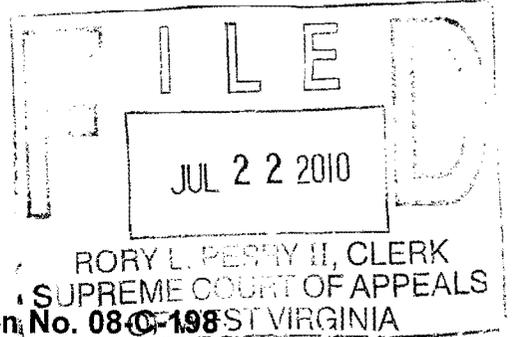


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____



STATE EX REL, GREGORY SMITH

Petitioner/Appellant,

v.

Civil Action No. 08-C-198
Honorable Jay M. Hoke
(By Assignment)

MINGO COUNTY COMMISSION,
JIM HATFIELD, Mingo County Clerk, and
LONNIE HANNAH, in his official capacity
as Mingo County Sheriff,

Respondents/Appellees.

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WEST VIRGINIA

PETITION FOR APPEAL

Submitted By:

John A. Kessler, WVSB No. 2027
David R. Pogue, WVSB No. 10806
Carey, Scott, Douglas, & Kessler, PLLC
901 Chase Tower
707 Virginia Street, East
P.O. Box 913
Charleston, WV 25323
(304) 345-1234

ATTORNEYS FOR PETITIONER

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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On July 23, 2008, Petitioner Gregory Smith filed a mandamus action to require the

Mingo County Commission, the County Clerk, and the Sheriff to reimburse him for the attorney fees and expenses he incurred in successfully defending an action to remove him from his public office as Mingo County Commissioner. On March 24, 2010, the Circuit Court of Mingo County, West Virginia entered a "Final Order in Mandamus Proceeding" denying Petitioner's mandamus request. It is from this Order that Petitioner now appeals.

STATEMENT OF THE FACTS

On or about December 15, 2006, Respondent Lonnie Hannah and the Mingo County Assessor, David Baisden, filed a petition for the removal of Petitioner Smith from his public office as Mingo County Commissioner. The petition for removal alleged that Mr. Smith willfully, and in neglect of his duties as a Mingo County Commissioner, violated the laws of West Virginia in seven different respects and on numerous occasions, and therefore should be removed from office. Specifically, the petition alleged the following grounds for removal:

- A. That Smith willfully and intentionally violated W.Va. Code § 7-3-3 by delegating his duty to auction county property;
- B. That Smith violated W.Va. Code § 7-5-4 by failing to sign all checks issued by the County Commission;
- C. That Smith voted to pay hundreds of thousands of dollars to Marcum Trucking Company, Inc. and 263 Towing, Inc. for flood relief work, which entities were indicted for defrauding the County;
- D. That Smith violated West Virginia Constitution, Article III, § 2 by representing Marcum Trucking Co. in a civil proceeding as a lawyer while voting to pay said company for flood relief;
- E. That Smith violated West Virginia Constitution, Article III, § 2 by agreeing to serve as a witness on behalf of Marcum Trucking Co. and 263 Towing in their criminal trials;
- F. That Smith "wasted" public funds by voting to pay a vendor \$12,500 more than he would have accepted in payment of an invoice for

services rendered; and

- G That Smith willfully violated W.Va. Code § 15-5-15 by employing and retaining in said employment a convicted felon as director of the Office of Homeland Security and Emergency Services of Mingo County.

On December 27, 2006, the Honorable Robin Jean Davis, Chief Justice of this Court, entered an administrative Order appointing the Honorable Fred L. Fox, the Honorable Lewis Marks, Jr., and the Honorable Thomas H. Keadle as a three judge panel to take all necessary action on the petition to remove Petitioner Smith from office. On March 26 and 27, 2007, a hearing was held before the three judge panel on the petition for removal.

