

IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
DONALD L. HICKS, CLERK OF THE  
MCDOWELL COUNTY COMMISSION,

PETITIONER/APPELLANT,

V.

APPEAL NO. 35646

A. RAY BAILEY AND THE MCDOWELL  
COUNTY COMMISSION,

RESPONDENTS/APPELLEES.

**BRIEF OF APPELLANT**

SUBMITTED BY:

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## INDEX

	<u>Page</u>
I. Kind of Proceeding and Nature of Ruling in Lower Tribunal	1
II. Statement of Facts	3
III. Assignments of Error	6
IV. Points and Authorities Relied Upon	7
V, Discussion of Law	8
VI. Conclusion	18

## **I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL.**

The appellant challenges the authority of the circuit court to order the McDowell County Commission to pay more than \$45,000.00 in attorney's fees that were incurred by the prevailing candidate in an election contest. The county commission was not a party to the election contest that was timely filed by incumbent County Commissioner Carl W. Urps shortly after the November, 2008, general election.

Appellee A. Ray Bailey defeated Urps in the primary election and again in the general election when Urps ran as a write-in candidate. Urps based his election contest on the ground that Bailey was constitutionally prohibited from taking office because Bailey and sitting Commissioner Judy Cortellesi both reside in Big Creek Magisterial District. Urps' contention was supported by the testimony and records of the county clerk and the opinion of a licensed land surveyor who examined those records.

When it became apparent to County Clerk Donald L. Hicks that the county commission would be unable or unwilling to hear the election contest prior to January 1, 2009, the clerk filed a mandamus action to compel the commission to hear the election contest. The parties then agreed that a trial

before the commission would be futile and jointly asked the circuit court to hear the election contest.

After a bench trial on January 20, 2009, the trial court ruled in favor of Mr. Bailey and declared him the winner of the contested county commission seat. Bailey then took the oath of office on February 10, 2009.

The unsuccessful candidate, Mr. Urps, filed a petition for appeal with this Court, which refused his petition by order entered on June 3, 2009. Four months later, Commissioner Bailey's attorneys filed a motion with the trial court asking that an order be entered requiring the county commission to pay his attorney's fees.

The matter of attorney's fees was never addressed, argued or even mentioned in the election contest. The ruling in favor of Mr. Bailey was silent in regard to attorney's fees and costs. Despite the filing by the appellant of a written objection to the motion and request to be heard, the trial court declined to conduct a hearing on the motion and entered an order on November 9, 2009, granting the motion and ordering the county commission to pay unspecified attorney's fees.

The order made no reference to the amount of the fees or any review of an itemized statement of the fees. Significantly, the trial judge made no finding that any party to the election contest or the mandamus action brought

by county clerk acted in bad faith or with any vexatious or improper purpose or motive.

## **II. STATEMENT OF FACTS.**

Pursuant to the provisions of West Virginia Code 7-1-1(b), the McDowell County Commission is comprised of three members. Article 9, Section 10 of the West Virginia Constitution provides that no more than one of the three county commissioners can be elected from a single magisterial district.

In the May, 2008, primary election, incumbent Commissioner Carl W. Urps, who resides in Browns Creek Magisterial District, and appellee A. Ray Bailey, who asserts that he resides in Sandy River Magisterial District, were the only candidates for the Democratic Party nomination for the open seat on the McDowell County Commission.

Bailey won the nomination in the primary election and in the November, 2008, general election Bailey again defeated Urps who had conducted a write-in campaign. On November 25, 2008, Urps filed an election contest in which he alleged that Bailey was ineligible to take office because both he and sitting Commissioner Judy Cortellesi live in Big Creek Magisterial District.

West Virginia Code 3-7-6 prohibited Commissioner Urps from participating in the trial of the election contest. When the parties appeared before the county commission to schedule the trial, County Commission President Gordon O. Lambert and Commissioner Cortellesi could not, or would not, agree to schedule a trial date prior to January 1, 2009, when the successful candidate would ordinarily take office.

