

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ERIC CARPER, Plaintiff Below,
Appellant,**

Vs.

Case No. 34750

COPY

**CHAD WATSON and BURKHARTS, INC., Defendants Below,
Appellees.**

APPELLANT'S REPLY BRIEF

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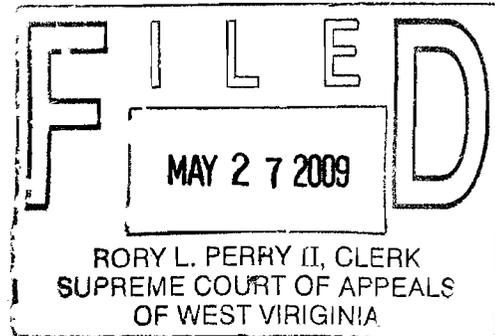


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APPELLANT ERIC CARPER'S REPLY TO BRIEF OF APPELLEES

As previously set forth in the parties' respective briefs, Appellant Eric Carper is seeking an appeal of certain costs awarded to Appellees after Appellant Eric Carper, at trial, obtained a judgment less favorable than a previously rejected Offer of Judgment made pursuant to Rule 68 of the West Virginia Rules of Civil Procedure; specifically, Appellees were awarded costs in the amount of \$7,012.07.¹

According to the transcript below, the Trial Court specifically awarded \$3,450.00 in expert witness fees for Appellees' privately retained expert witness, Dr. Cirincione; said expert was hired by Appellees and was not mandated to testify or give an opinion by any Court. Rule 68 Hrg. Tr., 60:19-21 (January 8, 2008).

The amount of \$326.60 was awarded to Appellees for costs incurred in obtaining a video deposition of Appellant Eric Carper's treating physician and subsequent written transcript of said video deposition *Id.* at 62:19-21.

By Statement of Costs submitted by the Circuit Clerk of Berkeley County, West Virginia, the Appellees were awarded the amount of \$3,236.10 (\$145.00 filing fee, \$20.00 civil witness fee, \$200.00 court reporter fee, and \$2871.10 jury fee). As noted in Appellant's Brief, these costs are general costs taxable by the Circuit Clerk of Berkeley County, West Virginia. Therefore, the trial court may exercise its wide discretion in determining the amount of said taxable court costs pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. *Id.* at 62:14.

¹ Said monetary award was comprised of the following alleged costs: \$3,450.00 for Appellees' expert witness fees incurred after the June 8, 2007 Offer of Judgment; \$326.60 for Appellees' video deposition of Appellant Eric Carper's treating physician and written transcript of said video deposition; and \$3,216.10 for general court costs taxed by the Circuit Clerk of Berkeley County, West Virginia.

I. STATE CASE LAW AND PRECEDENT CITED IN BRIEF OF APPELLEES LENDS SUPPORT TO APPELLANT ERIC CARPER'S ARGUMENT THAT, ABSENT A SPECIFIC STATUORY PROVISION DEFINING A PARTY'S EXPERT WITNESS FEES AS COSTS, A DEFENDING PARTY'S EXPERT WITNESS FEES CANNOT BE CONSIDERED COSTS THAT CAN BE ASSESSED AGAINST AN OFFEREE PARTY PURSUANT TO RULE 68 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

a. Appellees use of state law precedent

Appellant Eric Carper respectfully asserts that case law and authority cited in the Brief of Appellees supports Appellant Eric Carper's argument that a defending party's retained expert witness fees cannot be considered costs awardable pursuant to a Rule 68 Offer of Judgment absent a statutory provision that specifically defines expert witness fees as taxable costs.

The Appellees primarily rely on a singular Opinion from an outside jurisdiction, cited by this Honorable Court, to argue that a defending party's privately incurred expert witness fees can be assessed as Rule 68 costs in the absence of a statutory provision defining said expert witness fees as costs; specifically, Appellees improperly contend that support for their theory can be found in the Opinion of *Weber v. v. Kessler*, 126 Cal.App.3d 1033, 1036, 179 Cal.Rptr. 299, 301, (1981), as cited by this Honorable Court in *State v. Myers*, 216 W.Va. 120, 602 S.E.2d 796 (2004).