On October 2, 2007, the three judge panel entered a 23 page "Order Denying Petition for Removal," holding that Petitioner should not be removed from office and dismissing the petition for removal from the docket. As to each of the asserted grounds for removal, the three judge panel found either that there was no violation of any applicable law, or that any violations were "technical" and did not arise to a level sufficient to justify removal from office. See "Order Denying Petition For Removal" at pp. 5-20. On October 31, 2007, Respondent Hannah and David Baisden filed a Petition for Appeal seeking reversal of the three judge panel's Order; on May 22, 2008, this Court denied the Petition for Appeal. Thus, Petitioner Smith prevailed in the removal action in all respects.

In defending against the removal proceeding and the ensuing appeal from the ruling therein, Petitioner Smith personally incurred attorney fees in the amount of \$51,943.00 and

costs in the amount of 1,605.81, for a total of \$53,548.81.¹ In an attempt to recover such expenses, Petitioner filed a mandamus action in the Circuit Court of Mingo County, West Virginia on July 23, 2008. An itemized statement of fees and expenses was attached to the mandamus complaint with copies provided to the parties.

On or about August 18, 2008, Respondents Mingo County Commission and Jim Hatfield filed their answer to Petitioner's mandamus complaint and admitted that the mandamus action brought against the County Commission for indemnification of Petitioner's attorney fees is an appropriate remedy pursuant to Powers v. Goodwin, 170 W.Va. 151, 291 S.E.2d 466 (1982). The Mingo County Commission and Mr. Hatfield further admitted that Petitioner incurred legal fees and expenses in the amount of \$53,498.81 in defense of the removal action but withheld approval of the reasonableness of such charges pending review of the itemized statement of charges.

On August 27 2008, Respondent Lonnie Hannah filed his answer to Petitioner's mandamus complaint and denied that Petitioner was entitled to reimbursement for attorney fees and expenses in any amount, in spite of his admission that Petitioner has prevailed on every claim of misconduct alleged in the removal petition. On March 23, 2009, Respondent Hannah filed a motion to deny Petitioner's attorney fees. Petitioner filed a response to this motion on April 24, 2009, and a hearing was held on February 11, 2010.

On March 24, 2010, the Circuit Court of Mingo County, West Virginia entered a "Final Order in Mandamus Proceeding," in which the circuit court denied Petitioner's requested mandamus relief. More specifically, the circuit court found that the grounds for

¹ This total does not include the fees and costs incurred in the mandamus proceeding or the filing of the instant Petition for Appeal.

issuing a writ of mandamus had not been met. As phrased by the circuit court, “[a] writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” See “Final Order in Mandamus Proceeding” at ¶ 8 (citing State ex rel Billings v. Point Pleasant, 194 W.Va. 301, 460 S.E.2d 436 (1995)).

In determining that this test had not been satisfied, the circuit court focused on the first element, finding that it had not been met for three reasons: (1) that there is no explicit statutory basis for the granting of attorney fees and costs under the facts and circumstances of this case; (2) that there is no explicit award of attorney fees and costs made in the three judge panel’s “Order Denying Petition For Removal,” and (3) that the test set forth by this Court in Powers v. Goodwin, 170 W.Va. 151, 291 S.E.2d 466 (1982), has questionable application to the present case because Powers was decided prior to the 1985 amendments to W.Va. Code § 6-6-7(c), which amendments replaced the single-judge proceeding involved in a removal action with a three judge panel authorized to decide “all issues presented to it in the matter.” See “Final Order in Mandamus Proceeding” at ¶ 10.

While the circuit court did not address the remaining two elements at length, the court stated that such elements appeared to be lacking as well. The court noted that a legal duty on the part of the Respondents to pay Petitioner’s attorney fees and costs did not appear to be established by any specific statute, rule, or case law. In addition, the circuit court noted that the “absence of another adequate remedy” was not established because the three judge panel could have awarded attorney fees and costs in this matter but did not do so. See “Final Order in Mandamus Proceeding” at ¶ 11. As a result of

these findings, the circuit court determined that the mandamus relief requested should be denied.

