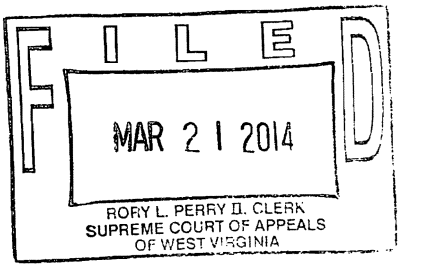
Tod J. Kaufman, Judge
Kanawha County Circuit Court
Charleston, West Virginia 25301
304-357-0363



March 21, 2014

The Honorable Rory L. Perry, II
Clerk
West Virginia Supreme Court of Appeals
State Capitol
Charleston, WV 25305

Re: State of West Virginia ex rel., Justin S. Golden, Sr., v. Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, West Virginia, and Mark A. Miller, Respondents
Circuit Court Civil Action No.: 12-C-1038
Supreme Court Case No.: 14-0280

To the Clerk and the Honorable West Virginia Supreme Court of Appeals:

JUDGE'S RESPONSE TO THE PETITION FOR WRIT OF PROHIBITION FILED MARCH 19, 2014, IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

By Scheduling Order of March 20th at the Supreme Court of Appeals, the respondents have been ordered to file a response to the Petition for Prohibition on or before 5:00 p.m., Friday, March 21, 2014. Jury selection is to begin on this coming Monday, March 24, 2014, at 8:30 a.m. in the undersigned judge's court.

Judge Kaufman's Position

The West Virginia Supreme Court of Appeals has long held that:

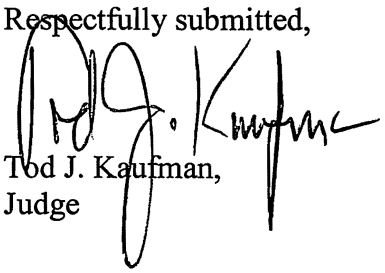
In determining whether to entertain and issue the writ of prohibition

> for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger,* 199 W. Va. 12, 483 S.E.2d 12 (1996).

Judge Kaufman believes that the denial of summary judgment motions was not clearly erroneous as a matter of law; that there are questions of fact that should be tried; that no factual development has yet been made at trial; nor have any instructions on the law of the case been given. Thus, this Petition for Prohibition is without merit, again, in the judgment of the lower Court.

Respectfully submitted,



Tod J. Kaufman,
Judge

cc: All Counsel (*via facsimile*)