Appellant Eric Carper respectfully contends that a simple reading of *Weber v. Kessler* makes it impossible to determine that said decision lends any support to Appellees' theory. In fact, the *Weber* decision lends unequivocal support for Appellant's argument regarding expert witness fees.

As previously noted, in *Shafer v. Kings Tire Service, Inc.*, this Honorable Court found that costs pursuant to Rule 68 would not include attorney's fees if the statute

creating the right to attorney's fees did not specifically define said attorney's fees as costs. See Syl. Pt. 4, *Shafer v. Kings Tire Service, Inc.* 215 W. Va. 169, 597 S.E.2d 302 (W. Va. 2004).

In *Shafer*, because the statutory provision set forth in W. Va. Code § 5-11-13(c) defined attorneys fees as costs awardable to a prevailing respondent said costs could be awarded pursuant to Rule 68 of the West Virginia Rules of Civil Procedure.² The facts underlying *Shafer* dealt with an action for discrimination brought pursuant to the West Virginia Human Rights Act, West Virginia Code § 51-11-1 *et. seq.*

On appeal, the Court in *Weber v. Kessler* was left to interpret statutory authority regarding California's laws governing mandatory judicial arbitration as set forth in California's Code of Civil Procedure.³ 126 Cal.App.3d 1033, 1034, 179 Cal.Rptr. 299, 300 (1981). In *Weber*, the applicable statutory law allowed parties engaging in judicial arbitration to participate in a trial *de novo* if either party was dissatisfied with the findings of the judicial arbitrator. *Id.* at 126 Cal.App.3d at 1035-36, 179 Cal.Rptr. at 300- 301. Pursuant to California Code of Civil Procedure § 1141.21, if a party elects to have a trial *de novo* after arbitration is completed and said party does not obtain a judgment at trial more favorable than the damages awarded through the previous arbitration, the party failing to obtain a judgment more favorable may be required to pay certain specifically defined costs. *Id.* at 126 Cal.App.3d at 1036, 179 Cal.Rptr. at 300-301.

² West Virginia Code §5-11-13(c) states as follows: (c) In any action filed under this section, if the court finds that the respondent has engaged in or is engaging in an unlawful discriminatory practice charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

³ For the convenience of the Court, the Appellant has attached a copy of the California Opinion and relevant statute to the instant reply brief.

In *Weber*, the relevant statute *specifically defined the “services of expert witnesses”* as a costs that may be payable to a party electing to have a trial *de novo* after arbitration but failing to obtain a judgment more favorable than the amount of damages awarded through arbitration. Again, a simple reading of *Weber* shows that expert witness fees should only be awardable costs when specifically defined as such by statute. This is the same theory correctly followed in *Shafer* and the same theory that should be applied to the facts of this Case.

Appellant respectfully asserts that this Honorable Court correctly cites *Weber v. Kessler* in the opinion of *State v. Myers* for the purpose of determining whether “jury costs” fall within the general meaning of “costs” in other contexts. However, Appellant is incorrect in asserting that *Weber* lends support to the argument that a party’s expert witness fees can be awarded pursuant to Rule 68 in the absence of a specific statute defining expert witness fees as costs.

In *State v. Myers*, the Appellant argued that the Trial Court’s award of jury costs was void because its written Order did not meet the “specific provision” requirement of West Virginia Code § 52-1-17(c). *State v. Myers*, 216 W.Va. 120, 127-128, 602 S.E.2d 796, 803-804. Specifically, the Appellant argued that “jury costs” should not be awarded against him because the Order at issue simply states that the “State shall recover of the Defendant its costs in this behalf expended,” whereas the relevant statute requires jury costs be set forth by “by specific provision in a court order.” *Id.*, 216 W.Va. at 127-128, 602 S.E.2d 803-804.

