

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Appeal No. 35646**

**STATE OF WEST VIRGINIA EX REL  
DONALD HICKS, Clerk of the McDowell  
County Commission,**

**Petitioner/Appellant,**

**v.**

**Civil Action No. 08-C-307-S  
Circuit Court of McDowell County**

**A. RAY BAILEY, and  
THE MCDOWELL COUNTY COMMISSION,**

**Respondents/Appellees.**

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**BRIEF OF APPELLEE**

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## **RESPONSE TO PETITION FOR APPEAL**

Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, Appellee A. Ray Bailey submits this brief in response to the brief of Appellant Donald L. Hicks.

### **STATEMENT OF THE FACTS**

In November of 2008, Appellee A. Ray Bailey defeated Carl Urps in the race for the open seat on the McDowell County Commission. Carl Urps then filed a "Notice of Election Contest" on November 25, 2008, alleging that Mr. Bailey was constitutionally disqualified from serving as a member of the McDowell County Commission. Appellant Donald Hicks, in his capacity as Clerk of McDowell County, filed a Writ of Mandamus essentially asserting that a trial before the McDowell County Commission would be futile. Upon the recusal of Judge Booker T. Stephens and Judge Rudolph J. Murensky II, the Chief Justice of the West Virginia Supreme Court of Appeals appointed Special Judge William J. Sadler to hear Appellant Hicks' mandamus action. By agreement of the parties, the actions were consolidated before the Circuit Court of McDowell County, West Virginia, and a hearing before Judge Sadler was held on January 20, 2009.

On February 3, 2009, after hearing the arguments of counsel and considering the evidence presented at the hearing, the circuit court entered an **ORDER DENYING PETITION FOR WRIT OF MANDAMUS** in which the court found that Appellee Bailey was not constitutionally disqualified and ordered that he be seated as a member of the McDowell County Commission. However, Appellant and Carl Urps subsequently attempted to attack the validity of this February 3, 2009, order based on a clerical error. The circuit court, by order dated February 11, 2009, rejected this attack and simply corrected it's clerical mistake.

Before the entry of the circuit court's February 11, 2009 order amending its original order, Appellant and Carl Urps preemptively filed a motion to reconsider, correct, or vacate the court's final corrected order. By order dated March 26, 2009, the court affirmed its previous ruling and denied the motion to reconsider. Thus, through three separate orders dated February 3, 2009, February 11, 2009, and March 26, 2009, the court declared that Appellee Bailey was not disqualified from serving on the McDowell County Commission. Unsatisfied with the result, Appellant and Carl Urps filed an "Expedited Petition for Appeal of Election Mandamus Action" before this Court. On June 3, 2009, this Court voted unanimously to decline to hear the appeal.

Thus, Appellee Bailey ultimately prevailed in the above-styled election mandamus action. However, throughout the course of this litigation he incurred substantial attorney fees and costs in defending his right to take office. At two separate meetings of the McDowell County Commission on August 26, 2009 and September 23, 2009, Commissioner Judy Cortelezi moved for a vote to reimburse Respondent Bailey for these fees. Unfortunately, at each such meeting, Commissioner Gordon Lambert (who aligned himself with Petitioner and Carl Urps, and against Respondent Bailey, in the underlying election contest) refused to second the motion to reimburse Respondent Bailey for his attorney fees and costs. In doing so, Mr. Lambert effectively prevented the Commission from authorizing the reimbursement of Appellee Bailey's attorney fees and costs.<sup>1</sup>

Accordingly, on October 13, 2009, Appellee Bailey filed a motion for an Order directing the McDowell County Commission to reimburse him for the attorney fees and costs he incurred in

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<sup>1</sup> There are three sitting McDowell County Commissioners: Appellee Bailey, Gordon Lambert, and Judi Cortellesi. Each time that Ms. Cortellesi moved the Commission to pay Appellee Bailey's attorney fees, Appellee Bailey abstained due to self-interest, and Mr. Lambert refused to second the motion, causing it to die.

successfully defending the underlying election mandamus action. By order dated November 9, 2009, the circuit court granted Appellee Bailey's motion and directed the McDowell County Commission to reimburse Appellee Bailey for his attorney fees. It is this order that Appellant asks this Court to overturn. Appellant's brief cites three assignments of error to the trial court's award of attorney fees to Appellee Bailey: (1) the trial court erred by awarding attorney 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; (2) the trial court erred by entering an order requiring the county commission to pay a political candidates's attorney fees without conducting a hearing or a review of an itemized statement of those fees; and (3) the trial court erred by awarding attorney fees to a county commission candidate without making a finding that the contestant filed the contest in bad faith or for vexatious or oppressive purposes.<sup>2</sup> For the reasons set forth below, Appellant's assignments of error are without merit.

