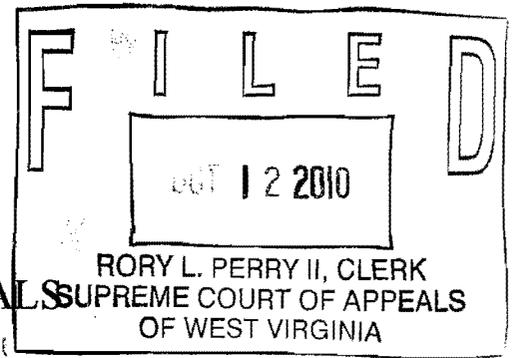


IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



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.

**REPLY BRIEF OF APPELLANT**

SUBMITTED BY:

Sidney H. Bell  
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## **AUTHORITIES RELIED UPON**

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)

## STATEMENT OF THE FACTS

In the "Statement of Facts" set forth in the appellee's brief, his counsel adopts the tone of the trial court's order granting attorney's fees to the appellee and directing the McDowell County Commission to pay them. Appellee's counsel states that following the trial court's ruling in the election contest, "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 (*sic*) clerical mistake." (*Appellee's Brief, page 1*)

The circuit court used similar language in its November 9, 2009, order granting the appellee's motion for attorney's fees. After referring to its ruling in favor of the appellee in the election contest, the trial court said, "Thereafter, the petitioners attempted to attack the validity of the court's February 3, 2009, Order based on a clerical error. The court, by Order dated February 11, 2009, rejected this attack and simply corrected its clerical mistake." ("*Order Granting Respondent's Motion for Payment of Attorney's Fees and Costs*", page 2)

The "clerical error" was properly challenged by the appellant and candidate Urps because it was the single most material finding in the election contest. As the circuit court acknowledged in its order amending

the February 3, 2009, order, the Court made a finding of fact that "(t)he official public records of the McDowell County Commission indicate that the boundary line between Precincts 109 and 105 was the N & W Railroad, placing the Bailey residence in precinct 109. Respondent's Exhibits 1, 2, 3 & 5."

Based upon the written descriptions of the precincts in the county clerk's records, candidate Urps had argued that the railroad tracks were the boundary between precincts 109 and 105. With candidate Bailey's home being south of the railroad tracks, that finding would have placed Bailey's residence in Precinct 105 in Big Creek District and would have made him constitutionally ineligible to take office with sitting Commissioner Judy Cortellesi also residing in Big Creek District.

This "clerical error" was so significant that the appellee's counsel filed a written motion asking that the order be corrected. "Clearly, this is a clerical mistake, and finding of fact number two was meant to state that '(t)he official public records of the McDowell County Commission indicate that the boundary line between Precincts 109 and 105 was U. S. Route 52, placing the Bailey residence in precinct 109', because if the boundary line were the N & W Railroad then the Bailey residence would be in precinct 105

and the rest of the Court's Order would not make sense," the appellee's counsel stated. (*February 10, 2009, "Motion to Correct Clerical Mistake"*)

The appellant county clerk and candidate Urps did not "attack" the trial court or the validity of its order. They simply exercised their right to seek clarification or correction of the ruling that was in direct conflict with the most material finding of fact in the case.

The issue of attorney's fees and costs was never raised, addressed or argued at any time in the proceedings before the trial court. The final ruling in favor of the appellee is silent in regard to attorney's fees and costs.

After this Court refused to hear the appeal of the election contest, the appellee's fellow county commissioner, Ms. Cortellesi, made two motions at commission meetings to pay the appellee's attorney's fees. Commisisoner Gordon Lambert properly refused to second the motions on the ground that there should first be judicial review and approval of such fees.

On October 13, 2009, more than eight months after the circuit court's final ruling in the election contest, and more than four months after this Court voted not to hear the appeal, the appellee filed a motion with the trial court requesting an order granting attorney's fees and requiring the McDowell County Commission to pay them.

The appellant promptly filed an objection to the motion and requested a hearing. Without allowing the parties any opportunity to argue the motion in person or in writing, the circuit court entered an order granting the motion. Significantly, the order contains no reference to a review of itemized statements of the fees or any reference to the amount of those fees.

The appellant then filed the petition for appeal herein based upon the absence of any case law or statutory authority for ordering a county commission to pay attorney's fees that were incurred in an election contest.

### ARGUMENT

#### **I. THE TRIAL COURT ERRED IN REQUIRING THE COUNTY COMMISSION TO PAY THE ATTORNEY'S FEES OF THE PREVAILING PARTY IN AN ELECTION CONTEST.**

Despite the efforts of the appellee to apply to his benefit the holdings of this Court in 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), the case below was purely and simply an election contest between Carl Urps and A. Ray Bailey who were Democratic candidates for an open seat on the McDowell County Commission..