County Clerk Donald L. Hicks filed a mandamus action asking the circuit court to compel the commission to hear the election contest as required by West Virginia Code 3-7-7 and to stay the administration of the oath of office to either candidate until it did so. Circuit Judge Booker T. Stephens entered an order filing the mandamus action and granting the stay.

After Judge Stephens and Circuit Judge Rudolph J. Murensky recused themselves, Mercer County Circuit Judge William J. Sadler was appointed to preside as special judge. At a status hearing on December 20, 2008, all of the parties moved Judge Sadler to consolidate the two actions and to conduct the trial of the election contest between Urps and Bailey. The court granted the motion and set the election contest for trial on January 20, 2009.

After the parties rested their cases on that date, the court directed their counsel to submit proposed orders with findings of fact and conclusions of

law. The court then issued a written order on February 3, 2009, in favor of candidate Bailey. Observing that the trial court had made a finding of fact that would have placed Bailey's residence in Big Creek District, making him ineligible to take office, Bailey's attorneys filed a motion asking the court to correct the "clerical error" that was in direct conflict with the court's ruling.

The court then made the requested correction to support its finding that Bailey lives in Sandy River District and entered an amended order on February 10, 2009. On that date candidate Bailey was sworn in as the elected county commissioner.

Counsel for Urps and County Clerk Hicks unsuccessfully moved the trial court to stay its order pending the filing of an appeal. Their petition for appeal was filed on April 3, 2009, and was refused by this Court by order entered on June 3, 2009.

More than four months later, and after several attempts by Commissioner Cortellesi to have Commissioner Lambert approve payment of Bailey's attorney's fees without court review or approval, Bailey's counsel filed a written motion asking the trial judge to order the county commission to pay the attorney's fees. Three days later the county clerk filed an objection to the motion and requested a hearing.

Without conducting a hearing, and without making any reference to the amount of the fees or any review of supporting itemized statements, the trial court entered an order on November 9, 2009, awarding Bailey's attorney's fees and ordering the county commission to pay them. The court also directed candidate Urps to reimburse Bailey for his election contest costs other than attorney's fees.

### **III. ASSIGNMENTS OF ERROR.**

A. The trial court erred, abused its discretion and exceeded its jurisdiction by awarding attorney's fees to the prevailing party in an election contest and ordering the McDowell County Commission, which was not a party to the contest, to pay those fees.

B. The trial court erred and abused its discretion by entering an order requiring the county commission to pay a political candidate's attorney's fees of more than \$45,000.00 without conducting a hearing and without any review of itemized statements of those fees.

C. The trial court erred by awarding attorney's fees to a county commission candidate without making any findings that the contestant acted in bad faith, that the contest was filed for vexatious or oppressive purposes, or any other findings that would justify such an award against the losing party or the county commission which was not a party.

#### **IV. POINTS AND AUTHORITIES RELIED UPON.**

Alden v. The Harpers Ferry Police Civil Service Commission, 219 W. Va. 67, 631 S.E.2d 625 (2006)

Beto v. Stewart, 213 W. Va. 355, 582 S.E.2d 802 (2003)

Powers v. Goodwin, 170 W. Va. 151, 291 S.E.2d 466 (1982)

Powers v. Goodwin, 174 W. Va. 287, 324 S.E.2d 701 (1984)

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

Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 (1951)

Constitution of West Virginia, Article 9, Section 10

Code of West Virginia, 3-2-22

Code of West Virginia, 3-7-6

Code of West Virginia, 3-7-7

Code of West Virginia, 3-7-9

Code of West Virginia, 3-9-9

Code of West Virginia, 7-1-1(b)

## V. DISCUSSION OF LAW.

In its November 9, 2009, order awarding attorney's fees to county commission candidate A. Ray Bailey, the trial court stated, "West Virginia jurisprudence supports Mr. Bailey's Motion, and the court concludes that Mr. Bailey is entitled to indemnification for the attorney's fees incurred while defending his right to hold the office of County Commissioner to which he was duly elected." (*Order Granting Respondent's Motion For Payment Of Attorney's Fees And Costs*, page 3)

The court then cited the holding of this Court in Powers v. Goodwin, 170 W. Va. 151, 291 S.E.2d 466 (1982), in which the Court held that a county official who successfully defends himself against a removal action or criminal prosecution can be reimbursed for his or her attorney's fees if he or she acted in good faith and the action had been based on the discharge of his or her official duties.