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<sup>2</sup> It should be noted that the assignments of error in Appellant's brief are different than those in his Petition for Appeal. The assignments of error in Appellant's Petition for Appeal consisted of the following: (1) that the circuit court erred by requiring the McDowell County Commission to pay the attorney fees of the prevailing party in an election contest that was concluded four months earlier; (2) that the circuit court erred in granting Respondents motion for attorney fees because the appropriate remedy would have been the filing of a separate mandamus action; and (3) that the circuit court erred in requiring the county commission to pay Respondent's attorney fees without conducting a hearing and without any review of an itemized statement of Respondent's attorney fees. To the extent that the assignments of error in Appellant's brief are different from those set forth in his Petition for Appeal, such assignments of error are waived and should not be considered by this Court. See State v. Lively, 697 S.E.2d 117, 103 (W.Va. 2010)(observing that an argument is deemed waived if the appellant fails to raise it as an assignment of error in his petition for appeal).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN REQUIRING THE COUNTY COMMISSION TO PAY THE ATTORNEY FEES OF THE PREVAILING PARTY IN AN ELECTION CONTEST

This Court has recognized that a public official is entitled to indemnification for attorney fees if the following criteria are met: "the underlying action must arise from the discharge of an official duty in which the government has an interest; the officer must have acted in good faith; and the agency seeking to indemnify the officer must have the express or implied power to do so." Powers v. Goodwin, 170 W.Va. 151, 157, 291 S.E.2d 466, 472 (W.Va. 1982). The trial court applied this test and determined that each of these criteria were met, thus entitling Appellee to reimbursement of his attorney fees. *See* Order p. 4-5, Nov. 9, 2009.

On appeal, Appellant complains that Powers only supports an award of attorney fees to a public official who successfully defends himself in a *removal action* that was based on his discharge of his official duties. Indeed, the trial court below recognized that the present case was distinguishable from Powers. *See* Order p. 5, n.1, Nov. 9, 2009. However, the trial court found the legal distinction to be negligible, and that the public policy enunciated in Powers governs whether a public official is entitled to indemnification for attorney fees. *See* Order pp. 4- 5, 9, 2009.

The public policy considerations behind indemnifying a public official for attorney fees incurred in successfully defending a removal action and indemnifying a public official for attorney fees in successfully defending a challenge to his right take office in the first place are identical. As this Court observed in Powers,

. . . the voters have a legitimate interest in protecting their duly elected officials from being hectorred out of office through the constant charge of bankrupting attorneys' fees on their own personal resources. One of the obligations of a duly elected public

official is to continue to discharge the office to which he was elected since it can reasonably be assumed that he was elected because of his public stand on issues of concern to the voters. Consequently, continued service in an elected position is not a question in which only the officeholder has a personal concern; in a democratic government predicated upon the competition of policies and ideas through different candidates for elected office, the public itself has an interest in seeing persons elected by a majority continue in office.

170 W.Va. at 161, 291 S.E.2d at 476.

As the trial court properly reasoned, “if the public has an interest in seeing persons elected by a majority continue in office, it follows that the public has an interest in seeing such persons take office in the first place.” *See* Order p. 4, Nov. 9, 2009. The thrust of the public policy articulated in Powers is that a duly elected public official should not be personally responsible for attorney fees incurred in defending his right to hold an office to which the public itself elected him. Whether the official’s right to hold office is challenged initially in an election contest or subsequently in a removal proceeding, his service in the office to which he was duly elected is not merely a personal concern for which he should bear financial responsibility, but rather is a matter in which the entire electorate has an interest. In both circumstances, the will of the electorate is directly implicated. To hold that Appellee bears sole responsibility for the attorney fees he incurred in defense of his right to assume the office to which he was duly elected would effectively make the will of the electorate contingent upon the chosen candidate's ability to finance the defense of election contests brought by his or her political opponents. This outcome would be in direct contravention of the public policy expressed by this Court in Powers, and must not be allowed.

Nevertheless, Appellant maintains that Appellee is not entitled to reimbursement. First, Appellant argues that Appellee is not entitled to reimbursement because there is no statutory basis for charging his fees to the county commission. In support of this argument, Appellant points to the

fact that in 1985 the legislature codified the holdings in Powers with regard attorney fees in removal actions by enacting W.Va. Code § 11-8-31a, but that there is no similar statute regarding attorney fees in election contests. However, before the legislature took action in 1985, the reasoning in Powers was no less sound and its legal effect was no less binding. The holdings of this Court need not be codified by the legislature before they become law. Thus, the absence of a statute providing for the reimbursement of attorney fees to public officials who successfully defend election contests does not prevent the trial court from awarding such fees pursuant to the public policy articulated by this Court in Powers.

