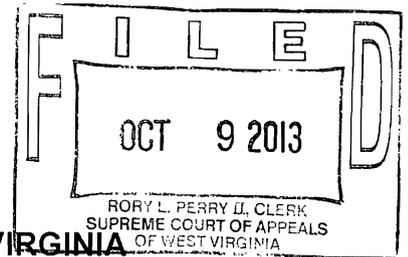


No. 13-0603



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

RON KING "Fire Marshal/Code Official"
For the City of Nitro, DAVID A. CASEBOLT,
Duly elected and serving Mayor for the
CITY OF NITRO, a municipal corporation
and political subdivision of the State of
West Virginia,

Petitioners,

v.

RICHARD A. NEASE and
LORINDA J. NEASE, husband and wife,

Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

RESPONDENTS' BRIEF

James A. Dodrill
WV State Bar No. 4744
Law Office of James A. Dodrill
76 StoneGate Dr.
Hurricane, WV 25526
(304) 634-0103
Fax: (681) 313-4340
jadodrill@comcast.net
*Co-Counsel for Richard A. Nease
and Lorinda J. Nease*

E. Kay Fuller
WV State Bar No. 5594
MARTIN & SEIBERT, L.C.
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209
Fax: (304) 260-3378
ekfuller@martinandseibert.com
*Co-Counsel for Richard A. Nease
and Lorinda J. Nease*

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COME NOW the Respondents, Richard A. Nease and Lorinda J. Nease, husband and wife (hereinafter "the Neases"), by and through their co-counsel, E. Kay Fuller and Martin & Seibert, L.C., and James A. Dodrill, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, and present their Respondents' Brief requesting the April 25, 2013 Order of the Circuit Court of Kanawha County, West Virginia be affirmed.

I. STATEMENT OF THE CASE

The instant action arises due to the wilful refusal of the Petitioners to comply with provisions of the West Virginia Freedom of Information Act, W.Va. Code §29-B-1, *et seq.* (hereinafter "FOIA") in providing public documents to a citizen. Rather, the Petitioners attempt to impose undue and impermissible search and retrieval fees for said public documents.

On June 14, 2012, the Neases made a FOIA request to inspect or copy certain public records of the City of Nitro. (App. 2). The requested records consisted of a single, specific ordinance, meeting minutes, transcripts or other documentation of the adoption of the requested ordinance, complaints filed with the City of Nitro pertaining to storm drainage from June 14 2007 – June 14, 2012, and notices of violation issued by Nitro relating to storm drainage for the same five year period. (App. 3). Petitioners have stipulated that none of the requested documents are exempt from disclosure. (App. 4).

A response to this request was required from the Petitioners within a maximum of five days not including Saturdays, Sundays or legal holidays. W.Va. Code § 29B-1-3(4). That response was required to be in one of three forms: (1) furnish copies of the requested information; (2) advise the Respondents of the time and place at which they might inspect and copy the materials; or (3) deny the request, stating in writing the reasons for such

denial. W.Va. Code § 29B-1-3(3). Petitioners did not comply with the Code but instead wrote on June 19, 2012 that Petitioners had "...received the FOIA request...and will be working to compile the documentation [the Neases] had requested." (App. 2).

More than a month passed with no further response from Petitioners. Respondents again requested the public records on July 26, 2012. (App. 3). Petitioners sent another letter on July 31, 2012, that included with it some of the requested public records in paper and electronic form, but advised "the remaining files Back (sic) to 2007 are paper & will be required to be manually pulled and copied. Please advise if you are willing to assume the expense of an employee's time, and the cost of photocopying." (App.3). Another attempt to seek compliance by the Petitioner failed and the Respondents commenced a FOIA action on August 24, 2012. (App. 3). Cross motions for summary judgment were filed with the Respondents being granted summary judgment on April 25, 2013. (App. 1-13).

Petitioners allege they were entitled to withhold the records until the Respondents paid a search and retrieval fee per an ordinance adopted by the City of Nitro in 2009 (designated as "113.7.1"), supposedly under the authority of *W.Va. Code* §29B-1-3(5), that authorizes the City to charge persons requesting access to public records a "fee for searches and compilation for Records that require more than ten minutes to search and/or compile . . ." (App. 3). The ordinance purports to authorize the City to charge for the time spent searching for, and/or compiling, requested records at a rate of \$25.00 per hour for search and compilation time in excess of 10 minutes. (App.4).

