

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Thomas H. Johnson and
Teresa S. Johnson, Plaintiffs Below
Petitioners

OCT 25 2011

vs. No. 11-1105 (Circuit Court Civil Action No. 09-C-71)

Bertha Kirby, Individually
and as Administratrix
of the Estate of Jesse Frances Kirby, Defendant Below,
Respondent

BRIEF FOR THE PETITIONERS

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in upholding the County Commission's decision to accept the challenge to the probated Will because the Commission lacked jurisdiction to make that decision, thus the Circuit Court also lacked jurisdiction.
2. The Circuit Court erred in upholding the County Commission's decision to remove Brenda Kirby as Executrix/Administratrix of the estate because the Commission's decision was void for lack of jurisdiction.
3. The Circuit Court erred in not granting summary judgment to Petitioner for unjust enrichment since there was no evidence presented by Respondent of a genuine issue of material fact.

STATEMENT OF THE CASE

This Court is being asked to reverse a decision by the Circuit Court of Monroe County that incorrectly found that West Virginia Code §41-5-11 concerning the six month limitation to challenge a probated Will had no effect on the probated Will in this case.

On March 15, 2006, Jesse Frances Kirby executed a holographic Last Will and Testament wherein he named his wife, Brenda C. Kirby, as his sole heir. On September 1, 2006 Jesse Frances Kirby and Brenda C. Kirby by final order of the Court were divorced. Jesse Frances Kirby died on November 26, 2007. App. 3. On or about December 5, 2007, Brenda C. Kirby presented the Will for probate in the Office of the Clerk of the County Commission of Monroe County, fully disclosing her relationship to Jesse Frances Kirby as "ex-wife." App. 4, 43. On or about December 5, 2007, the Monroe County Clerk's office in vacation admitted the Last Will and Testament of Jesse Frances Kirby and qualified Brenda C. Kirby as the Executrix of the Estate. App. 43. It is important to note that Brenda C. Kirby was not named as Executrix in the Will but rather was qualified and appointed as such by the Monroe County Clerk's office in vacation. Id. The County Clerk of Monroe County entered a Probate order, on or about December 5, 2007, entering the Last Will and Testament of Jesse Frances Kirby into the record

of his estate. App. 58, 59.

Brenda C. Kirby filed the appraisal of the Estate of Jesse Frances Kirby on December 7, 2007. App. 44. On or about December 20, 2007, the Monroe County Commission caused to be published in the Monroe County Watchman newspaper notice of the administration of the Estate of Jesse Frances Kirby with Brenda C. Kirby as Executrix. App. 63. A claim was filed against the Estate of Jesse Frances Kirby on or about December 17, 2007, for \$6,797.07 for the funeral expenses of Jesse Frances Kirby. App. 64. Nearly six months after the Probate Order was entered, on or about June 1, 2008, Brenda C. Kirby listed the real property owned by Jesse Frances Kirby, 2.72 acres, parcel 2 (Deed book 196 at page 85), for sale through Coldwell Banker Real Estate, Tom Johnson, agent, for \$39,900.00. App. 65. After listing the property, Thomas (Tom) Johnson discovered there was a dispute with a neighbor over a boundary line of the listed property and a dispute concerning ownership of the well serving the property. See page 11, transcript, Thomas Johnson's deposition, App. 67. Mr. Johnson advised Brenda C. Kirby of the claimed disputes and suggested she get a survey to solve the problem. Brenda C. Kirby informed Mr. Johnson they could not afford a survey and asked him if he would buy the property. Id.

On or about July 11, 2008, a little more than seven months since the Probate Order was entered, Brenda C. Kirby agreed to sell the property of the Estate to Thomas Johnson and Teresa Johnson for the purchase price of \$11,500.00 due to the property disputes. App. 68. Out of the proceeds of the sale of property, the real estate taxes and funeral bill were paid, leaving a balance of \$3,377.40 to the Estate of Jesse Frances Kirby. App. 70-71. At the time of purchasing the property from Brenda Kirby, Thomas Johnson and Teresa Johnson had no knowledge that

Brenda Kirby was not the sole heir to the Estate of Jesse Frances Kirby. See Affidavit of Thomas Johnson and Teresa Johnson, App. 73-75. After purchasing the subject property, Thomas Johnson and Teresa Johnson made improvements to said property and paid expenses for said property in addition to the purchase price in the amount of \$18,198.63, all of which improved/protected the value of the property. Id.