ASSIGNMENTS OF ERROR

The circuit court erred in determining that the legal prerequisites for mandamus relief were not met.

ARGUMENT

I. STANDARD OF REVIEW

This Court has previously held that a *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus. See Harrison County Com'n v. Harrison County Assessor, 222 W.Va. 25, 28, 658 S.E.2d 555, 558 (2008). Under this standard, the Court considers *de novo* whether the legal prerequisites for mandamus relief are present. Id. (citing McComas v. Board of Educ. of Fayette County, 197 W.Va. 188, 193, 475 S.E.2d 280, 285 (1996)). In addition, to the extent that the Court's resolution of the instant matter requires the resolution of questions of law, the standard of review remains *de novo*. Id.

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE LEGAL PREREQUISITES FOR MANDAMUS RELIEF WERE NOT PRESENT

As the circuit court observed, a writ of mandamus is appropriate when the following elements coexist: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." State ex rel Billings v. Point Pleasant, 194 W.Va. 301, 303, 460 S.E.2d 436, 438 (1995)(citing Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969)). As set forth below, all of these

elements are present in the case before this Court.

A. Petitioner has a clear legal right to indemnification for his attorney fees incurred in defending the underlying removal proceeding.

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). In the present case, all of these elements are present.

1. *The underlying action arose from the discharge of Petitioner's official duties as a Mingo County Commissioner.*

A review of the charges made against Petitioner in the underlying removal action reveals that said charges arose directly out of Petitioner's discharge of his official duties as a duly elected Mingo County Commissioner. For example, Respondents alleged that Petitioner, as a member of the Mingo County Commission, improperly delegated his duty to auction county property, failed to sign all checks issued by the Mingo County Commission, voted to pay hundreds of thousands of dollars for flood relief work to two companies that were indicted for defrauding the County, wasted public funds by voting to overpay a vendor, and hired a convicted felon to work as director of a County agency. See "Order Denying Petition for Removal" at pp. 2-3. Thus, the underlying removal action arose from Petitioner's discharge of his official duties. Indeed, in denying the Petition for Removal, the three judge panel ultimately concluded that Respondents failed to prove that Petitioner "committed *official misconduct, malfeasance in office, incompetence, neglect of*

duty, gross immorality, or waste that would warrant his removal from office..” See “Order Denying Petition for Removal” at p. 22 (emphasis added).

Moreover, this Court has recognized that

. . . 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.

Powers, 170 W.Va. at 161, 291 S.E.2d at 476. The underlying action in this case arose from the obligation of Petitioner to continue to discharge the office to which he was duly elected in that Respondents unsuccessfully attempted to remove him from such office.

2. *Petitioner acted in good faith.*

This Court has held that “[a] public official, in the performance of official duties imposed upon him by law, is presumed to have done his duty and to have acted in good faith and from proper motives until the contrary is shown.” State by State Road Commission v. Professional Realty Co., 144 W.Va. 652, 662-63, 110 S.E.2d 616, 623 (1959). In its Order denying the petition for removal, the three judge panel made no finding that Petitioner acted in bad faith at any time. To the contrary, as to each of the asserted grounds for removal, the three judge panel found either that there was no violation of any applicable law, or that to the extent any violations occurred, they were “technical” and did not rise to a level sufficient to justify removal from office. See “Order Denying Petition For

Removal” at pp. 5-20.² Thus, the panel made no finding that Petitioner Smith acted in bad faith or acted in any manner warranting his removal from office. Accordingly, there has been no contrary showing to overcome the presumption that Petitioner performed his official duties in good faith.