West Virginia's FOIA does not contain a provision that permits public bodies to impose search and retrieval charges such as that attempted by the Petitioners. Rather,

W.Va. Code §29B-1-3(5) provides that a public body such as the City of Nitro and/or its Council “may establish fees reasonably calculated to reimburse for its actual cost in making reproductions of [requested public] records.” The statute clearly and unambiguously permits only the “actual cost” of copying records. The statute does not contain any further grant of authority to public bodies to charge other fees such as search and retrieval fees which, in essence, is requiring citizens to pay public servants to perform their public duties thus defeating the true nature and purpose of FOIA which is to grant citizens full, complete and unfettered access to information regarding the affairs of their government and the official acts of those who represent them as public officials and employees.

The Circuit Court of Kanawha County properly interpreted FOIA and, specifically, what it permits and, by its silence, what it prohibits. The April 25, 2013 Order of the Circuit Court of Kanawha County should, therefore, be affirmed.

II. SUMMARY OF ARGUMENT

FOIA is clear as to what it permits and what it does not contemplate. Petitioners’ refusal to follow the clear dictates of FOIA is improper. Moreover, the Nitro City ordinance which attempts to expand what FOIA provides is improper and, therefore, unlawful. W.Va. Code § 29B-1-3 permits a public body to charge the “actual cost” for the “reproduction” of requested documents. Nowhere does it permit a public body to also charge for the search, retrieval and compilation of those documents, yet the Nitro ordinance attempts to do just that. The ordinance is not only unauthorized, but it is contrary to stated West Virginia public policy to make government records open and accessible to the people of West Virginia.

In addition to stated public policy, the FOIA statute on its face does not authorize the fees Petitioners claim it does. This Court has long held that a statutory provision which is clear and unambiguous, and which plainly expresses the legislative intent, will not be interpreted by the courts, but will be given full force and effect. Statutory provisions are to be given their common, ordinary meaning, and the common ordinary meaning of “making reproductions” is making copies. The Legislature authorized charges for making copies and nothing further. To the extent Petitioners’ ordinance goes beyond the scope of the statute, it is unlawful.

Petitioners point to other inapplicable sections of the Code which permit search and retrieval fees in certain limited instances. The very fact that the Legislature has permitted separate search fees in other circumstances shows that the Legislature is aware that making copies of records, searching for records, and compiling records are separate and distinct activities. Therefore, by choosing not to include a separate search and/or compilation fee provision in the FOIA statute, the Legislature is presumed to have intended to limit the fees charged to the “actual cost” of reproductions – the charge for making the copies – as the statute clearly states.

Should this Court determine that the FOIA provision in issue is ambiguous and warranting judicial interpretation, Petitioners’ ordinance is still unauthorized. When a statute is ambiguous, the Court will look to the intent of the Legislature to guide interpretation. In its policy statement contained in the FOIA statute, the Legislature stated FOIA is for the people, allowing them to retain control over the instruments of government they, the people, have created. Given this fundamental policy, the Legislature’s intent

cannot be interpreted as authorizing a public body to impose additional fees upon its citizens simply to gain access to public documents.

Finally, other jurisdictions with similar statutes that have faced this issue have also applied the statutes' clear language concluding that making reproductions as opposed to search and retrieval are different concepts requiring separate provisions. In the absence of a search and retrieval provision, one will not be inserted.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument pursuant to West Virginia Rule of Appellate Procedure 20. This case is one involving issues of first impression and concerns the validity of a statute and a municipal ordinance.

IV. ARGUMENT

A. The standard of review is *de novo*

When the issue to be resolved presents a question of law and involves statutory interpretation, the *de novo* standard of review is applied. *State ex rel. v. W.Va. Crime Victims Comp. Fund*, No. 12-0117, 2013 W.Va. LEXIS 579 (2013); Syl Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. Petitioners' attempt to impose additional costs upon citizens to review matters of their government is contrary to West Virginia public policy

Understanding the public policy surrounding West Virginia's FOIA is especially important when first considering the potential chilling effect of Petitioners' refusal, relying solely on their unlawful "pay to play" ordinance, to produce the public records requested by the City's citizens. When FOIA was adopted, the West Virginia Legislature declared the public policy of this State acknowledging that the bedrock of our American constitutional form of representative government is that government is the servant of the

people, not the master of them, holding: "*it is the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees*". W.Va. Code, § 29B-1-1 (emphasis supplied). The Legislature further declared that the people of West Virginia, in delegating authority, do not give their public servants, such as the Petitioners herein, the right to decide what is good for the people to know and what is not good for them to know. *Id.* To this end, the provisions of FOIA are to "be liberally construed with the view of carrying out the foregoing declaration of public policy" in West Virginia. *Id.* (emphasis supplied). *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (2008).