Nearly nine months after the death of Jesse Frances Kirby, on or about August 25, 2008, Bertha Kirby, the mother of the decedent, through her attorney filed an Objection to the Final Settlement and a Petition for Removal of the Executrix of the Estate of Jesse Frances Kirby and Demand for Full Accounting in which she demanded the probated Will be set aside. App. 79-81. Bertha Kirby knew within one week of Brenda C. Kirby's appointment as Executrix that her appointment was not legal and that Brenda C. Kirby had no right to the property. See page 11, transcript, Bertha Kirby's deposition, App. 76. Bertha Kirby visited the subject property the last week in July 2008 and saw Mr. Elmer Bryant painting the house. App. 77. On or about April 1, 2009, the Monroe County Commission filed an Order indicating that Brenda Kirby be removed as Executrix of the Estate of Jesse Frances Kirby and ordered any property would go to Bertha Kirby as the sole heir of said Estate. App. 83.

This matter was brought by Petitioners, Thomas H. Johnson and Teresa S. Johnson, seeking that the Circuit Court rule that the sale made by Brenda C. Kirby as Executrix of the Estate under the voidable Will and having been given the powers by the County Commission to act as Executrix, the Deed to Petitioners is valid; that the Court acknowledge the payments to the creditors of the state made from the proceeds of the sale of the real estate are valid payments; and that the First National Bank of Ronceverte release the balance of the funds in escrow to

Petitioners. App. 6. Petitioners further requested the Circuit Court to find that they were bona fide purchasers of the property; or, in the alternative, that the funds in escrow at First National Bank of Ronceverte be released to Petitioners and the real estate sold and Petitioners receive the proceeds from the sale of the property sufficient to pay the purchase price of the property and improvements in the amount of \$28,583.14. App. 7

Respondent filed a Motion for Summary Judgment as to the quiet title action. App. 37. Petitioners filed a response and filed their own Motion for Summary Judgment on the quiet title issue and unjust enrichment claim. App. 43. The Circuit Court granted Respondent's summary judgment on the quiet title issue and denied Petitioners' motion for summary judgment on the unjust enrichment claim. App. 95-96. The Circuit Court reasoned that Bertha Kirby was not the sole heir of the Estate of Jesse F. Kirby as his "wife" and Petitioners should have known that. App. 94. The Circuit Court upheld the April 1, 2009, Order of the County Commission, replacing Brenda Kirby as the Executrix of the Estate and since Bertha Kirby did not join in the deed to the Petitioners then title did not pass to them. Id.

SUMMARY OF ARGUMENT

The probate process is an important judicial procedure used to prove the validity of a Will, provide for the administration of estates, and facilitate the final settlement of estates. This important legal process should never be set aside and treated as ineffective because such a policy would not only impede the final settlement of estates, but also it would harm bona fide purchasers of such estates who believe that good title has been passed to them. In this case a Will that should have been ineffective was made effective once it was entered into probate.

The main issue in this case centers around West Virginia Code §41-1-6, which basically

holds that divorce revokes any “disposition or appointment of property made by the will to the former spouse.” The holographic Will of Jesse Frances Kirby bequeaths the entire estate to his wife, then Brenda Kirby. App. 57. The subsequent divorce between Jesse Frances Kirby and Brenda Kirby made the Will ineffective or invalid under §41-1-6. However, after the death of Jesse Frances Kirby, Brenda Kirby presented the Will for probate in the Office of the Clerk of the County Commission of Monroe County. Brenda Kirby had no knowledge of §41-1-6, nor did she have any intent to commit fraud or misrepresentation. Brenda Kirby declared her relationship with the decedent to be that of “ex-wife.” App. 61. Despite §41-1-6, the Monroe County Clerk’s office in vacation admitted the Will into probate and the Monroe County Commission approved the same by publication of the Probate Order. Once a Will is entered into probate the rules governing probated Wills apply, including West Virginia Code §41-5-11, which provides that any person who was not a party to a probate proceeding may challenge the validity of a Will but must do so within six months of the order to probate otherwise the order “shall be forever binding.” In this case, Respondent’s complaint was made more than six months after the order of probate, thus the Circuit Court erred by not upholding the statute of limitations for challenging the validity of probated Wills.