In its “Final Order in Mandamus Proceeding,” the circuit court apparently discounted the presumption of good faith expressed by this Court in Professional Realty on the ground that “the Professional Realty case was rendered . . . within the peculiar context of an ‘eminent domain’ proceeding brought by the State of West Virginia, and therefore, not directly applicable to this case or to these circumstances.” However, a review of this Court’s decision in Professional Realty reveals that the presumption of good faith is not limited to the “peculiar context” of that case. First, the presumption is expressed as a general point of law in the syllabus of the opinion. See Syl. Pt. 5, Professional Realty, 144 W.Va. At 652, 110 S.E.2d at 618. Second, in the body of the opinion, the Court cites numerous cases in support of the presumption, none of which arise in the “peculiar context” of an eminent domain proceeding brought by the State of West Virginia. See Id. at 662-63, 110 S.E.2d at 623 (*citing* Title Ins. Co. of Richmond v. Carver, 113 W.Va. 58,

² For example, the Petitioners below asserted that Mr. Smith should be removed because, as President of the Mingo County Commission, he was required by W.Va. Code § 7-5-4 to sign all checks issued by the County Commission, but failed to do so. In addressing this purported ground for removal, the three judge panel found that the Mingo County Commission had a long-standing practice of allowing any of the three Commissioners to sign checks as a convenience. Furthermore, when the State Auditor’s Office brought to the attention of the Mingo County Commission that its President had failed to sign many of the checks issued by the Commission, such failure was promptly corrected. Thus, the three judge panel concluded that to the extent there was a technical violation of W.Va. Code § 7-5-4, such violation did not rise to a level sufficient to justify Mr. Smith’s removal from office. See "Order Denying Petition For Removal" at pp. 7-8.

166 S.E. 697; Consentina v. State Compensation Commissioner, 127 W.Va. 67, 31 S.E.2d 499 (1944); Price v. Sims, 134 W.Va. 173, 58 S.E.2d 657 (1950); State ex rel. Staley v. Wayne County Court, 137 W.Va. 431, 73 S.E.2d 827 (1953); State ex rel. Watts v. Kelly, 140 W.Va. 177, 83 S.E.2d 465 (1954)). Thus, the circuit court erred in discounting the presumption of good faith expressed in Professional Realty.

3. *The Mingo County Commission has the power to indemnify Petitioner.*

As to the third and final element, the West Virginia Supreme Court of Appeals recognized in Powers that county commissions have the power to indemnify county officials for attorney fees. Syl. Pt. 2, Powers, 70 W.Va. at 153, 291 S.E.2d at 468. In summary, because this Court has held that a public official is entitled to indemnification for attorney fees when the three criteria set forth in Powers are met, and because such criteria are met in the present case, Petitioner has a clear legal right to the reimbursement of the attorney fees he incurred in defending the underlying removal action.

4. *The circuit court's reasons for finding that "a clear legal right in the petitioner to the relief sought" had not been established are flawed.*

The first reason the circuit court gave for not finding "a clear legal right in the petitioner to the relief sought" is that there is no explicit statutory basis for the granting of attorney fees and costs under the facts and circumstances of this case. However, the fact that there is no "explicit statutory basis" is irrelevant in light of the fact that this Court has held that a county official is entitled to reimbursement if the elements set forth in Powers are met. As set forth above, all of the elements of the Powers test are met in this case, and Petitioner therefore has "a clear legal right" to the reimbursement of his attorney fees.

The circuit court's second reason, that there is no explicit award of attorney fees and

costs in the three judge panel's "Order Denying Petition For Removal," is similarly irrelevant. The fact that the three judge panel did not address the issue of attorney fees does not change the fact that Petitioner is entitled to reimbursement under the Powers test.

The third and final reason the circuit court provided is that Powers "was decided by our Supreme Court under the old law authorizing the use of a single-judge proceeding involved in a removal proceeding, and prior to the 1985 amendments to West Virginia Code § 6-6-7(c), which codified changes authorizing the three-judge court to preside over such removal cases," and "the present statutory language authorizes the three-judge court to decide ' . . . all issues presented to it in the matter.'" See "Final Order in Mandamus Proceeding" at ¶ 10.

