

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 35721

MULTIPLEX, INC.

Appellant,

v.

Civil Action No. 09-C-2075

RALEIGH COUNTY BOARD OF
EDUCATION, et al.,

Appellees.

RESPONSE TO APPELLANT'S BRIEF ON BEHALF OF
APPELLEE RALEIGH COUNTY BOARD OF EDUCATION

RALEIGH COUNTY BOARD
OF EDUCATION

BY COUNSEL

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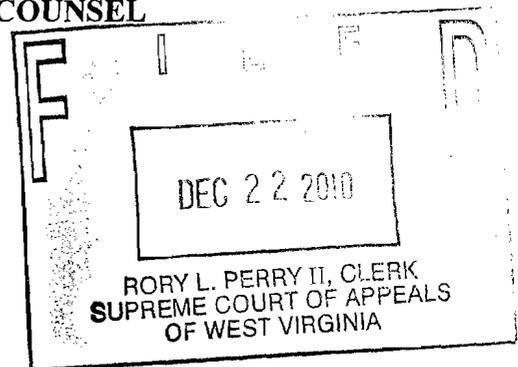


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**RESPONSE TO APPELLANT'S BRIEF ON BEHALF OF
APPELLEE RALEIGH COUNTY BOARD OF EDUCATION**

Appellee, Raleigh County Board of Education ("Raleigh County BOE"), by counsel, respectfully submits this Response in opposition to Appellant's Brief in Support of Appeal filed by Multiplex, Inc. ("Multiplex") in the instant matter.

I. THE KIND OF PROCEEDING BELOW

The Order of the Circuit Court of Kanawha County, entered by the Honorable Paul Zakaib, Jr. properly dismissed Multiplex's Complaint enforcing the Release in Full of All Claims related to the Independence High School Project, ("the Project") executed by Multiplex on April 25, 2007. The Circuit Court properly held that Multiplex's Complaint, in Civil Action 09-C-2075, also seeking damages for delay, was barred by the terms of the Release in Full of All Claims, which expressly released the Raleigh County BOE from future claims of delay, known or unknown, arising out of the Project. This decision must be affirmed. [See Order with Exhibits Entered March 24, 2010, in the Circuit Court of Kanawha County, attached as Exhibit 1].

II. STATEMENT OF FACTS

Appellee, Raleigh County BOE was and is the owner of the improvements made at the Independence High School Project. Appellant, Multiplex contracted with the Raleigh County BOE to provide construction services on the Project. The School Building Authority of West Virginia ("SBA") provided some funding for the school improvement project. SBA was not a party to the contract between Multiplex and the Raleigh County BOE. During Multiplex's work on the Project, a dispute arose between Multiplex and the Raleigh County BOE. Multiplex demanded compensation contending that its work on the Project was delayed, allegedly by the acts or omissions of the Raleigh County BOE. On August 28, 2006, Multiplex, by counsel, instituted Civil Action No. 06-C-1747 in the Circuit Court of Kanawha County against the Raleigh County BOE and SBA and alleged, amongst other allegations, that Multiplex's work on the Project had been improperly delayed by the conduct of the Raleigh County BOE and others. [A copy of the August 28, 2006 Complaint in Civil Action No. 06-C-1747 is designated as part of the record by Appellant and is attached hereto as Exhibit A to the March 24, 2010 Order].

Ultimately, Multiplex's Civil Action No. 06-C-1747, against the Raleigh County BOE and the SBA¹ was settled through a bargained for exchange, by and between the contracting parties, Multiplex and the Raleigh County BOE. The settlement is memorialized in the written "Release in Full of All Claims," executed by the President of Multiplex, Mr. Art Poff, on April 25, 2007. [A copy of the April 25, 2007 Release in Full of All Claims is attached hereto as Exhibit 2]. In consideration and exchange for Raleigh County BOE's payment of One

¹ The SBA, which was not a party to any of the contact between Raleigh County BOE and Multiplex was dismissed with prejudice from Civil Action No. 09-C-2075 by Order entered May 24, 2010.