The Circuit Court also erred in not reinstating Brenda Kirby as Executrix/Administratrix of the estate. The Will did not appoint Brenda Kirby as Executrix/Administratrix, rather the County Clerk’s office in vacation found that she qualified as executrix and after she paid the bond she was thus appointed to administer the estate. App. 55. West Virginia Code §44-1-14a(e) explains that any interested person who objects to the qualifications of the personal representative has ninety (90) days after the first publication to file an objection and if an

objection is not timely filed, then “the objection is forever barred.” Respondent knew of Brenda Kirby’s appointment as personal representative, but did not object until more than six months after the first publication made on December 20, 2007. The Respondent’s objection was forever barred by statute, thus the County Commission’s decision to remove Brenda Kirby as Executrix/Administratrix is void for lack of jurisdiction and the Circuit Court should not have upheld such a decision.

Finally, the Circuit Court erred in not granting Petitioner’s motion for summary judgment on the claim for unjust enrichment. Petitioners’ presented evidence of funds for the purchase of the property being used to settle the funeral debt that was against the Estate. Petitioners’ also provided evidence of improvements made which benefitted the property. Petitioners’ did not intend for these improvements to benefit Respondent whom the Circuit Court declared to be the actual owner of the property. A claim for unjust enrichment has been recognized in West Virginia particularly where there is a reasonable mistake of fact as to who owns the property that has been improved. See Somerville v. Jacobs, 153 W.Va. 613 (1969). Petitioners properly supported their motion for summary judgment and showed there was no issue of material fact, Respondent offered no evidence to contradict Petitioners’ claims nor submitted an affidavit explaining the need for further discovery, therefore summary judgment was appropriate and the Circuit Court erred in not granting the Petitioners’ motion. Syl. pt. 3 Williams v. Precision Coil, Inc. 194 W.Va. 52 (1995).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in long standing and well-established case law regarding subject matter jurisdiction and probated Wills,

oral argument under Rev. R.A.P. 18(a)(3) is not necessary. Unless the Court, in its discretion, determines that oral argument is necessary then oral argument would be appropriate under Rev. R.A.P. 20 (a)(1) and (2) as a case of first impression or a case involving issues of fundamental public importance.

ARGUMENT

Standard of Review

“A circuit court’s entry of summary judgment is reviewed de novo.” Williams v. Precision Coil, Inc. 194 W.Va. 52 at 58.

I. The Circuit Court erred in upholding the County Commission’s decision to accept the challenge to the probated Will because the Commission lacked jurisdiction to make that decision, thus the Circuit Court also lacked jurisdiction.

Questions concerning jurisdiction are raised in this case. Respondent’s challenge to the probated Will and appointment of Brenda Kirby as Executrix/Administratrix was not timely filed to the Monroe County Commission. This Court has held that filing deadlines are considered jurisdictional in nature. See Helton v. Reed, 219 W.Va. 557 (2006). Further, this Court decided in Dishman v. Jarrell, 165 W.Va. 709 at 712 (1980), “Subject matter jurisdiction may never be waived.” Further, in C.W. McKinley, et al, v. Orpha Queen, et al, 125 W.Va. 6 (1943), the Court addresses West Virginia Code §41-5-11 in Syllabus Point 3 where it states, “The period prescribed in Code §41-5-11 relative to filing a bill in equity, is jurisdictional, limiting the right and the remedy [. . .].” Also, in Syllabus Point 2 of McKinley, supra, the Court stated, “Jurisdiction of the subject matter of an equity suit may be challenged in any appropriate manner and at any time during the pending thereof.” The Court affirmed McKinley, in the more recent case, Far Away Farm v. County Board of Zoning Appeals, 222 W.Va. 252 (2008). In this case,

the County Commission lacked jurisdiction to hear the Respondent's challenge since the statutory deadline had passed, subsequently the Circuit Court also lacked jurisdiction. Since subject matter jurisdiction is never waived, the Will must stand and Brenda Kirby must be reinstated as Executrix/Administratrix of the Estate.