However, these statutory changes do not affect Petitioner's clear legal right to reimbursement. First, the circuit court made no finding that the issue of reimbursement was ever considered by the three judge panel. Second, the aforementioned changes to W.Va. Code § 6-6-7(c) do not mean that Powers is no longer controlling. The Powers court based its test on learned treatises and prevailing law across the country. See 170 W.Va. at 157, 291 S.E.2d at 472. At no point did the Powers court hinge its decision on, or even discuss, any part of W.Va. Code § 6-6-7, or the power of the judge in the removal proceeding to award attorney fees.

Furthermore, the Powers test has not been abrogated or treated negatively by subsequent cases. To the contrary, this Court has continued to utilize the Powers test in the wake of the 1985 amendments to W.Va. Code § 6-6-7. See Atkinson v. County Com'n of Wood County, 200 W.Va. 380, 385, 489 S.E.2d 762, 767 (1997); State ex rel. Warner v. Jefferson County Com'n, 198 W.Va. 667, 671-72, 482 S.E.2d 652, 656-57 (1996).

Indeed, in Warner, this Court endorsed the Powers test as the appropriate framework for determining whether a county official had a clear legal right to reimbursement in the context of a mandamus action. See 198 W.Va. at 671-72, 482 S.E.2d at 656-57. Because all of the elements of the Powers test are met in the present case, the circuit court erred in determining that Petitioner had not established “a clear legal right” to reimbursement.

B. Respondents have a legal duty to indemnify Petitioner for his attorney fees.

This Court has held that where a county commission has the power to pay a county official’s attorney fees, and the remaining elements of the three-prong test in Powers are satisfied, then there is a clear legal duty on the part of the county commission to pay the official’s legal fees and expenses. In Warner, supra, the appellant was on the board of directors of the Jefferson County Solid Waste Authority (“JCSWA”), and was indicted for alleged violations relating to the operation and maintenance of a landfill. 198 W.Va. at 670, 482 S.E.2d at 655. The appellant was acquitted and sought reimbursement of \$95,345.56 in legal fees and expense incurred in the defense of his prosecution. Id. at 671, 482 S.E.2d at 656. The Jefferson County Commission refused to pay these legal fees and expenses, and the appellant filed a petition for writ of mandamus. Id. The circuit court denied the relief sought on the ground that the County Commission had no legal duty to pay these fees and expenses. Id.

On appeal, the Warner court observed that W.Va. Code § 22C-4-7(b), which requires county commissions to pay the “general administrative expenses” of solid waste authorities, gives the Jefferson County Commission “at the very least, the implied power to pay the appellant’s reasonable legal fees and expenses, provided that the appellant satisfies all of the other elements in Powers.” Id. at 673, 482 S.E.2d at 658, and because

it has such authority, there is a clear legal duty on the part of the Jefferson County Commission to pay such reasonable legal fees and expenses. Id.

In the present case, the Mingo County Commission has more than an implied power to pay Petitioner's legal fees: this Court has expressly held that a county commission has the power to indemnify a county official like Petitioner for attorney fees. See Syl. Pt. 2, Powers, 70 W.Va. at 153, 291 S.E.2d at 468.³ Thus, under the holding in Warner, the Mingo County Commission has a legal duty to indemnify Petitioner as long as the remaining elements of the Powers test are satisfied. As discussed above, all of the elements of the Powers test are satisfied. Accordingly, the Mingo County Commission has a legal duty to reimburse Petitioner.

C. There is not another adequate remedy.

In Warner, this Court held that "[p]roviding that appellant is able to factually satisfy all of the elements of Powers and recognizing that the County Commission does have a clear legal duty to pay legal fees and expenses, the appellant has no remedy other than mandamus to compel the County Commission to exercise its nondiscretionary duty." 198 W.Va. at 673, 482 S.E.2d at 658. While it is true that Warner did not involve a removal action and that therefore the appellant in Warner never had the option of asking a three judge panel for an award of attorney fees in the course of such removal action, the removal