West Virginia's FOIA, specifically W.Va. Code § 29B-1-3, authorizes public bodies such as the Petitioners to charge citizens only for the "actual cost" of making reproductions of requested records. The "actual cost" means the cost incurred to make a copy. By its terms, it does not include paying a fee or a portion of the salary of a City employee to search for, retrieve or compile requested records. Had the Legislature intended to transfer such fees to the citizens, it would have expressly done so in our FOIA; it did not. Petitioners, however, attempted to go beyond the strictures of FOIA by enacting a municipal ordinance which does include such cost shifting and attempt to justify the cost-shifting stating it is premised on FOIA. An ordinance cannot expand a state statute and simply cite a statute that contains no such provision as its authority in an attempt to give it legitimacy.

Additionally, while Petitioners go to great lengths to argue other public bodies charge search or retrieval fees, those other ordinances are equally unlawful¹ and provide no support for Petitioners' argument. Moreover, Petitioners attempt to recast the argument rather than analyzing the propriety of the Circuit Court's April 25, 2013 Order. The Circuit Court's Order extensively analyzes what FOIA permits and does not permit. Petitioners want to overlook the clear language and the stated public policy behind FOIA which cannot be ignored. Because the Circuit Court properly analyzed FOIA and its purpose, holding that the statute must be read as written and exclude extraneous and unauthorized search and retrieval charges, it should be affirmed. To the extent the Circuit Court also determined the Petitioners' ordinance improperly attempted to expand the scope of FOIA and impose search and retrieval fees, thus invalidating the ordinance, that ruling should likewise be affirmed.

C. Petitioners' ordinance clearly exceeds the scope of FOIA

As this Court has repeatedly held, most recently in *Martin v. Hamblet*, No. 11-1157, (Nov. 21, 2012), the analysis of the propriety and enforceability of Petitioners' ordinance under W.Va. Code § 29B-1-3(5) must begin with basic rules of statutory construction. "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). In other words, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not

¹ Respondents are not challenging ordinances of other public bodies which are not before the Court but simply demonstrate that Petitioner's reliance on other ordinances is unavailing.

construed." *DeVane v. Kennedy*, 205 W.Va. 519,529, 519 S.E.2d 622,632 (1999); accord, Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). Said yet another way, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)). In more recent FOIA decisions, this Court has applied this same standard as well. *Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009); *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (2008).

Thus, the threshold question is whether W.Va. Code § 29B-1-3(5) is clear and unambiguous and plainly expresses the Legislature's intent with respect to what fees can and cannot be charged by Nitro in responding to a FOIA request. If the statute is clear and unambiguous and the legislative intent is plain, the statute is not subject to interpretation. Instead, it is the duty of this Court to apply the statute as written. The statute is clear, unambiguous and quite plainly expresses the Legislature's intent, especially considering the Legislature's declaration of public policy of granting open access to government records. It is untenable to declare openness and then charge for access. The Legislature chose to impose only minimum costs, i.e., the "actual cost in making reproductions" of requested public records. Those five words are quite clear. The Legislature authorized public bodies to collect their actual costs in making copies for the public - nothing more.

Petitioners rely on *State ex rel. Smith v. W.Va. Crime Victims Comp. Fund*, (No. 12-0117, 2013 W.Va. LEXIS 579 (2013)) to support their assertions that the FOIA language at issue may be open to different interpretations. This Court's holding in *Smith*, which interpreted language in the Crime Victims Compensation Fund, provides an example of statutory language that rises to the level of ambiguity necessary for judicial interpretation; the FOIA language here simply does not rise to that level. In *Smith*, the Court interpreted the phrase "other monetary scholastic assistance" because it found "reasonable minds can disagree as to its meaning which makes it ambiguous." *Id.* at 11. While the term "other" may be open to various interpretations in the Crime Victims Compensation Fund, "actual cost in making reproductions" is neither ambiguous nor confusing. Thus, no judicial interpretation is necessary. The clarity of the statute and its intent to limit the burden imposed upon citizens seeking their public records in the possession of the government to actual reproduction costs must, therefore, be applied as written.