Hundred Eighty-Three Thousand Dollars and no cents (\$183,000.00), Multiplex expressly agreed to “. . . release and forever discharge the Board of Education of the County of Raleigh. . . from all claims . . . Plaintiff [Multiplex] may have, including past, present and future, both known and unknown, of whatever kind or nature, . . .” related to the conduct complained of in the Complaint. Additionally, the Release in Full of All Claims provides that:

It is expressly understood and agreed that **this Release is intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception** arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.

[See Release in Full of All Claims, Exhibit 2 at pg. 2]. The Release in Full of All Claims further covenants that “. . . as this a resolution of a disputed claim, all allegations of misconduct that have been asserted, or that could have been asserted by Multiplex against the Raleigh County BOE are forever withdrawn.” [See Release in Full of All Claims, p. 2]. The settlement draft dated May 10, 2007, was tendered to and accepted by Multiplex. [A copy of the May 10, 2007 check is attached hereto as Exhibit 3]. The Release In Full of All Claims was filed with the Circuit Court of Kanawha County, West Virginia in Civil Action No. 06-C-1747, after it was executed by Multiplex’s President, Mr. Art Poff, and the case was subsequently dismissed with prejudice.

After accepting payment in full from the Raleigh County BOE, as agreed, and after signing and having the Release in Full of All Claims with the Raleigh County BOE, entered by the Kanawha County Circuit Court, Multiplex filed a second lawsuit, Civil Action No. 09-C-2075 on November 4, 2009. This Complaint also alleges improper Project delay claims against

the Raleigh County BOE and SBA and seeks additional compensation. [A copy of the November 4, 2009 Complaint is attached hereto as Exhibit 4].

The April 25, 2007 Release in Full of All Claims expressly provides the Raleigh County BOE a release of, and from all claims, demands, damages, actions, causes of action and suits of law or equity that Plaintiff [Multiplex] may have, including, past, present and future, both known and unknown. The Release In Full of All Claim released the Raleigh County BOE from any delay claims raised by Multiplex, past present or future, known or unknown, arising out of the Project. The Circuit Court below properly applied and enforced the terms and conditions of the contractual Release in Full of All Claims when it dismissed Multiplex's November 4, 2009 second claim for delay damages arising out of the same Project as alleged in Multiplex's Complaint in Civil Action No. 09-C-2075, holding that Multiplex's delay claims were expressly barred by the Release in Full of All Claims.

III. ASSIGNMENT IN ERROR

The Circuit Court's dismissal of Multiplex's second claim for delay damages against the Raleigh County BOE arising out of the same Project must be affirmed because the Circuit Court properly applied and enforced the Release in Full of All Claims as a bar to Multiplex's alleged additional claims of delay in the same Project.

IV. POINTS OF AUTHORITIES RELIED UPON

Roth v. Defelicecare, Inc., --- S.E.2d ---, 2010 WL 2346248 (June 8, 2010); Syl. Pt. 2,

State ex rel. McGraw v. Scott Runyab Pontiac-Buick, Inc., 461 S.E.2d 516 (W.Va. 1995).

Hildick v. Hildick, 1990 WL 1657 (Del.Fam.Ct. 1990).

Fortuna v. Queen, 363 S.E.2d 472 (W.Va. 1987).

Floyd v. Watson, 254 S.E.2d 687 (W.Va. 1979).

Accord v. Chrysler Corp., 399 S.E.2d 860 (W.Va. 1990).

State ex rel Vapor Corp. v. Narik, 320 S.E.2d 345 (W.Va. 1984).

15A Am Jur 2d, Compromise and Settlement, § 9.

Millner v. Norfolk & W. R.R. Co., 643 F.2d 1005 (4th Cir. 1981).

Woodrum v. Johnson, 210 W.Va. 762, 771, 559 S.E.2d 908, 917 (2001); Syl. pt. 1.