Second, Appellant misapplies three cases cited by Appellee in the “standard of review” section of his response to Appellant’s Petition for Appeal.<sup>3</sup> The substantive holdings of first two cases, Beto v. Stewart, 213 W.Va. 355, 582 S.E.2d 802 (2003) and Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E.2d 730 (2004), have no bearing on the case at bar because those cases deal with the award of attorney fees against an *opposing party* who acted in bad faith or otherwise engaged in misconduct. Conversely, the present case does not involve the assessment of attorney fees against an *opposing party* based on bad faith, but rather the reimbursement of a public official’s attorney fees from public funds based on the public’s interest in seeing their chosen candidate hold the office to which he was duly elected. Thus, Appellee’s reliance upon Beto and Sanson is

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<sup>3</sup> While Appellant claims that Appellee cited these case as "support for the trial judge's decision to award attorney fees," Appellee cited these cases for the sole purpose of establishing the standard of review. *See* A. Ray Bailey's Response to Petition for Appeal (*citing Alden v. The Harpers Ferry Police Civil Service Com'n*, 219 W.Va. 67, 631 S.E.2d 625 (2006); Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E.2d 730 (2004); and Beto v. Stewart, 213 W.Va. 355, 582 S.E.2d 802 (2003) for the proposition that the applicable standard of review is abuse of discretion). These cases are not mentioned anywhere outside of the short "standard of review" section of Appellee's response, and Appellee at no point relied upon the substantive holdings of such cases.

misplaced.

Furthermore, the third case, Alden v. The Harpers Ferry Police Civil Service Com'n, 219 W.Va. 67, 631 S.E.2d 625 (2006) actually weighs against Appellant's argument that there must be a statutory basis for awarding attorney fees. Appellant states that in Alden, "this Court affirmed the circuit court's partial award of attorney fees based on the clear statutory authority of West Virginia Code 8-14-20." *See* Appellant's brief at p. 17. This statement misrepresents the holding in Alden. In that case, the circuit court held that a police officer was entitled to a partial award of attorney fees from the civil service commission after he was forced to take legal action to enforce his right to a pre-termination hearing. *See* 219 W.Va. at 68-69, 631 S.E.2d at 626-27. On appeal, this Court expressly observed that

As set forth above, W.Va.Code § 8-14-20 provides for an award of attorney's fees but only when an officer is "reinstated or exonerated." Since Officer Alden was not reinstated or exonerated, we agree with the Commission that Officer Alden is *not entitled to an award of attorney's fees pursuant to the statute.*

Id. at 69, 631 S.E.2d at 627 (emphasis added). Nevertheless, this Court affirmed the circuit court's award of attorney fees based on the public policy that "[c]itizens should not have to resort to law suits to force government officials to perform their legally prescribed non-discretionary duties," and "[w]hen . . . resort to such action is necessary to cure willful disregard of law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action." Id. at 70, 631 S.E.2d at 628. Because Officer Alden had to incur attorney fees in order to enforce his clear right to a pre-termination hearing, the Court held that he was entitled to reimbursement even though W.Va.Code § 8-14-20 did not apply. Id.

Thus, contrary to Appellant's representations, Alden is actually an example of this Court

awarding attorney fees based on public policy considerations *in the absence* of a statute providing for an award of such fees. Accordingly, in the present case, the circuit court did not abuse its discretion in requiring the McDowell County Commission to reimburse Appellee for his attorney fees.

**II. THE TRIAL COURT DID NOT ERR IN REQUIRING THE COUNTY COMMISSION TO PAY APPELLEE'S ATTORNEY FEES WITHOUT CONDUCTING A HEARING OR A REVIEW OF AN ITEMIZED STATEMENT OF THOSE FEES**

Appellant argues that the Powers cases “clearly show the necessity of a careful review of itemized statements of the requested attorney fees and costs.” However, the Powers cases do not mandate that a *court* must conduct a review of an itemized statement of attorney fees. The two commissioners involved in the Powers decisions were found negligent because *they* failed to make any investigation or require an itemization of the other commissioner’s bill for attorney fees, and it appeared that some of the charges were incurred for services unrelated to the removal action. Powers v. Goodwin, 174 W.Va. 287, 290, 324 S.E.2d 701, 704 (1984). Indeed, this Court observed that the county commissioners in the Powers cases “failed to make any investigations on their own and that they simply turned the entire matter over to an assistant prosecutor with the general request that he tell them if payment was proper,” and “made no attempt to question or otherwise discuss the matter with him.” Id. Under those circumstances, this Court found that the county commissioners were negligent. Id. At no point did this Court articulate a requirement that a review of an itemized statement of attorney fees must be conducted by a court.<sup>4</sup>

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<sup>4</sup> Indeed, even the statute that Appellant cites as “codifying” the Powers decisions states that the governing body authorized to reimburse the affected official, i.e. the county commission in this case, “shall have authority to determine . . . the reasonableness of the amount sought to be recovered.” *See* W. Va. Code, § 11-8-31a.