Moreover, when the Legislature has seen fit to expand the costs imposed, it has done so with equal clarity. For example, the Legislature permits health care providers to charge for "all reasonable expenses incurred" in producing copies of health care records. W.Va. Code §16-29-2(a). There, the statute authorizes a charge for searching and reproducing health care records and specifically identified the costs to be imposed. The Legislature clearly recognized two separate acts and permitted imposition of costs for those two separate acts – something it chose not to do with respect to public records. Moreover, the statute concerning health care records goes to private litigation and does not involve public records - it imposes additional costs upon private individuals seeking

private information for a private purpose as opposed to citizens seeking access to and review of public documents held by their government.

In the FOIA statute under scrutiny here, our Legislature clearly and unambiguously authorized public bodies to charge only for the "actual cost in making reproductions" of the requested records, nothing more. W.Va. Code § 29B-1-3(5). The intentional nature of the Legislature in limiting what citizens can be charged must therefore be applied as written. This Court must resist Petitioners' urging, unsupported in the law, to read into the statute what the Legislature chose not to include. The common, ordinary meaning of the words "making reproductions" is "making copies." Merriam-Webster's Dictionary defines the word "reproduction" in this statutory context as "the act of copying something (such as a document, book, or sound)." *Merriam Webster n.d. Web.* 19 Sept. 2013. Alternatively, the word is defined as "something that is made to look exactly like the original." *Id.* Nowhere in the definition of "reproduction" are the terms "searching" or "compilation" used nor are the concepts embodied. Thus, it is plainly apparent that when our Legislature authorized public bodies like the City of Nitro to charge for the "actual cost in making reproductions" of public records, it meant exactly what the common and ordinary person thinks it means, i.e., to charge for the public body's actual cost in making copies of the requested public records. The Circuit Court of Kanawha County properly reached that conclusion and its Order should be affirmed.

D. Should this Court determine that FOIA is ambiguous and susceptible to two or more interpretations, pursuant to the rules of statutory interpretation, Petitioners' ordinance is unauthorized

Even if this Court finds that the FOIA provision at issue here is ambiguous and subject to judicial interpretation, Petitioners' ordinance is still unauthorized. This Court

held in *Farley v. Buckalew* that “[a] statute that is ambiguous must be construed before it can be applied.” Syl. Pt. 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E. 2d 454 (1992). This Court further explained that the, “[the primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl Pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). The intent of the Legislature in creating FOIA was to ensure that all members of the public are, “unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” W.Va. Code § 29B-1-1.

The Petitioners assert that the intention of the Legislature to authorize multiple FOIA fees is implied by the Legislature’s adoption of two Legislative Rules that authorize special fees for record searches. (Petitioners’ Brief, p. 8.) In both 24 CSR 24-5-4 (Osteopathic Rule) and 64 CSR 51-4 (Bureau of Public Health Rule), the Legislature authorized two separate fees to be charged in responding to document requests - one for copying, and one for record searches. While both rules cite W.Va. Code §29B-1-3(5) in their “Authority Clause,” that is because both involve public entities which grants the public the right under FOIA to request records of these agencies. The authority is based upon the nature of the agency, not the nature of the fees to be charged. That serves as no authority for the Petitioners to craft an ordinance which imposes cost-shifting and to cite FOIA as its authority.

E. Other jurisdictions are in complete accord with the circuit court’s interpretation of FOIA

Finally, how other jurisdictions’ open records laws treat the issue of copying, search, retrieval and compilation charges is instructive in this Court’s interpretation of the

statute. Even those jurisdictions that, unlike West Virginia, authorize additional costs do so explicitly. The Circuit Court reviewed those other statutes and reached the same conclusion. The Commonwealth of Virginia specifically authorizes a search charge, in addition to a copying charge, in its FOIA. In § 2.2-3704 of Virginia's *Freedom of Information Act*, a public body is authorized to make "reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records". In so doing, the Virginia General Assembly distinguished between searching, retrieving and copying – something the West Virginia statute specifically does not do.

Kentucky's *Open Records Act*, § 61.874 of the Kentucky Revised Statutes, provides that public bodies "may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." Kentucky's legislative scheme, even though it specifically authorizes a charge for "staff time" in addition to actual copying costs, clearly distinguishes between the "actual cost of reproduction" and staff time to search for, retrieve and compile requested public records.

Notably, Ohio's *Open Records Law*, § 149.43 of the Ohio Revised Code, allows a charge only for the actual cost of the copies provided in response to a public records request. Ohio's legislative intent to distinguish between the "actual cost" of making copies or reproductions and separate charges for searching, retrieving or compiling requested records is very clear. Ohio's law explicitly makes this distinction through its provision allowing additional "special extraction costs" only for bulk driver data requests submitted

to the Bureau of Motor Vehicles. Specifically, Ohio's law defines "actual cost" as "the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services" and allows only these specific actual costs to be charged by public bodies, except for the Bureau of Motor Vehicles as noted below, in responding to public records requests. Ohio Revised Code §149.43(B)(l) and (F)(2)(a). Special extraction costs are defined as "the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction [as well as]. ... any charges paid to a public agency for computer or records services." *Id.*, §149.43(F)(2)(d).