The singular relevant issue in *Myers* dealt with whether the general reference to “costs” in the Trial Court’s Order met the “specific provision” requirement of West

Virginia Code § 52-1-17(c). *State v. Myers*, 216 W.Va. 120, 127-128, 602 S.E.2d 796, 803-804. In *State v. Myers*, this Honorable Court properly quoted a string of cases that discussed general costs taxable by courts. *Id.*, 216 W.Va. at 127-128, 602 S.E.2d at 803-804. When citing said string of cases, the *Myers* opinion exclusively places emphasis on the phrase “*jury fees*” and specifically refrains from placing emphasis on the phrase “*expert fees*.” *Id.*, 216 W.Va. 120, 128, 602 S.E.2d 796, 804. (quoting *Weber v. Kessler*, “[C]osts include, but are not limited to, expert witness and *jury fees*, depositions, and expenses incurred in executing the judgment.” *Emphasis added by this Honorable Court*).⁴

As such, it becomes clear that Appellees’ reliance on the *Weber* citation is incorrect as said case law specifically lends support to Appellant’s argument that a

⁴ For reference, said string cite is set forth in full: While we have never before addressed the specific question of whether an order imposing “costs” was precise enough to fulfill the “specific provision” requirement of W. Va. Code § 52-1-17(c) we have previously included “jury costs” within the general meaning of “costs” in other contexts. For example, in *King v. Ferguson*, 198 W. Va. 307, 315, 480 S.E.2d 516, 524 (1996) (per curiam), this Court, concluded that a trial court had properly assessed jury costs against a plaintiff under the authority of Rule 68(c) of the West Virginia Rules of Civil Procedure which refers merely to “costs” in providing that “[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the *costs* incurred after the making of the offer.” The same view of the term “costs” had been adopted by numerous courts. See *General Refractories, Co. v. Federal Ins. Co., No. CIV. A. 00-5508, 2001 WL 1580173 (E.D.Pa. Dec. 6, 2001)* (unpublished opinion) (“Generally, the term ‘court costs’ encompasses those expenses incurred by a party which have been taxed as costs by the court. Items that courts have held may be awarded as *costs include*: docket fees, *jury fees*, photocopy costs, deposition costs, and the like.” (emphasis added) (citations omitted)); *Weber v. Kessler, 179 Cal.Rptr. 299, 301, 126 Cal.App.3d 1033, 1036 (1981)* (“[C] *osts include*, but are not limited to, expert witness and *jury fees*, depositions, and expenses incurred in executing the judgment.” (emphasis added)); *Roget v. Grand Pontiac, Inc., 5 P.3d 341, 348 (Colo.Ct.App.1999)* (“Items that courts have held may be awarded as costs include: docket fees, *jury fees*, photocopy costs, deposition costs, mileage, parking, delivery, and long distance telephone charges.” (emphasis added) (citations omitted)); *People v. White, 333 Ill.App.3d 777, 267 Ill.Dec. 464, 776 N.E.2d 836, 839 (2002)* (“ A ‘*cost*’ is a charge or fee taxed by a court such as a filing fee, *jury fee*, courthouse fee, or reporter fee.” (emphasis added) (citation omitted)); *State v. Powers, 117 Ohio App.3d 124, 690 N.E.2d 32, 34 (1996)* (“Although there appears to be a dearth of case law interpreting these statutes, we find that the legislature intended that *costs of prosecution, including jury fees*, can be assessed against a defendant only if the state is successful.” (emphasis added)). See *Generally Black’s Law Dictionary* 349-50 (7th ed. 1999) (defining costs in sense 2 as “[t]he charges or fees taxed by the court, such as filing fees, *jury fees*, courthouse fees, and reporter fees.-Also termed *court costs*.” (first emphasis added)). *But see Gantt v. State, 109 Md.App. 590, 597-98, 675 A.2d 581, 585 (1996)* (“The ordinary import of the term ‘court costs’ supports the conclusion that jury costs are not ‘court costs’ under Rule 4-353. Jury costs are generally not understood to be ‘court costs,’ and are usually not included within the costs imposed by courts in civil and criminal cases.”).

defending party's expert witness fees cannot be considered costs awardable pursuant to a Rule 68 Offer of Judgment absent a statutory provision that specifically defines expert witness fees as taxable costs.

Appellees refrain from addressing Appellant's argument that *Geary Land Co. v. Adam M. Conley* lends great support for finding that expert witness fees cannot be awarded pursuant to Rule 68 without a specific statute defining expert witness fees as taxable costs. 175 W. Va. 809, 338 S.E.2d 410 (W. Va. 1985). In *Geary Land Co.*, the Court declined to award costs for the fees expended for Appellant's surveyor "in the absence of a provision for their allowance in a statute or court rule." 175 W. Va. at 813, 338 S.E.2d at 414. The strictures propounded in *Geary Land Co.* are the same strictures generally adhered to in *Shafer v. Kings Tire Service, Inc.* 215 W. Va. 169, 597 S.E.2d 302 and *Weber v. Kessler*, 126 Cal.App.3d 1033, 1034, 179 Cal.Rptr. 299, 300 (1981).