The circuit court's order scheduling the bench trial for January 20, 2009, stated, "With there being only three members of the McDowell

County Commission, and with the parties agreeing that there is little or no likelihood that the two commissioners who can judge the pending election contest would vote together for either candidate to resolve the contest, this Court is in a better position to promptly resolve the election contest." *(January 5, 2009, "Order Scheduling Evidentiary Hearing")*

The appellee's counsel correctly points out the criteria that a public official must meet to qualify for reimbursement for attorney's fees. The underlying case must be based on the discharge of an official duty by the elected official, he or she must have acted in good faith and the body seeking to indemnify him or her must have the authority to do so. **Powers v. Goodwin**, 170 W. Va. 151, 157, 291 S.E.2d 466, 472 (1982)

In the case at bar, the underlying election contest was brought in good faith and was supported by substantial evidence from which the trial court could have reasonably found in favor of the appellee's opponent, incumbent Commissioner Urps.

Although the trial court ruled in the appellee's favor by finding him eligible to hold office as a resident of Sandy River District, the case was certainly complicated by the appellee's admitted failure to update his voter's registration as required by law when he moved from one precinct to another many years earlier.

The election contest had nothing to do with the discharge of any official duty by an elected official because the appellee did not take office until February 10, 2009, after the trial court decided the election contest with its order in favor of the appellee.

**II. THE TRIAL COURT ERRED IN REQUIRING THE COUNTY COMMISSION TO PAY APPELLEE'S ATTORNEY'S FEES WITHOUT CONDUCTING A HEARING OR A REVIEW OF AN ITEMIZED STATEMENT OF THOSE FEES**

The appellee disagrees with the appellant's assertion that the Powers opinions require careful judicial review of itemized statements of attorney's fees and costs that are requested by a public official. He further argues that the circuit court's order "insulates" the McDowell County Commission and the county clerk from any claim of negligence or other liability if they simply paid the attorney's fees without challenging the judge's order.

As the appellant has pointed out in his petition and his brief, the trial court's order makes no reference to the amount of attorney's fees or costs. It makes no reference to any itemized statements or any review of such statements.

In the second Powers case, this Court affirmed the removal from office of two Boone County commissioners who voted to pay attorney's fees

of more than \$14,000.00 that were incurred by another commissioner who had successfully defended himself against a removal action.

The circuit judge who reviewed the requested attorney's fees found that more than \$10,000.00 of the \$14,000.00 bill had nothing to do with the previous removal action and that the other two commissioners had voted to pay the attorney's fees without making a thorough investigation of the fees and the legal basis for paying them. The court also found that the commissioner who was seeking his attorney's fees had not acted in good faith in the underlying action. **Powers v. Goodwin, 174 W. Va. 287, 324 S.E.2d 701, 704 and 705 (1984)**

In this case, the appellee seeks reimbursement of attorney's fees in excess of \$45,000.00 that were incurred in an election contest which was filed in good faith by his election opponent. The election contest was decided after a bench trial that was concluded in a single day.

Under these facts and circumstances, the appellant asserts that there should be independent judicial review of the requested attorney's fees and that the county commission should not be required to pay them in the absence of clear case law or statutory authority.

### **III. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO APPELLEE WITHOUT MAKING A FINDING THAT THE CONTESTANT ACTED IN BAD FAITH**

The appellee contends in his brief that the appellant did not make this argument in the court below. He further contends that the case law cited in the appellant's brief does not apply because the appellee is seeking attorney's fees from the McDowell County Commission and not from an opposing party.

In replying to these arguments, the appellant points out again that the circuit court ignored the appellant's request for a hearing on the appellee's motion for attorney's fees which was filed more than eight months after the trial court entered its final order in the election contest. That order was silent in regard to attorney's fees because the issue of attorney's fees was never raised, addressed or argued in the circuit court.

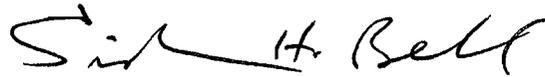
The circuit court entered an order granting the motion for attorney's fees and ordered the McDowell County Commission to pay them without conducting a hearing or giving either party an opportunity to brief the issue.

### **CONCLUSION**

The appellant respectfully moves this Honorable Court to reverse the order of the court below and deny the appellee's motion for attorney's fees or

remand the case for hearing before another circuit judge in order that the requested fees can be reviewed and an appropriate order can be entered based on the applicable law.

Respectfully submitted,

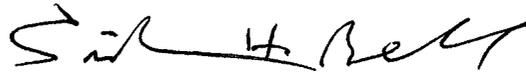


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## **CERTIFICATE OF SERVICE**

I, Sidney H. Bell, attorney for the appellant, Donald L. Hicks, Clerk of the McDowell County Commission, hereby certify that a true copy of the foregoing "Reply 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, 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 7th day of October, 2010.



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