the County's insurance company.

Steptoe & Johnson successfully defended the petition to remove Commissioners Teets and Keplinger. Upon the successful resolution of part one of the litigation, Steptoe & Johnson continued representation under the same rate terms, albeit the insurer did not provide coverage for the Hardy County Commission and the two Commissioners in their official capacity in the second phase of the litigation.

Important to the determination that such representation was reasonable is the fact that there was no wrongdoing found in the actions taken by the Hardy County Commission by the tribunal, and Commissioners Teets and Keplinger continued to be county commissioners acting in their official capacity.

Two commissioners make a quorum of a three body commission. The Hardy County Commission continued its representation by Steptoe & Johnson for good cause given that the issues joined in the initial Petition to Remove and to Invalidate the Purchase of the Building and the Enacting of the Ordinance involved the same parties; the same set of circumstances; the same witnesses; the same alleged wrongdoing; and the same voluminous record of evidence.

The continuation of representation ensured less cost, since the hourly rate was a negotiated lower rate than the standard rates ordinarily charged by the attorneys staffing the case and less time would be needed to be spent reviewing the record.

Certainly, given the findings of the tribunal, the remaining matters seemed to be limited to a straightforward request to the circuit court to apply the doctrine of collateral estoppel and allow the County to move forward to address the need for emergency ambulance service for the people of Hardy County.

The tribunal found that the County Commission's purchase of the Baker Building put it in the taxpayers' hands; that the building has rooms available for other community functions and is used as a polling station, it is centrally located, ideal for responding to emergencies throughout the county; and that pursuing other options would have nonetheless required the expenditure of money without guarantees of future use or availability of both a building and equipment. App. 451-462.

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 concluded the purchase of the building was in the County's best interest. App. 451-462.

Likewise, the tribunal found that the enactment of the Ordinance imposing the fee for emergency ambulance service was within the authority of the Commissioners pursuant to W. Va. Code § 7-15-17. App. 451-462.

On October 10, 2014, the Circuit Court essentially overruled the findings of fact and conclusion of law by the three-judge panel; refused to apply the doctrines of res judicata and collateral estoppel; and not only invalidated the legislative actions of the Commission, but held that the two Commissioners are personally liable to reimburse the County for the purchase price of the building, which was \$1,130,000, even though under the Circuit Court's order, the County will continue to own the building. App. 1078-1098.

The Circuit Court also awarded Respondents \$112,000 in attorney fees and litigation expenses, including those incurred in the unsuccessful effort to remove the two Commissioners from office. App. 1078-1098.

Following the Circuit Court's ruling, Respondents immediately commenced efforts to collect their judgment, even after a timely notice of appeal was filed, including the filing of motions for contempt, until this Court granted Petitioners' motion for stay.

Until the Circuit Court's order of October 10, 2014, no issue had ever been raised by anyone regarding any conflict of interest arising from joint representation of the Hardy County Commission and the two Commissioners.

The Circuit Court ruling denied the application of collateral estoppel and entered an Order on October 10, 2014, holding the two Commissioners personally liable for the purchase price of the building now owned by Hardy County. App. 1078-1098.

The Circuit Court included in the October 10, 2014 Order the following language: "In light of the conflict now existing between the Respondents and their Counsel, the Court directs the Hardy County Prosecuting Attorney, Lucas See, to perform his duty to protect the interest of the Hardy County Commission in this and any future proceedings regarding this matter." App. 1078-1098.

The Prosecuting Attorney initially agreed to be included as co-counsel on the Notice of Appeal of the August 8 and October 10, 2014, Orders, but subsequently determined he had a conflict given that the County Commission set his budget. He filed a motion requesting the appointment of a Special Prosecutor, which Petitioners joined.

Steptoe & Johnson then filed a timely notice of appeal on behalf of Petitioners, and proceeded to provide legal services to seek review of the orders of the Circuit Court as such orders were clearly erroneous and in conflict with the findings of the tribunal.

Respondents then alleged a conflict in the continued representation of the Petitioners by Steptoe & Johnson. The Circuit Court refused to rule on the alleged conflict given the stay of the circuit court action on appeal and this Court ultimately remanded to the Circuit Court solely for addressing the issue of disqualification.¹

Upon remand, however, the Circuit Court went beyond the issue of disqualification and ordered Steptoe & Johnson to return fees earned in representing the Petitioners. Importantly, the issue of disgorgement of fees was never raised by Petitioners; no evidence was presented regarding disgorgement; and the issue was not briefed or argued in the Circuit Court. Rather, the Circuit Court simply *sua sponte* ordered that Steptoe & Johnson refund fees.