In the case at bar, candidate Bailey incurred attorney's fees in an election contest filed by another candidate, Carl W. Urps. The election contest was based upon Bailey's place of residence with candidate Urps contending Bailey was ineligible to take office because Bailey and sitting Commissioner Judy Cortellesi both reside in the Big Creek Magisterial District.

Even though Urps was unsuccessful in the election contest, the trial court made no finding that the contest was filed in bad faith or for any vexatious or other improper purpose.

At trial, McDowell County Clerk Donald L. Hicks and professional licensed land surveyor Elden Eugene Green (*identified in the trial transcript as "Eldon Eugene Green"*) both testified that Urps' contention was correct. From the legal descriptions of the precincts on each side of the boundary between Sandy River District and Big Creek District, both witnesses testified that Bailey actually resides in Big Creek District.

The county clerk testified as follows:

Q. In the course of examining the evidence, the record evidence in this case, did you look at Mr. Bailey's voter's registration record?

A. I did.

Q. Tell the Court what you learned about that.

A. He is registered to vote in 112, Mohawk, and that is in Sandy River, and the registration form shows--where it shows residence, it has General Delivery, Mohawk.

Q. From the representations that have been made here this morning and throughout this case, where do you believe or do you know where Mr. Bailey lives?

A. I know the physical location of his home now because when this initially started, I called to see if he had a residence at Mohawk, which I discovered that he did not at that time, nor at the time of filing or at the time of the election, and it's, certainly, in my opinion, in Big Creek District.

Q. And you mentioned the community of Mohawk, is that where Mr Bailey lived when he first registered to vote?

A. Yes, sir.

Q. And can you tell the Court approximately how far that is from where he actually lives and has lived for the past 25 years or so?

A. I wouldn't have any idea of the mileage. It, you know, it's several miles though, and you know, it, certainly, is not within, you know, Big Creek District. It's in Sandy River, and he does not reside there.

Q. What community does he live in, Mr. Bailey?

A. He lives on the Welch-Iaeger Road.

*(Trial transcript, pages 15 and 16)*

Bailey's admitted failure to update his voter's registration, in violation of West Virginia Code 3-2-22 and 3-9-9, after he moved from the community of Mohawk to his current residence at Wilmore more than 26 years ago complicated the case, and, the appellant contends, negated any claim that Bailey came into the election contest with clean hands.

Under cross-examination in the election contest trial, Bailey testified as follows:

Q. Okay, I just had a question. On the voter's registration, you--if says your residence address is General Delivery, Mohawk. Is--Did you used to live in Mohawk?

A. Yes, sir.

Q. Okay, about when did you live in Mohawk?

A. I lived in Bull Creek from 1967 up until 1982.

Q. Okay, is '82 about when you moved to the residence that is shown in the aerial photograph?

A. March of '82 I moved where I presently live.

Q. And so, would it be fair to say that after you made the move from Mohawk, I know you gave a more specific name, to where you live now, you simply didn't update your residence in your voter's registration?

A. I did not for a reason.

Q. Okay, what was that reason?

A. In 1980, I ran for House of Delegates, and my family and friends down Mohawk, Bull Creek said there's no point--said, "You're going to move up to Iaeger, you'll forget all about us down here." I said, "No, I won't. I will leave my voter's registration here as long as I possibly can." I've kept my word for 29 year.

*(Trial transcript, pages 158 and 159)*

Bailey's move from Mohawk to Wilmore placed him in a different precinct for voting purposes and required him to update his voter's registration. The significance of his failure to do so was amplified when the Wilmore precinct was transferred by the county commission from Sandy River District to Big Creek District in 1993.