Sanders v. Roselawn Memorial Gardens, 152 W.Va. 91, 159 S.E.2d 784 (1968).

Wright v. Davis, 132 W.Va. 722, 727, 53 S.E.2d 335, 337 (1949).

Janney v. Virginian Railway Company, 119 W.Va. 249, 252, 193 S.E. 187, 188 (1937).

State ex rel. Showen v. O'Brien, 89 W.Va. 634, 109 S.E. 830 (1921).

Sanson v. Brandywine Homes, 215 W.Va. 307, 599 S.E.2d 730 (W.Va. 2004);

Triad Energy Corp. of West Virginia, Inc. v. Renner, 215 W.Va. 573, 600 S.E.2d 285 (W.Va. 2004).

Berkeley County Public Service District v. Vitro Corporation of America, 152 W.Va. 252, 267, 162 S.E.2d 189, 200 (1968).

Wood v. Acordia, 217 W.Va. 406, 411, 618 S.E.2d 415, 420 (2005).

Cotiga Development Company v. United Fuel Gas Company, 147 W.Va. 484, 128 S.E.2d 626 (1962).

Isaacs v. Bonner, 225 W.Va. 460, 694 S.E.2d 302 (W.Va. 2010).

W.Va.R.Civ.P. 18(a).

V. DISCUSSION OF LAW/DENIAL OF RELIEF

A. Standard of Review

Appellate review of a lower court's order granting a motion to dismiss a Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is *de novo*. Syl. Pt. 1, *Roth v. Defelicecare, Inc.*, --- S.E.2d ---, 2010 WL 2346248 (June 8, 2010); Syl. Pt. 2,

State ex rel. McGraw v. Scott Runyab Pontiac-Buick, Inc., 461 S.E.2d 516 (W.Va. 1995). The Circuit Court below correctly applied the contractual provisions of the Release in Full of All Claims executed by Multiplex, enforcing the settlement reached by the parties to dismiss the Complaint in Civil Action No. 09-C-2075 because was barred by prior settlement. The issue is not whether Multiplex can prove a set of facts which would entitle it to relief by alleging a second or subsequent delay, but rather whether Multiplex agreed to release any such future claims by accepting the settlement payment, and executing the Release in Full of All Claims in which Multiplex expressly agreed to “. . . release and forever discharge the Board of Education of the County of Raleigh. . . from all claims . . . Plaintiff [Multiplex] may have, including past, present and future, both known and unknown, of whatever kind or nature, . . .” arising out of the Project. The Circuit Court correctly held that Multiplex’s Complaint in Civil Action No. 09-C-2075 was barred by the Release in Full of All Claims, and should be affirmed.

B. A Valid Settlement and Release Agreement Existed Which The Lower Court Properly Enforced.

As one Court has stated, “[t]he entire fabric of civil litigation is dependent upon the willingness of parties to settle cases. . . [and] parties and their attorneys must act in good faith in this respect . . .” *Hildick v. Hildick*, 1990 WL 1657 (Del.Fam.Ct. 1990). To be sure, contracts of compromise and settlement of lawsuits are to be construed and enforced like any other contract. *Fortuna v. Queen*, 363 S.E.2d 472 (W.Va. 1987); *Floyd v. Watson*, 254 S.E.2d 687 (W.Va. 1979). The law favors settlement contracts and has a policy upholding them if they are fairly entered into and not in conflict with any public policy. *Accord v. Chrysler Corp.*, 399 S.E.2d 860 (W.Va. 1990); *State ex rel Vapor Corp. v. Narik*, 320 S.E.2d 345 (W.Va. 1984).

In keeping with this general policy, the Circuit Court below has, and had, the authority to apply and enforce the previous settlement agreement, the Release in Full of All Claims, entered into by the parties in the instant case, to settle Multiplex's prior suit alleging that the Raleigh County BOE improperly delayed the Project to Multiplex's detriment. The Circuit Court properly dismissed the Complaint in Civil Action No. 09-C-2075, because the Release in Full of All Claims signed by Multiplex expressly released all claims for delay damages, past, present and future, whether known or unknown, arising out of the Project. [See Release in Full of All Claims, pp. 1-2, Exhibit 2].