As such, the State Case Law and precedent argued by Appellees lends great support to Appellant's theory that expert witness fees cannot be awarded pursuant to a Rule 68 Offer of Judgment unless a statutory provision explicitly defines expert witness fees as costs.

Lastly, Appellant Eric Carper respectfully contends that Appellees' reference to an Order entered by the Circuit Court of Kanawha County, West Virginia should not be considered as precedent to argue Appellees' position as it is well established that unpublished Circuit Court Orders cannot be considered to have precedential or persuasive effect. Further, there is absolutely no record established at the instant Trial Court level to interpret the facts and applicable statutory law which led the entry of this rogue order.

a. Appellees use of federal law precedent

Appellees cite no federal authority which lends support to their theory that expert witness fees can be awarded pursuant to Rule 68 without a statutory provision defining expert fees as costs.

In support of his argument, Appellant Eric Carper cited a federal case directly on point which discussed the type of costs awardable in a common law negligence action pursuant to Rule 68 of the Federal Rules of Civil Procedure. *See Phillips v. Bartoo*, 161 F.R.D. 352 (1995).⁵ In *Bartoo*, Defendant Bartoo's request for an award of expert witness fees pursuant to Fed. R. Civ. P. 68 was specifically denied as no statute existed to allow recovery for expert witness fees as costs, as such, Defendant Bartoo was limited to recover the standard \$40.00 per day attendance fee allowed by 28 U.S.C.A. § 1821. *Id.* at 354-355.

Appellees improperly imply that any reference to the limitation of the award in *Bartoo* should be disregarded because “[in] that case, a federal statute limited the amount of expert witness fees to \$40.00.” (Brief of Appellees, pg. 9). The decision in *Bartoo* did not involve a federal statute that specifically limited expert witness fees to \$40.00; *Bartoo* simply applied the requirements of 28 U.S.C.A. § 1821 which statutorily controls the general per diem and mileage expenses for every witness. *Id.* The Court in *Bartoo* correctly found that increased expert witness fees could not be awarded pursuant to Rule 68 because no applicable statute defined them as costs; as such, the most the Defendant in said case could recover was the standard witness fee allotted to every witness and taxed by the Court. *Id.* West Virginia has its own statute allowing for general witness

⁵ For the convenience of the Court, the Appellant has attached a copy of the Illinois Opinion and to the instant reply brief.

compensation which statutorily allows witnesses to receive compensation in the amount of ten to twenty dollars for each day's attendance at Court. *See West Virginia Code* § 59-1-16. Therefore, at the most, Appellees' expert witness should be limited to recovering the amount of ten to twenty dollars per day for said witnesses' testimony at trial.

The remaining federal case cited by Appellees in support of their argument is *Sack v. Carnegie Mellon University*, 106 F.R.D. 561 (United States District Court W.D. Pennsylvania 1985).⁶ Appellees cite *Sack* in support of their argument that Appellees' expert witness fees should be awarded. However, the theories propounded in said case are completely inapplicable to the instant proceeding.

In *Sack*, the Plaintiff proceeded under a theory of negligence to attempt to recover damages for a slip and fall that occurred at Carnegie Mellon University. 106 F.R.D. at 562. Pursuant to Fed. R. Civ. P. 68, the Defendant in said case did make an offer of judgment in the amount of \$15,000.00 together with costs then accrued. *Id.* at 562. At trial, the Plaintiff failed to recovery any monetary award and did not obtain judgment in her favor. *Id.* at 563. Defendant then filed a Motion for Costs pursuant to said Fed. R. Civ. P. 68. *Id.* at 563. The Court in *Sack* noted that “**Rule 68 is inapplicable to the situation presented by our case since the judgment entered here was “for defendant” and plaintiff received no monetary award.**” *Id.* at 563 (emphasis added). The Court went on to discuss what costs could be awarded pursuant to Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920. *Id.*