III. SUMMARY OF ARGUMENT

In Syllabus Point 1 of *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991), this Court held:

A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.

¹ On February 3, 2015, at a meeting of the Hardy County Commission, Steptoe & Johnson offered to voluntarily withdraw from petitioners in order to eliminate further litigation regarding the alleged conflict of interest, a matter clearly outside of the merits of the case, which was an increasing distraction from the resolution of the need for ambulance service and the inequity of an order finding the two Commissioners personally liable for the cost of a building now owned by the County, but the Commission voted to continue to have Steptoe & Johnson represent Petitioners.

Thus, the February 10, 2015, hearing was solely to address the issue of whether there was a showing that necessitated the disqualification of Steptoe & Johnson. The issue before the Circuit Court at the hearing on February 10, 2015 was not the issue of whether Steptoe & Johnson had been properly retained to represent Petitioners nor was it whether there was a basis to Order fees earned in representing the Petitioners should be returned. Rather, the issue before the Circuit Court was whether disqualification of counsel was warranted given the August 8, 2014, and October 10, 2014, Orders which held Commissioners Teets and Keplinger personally liable for the purchase price of the building.

Accordingly, the Circuit Court erred by ordering Steptoe & Johnson to refund fees received in conjunction with its representation of Petitioners.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

With respect to its appeal, Steptoe & Johnson believes that only Rule 19 argument is warranted as it is clear that issue of Steptoe & Johnson's fees were not before the Circuit Court and that the Circuit Court exceeded the scope of this Court's remand order.

V. ARGUMENT

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ORDERING THAT STEPTOE & JOHNSON RETURN FEES EARNED REPRESENTING PETITIONERS PRIOR TO THE CIRCUIT COURT'S ORDER DISQUALIFYING STEPTOE & JOHNSON, WHICH WAS DONE WITHOUT NOTICE, WITHOUT HEARING, AND IN EXCESS OF THIS COURT'S REMAND ORDER.

The Rules of Professional Conduct require that a lawyer's fee shall be reasonable. R. Prof. Cond. 1.5. In this matter, the fees earned by Steptoe & Johnson were reasonable and, indeed, there was no finding by the Circuit Court that the fees were unreasonable.

The fees were based upon a negotiated rate set by an agreement between the Hardy

County Commission's insurer, West Virginia Counties Risk Pool, and Steptoe & Johnson. The hourly rate was far less than the standard hourly rate for the attorneys staffing the matter, and indeed less than the current Special Prosecutor's hourly rate. Thus, it cannot be argued that the fees were excessive.

There has been no request made by the Hardy County Commission for the return of the fees earned by Steptoe & Johnson in representing the two Commissioners in their official capacity. Rather, the Circuit Court acted *sua sponte* without any basis for the order to return fees earned.

There has been no showing, argument, or briefing that the fees earned do not accurately reflect the amount of time and labor required to perform the legal services properly. Likewise, it is apparent that the Hardy County Commission benefited from the diligent assistance of counsel, and the Hardy County Commission was charged the same hourly rate that had been charged during the initial representation of the two county commissioners in their official capacity under the insurance policy. The Hardy County Commission was provided itemized statements of services provided and paid the bills without dispute.

Where this Court has address attorney fee disputes, it has held that "[p]arties to a suit accepting the services of an attorney, with knowledge thereof, as the services are performed from time to time, and in the absence of any agreement for gratuitous service and circumstances from which gratuitous service would be implied in law, are liable therefor." Syl. pt. 1, *Cecil v. Clark*, 69 W. Va. 641, 72 S.E. 737 (1911); see also Syl. pt. 2, in part, *Security Nat'l Bank & Trust Co. v. Willim*, 155 W. Va. 1, 180 S.E.2d 46 (1971) ("The general rule is that the creation of a relationship of attorney and client by contract, expressed or implied, is essential to the right of an

attorney to recover compensation from one for whose benefit the attorney claims to have rendered legal services."), as cited in *Trickett v. Laurita*, 223 W. Va. 357, 674 S.E.2d at 220 (2009)). Here, there is no legitimate dispute in the record that that fees in question were earned, were reasonable, and Petitioners are not requesting Steptoe & Johnson's refund of the fees.