³ Just as the Warner court observed that W.Va. Code § 22C-4-7(b), which requires county commissions to pay the "general administrative expenses" of solid waste authorities, gives county commissions the implied power to pay a solid waste authority director's legal fees and expenses, the Powers court observed that W.Va. Code 7-1-3, which provides that county commissions "have the superintendence and administration of the internal police and fiscal affairs of their counties," gives county commissions the power to pay a county commissioner's legal fees and expenses. See Powers, 170 W.Va. at 157, 291 S.E.2d at 472, n.3.

action in the present case has been removed from the docket. Even if the circuit court was correct that the three judge panel *could have* awarded attorney fees and costs in the course of the removal proceeding, now that said proceeding has been removed from the docket, Petitioner has no remedy other than mandamus to require Respondents to indemnify him for his attorney fees and costs.

Moreover, the circuit court points to no statute, regulation, or case law specifically stating that the three judge panel in a removal proceeding has the power to award attorney fees and costs, or that the single-judge in pre-1985 removal proceedings did not have such power. To the contrary, this Court observed in Powers that mandamus (which requires the absence of other adequate remedies) was an appropriate vehicle to secure reimbursement of legal expenses incurred in the successful defense of a removal action. See 170 W.Va. at 159-60, 291 S.E.2d at 475. Petitioner is entitled to rely on the published opinions of this Court. If Petitioner had known that Powers had been abrogated as posited by the circuit court, that mandamus was no longer an appropriate vehicle for seeking reimbursement of attorney fees stemming from a removal action, and that he was required to seek such fees in the course of the removal action or forfeit them forever, Petitioner would have moved for attorney fees in the underlying removal action before the case was removed from the docket and the three judge panel was disbanded.

As noted above, this Court observed in Powers that “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.” 170 W.Va. at 161, 291 S.E.2d at 476. This Court further observed that “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.” Id. In denying Petitioner’s mandamus action to recover the attorney fees and expenses he incurred in successfully defending against removal from office, the circuit court has flouted the above-quoted language from Powers and declared that Petitioner’s continued service in his elected position is a personal concern of Petitioner for which he bears sole financial responsibility. The circuit court’s decision has effectively made the will of the electorate contingent upon the chosen candidate’s ability to finance the defense of removal actions brought by his or her political opponents. This outcome is in direct contravention of the public policy expressed by this Court in Powers, and must not be allowed to stand.

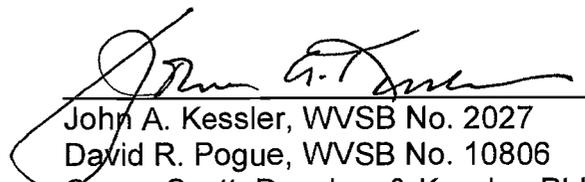
CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant his Petition for Appeal.

Respectfully submitted,

GREGORY SMITH

By Counsel,


John A. Kessler, WVSB No. 2027
David R. Pogue, WVSB No. 10806
Carey, Scott, Douglas, & Kessler, PLLC
901 Chase Tower
707 Virginia Street, East
P.O. Box 913
Charleston, WV 25323
(304) 345-1234

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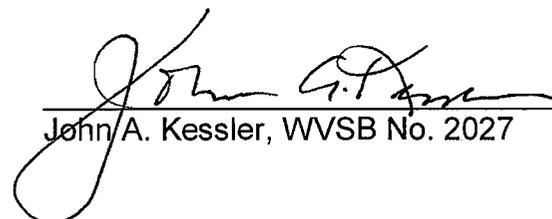
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CERTIFICATE OF SERVICE

I, John A. Kessler, counsel for Plaintiff/Petitioner, do hereby certify that on this, the 9th day of June, 2010, I served a true and exact copy of the foregoing "Petition for Appeal" by United States Mail, postage pre-paid, addressed as follows:

Letitia Neese Chafin, Esquire
The H. Truman Chafin Law Firm, PLLC
P.O. Box 1799
Williamson, WV 25661

Glen Rutledge, Esquire
P.O. Box 340
Williamson, WV 25661


John A. Kessler, WVSB No. 2027