Appellees wrongfully contend that the Court in *Sack* found that a defending party's expert witness fees could be considered costs when it ruled on whether the costs

⁶ For the convenience of the Court, the Appellant has attached a copy of the Pennsylvania Opinion and to the instant reply brief.

associated with a deposition of the *Plaintiff's* treating physician were costs to be awarded to a prevailing party. *Id.* at 563. The deposition at issue in *Sack* was a deposition of *Plaintiff's* expert witness which occurred in New York and was taken by Defendant. *Id.* at 563. At trial, *Plaintiff* sought to introduce the video deposition during *her* case in chief. *Id.* at 563. The Court ruled that Plaintiff could utilize the videotape deposition during her case in chief if Plaintiff paid to Defendant the costs of the taking said deposition. *Id.* at 563. Plaintiff then played the deposition to the jury. *Id.* at 563. It was because Plaintiff used said deposition, paid for by Defendant, in her case in chief that the Court in *Sack* awarded Defendant the physician's fees previously paid. *Id.* at 563. The Court in *Sack* never awarded any money to the experts hired by Defendant but merely found that Plaintiff would have to pay for the deposition costs of Plaintiff's treating physician when Plaintiff failed to obtain any judgment. *Id.* at 564. The Court's decision in *Sack* lends further support to Appellant's argument that a party's own expert witness fees cannot be considered as costs as the Court in *Sack* only required Plaintiff to pay for the fees of a video deposition of Plaintiff's treating physician when she used said video deposition in her case in chief.

In summation, Appellant respectfully asserts that Appellees have failed to cite any case law, whether State or Federal, that supports their position. Instead, the case law and precedent set forth in the Brief of Appellees actually lends great support to Appellant's position that, absent a statutory provision specifically defining expert witness fees as costs, a defending party's expert witness fees cannot be considered awardable costs after an offeree party fails to obtain a judgment more favorable than a previously rejected offer of judgment made pursuant to Rule 68 of the West Virginia Rules of Civil Procedure.

II. CASE LAW CITED BY APPELLEES LENDS SUPPORT TO APPELLANT'S ARGUMENT THAT APPELLEES' FEES FOR OBTAINING THE TRANSCRIPT OF THE VIDEO DEPOSITION OF APPELLANT'S TREATING PHYSICIAN ARE NOT COSTS THAT CAN BE AWARDED PURSUANT TO AN OFFER OF JUDGMENT MADE IN ACCORDANCE WITH RULE 68 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

Appellant Eric Carper maintains that this Honorable Court should differentiate between costs awarded for Appellees' expert witness fees and the costs awarded to Appellees' for obtaining a video deposition of *Appellant's* treating physician and a subsequent transcript of said video deposition.

The costs awarded for Appellees' privately retained expert witness, Dr. Cirincione, should be analyzed separately from the amount awarded to Appellees for the costs for recording a video deposition of Appellant's treating physician, Dr. John Phillips, and obtaining a subsequent written transcript of said video deposition

Appellant concedes that the costs associated with certain depositions, in limited circumstances, can be considered costs awardable pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. Further, Appellant Eric Carper concedes that the argument asserted in his brief regarding the awarding of costs for the video deposition of Appellant's treating physician and subsequent transcript is a weaker argument than Appellant's argument for precluding an award of a defending party's expert witness fees.

However, Appellant would be remiss to fail to point out that the case Appellees incorrectly cited for the proposition that Appellees' expert witness fees could be awarded as costs pursuant to Rule 68 actually contains dicta that supports the argument for precluding recovery for certain costs expended for the video deposition of Appellant Eric Carper's treating physician. *See Sack v. Carnegie Mellon University*, 106 F.R.D. 561.

In *Sack*, the Court specifically noted that Defendant could not be compensated for fees expended in obtaining the written transcript of a video deposition of Plaintiff's treating physician as the video deposition was the "original transcript" used as an exhibit and held in the Office of the Clerk of the Court while the written copy of said video deposition was "made for the convenience of counsel." *See Sack v. Carnegie Mellon University*, 106 F.R.D. at 565. In the instant case, Appellees were awarded the amount of \$326.60 which totals the costs of preparing the actual video played at trial and transcript for Defendant. Appellant maintains that the Trial Court, in exercising its wide discretion to determine the amount of costs, should have determined that no costs be assessed against Appellant, however, Appellant further argues that the sum awarded for the preparation of the video should have been separately considered from the cost of the preparation of the transcript of said video deposition.