As the undisputed facts material to resolution of the earlier civil action indicate, Multiplex, agreed to settle delay claims and entered into a written "Release in Full of All Claims" with the Raleigh County BOE on April 25, 2007 that broadly released all claims, known and unknown, past, present and future related to Multiplex's work on the Project and claims of delay. Accordingly, a settlement between Multiplex and the Raleigh County BOE was struck as to all claims of delay -- then known and unknown -- related to the Independence High School Project that is binding and enforceable against Multiplex. Multiplex cannot repudiate a settlement after it is made. Long held and universally recognized principals of contract law provide that: "[o]nce an offer of compromise is accepted, . . . the offeror is bound by the terms of the compromise and is powerless to withdraw his offer, and if he refuses to perform such formalities, such a refusal is ineffective as a withdrawal of his offer." 15A Am Jur 2d, *Compromise and Settlement*, § 9.

Under the law, the Circuit Court's authority to enforce settlements arises from a trial court's inherent equity power to summarily enforce a settlement agreement when the practical effect is to enter a judgment by consent. *Millner v. Norfolk & W. R.R. Co.*, 643 F.2d

1005 (4th Cir. 1981). Accordingly, the Circuit Court's dismissal of Multiplex's second delay damages Complaint arising out of the same Project, based on the application of the Release in Full Of All Claims, must be affirmed.

C. Releases Are Contracts Based Upon Offer and Acceptance And Payment Of Valuable Consideration To Compromise And Settle Claims Which Are Binding On the Parties.

The Release in Full of All Claims is a written contract of compromise between Multiplex and the Raleigh County BOE. As long recognized by this Court, the law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation. *Woodrum v. Johnson*, 210 W.Va. 762, 771, 559 S.E.2d 908, 917 (2001); syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968); 288, 576; *Wright v. Davis*, 132 W.Va. 722, 727, 53 S.E.2d 335, 337 (1949); *Janney v. Virginian Railway Company*, 119 W.Va. 249, 252, 193 S.E. 187, 188 (1937). As syllabus point 5 of *State ex rel. Showen v. O'Brien*, 89 W.Va. 634, 109 S.E. 830 (1921), holds: "[T]he rule that the courts favor compromise settlements by parties to prevent vexatious and expensive litigation only applies where the legal and equitable rights and interests of all parties concerned in a judgment are regarded and respected in good faith." *Id.*

In this case, the parties, Multiplex and Raleigh County BOE, agreed to compromise Civil Action No. 06-C-1747 by settlement in a mutually bargained for exchange. Multiplex accepted the payment offered by Raleigh County BOE, and executed the Release in Full of All Claims which expressly provided a release of claims of delay, past present or future, whether known or unknown. [See Release in Full of All Claims, Exhibit 2, pp 1-2].

Settlement agreements, like the Release in Full of All Claims executed by Mr. Poff, are to be applied and construed "as any other contract," *Floyd v. Watson*, 163 W.Va. 65,

68, 254 S.E.2d 687, 690 (1979). Contracts are to be enforced by the Courts and given their due effect, even contracts which are entered to settle and compromise disputed claims. *Id.*, *See also*, *Sanson v. Brandywine Homes*, 215 W.Va. 307, 599 S.E.2d 730 (W.Va. 2004); *Triad Energy Corp. of West Virginia, Inc. v. Renner*, 215 W.Va. 573, 600 S.E.2d 285 (W.Va. 2004).