Lastly, California's *Public Records Act*, §6253(b) provides that " ... each state or local agency, upon a request for a copy of records ... shall make the records promptly available to any person upon payment of fees covering direct costs of duplication ... " When called upon to review this statute, the California appellate court held in *North County Parents Organization v. Department of Education*, 23 Cal.App.4th 144, 28 Cal.Rptr.2d 359 (1994), the meaning of the term "direct costs of duplication" only allows a public body to recover the cost of copying documents, further holding that "direct cost" does not include any ancillary tasks necessarily associated with retrieval, inspection or handling of the requested public records. The *North County Parents* Court held:

... There seems to be little dispute as to what "duplicate" means. It means just what we thought it did, before looking it up: to make a copy. (See Black's Law Dict. (4th ed. 1968) p. 593 ["to ... reproduce exactly"]; Webster's Third New Internat. Dict. (1981) p. 702 ["to be

or make a duplicate, copy or transcript ...”].) Since words of a statute are to be interpreted “according to the usual, ordinary import of the language employed in framing them” (*In re Alpine* (1928) 203 Cal. 731, 737, 265 P. 947), we conclude that the cost chargeable by the Department for furnishing these copies is the cost of copying them.

There is no disagreement with the proposition that the Department was put to a great amount of trouble responding to appellant's request, much of which had nothing to do with copying. Records were searched, documents were read for any material to be excised, such material was removed, files were refiled, etc.

We sometimes presume too much of the Legislature, but this is assuredly not the case when we presume that the statute writers, themselves bureaucrats of a sort, knew the ancillary costs of everything government does.

North County Parents Organization v. Department of Education, 23 Cal.App.4th 144, 147, 28 Cal.Rptr.2d 359, 360 (1994).

The Circuit Court of Kanawha County considered the acts of other jurisdictions in distinguishing between the acts of copying and the acts of retrieving and the different legislative enactments imposing separate fees when deemed necessary upon each act. Comparing those to the presumed deliberate acts of the West Virginia Legislature, the Circuit Court deemed the words of the Legislature to be what the Legislature intended – to impose only the “actual cost” of making copies. That analysis of the Circuit Court was correct and should not be disturbed.

V. CONCLUSION

The Legislature is presumed to act intentionally in the words it includes and in those it omits from its statutes. Here, per the stated public policy of our FOIA, the Legislature limited the fees it would impose upon West Virginians to review its government's documents. That stated public policy and clear statutory language should

be enforced. Any attempt by the Petitioners to impose further costs upon citizens by attempting to expand the scope of FOIA in a municipal ordinance must be rejected. The Circuit Court properly concluded the statute was clear, requiring no judicial interpretation. The Circuit Court also determined that the acts of the Petitioners in attempting to expand the scope of FOIA were unlawful and of no effect. Those rulings of the Circuit Court should be affirmed.

Respectfully Submitted,

RICHARD A. NEASE and
LORINDA J. NEASE
By Counsel

MARTIN & SEIBERT, L.C.

Allison Marquies (9469) for

E. Kay Fuller
WV State Bar No. 5594
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209
Fax: (304) 260-3378
ekfuller@martinandseibert.com

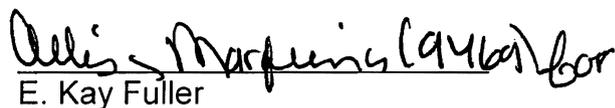
Allison Marquies (9469) for

James A. Dodrill
WV State Bar No. 4744
76 StoneGate Dr.
Hurricane, WV 25526
(304) 634-0103
Fax: (681) 313-4340
jadodrill@comcast.net

CERTIFICATE OF SERVICE

I, E. Kay Fuller, co-counsel for the Respondents, hereby certify that I served a true copy of the foregoing ***Respondent's Brief*** upon the following individuals by UPS, overnight delivery, on this the **8th** day of **October**, 2013:

Johnnie E. Brown
Theresa M. Kirk
PULLIN FOWLER FLAQNAGAN BROWN & POE< PLLC
901 Quarrier St.
Charleston, WV 25301


E. Kay Fuller