Appellant Eric Carper again notes that this is a much weaker argument for Appellant to assert and does not wish to confuse the issue of costs awarded for the video deposition of Appellant's treating physician with the issue of the award of costs for Appellees' expert witness fees.

CONCLUDING REPLY

In reply, Appellant Eric Carper respectfully asserts that Appellees failed to cite any relevant case law or precedent to support their argument regarding an award of costs for Appellees' expert witness fees. In actuality, the Brief of Appellees cites case law and precedent which unequivocally supports Appellant's argument that, in the absence of a specific statutory provision defining expert witness fees as costs, a defending party's expert witness fees cannot be awarded after an offeree party fails to obtain a judgment

more favorable than a previously rejected offer of judgment made pursuant to W. Va. R. Civ. P. 68. Clearly, the applicable West Virginia precedent and Federal precedent support Appellant's theory.

Appellant concedes that certain deposition costs used for trial and the taxable costs assessed by the Circuit Clerk of Berkeley County, West Virginia are costs that can be awarded to a defending party pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. Appellant further concedes that trial court judges have wide discretion in assessing the amount of said costs against an offeree party. However, Appellant staunchly maintains that a defending party's expert witness fees cannot be assessed pursuant to Rule 68 unless there is a specific statutory provision which defines said expert fees as costs. This is the rule followed by Federal Courts and it is a rule that should be followed in West Virginia.

The Brief of Appellees simply fails to address the issues raised by Appellant and improperly generalizes each argument by claiming that the Trial Court's wide discretion to determine the amount of costs awarded pursuant to Rule 68 mandates that trial courts be given unrestrained power to assess anything as costs. This is both untenable and incorrect. Expert witness fees should be the exclusive costs of defending parties when assessing costs pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. In West Virginia, there are several statutory provisions which specifically define expert witness fees as costs.⁷ If offers of judgment are made pursuant to said statutes which define expert witness fees as costs then said expert witness fees can be awarded pursuant to Rule 68. As in *Weber v. Kessler*, Appellant notes that most statutes that define expert

⁷ See, but not limited to, West Virginia Code § 22-3-5(e); West Virginia Code § 22-3-5(d); West Virginia Code § 22C-5-8(d); West Virginia Code § 16-9D-9(d).

witness fees as costs usually address heightened or regulatory legal procedure and an award of expert witness fees is commonly reserved for specifically delineated sets of facts. In the instant case, no applicable statute defined expert witness fees as costs as Appellant proceeded to trial on a standard common law negligence claim.

Appellant Eric Carper respectfully replies by asserting that if defending parties are allowed to be awarded expert witness fees pursuant to W. Va. R. Civ. P. 68 defending parties will be given an unfair advantage in litigation as there is no comparable rule allowing plaintiffs to recover expert witness fees in common law claims. The fear of being charged with a defending parties' expert witness fees, with no chance of recovery of said fees for plaintiffs, would cause an unfair advantage that would unduly plague the judicial system. In summation, West Virginia precedent, persuasive federal case law, and justice requires that defending parties not be awarded expert witness fees pursuant to Rule 68 in the absence of a statute defining expert witness fees as costs.

For the reasons set forth above and in Appellant Eric Carper's Brief, Appellant respectfully requests the judgment of the Circuit Court of Berkeley County be reversed.

Respectfully submitted,
Eric Carper
Appellant



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ERIC CARPER, Plaintiff Below,
Appellant,**

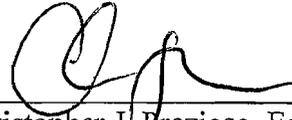
Vs.

Case No. 34750

**CHAD WATSON and BURKHARTS, INC., Defendants Below,
Appellees.**

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Appellant, do hereby certify that I have served a true and accurate copy of the foregoing REPLY BRIEF OF APPELLANT, upon Macel E. Rhodes, Esq. by First class mail, postage prepaid, at her address of Zimmer Kunz, PLLC, 206 Spruce Street, Morgantown, West Virginia 25606, on this 26th day of May, 2009.



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EXHIBITS

ON

FILE IN THE

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