Obviously, Steptoe & Johnson had a property interest in its retention of fees received in conjunction with its representation of Petitioners. Consequently, Steptoe & Johnson was entitled to notice and a hearing on the issue.²

Finally, this Court's remand order stated as follows:

It is therefore ORDERED that this matter shall be, and it hereby is, remanded to the Circuit Court of Hardy County for the making of a record on the issue of any potential conflict of interest; for the entry of findings of fact and conclusions of law regarding the conflict issue; and for the entry of any order(s) necessary and appropriate to accommodate the foregoing. The respondents herein, petitioners below, Wendy J. Miller, et al., are directed to participate as the movant as appropriate regarding the motion to disqualify opposing counsel.

It is further ORDERED that the stay of lower court proceedings entered by this Court on October 30, 2014, shall be, and it hereby is, lifted for the limited purpose of allowing the circuit court to comply with the directives herein.

² See, e.g., *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 557 S.E.2d 277 (2001)(trial court violated due process by awarding attorney fees without a hearing), and not to be subjected to a *sua sponte* order without adequate notice or an opportunity to be heard, see, e.g., *Davis v. Rutherford*, 2015 WL 1740930 at *3 (W. Va. April 9, 2015)(memorandum decision)("The summary method of the circuit court's actions gave the petitioner no opportunity to be heard on his underlying failure to participate in discovery or to contest the reasonableness of the sanctions. This was an abuse of the court's discretion and the circuit court's order must therefore be reversed."); *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 778, 671 S.E.2d 776, 783 (2008)("By dismissing the complaint *sua sponte*, the circuit court denied both parties an opportunity to be heard in violation of their due process rights."); *Kanawha Valley*, supra at 229, 557 S.E.2d at 283 ("With respect to the circuit court's *sua sponte* award of attorney's fees without conducting a hearing to allow CNA to dispute the award, CNA contends that it was denied due process. We agree.").

Plainly, the sole scope of the remand was “any potential conflict of interest,” not whether fees received by Steptoe & Johnson should be refunded.

In Syllabus Points 3, 4, and 5 of *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003), this Court held:

3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.

4. A circuit court’s interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed de novo.

5. When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate.³

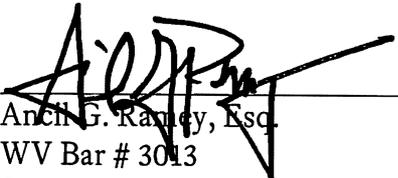
Likewise, in this case, the Circuit Court erred in exceeding the scope of this Court’s limited remand by ordering Steptoe & Johnson to refund fees to the Hardy County Commission.

³ See also *Quicken Loans, Inc. v. Brown*, 2014 WL 6734107 (W. Va.) (“‘Under a limited remand, the court on remand is precluded from considering other issues, or new matters, affecting the cause.’ *Id.* (internal quotation omitted); see also 5 Am. Jur.2d *Appellate Review* § 736 (2014) (‘Where a remand limits the issues for determination, the court on remand is precluded from considering other issues, or new matters, affecting the cause.’ (Footnote omitted.)). ‘[W]hen the further proceedings are specified in the mandate, the district court is limited to holding such as are directed.’ *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir. 1991) (quoting 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶ 0.404[10] (1998)); see also 5 Am. Jur. *Appellate Review* § 736 (2014) (‘When a case is remanded for a specific act, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court’s mandate, and the trial court may be powerless to undertake any proceedings beyond those specified.’ (Footnote omitted.))”); *In re Name Change of Jenna A.J.*, 234 W. Va. 271, 765 S.E.2d 160 (2014) (trial court erred in exceeding scope of remand); *State ex rel. Advance Stores Co., Inc. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59 (2013) (trial court erred in exceeding scope of remand).

VI. CONCLUSION

WHEREFORE, Petitioner, Steptoe & Johnson PLLC, respectfully requests that this Court set aside the Order of the Circuit Court of Hardy County directing it to refund fees earned and received in the representation of Petitioners.

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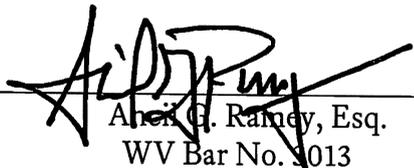
CERTIFICATE OF SERVICE

I do hereby certify that on June 22, 2015, I served the foregoing BRIEF OF PETITIONER on counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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