Black's Law Dictionary 8th ed. defines probate as "[t]he judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court." The Will in question in this case reads "Last will & Testament March 15 the year 2001. I Jesse Kirby do hereby give all of my world possession includ [sic] my part of the house to Brenda Kirby. My wife" signed Jesse Kirby. West Virginia Code §41-1-6 revokes the entire Will because of the divorce between Jesse Kirby and Brenda Kirby, thus the Will was invalid. However, the probate order entered by the County Clerk's Office in vacation and approved by the County Commission by publication of the Notice, served to validate and make effective the entire Will. See Cowen v. Cowen, 133 W.Va. 115 (1949).

In Cowen West Virginia Code §41-5-11 provided a limitation of two year to challenge the validity of a Will, the same statutory provision has since been modified to limit the time to six months. The facts presented in Cowen are very similar to the facts of this case because an unsigned Will that should not have been valid, was probated and then it was challenged after the statute of limitations had expired. The Court in Cowen found that a complaint meant to challenge the validity of an unsigned Will more than three years after the Will was probated was barred by §41-5-11. Id. at 115-16; 120. The party attacking the Will in Cowen argued that it was not a valid Will and "its probate should be treated as of no consequence, and that therefore Code, 41-5-11, providing that if two years have elapsed since the order of a county court probating a

Will and not appealed from, the order of probate ‘shall be forever binding’ has no effect.” Id. at 118. However, the Court determined that “[t]he probate was effective to establish the paper in question as the Will of A.B. Cowan [decedent] and that paper did vest title [. . .]. Id. at 121. The Court in Cowan agreed that the Will alone was invalid, but the probate process validated the Will. Id. at 116; 121

There is no argument, in the present action, as to the meaning of West Virginia Code §41-1-6, which states that a divorce revokes any disposition or appointment of property made by a Will to the former spouse. However, Mr. Kirby’s Will was placed into probate and the Order entered December 5, 2007. West Virginia Code §41-5-11 clearly states if the order of probate was entered by the County Commission or the County Clerk in vacation, a complaint shall be filed within six months of the date of such order or probate. Said Code section further states if said complaint is not filed timely the order shall be forever binding. Respondent had actual knowledge by her own testimony within a week of the Will being probated that she believed it was not legal and Brenda Kirby had no interest in the property. App. 76. Respondent was also constructively noticed by the publication made by the County Commission on December 20, 2007. App. 63. Respondent attempted to use the County Commission to challenge the probated Will on August 25, 2008, over 8 months and 20 days from the date the Probate Order was entered. The Respondent knew she had a claim on the property, yet she sat on her rights until after the statutory period had run. Respondent is guilty of laches.

The Circuit Court in upholding the County Commission’s order, refused to recognize the importance of the probate proceedings, unlike the Court in Cowan. The Circuit Court does not even acknowledge that the Will was probated, but rather treats the probate process of no

consequence and finds that Code §41-5-11 has no effect on the probated Will in this case. The application of Code §41-5-11 is appropriate in this case since, as the Court in Cowen explained, the plain purpose of Code §41-5-11 “is to stabilize the settlement of estates of decedents.” Id. at 119. Respondent failed to timely file her petition with the Monroe County Commission this statutory violation should not be allowed to upset the settling of the Estate. The Will of Jesse Frances Kirby should stand as it exists and Brenda Kirby should be reinstated as Executrix because both the County Commission and Circuit Court lacked jurisdiction to decide otherwise.

II. The Circuit Court erred in upholding the County Commission’s decision to remove Brenda Kirby as Executrix/Administratrix of the estate because the Commission’s decision was void for lack of jurisdiction.

The Will of Jesse Frances Kirby did not appoint a personal representative. West Virginia Code §44-1-2 provides that if there is no executor appointed by the Will then the Court or the clerk, when the Court is not in session, may grant administration “to the person who would have been entitled to administration if there had been no will.” West Virginia Code §44-1-4 explains who can be appointed as an administrator:

Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such others entitled to distribution as such court or clerk see fit. If no distributee apply for administration within thirty days from the death of the intestate, such court or clerk may grant administration to one or more creditors, or to any other person. (emphasis added).