In all cases, whether a contract is ambiguous, or how a contract should be interpreted, are questions of law to be determined by the court. *Berkeley County Public Service District v. Vitro Corporation of America*, 152 W.Va. 252, 267, 162 S.E.2d 189, 200 (1968) (The question as to whether a contract is ambiguous is a question of law to be determined by the court.); *Wood v. Acordia*, 217 W.Va. 406, 411, 618 S.E.2d 415, 420 (2005) (interpretation of contract language is a question of law). However, “[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. pt. 3, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962); *see also*, *Isaacs v. Bonner*, 225 W.Va. 460, 694 S.E.2d 302 (W.Va. 2010).

As set out previously, the Release in Full of All Claims, executed by Multiplex, covenants that:

“It is expressly understood and agreed that this Release is intended to extend to ***any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising*** out of the alleged wrongful acts set forth in the aforementioned Complaint, ***including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.***”

[See Release in Full of All Claims, p. 1-2, emphasis added]. The Release In Full of All Claims, signed by Mr. Poff, Multiplex's President, further provides the parties' agreement that: "as this case is the a resolution of a disputed claim, all allegations of misconduct that have been asserted, or that could have been asserted by Multiplex against the Board of Education of the County of Raleigh, are forever withdrawn." Thus, Multiplex agreed to, and entered a Release in Full of All Claims of delay, past, present and future, "even to the extent that such injuries or damages may not be known." [See Release In Full of All Claims p. 1-2].

Multiplex's current attempt to distinguish or carve out the instant claim from the prior settlement by artful allegation that it is a separate claim is unavailing, because "it is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962); *see also Isaacs v. Bonner*, 225 W.Va. 460, 694 S.E.2d 302 (W.Va. 2010). In the case below, the Circuit Court properly concluded that the written settlement agreement, the Release in Full of All Claims, filed in Civil Action No. 06-C-1747, prohibited Multiplex from bringing a subsequent suit alleging a claim for delay against the Raleigh County BOE arising out of the same Project. The language used in the April 25, 2007 Release In Full of All Claim specifically extends to release and discharge any and all claims of delay, including any allegedly unknown or future claims of delay raised by Multiplex in the present case. The language of the Release In Full of All Claims shows that the parties contemplated a release of future injuries and damages claims related to delay. Multiplex's President, Art Poff, signed the Release, and thereby covenanted and agreed that:

“It is expressly understood and agreed that this Release is intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.”

[See Release in Full of All Claims, Exhibit 3, pp 1-2].

Multiplex, in the instant Civil Action No. 09-C-2075, again alleged wrongful acts by the Raleigh County BOE that allegedly caused delay in the same Independence High School Project to Multiplex’s detriment. The Release In Full of All Claims, executed by Multiplex was clearly intended to release all claims of delay, known or unknown, past present and future, and cannot be limited in scope in such a manner that exposes the Raleigh County BOE to financial liability for whatever additional delay claims that Multiplex can contrive simply by disclaiming awareness of the claims when it signed the Release In Full Of All Claims. Accordingly, the enforcement of the Release In Full of All Claims by the Circuit Court below must be affirmed.

D. Multiplex May Not Be Permitted To File Separate Complaints For Delay Relating to Same School Improvement Project After Settling Civil Action No. 06-C-1747 By An Agreement to Release Past, Present And Future Claims of Delay.

Multiplex’s Complaint against the Raleigh County BOE in Civil Action No. 09-C-2075 arises out of the same Independence High School Project and contract with the Raleigh County BOE as the prior suit, Civil Action No. 06-C-1747 for which the Raleigh County BOE agreed to pay, and Multiplex accepted, \$183,000.00 to settle all of Multiplex’s claims for delay damages, including past, present and future claims, both known and unknown.

Multiplex acknowledges that its delay damages lawsuit filed against the Raleigh County BOE on August 28, 2006, Civil Action No. 06-C-1747 was settled, compromised,

released and dismissed on or about April 25, 2007. Multiplex does not dispute the validity of the Release of All Claims, or its terms. Multiplex accepted the payment of the agreed upon amount, paid in full by the Raleigh County BOE to buy its peace and agreed to settle past present and future delay claims, known or unknown. Multiplex attempts to distinguish its current Complaint for delay in Civil Action No. 09-C-2075, the instant action, from the previously settled delay suit, Civil Action No. 06-C-1747, by suggesting that the instant claim for delay “. . . involves issues of delay in regards to laying tile in a construction project . . .” while the previously settled delay case “. . . involved issues of delay in regards to the location of utility lines in a construction project . . .” Multiplex never points out the fact that both claims of delay arise out of Multiplex’s work on the same Project.