In the present case, Respondent Bailey's bill is already itemized, and Respondent has not asked nor has the circuit court ordered that the McDowell County Commission pay Respondent's attorney fees without exercising due diligence in reviewing Respondent's bill to make sure that it does not include charges for services unrelated to the underlying election contest, and various appeals therefrom. The McDowell County Circuit Court's Nov. 9, 2009, order directing the McDowell County Commission to reimburse Respondent for his attorney fees insulates the commissioners from any possible negligence action claiming that the decision to reimburse Respondent was improper, and as long as the commissioners exercise due diligence in reviewing his bill, they are insulated from a negligence action claiming that the amount ultimately paid was incorrect.<sup>5</sup> Thus, the circuit court did not err in directing the McDowell County Commission to reimburse Respondent for his attorney fees.

### **III. THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY FEES TO APPELLEE WITHOUT MAKING A FINDING THAT THE CONTESTANT ACTED IN BAD FAITH**

This Court held in Powers that a public official is entitled to indemnification for attorney fees if three criteria are met: (1) "the underlying action must arise from the discharge of an official duty in which the government has an interest;" (2) "the officer must have acted in good faith;" and (3) "the agency seeking to indemnify the officer must have the express or implied power to do so." 170

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<sup>5</sup> It is curious that the instant Appeal is being pursued by the Clerk of the McDowell County Commission. Although the Clerk has some role in the payment of money out of the county treasury (*see* W. Va. Code § 7-5-4), and thus an interest in protecting himself from an action for improperly paying money out of the county treasury, the circuit court's Nov. 9, 2009 order directing payment of Respondent's attorney fees insulates the Clerk from any such action. It is the McDowell County Commission that is the real party in interest in this appeal, not the Clerk. In the wake of the circuit court's Nov. 9, 2009 order, Petitioner has no greater interest in the issue of whether the McDowell County Commission reimburses Respondent's attorney fees than any other citizen of McDowell County.

W.Va. at 157, 291 S.E.2d at 472. At no point in Powers did this Court graft on an additional requirement that the person challenging the public official's right to hold office must have acted in bad faith, vexatiously, or for oppressive reasons.

Appellant's contention that there is a "bad faith" requirement comes from cases holding that a prevailing party is entitled to an award of attorney fees against *an opposing party* when that party has conducted itself improperly. See Appellant's brief at p. 16 (*citing* Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E.2d 730 (2004)). As previously discussed, such cases are inapposite to the case at bar. The instant case involves the reimbursement of an attorney fees incurred by an elected official in defending his right to hold office, and is based on the public's interest in protecting its chosen candidate from being "hectored out of office" by his or her political opponents. The separate policy of rewarding fees to a prevailing party in cases where the opposing party acts in bad faith or for oppressive reasons has no bearing on this case.

Finally, even if there were any merit to Appellant's argument that the trial court could not award Appellee's attorney fees in the absence of a finding that the contestant filed the election contest in bad faith or for vexatious or oppressive purposes, Appellant did not make such argument before the trial court and is therefore barred from making it on appeal. See Zaleski v. West Virginia Mut. Ins. Co., 224 W.Va. 544, 550, 687 S.E.2d 123, 129 (2009)(observing the "longstanding" rule that arguments raised for the first time on appeal are not considered).

### CONCLUSION

For the reasons set forth above, Appellee A. Ray Bailey respectfully requests that this Court affirm the McDowell County Circuit's Order directing the McDowell County Commission to reimburse Respondent Bailey for his attorney fees.

Respectfully submitted,

AVERY RAY BAILEY

By Counsel,

A handwritten signature in cursive script that reads "Michael W. Carey". The signature is written in black ink and is positioned above a horizontal line.

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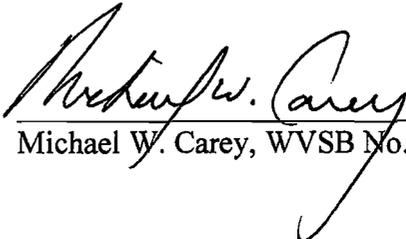
**Respondents.**

**CERTIFICATE OF SERVICE**

I, Michael W. Carey, counsel for Respondent A. Ray Bailey, do hereby certify that I have served a true and exact copy of the foregoing "Brief of Appellee" by United States Mail, postage pre-paid, addressed as follows:

Sidney H. Bell, Esquire  
Prosecuting Attorney of McDowell County  
93 Wyoming Street, Suite 207  
Welch, WV 24801

this 27<sup>th</sup> day of September, 2010.

  
Michael W. Carey, WWSB No. 635