Even though Brenda Kirby may have been prematurely appointed to Executrix/Administratrix, she still qualified under statute for the position. West Virginia Code §44-1-14a(e) requires any interested person to object to the qualification of the personal representative within 90 days of the first publication of the notice of the estate. No one other than Brenda Kirby applied to administer the Estate. Respondent did not object of the

appointment of Brenda Kirby within 90 days, thus missing the statutory deadline and losing her right to have Brenda Kirby removed as the personal representative of the Estate. Respondent knew within a week of the Will being probated that Brenda Kirby had been appointed as Executrix/Administratrix. App. 76, 109-10. Respondent had actual knowledge of Brenda Kirby's appointment and constructive notice through the publication of the Probate Order by the Monroe County Commission, which also outlines that anyone wishing to challenge the validity of the Will or the qualifications of the representative must do so within 90 days. App. 63. Despite this knowledge, Respondent sat on her rights and did not challenge the appointment until 159 days past the deadline.

Again, this case raises issues regarding subject matter jurisdiction. Respondent did not timely file her complaint, therefore the Monroe County Commission lacked jurisdiction to remove Brenda Kirby as Executrix/Administratrix of the Estate of Jesse Frances Kirby. The Circuit erred in upholding the County Commission's decision because of lack of jurisdiction since Respondent ignored the statutory deadline.

III. The Circuit Court erred in not granting summary judgment to Petitioner for unjust enrichment since there was no evidence presented by Respondent of a genuine issue of material fact.

If this Court chooses to uphold the decision of the Circuit Court and set aside the probated Will and the appointment of Brenda Kirby, then Petitioner's claim for unjust enrichment must be addressed. The doctrine of unjust enrichment is well established in West Virginia by case law and Somerville v. Jacobs, 153 W.Va. 613 (1969) is the case on point for this unjust enrichment claim. The Court in Somerville determined that

[a]n improver of land owned by another, who through a reasonable mistake of fact

and in good faith erects a building entirely upon the land of the owner, with reasonable belief that such land was owned by the improver, is entitled to recover the value of the improvements from the landowner and to a lien upon such property which may be sold to enforce the payment of such lien, or, in the alternative, to purchase the land so improved upon payment to the landowner of the value of the land less the improvements and such landowner, even though free from any inequitable conduct in connection with the construction of the building upon his land, who, however, retains but refuses to pay for the improvements, must, within a reasonable time, either pay the improver the amount by which the value of his land has been improved or convey such land to the improver upon the payment by the improver to the landowner of the value of the land without the improvements. Syl. pt 1.

More recently, in Syllabus Point 2 of Realmark Developments v. Ransom, 214 W.Va. 161 (2003), the Court stated, “The measure of damages in an unjust enrichment claim is the greater of the enhanced market value of the property or the cost of the improvements to the property.” To the extent that the syllabus of Somerville, supra, differs from the holding it is hereby modified. The Court in Ransom, supra, at 722 confirmed the entire syllabus as being the law of unjust enrichment in West Virginia. The only modification of the law was as stated above the measure of damages is the “greater of the two measurements.” These cases establish the test for unjust enrichment which is a reasonable mistake of fact by the improver.

The present case developed from a reasonable mistake of fact. The fact is the County Clerk mistakenly probated an invalid Will, as such Petitioners believed that good title for the property of the Estate had passed to them. No one challenged the probate order within six months and Petitioners purchased the property after the statutory deadline had passed. In Somerville, the mistake came from a surveyor’s report that indicated the wrong lot number causing the improver to build on the wrong lot. Petitioners, in good faith, made improvements to the property which they had reason to believe, due to a reasonable mistake of fact, they owned.

Petitioners did not intend for these improvements to benefit Respondent. Respondent knew that Petitioners were improving the property, she testified that on one visit to the property she saw the house being painted. App. 77.

Petitioners' purchase and improvements of the property have benefitted the Estate and Petitioners have provided evidence and affidavits to show this. App. 73-75. The money used to purchase the property paid for the debts against the Estate, particularly the funeral bill in the amount of \$6,797.07. App. 64. This amount is included in the claim for unjust enrichment to the Estate because under West Virginia law if not paid the real estate would be sold to pay such a debt against the Estate. No one has come forward to pay the debt or reimburse said amount. App. 51. Petitioners provided in their affidavit an itemized list of costs for improvements made to the property. App. 74-75. Petitioners purchased the property for \$11,500.00 as a fair and equitable price considering the very poor condition of the property and the boundary line/well disputes with a neighbor. App. 50. Petitioners, both experienced real estate broker/salespersons, believe the value of the land and improvements is \$34,000.00. App. 75. Respondent presented no evidence by affidavit or otherwise, with limited argument but nothing was substantiated by introduction into the record of any evidence to contest the unjust enrichment claim.

The Circuit Court erred in not granting summary judgment to Petitioners on their claim for unjust enrichment since there was no genuine issue of material fact. See Syl. pt. 1 Williams v. Precision Coil, Inc., 194 W. Va. 52 (1995). The Court in Williams explained in Syllabus Point 2 that “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that

it has the burden to prove.” The Court continued in Syllabus Point 3 explaining the burden that the nonmoving party, in this case the Respondent, must bear:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Petitioners in this case have made a properly supported motion for summary judgment and provided affirmative evidence, which shows there is no genuine issue of a material fact. Respondent, however, has not met her burden of production, making no attack on the evidence submitted by Petitioners nor provided any evidence or affidavit that raises a genuine issue of material fact or explains why further discovery is necessary. Respondent offered no evidence contradicting Petitioners’ purchase of the property, the amount paid for the property and the improvements nor did the Respondent object or offer evidence as to the reasonableness of the amount paid. Therefore, summary judgment is appropriate on Petitioners claim for unjust enrichment.

The Circuit Court in the Agreed Amended Order Granting Partial Summary Judgment stated that “[t]he Court believes the Petitioners may be entitled to unjust enrichment; however, the Court believes further inquiry into the facts is necessary. Questions of fact exist as to what the Petitioners’ beliefs were at the time they made the improvements to the property and also on whether Bertha Kirby knew of the improvement.” The Circuit Court failed to state whether a genuine issue of material fact existed, which is the standard for summary judgment. Clearly, the Petitioners’ belief at the time they made the improvements was that they owned the property,

they were not making the improvements to benefit the Estate or the Respondent. Bertha Kirby testified that she had knowledge of the improvements to the property. Regardless of Petitioners' beliefs and Respondent's knowledge, the test for unjust enrichment is a reasonable mistake of fact relied upon by the improver according to Somerville, supra, and confirmed in Realmart, supra.

Petitioners purchased and made improvements upon the property of the Estate of Jesse Frances Kirby. If this Court determines that good title did not pass to Petitioners, then Respondent will be unjustly enriched because of Petitioners reliance on the County Clerk's probating of an invalid Will, a mistake of fact. Petitioners' were bona fide purchasers for value, they have made significant improvements to the property and without their purchase the debts of the Estate would remain unpaid. If the Respondent is named sole heir of the Estate then she will receive all the benefit of the Petitioners' purchase and improvements and that is unjust enrichment. Therefore, the Circuit Court should have granted Petitioners' motion for summary judgement on the claim for unjust enrichment.

CONCLUSION

The Circuit Court erred in upholding the Monroe County Commission's April 1, 2009 Order which was void for lack of jurisdiction since Respondent did not meet the statutory deadlines. Therefore, this Court should reverse the decision below and grant Petitioners' motion for summary judgement. Additionally, the Circuit Court erred in not granting Petitioners' motion for summary judgment for unjust enrichment. If this Court determines not to reverse the decision below then Petitioners' claim for unjust enrichment should be granted and the sale of the property to the Petitioners' for the amount of \$11,500.00, the fair market price of the property

less the improvements on said property should be approved.

Respectfully submitted,

**THE PETITIONERS
THOMAS H. JOHNSON AND TERESA
S. JOHNSON**



Barry L. Bruce (WV Bar No. 511)

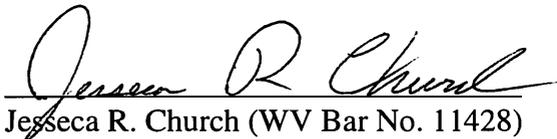


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CERTIFICATE OF SERVICE

I, Jesseca R. Church, Barry L. Bruce and Associates, L.C. counsel for Petitioners, Thomas H. Johnson and Teresa S. Johnson, do hereby certify that on the 24th day of October 2011, I served a true copy of the foregoing by depositing said copy in the United States mail, with sufficient Postage attached thereto, to counsel:

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