Multiplex apparently believes it can settle one claim that the Raleigh County BOE caused delay in the project, by accepting payment and signing a Release which Multiplex agreed was “. . . intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time,” then bring another delay claim for the same Project, by merely alleging a different part of the Project was delayed. Such contrived artifice to escape the application of the Release in Full of All Claims was correctly held to be unavailing by the Circuit Court of Kanawha County which enforced the Release in Full of All Claims to dismiss the underlying suit.

West Virginia Rule of Civil Procedure 18(a) dealing with the joinder of claims provides that: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." *W.Va.R.Civ.P. 18(a)*. This Rule requires joinder of all claims one has against an opposing party into one civil action to avoid piecemeal resolution of claims and to promote judicial economy by combining all claims which a party may have arising out of the same operative facts, contracts or transaction against the opposing party in one unified action so that all claims may be resolved. Thus, the law essentially requires parties to bring and combine the claims they may have arising out of a transaction, or chain of events, in one unified action, and discourages parties from asserting separate claims arising out of the same transactions in multiple civil actions, especially after previously agreeing that all claims, past present and future, known or unknown have been settled and compromised.

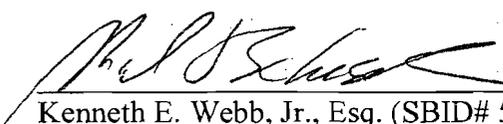
West Virginia also encourages the resolution of controversies by contracts of settlement and its Courts are empowered to enforce such contracts if fair and not contrary to public policy. There is no showing that the Release In Full Of All Claims executed by Multiplex, is anything other than the result of mutually bargained for exchange, between two sophisticated parties represented by counsel. Accordingly, the settlement agreement between the parties was properly enforced by the lower court and the November 4, 2009 Complaint relating to similar claims that the Raleigh County Board of Education caused a delay in the completion of project was properly dismissed. Since the Circuit Court properly enforced the terms and conditions of the Release In Full Of All Claims executed by Multiplex to settle the prior Civil Action No. 06-C-1747, its ruling must be affirmed.

VI. CONCLUSION

WHEREFORE, the Raleigh County Board of Education, by counsel, respectfully requests that this Honorable Court affirm the ruling by the Circuit Court of Kanawha County because the Release in Full of All Claims, known or unknown, past, present or future, bars Multiplex from bringing subsequent claims of delay arising out of the Independence High School Project in the subsequent Civil Action.

RALEIGH COUNTY BOARD OF
EDUCATION,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 35721

MULTIPLEX, INC.

Petitioner,

v.

Civil Action No. 09-C-2075

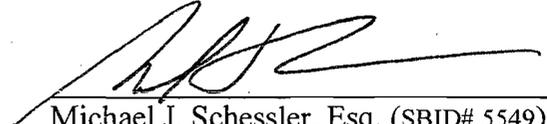
RALEIGH COUNTY BOARD OF
EDUCATION, et al.,

Appellee.

CERTIFICATE OF SERVICE

I, Michael J. Schessler, counsel for Appellee, Raleigh County Board of Education, do hereby certify that service of the foregoing *Response to Petition for Appeal on Behalf of Appellee Raleigh County Board of Education* has been made this 22nd day of December, 2010, on counsel of record via United States Mail, postage prepaid, a true and exact copy thereof, addressed as follows:

Gregory A. Hewitt, Esquire
Hewitt & Salvatore, PLLC
204 N. Court Street
Fayetteville, West Virginia 25840


Michael J. Schessler, Esq. (SBID# 5549)

EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE