

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

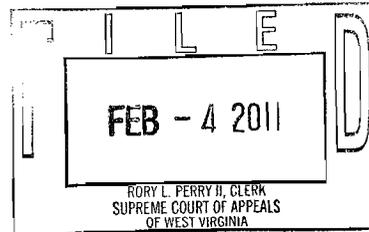
**STATE OF WEST VIRGINIA, ex rel.  
ASHLEIGH AND DANIEL JURKOVICH,  
Petitioners,**

**vs.**

**CASE NO. 35737  
WRIT OF MANDAMUS**

**RUSSELL W. GOODWIN, et al.,  
Respondents.**

**and**



**STATE OF WEST VIRGINIA, ex rel.  
RHONDA BAY,  
Petitioner,**

**vs.**

**CASE NO. 35736  
WRIT OF MANDAMUS  
AND PROHIBITION**

**BRENDA K. MARSHALL, et al.,  
Respondents.**

**LEGAL BRIEF**

**OF THE**

**WEST VIRGINIA LANDLORDS ASSOCIATION, INC.,  
OF THE WEST VIRGINIA LANDLORDS ASSOCIATION, INC.,  
KANAWHA COUNTY/CHARLESTON CHAPTER, INTERVENOR**

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Comes now Victoria L. Casey, Attorney and Law, and presents this brief regarding two issues relative to the cases as styled, *supra*.

**I. The Magistrate Court Has No Authority to Require Payment of Fee by an Appellant Who Files a Financial Affidavit of Inability to Pay Fees Under WV Code § 59-2-1.**

The Petitioners argue that they have a right to appeal a judgment of the Magistrate Court to the Circuit Court without payment of filing fees and without the posting of a bond, because a prior affidavit of indigency was accepted. However, it is the responsibility of the Magistrate to determine if the appellant is eligible, by virtue of financial state, to proceed with the appeal without the posting of a bond. See Rule 22(b) of the *West Virginia Rules of Civil Procedure for Magistrate Courts*.

In the case of Jurkovich, it appears that Jurkovich was not willing to discuss the appeal with

the Magistrate. Jurkovich had previously filed an affidavit of indigency that was approved for the original lawsuit. In the matter of the appeal, the Clerk was correct in requiring the Magistrate's approval prior to processing of the appeal without payment of fees by Jurkovich.

In the case of Bay, the issue of lack of notice of the hearing seems to have precipitated the action for appeal of the Magistrate's ruling. If indeed Bay filed an Answer but received no notice of the hearing, and if she qualified to proceed without prepayment in accordance with West Virginia Code § 59-2-1, then it would appear that the Magistrate should have permitted her to appeal the monetary judgment without the posting of a bond.

**II. The Magistrate Court Has No Authority to Refuse to Grant the Automatic Stay Set Forth in WV Code § 50-5-12(a) upon Appeal of a Civil Case in Magistrate Court.**

The West Virginia Landlord Association disputes this position. The Magistrate Court is authorized by law to deny continued possession of real estate during the pendency of an appeal. The law recognizes that, unless the landlord has breached the lease by failing to provide a habitable residence, a tenant who has not paid the rent or has damaged the property is wrongfully occupying the premises. *W. Va. Code* § 55-3A-1(a)(3). In the event of a tenant's wrongful occupation, the landlord may petition the court for the tenant's removal from the premises.

In devising § 55-3A-1 of the *West Virginia Code*, the legislature recognized the harm to an owner of property when that property is occupied by a person who has failed to pay the rent or who is damaging the property.<sup>1</sup> Indeed, when a tenant is occupying a rental unit without paying the rent, the landlord's livelihood is threatened. Society benefits when landlords are able to provide quality

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<sup>1</sup> In *Criss v. Salvation Army Residences*, 173 W. Va. 634, 319 S.E.2d 403 (1984), the court describes the purpose of wrongful occupation statutes: "to provide the landlord with a quick procedure to remove a hold-over tenant." P. 407, Citing 3A G. Thompson, Real Property, § 1370 (1981 Repl. Vol.)

housing, and this is possible only if the tenant pays the rent and prevents destruction of the property.

Recognizing that the landlord suffers financially during the process of repossession of property wrongfully occupied, the legislature devised a narrow time frame for the setting of a hearing, specifically, “not...less than five nor more than ten judicial days” from the date of the filing of the petition. *W. Va. Code* § 55-3A-1(b). If the tenant requests a continuance of the hearing, and a continuance is granted, then “the tenant shall be required to pay into court any periodic rent becoming due during the period of such continuance.” *W. Va. Code* § 55-3A-3(d); *Criss v. Salvation Army Residences*, 173 W. Va. 634, 319 S.E.2d 403 (1984). Considering that money must be posted for a continuance, it is not logical that the law would permit a tenant to appeal an eviction without posting a bond for the lost rent. To permit a tenant’s continued possession of the property throughout the appeal process would impede the intent of the statute.

Section (b) of *West Virginia Code* Chapter 55-3A-3 applies specifically to arrearage in rent, stating “if the tenant files an answer raising the defense of breach by the landlord of a material covenant upon which the duty to pay rent depends, the court shall proceed to a hearing on such issues.” Emphasis added. If there is no allegation of breach of lease or violation of statute by the landlord, and if the Magistrate finds that the tenant is in wrongful occupation of the rental property, then the Magistrate “*shall* make and enter an order granting immediate possession of the property to the landlord.” Emphasis added. *W. Va. Code* § 55-3A-3(e).<sup>2</sup>

The appellants in the case at bar posit that even a tenant who has been found to be in

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<sup>2</sup> “In the average landlord-tenant dispute where the failure to pay rent is the ground for removal of a tenant there will be no substantial defenses asserted by the tenant. Once the failure to pay rent is established there will be no genuine issues of material fact and the court will have the power to grant summary judgment...” *Criss*, p. 407.

wrongful occupation of real estate should be permitted to remain in possession of the real estate throughout the appeal process. This would be a valid proposition only if there was an issue of “title, retaliatory eviction, or breach of warranty,” as stated in *West Virginia Code* § 55-3A-3(g). Absent these issues, this section of the code states: “During the pendency of any such appeal, the tenant is not entitled to remain in possession of the property if the period of the tenancy has otherwise expired.” Even if the tenant prevails upon appeal, “the relief ordered by the appellate court shall be for monetary damages only and shall not restore the tenant to possession if the term of the lease has expired.” *Id.*

In the case at bar of *Bay v. Marshall, et al.*, Bay did not have a written lease with the landlord [hereinafter referred to as “Pryor”], only a verbal, month to month “lease.” In that situation, the landlord only has to give a thirty day notice, and the tenant must vacate. Pryor had given Bay such notice, and Bay refused to leave. The Magistrate rightly found that Bay was in wrongful occupation of the premises. Bay purposefully tried to stay in the rental unit by filing an appeal, even though the term of her tenancy obviously had expired.

Bay argues that by virtue of the filing of an appeal, the Magistrate’s order returning possession of the property to Pryor should have been stayed, thus permitting her to maintain possession of the property throughout the pendency of the appeal process. However, this would be in direct violation of *West Virginia Code* § 55-3A3(g), which states that if the period of tenancy has expired, the tenant is not entitled to possession of the property during the pendency of the appeal.

In the appellant’s memorandum of law, Bay argues that Chapter 55, Article 3A of the *West Virginia Code* is “poorly written and difficult to understand,” and that magistrates and judges throughout West Virginia have misinterpreted the statute. In fact, the statute is not ambiguous and

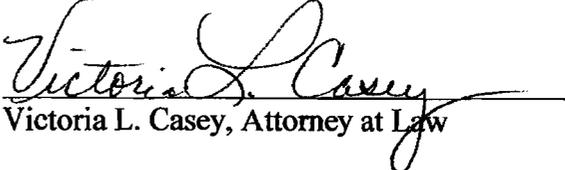
the magistrate's admonition to Bays that the monetary award can be appealed but not the eviction was a correct of interpretation of the law. The term of Bay's tenancy had expired, and therefore, as clearly stated in *West Virginia Code* § 55-3A-3(g), Bay was not entitled to remain in possession of the property during the pendency of the appeal. To permit Bay to remain in possession of the property when there was no written lease, only a 30 day verbal leasehold that she refused to honor, would be unjust and an unfair financial loss to Pryor.

If a tenant has not paid the rent and comes to court without a sum of money to make the rent current, then the tenancy remains expired. To permit that tenant to appeal an order of eviction without posting a bond for the amount of unpaid rent and to maintain possession of the premises would violate the intent of the statutes, and would impose a financial hardship on the landlord, who would continue to lose income for several weeks, with no possibility of recovery.

#### CONCLUSION

Magistrates who are not permitting a tenant to appeal an eviction when the tenancy has expired are correctly interpreting the statute. The appellate court may only order relief of monetary damages and not for repossession of the residence if the term of the lease has expired. If the rent has not been paid, the lease has expired; the tenant must reinstate the lease by bringing the rent to a current state in order to maintain possession of the premises during the pendency of an appeal. We pray that this Honorable Court will find that the interpretation of the statute as stated is accurate, and is fair and just and in the public interest.

Respectfully submitted,

  
Victoria L. Casey, Attorney at Law

**CERTIFICATE OF SERVICE**

I, Victoria L. Casey, counsel for the West Virginia Landlords Association, Kanawha County/Charleston Chapters, do hereby certify that on this 4th day of February, 2011, a copy of the foregoing **LEGAL BRIEF OF THE WEST VIRGINIA LANDLORDS ASSOCIATION, INC., KANAWHA COUNTY/CHARLESTON CHAPTER** was served upon the parties herein by placing the same in the United States first-class mail, postage prepaid, and addressed as follows:

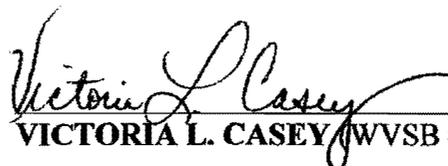
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Magistrate of Roane County  
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