Licensed land surveyor Green testified at the election contest trial as follows:

Q. Let me have you look Mr. Green, at Petitioner's Exhibit No. 6 and, which is represented to be an aerial photograph showing A. Ray Bailey's residence, Tug River behind it and then the railroad tracks.

A. Yes, sir.

Q. Based on your study of the descriptions over the past 26 years and information made available to you, can you point out the--Are those the same railroad tracks that you're referring to in those descriptions from 26 years ago?

A. Yes, sir.

Q. And do you recognize that as Mr. Bailey's residence.

A. I do. I work with aerial maps all the time.

Q. And when you told the Court that, really, the difference in the description, whether the railroad tracks are used as the boundary or the centerline of the river, it really doesn't make any difference because either way it goes, it would put Mr. Bailey in Precinct 105.

A. That's correct.

Q. And in your opinion, is that in Big Creek District?

A. Yes, sir.

Q. And has it been in Big Creek District since at least 1993?

A. At least 1993, yes.

*(Trial transcript, pages 112 and 113)*

The appellant asserts that the testimony of the county clerk, the licensed land surveyor and Mr. Bailey himself establish that the election contest was filed in good faith and was supported by compelling evidence even though the trial judge ultimately ruled in Bailey's favor.

In his objection to Bailey's motion for attorney's fees, which was filed more than four months after this Court refused the petition for appeal in the election contest, the appellant asked the trial court to follow the holdings of Powers v. Goodwin, 170 W. Va. 151, 291 S.E.2d 466 (1982), and Powers v. Goodwin, 174 W. Va. 287, 324 S.E.2d 701 (1984), by requiring the appellee to file a separate mandamus action to obtain a ruling based on objective findings.

Those Boone County cases clearly show the necessity of a careful review of itemized statements of the requested attorney's fees and costs. In reviewing the trial court's findings, this Court discussed in those cases the failure of two county commissioners to investigate or require an itemization of the other commissioner's attorney's fees before they voted to pay the entire bill.

When the fees were reviewed, the circuit court discovered that \$10,000.00 of the bill in excess of \$14,000.00 was for services that had nothing to do with the removal action. Powers v. Goodwin, 324 S.E.2d at 704 and 705.

The holdings in the two Powers opinions support the award of attorney's fees only if a public official successfully defends herself or himself in a removal action that was based on his or her official acts or acts

and the court finds that the official acted in good faith. The West Virginia Legislature codified these holdings with the enactment of West Virginia Code 11-8-31a in 1985.

This statute authorizes a governing body such as a county commission to lawfully reimburse an official for "the reasonable amount of such person's attorney fees" in a case "(a) Wherein such person has successfully defended against an action seeking his or her removal from office, or (b) Wherein such person has successfully defended against an action seeking the recovery of moneys alleged to have been wrongfully expended."

In the case at bar, candidate Urps properly and timely filed an election contest to challenge candidate Bailey's qualifications or eligibility for the office of county commissioner. This Court held in Slater v. Varney, 136 W. Va. 406, 68 S.E.2d 757 (1951), that an election contest is the proper procedure for challenging a candidate's qualifications or eligibility.

Candidate Bailey did not become a county commissioner until the oath of office was administered to him on February 10, 2009, on which date the trial court entered its corrected order resolving the election contest by ruling in Bailey's favor. His attorney's fees and costs were not incurred in a removal action based upon his official acts or acts as an elected official.

West Virginia Code 3-7-9 provides for the assessment of the prevailing candidate's election contest costs against an unsuccessful contestant. Those costs do not include attorney's fees. There simply is no statutory authority for charging the costs or the attorney's fees to the county commission which was not a party to the election contest.

In his effort to find some case law support for the trial judge's decision to award attorney's fees, the appellee's counsel cites three opinions that do not provide authority for such an order.

In Beto v. Stewart, 213 W. Va. 355, 582 S.E.2d 802 (2003), this Court affirmed the denial of attorney's fees to a party who sought them from the other party for allegedly obstructing discovery in a medical malpractice case.

