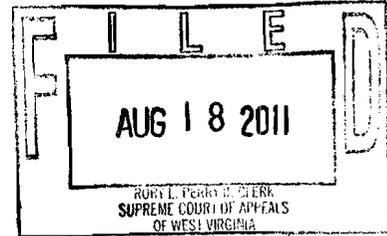


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 100916



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.

PETITIONER'S REPLY BRIEF

Submitted By:

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 2

 A. Petitioner was not required to seek attorney fees from the Mingo County Commission prior to filing a mandamus action, because, as Respondent Hannah has admitted, the Mingo County Commission did not have the power to act. 2

 B. This Court has the power to compel the Mingo County Commission to reimburse Petitioner for his attorney fees.. 4

CONCLUSION 5

TABLE OF AUTHORITIES

West Virginia Cases:

<u>State ex rel Billings v. Point Pleasant,</u> 194 W.Va. 301, 460 S.E.2d 436 (1995)	2
<u>State ex rel. Warner v. Jefferson County Com'n,</u> 198 W.Va. 667, 482 S.E.2d 652 (1996)	4
<u>Zaleski v. West Virginia Mut. Ins. Co.,</u> 224 W.Va. 544, 687 S.E.2d 123 (2009)	2

West Virginia Statutes:

W.Va. Code § 7-1-1	3
W.Va. Code § 11-8-31a	4

STATEMENT OF THE CASE

Petitioner's account of the facts relevant to this appeal is set forth in his Petition for Appeal. To summarize, 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. A three-judge panel appointed by this Court determined that Petitioner should not be removed from office and dismissed the petition for removal from the docket. On July 23, 2008, Petitioner 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.

On or about June 9, 2010, Petitioner filed a Petition for Appeal. Respondent Hannah did not file a response to this Petition for Appeal. On June 13, 2011, this Court entered an Order permitting the parties to file supplemental briefing, but restricted such briefing to the issue of "whether the three-judge panel has authority to award attorney's fees and expenses in a removal action brought under W.Va. Code § 6-6-7 and, if so, whether a party must seek his/her attorney's fees and expenses from the three-judge panel or risk waiving the same."

On August 15, Respondent Hannah filed a supplemental brief, taking the position that the three-judge panel does not have the authority to award attorney fees in a removal action.¹ However, Respondent Hannah's brief goes on to put forth two additional

¹ Notably, Respondent's position on this issue actually supports Petitioner's arguments for reversing the Circuit Court, which based its ruling in large part on its

arguments that go beyond the restricted scope of the supplemental briefing permitted by this Court's June 13, 2011 Order. First, Respondent Hannah argues that Petitioner is not entitled to relief because he failed to seek attorney fees from the Mingo County Commission prior to filing a mandamus action. Second, Respondent Hannah argues that neither this Court nor the Circuit Court has the power to compel the Mingo County Commission to exercise its "discretionary" power to reimburse Petitioner for his attorney fees. For the reasons set forth below, Respondent Hannah's arguments are without merit.²

ARGUMENT

- A. Petitioner was not required to seek attorney fees from the Mingo County Commission prior to filing a mandamus action, because, as Respondent Hannah has admitted, the Mingo County Commission did not have the power to act.**

One of the elements that a party must demonstrate when seeking a Writ of Mandamus is "the absence of another adequate remedy." See 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)). Respondent Hannah argues that because Petitioner did not ask the Mingo County Commission to pay his attorney fees prior to filing a mandamus action, he is not entitled to a Writ of Mandamus compelling the County Commission to pay those fees.

conclusion that "the three-judge panel *could have* awarded attorneys fees and costs in this matter (i.e. the statutory ability to determine '...all issues presented to it...'), but did not do so" (Emphasis added).

² Even if there were any merit to these arguments, Respondent Hannah did not make them before the Circuit Court and is therefore barred from making them 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).