The record in Beto showed that both the trial judge and a discovery commissioner conducted hearings on the motion for attorney's fees and the allegations of contempt of the court's orders and obstruction of discovery. In addition, the trial court had specific authority under the West Virginia Rules of Civil Procedure to award attorney's fees as a sanction.

"West Virginia Rule of Civil Procedure 37(b) explicitly authorizes a circuit court to award attorney's fees as a sanction for the failure to obey a discovery order. The decision to award or to not award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion

will not be disturbed on appeal except in cases of abuse," this Court held.

Beto v. Stewart, 213 W. Va. 355, 582 S.E.2d 802 (2003) (Syllabus Point 2)

The Court further explained, "In determining that no additional sanctions were warranted, the court considered the seriousness of the conduct and the impact or lack thereof that the conduct had in the case. Because we find no erroneous assessment of the evidence or the law in this case, we cannot say the circuit court abused its discretion." Beto v. Stewart, 582 S.E.2d at 810.

In Sanson v. Brandywine Homes, Inc., 215 W. Va. 307, 599 S.E.2d 730 (2004), this Court affirmed the award of attorney's fees against the losing party who had required the prevailing party to bring an action to enforce a settlement agreement.

After first observing that "(a)s a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court of express statutory or contractual authority for reimbursement" [quoting Syllabus Point 2, Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986)], the Court held, "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs', without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Sanson v. Brandywine Homes, Inc.,

*215 W. Va. 307, 599 S.E.2d 730 (2004) [Syllabus Point 6, quoting Syllabus Point 3, Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986)]*

The Court noted that the defendant fully performed its obligations under the settlement agreement but the plaintiffs kept the settlement check and release for three months before returning them and claiming there had been no settlement. *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 599 S.E.2d 730, 735 (2004)

In *Alden v. The Harpers Ferry Police Civil Service Commission*, 219 W. Va. 67, 631 S.E.2d 625 (2006), this Court affirmed the circuit court's partial award of attorney's fees based on the clear statutory authority of West Virginia Code 8-14-20. Even though the police officer was not reinstated to his position, the circuit court found that he had been denied due process and had to employ counsel to file an appeal because he was not allowed to have a pretermination hearing as required by West Virginia Code 8-14A-3(b).

*Alden v. The Harpers Ferry Police Civil Service Commission*, 219 W. Va. 67, 631 S.E.2d 625, 628 (2006)

In the case at bar, appellee Bailey can cite no statutory authority or case law supporting his position or any finding of bad faith or vexatious or

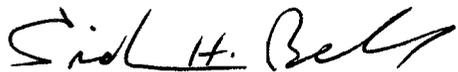
oppressive conduct to support the award of attorney's fees against the county commission which was not even a party to the election contest.

## VI. CONCLUSION.

The appellant moves this Honorable Court to reverse the ruling of the court below and deny the appellee's motion for attorney's fees of \$45,000.00 which he incurred in an election contest, or, in the alternative, to remand the case and appoint a special circuit judge to require and review itemized statements of the attorney's fees before making a ruling based on the applicable law.

Respectfully submitted,

DONALD L. HICKS, Clerk of the  
McDowell County Commission,  
by counsel.



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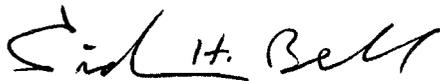
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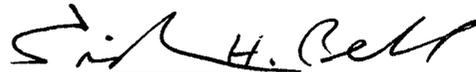


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## CERTIFICATE OF SERVICE

I, Sidney H. Bell, counsel for the appellant, Donald L. Hicks, Clerk of the McDowell County Commission, hereby certify that a true copy of the foregoing "Brief of Appellant" was served upon the appellee, A. Ray Bailey, by depositing said copy into the United States mail, postage prepaid, addressed to his attorneys of record, Michael W. Carey and David R. Pogue, Carey, Scott Douglas & Kessler, PLLC, Attorneys at Law, P. O. Box 913, Charleston, WV 25323, on this the 25th day of August, 2010.



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