However, as Respondent Hannah has admitted, the Mingo County Commission could not have paid Petitioner's fees without an Order from the Court. In paragraph 14 of Petitioner's "Mandamus Complaint" before the Circuit Court, Petitioner stated that "because Plaintiff [Smith] and former Petitioner in the removal action, Mr. Baisden, are present members of the Defendant Mingo County Commission, a court order is required before the attorneys' fees and expenses can be paid by the Defendants." In the "Answer of Lonnie Hannah, Sheriff of Mingo County," Respondent Hannah answered paragraph 14 of the "Mandamus Complaint" by stating that "Defendant Sheriff Hannah admits that because there can be no quorum of the Mingo County Commission, the Mingo County Commission cannot act."

Indeed, W.Va. Code § 7-1-1(b) provides that "[a] county commission shall consist of three commissioners as provided in section nine, article IX of the Constitution of the State of West Virginia, any two of whom shall constitute a quorum for the transaction of business." Because two of the three Mingo County Commissioners had a conflict of interest, there could be no quorum for the transaction of business with regard to the payment of Petitioner's attorney fees. Thus, as Respondent Hannah admitted, the Mingo County Commission could not have acted to pay Petitioner's attorney fees, and therefore Petitioner's failure to seek the fees from the Commission does not form a basis for denying Petitioner's request for a Writ of Mandamus.

B. This Court has the power to compel the Mingo County Commission to reimburse Petitioner for his attorney fees.

Respondent Hannah argues that W.Va. Code § 11-8-31a vests the "discretionary" power to award attorney fees from a removal action solely in the Mingo County

Commission, and that neither this Court nor the Circuit Court has the power to compel the Commission to exercise that power. In other words, Respondent appears to be arguing that the Mingo County Commission had no *duty* to reimburse Petitioner, and that the Court cannot employ mandamus to compel the Mingo County Commission to act in the absence of such a duty.

However, 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 v. Goodwin, 170 W.Va. 151, 291 S.E.2d 466 (1982) are satisfied, there is "a clear legal duty" on the part of the county commission to pay the official's legal fees and expenses. See State ex rel. Warner v. Jefferson County Com'n, 198 W.Va. 667, 671-73, 482 S.E.2d 652, 656-58 (1996).³ As discussed at length in Petitioner's Petition for Appeal, all of the elements of the Powers test are satisfied in this case. Accordingly, the Mingo County Commission had a clear legal duty, rather than a mere discretionary power, to pay Petitioner's attorney fees. Respondent Hannah cannot argue that W.Va. Code § 11-8-31a superseded the Warner decision, because this Court decided Warner in 1996, eleven years after the passage of § 11-8-31a in 1985. Thus, Respondent Hannah's argument that the Courts do not have the power to compel the Mingo County Commission to pay Petitioner's attorney fees is without merit.

CONCLUSION

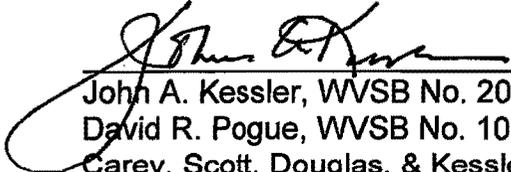
For the reasons set forth above, Petitioner respectfully requests that this Court grant his Petition for Appeal.

³ The Warner case is discussed in detail in Petitioner's Petition for Appeal.

Respectfully submitted,

GREGORY SMITH

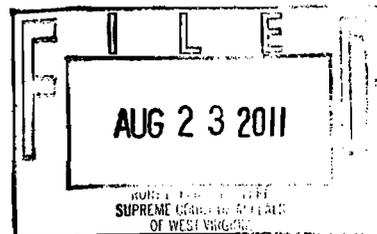
By Counsel,



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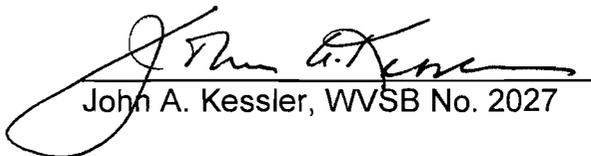
Respondents/Appellees.

CORRECTED CERTIFICATE OF SERVICE

I, John A. Kessler, counsel for Petitioner, do hereby certify that on this, the 22nd day of August, 2011, I served a true and exact copy of the previously filed "Petitioner's Reply Brief" via hand delivery, addressed as follows:

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