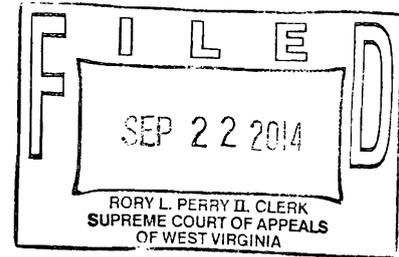


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0948



State of West Virginia *ex rel.*  
DR. TODD TALLMAN, M.D.,

Petitioner and  
Defendant Below,

v.

Upon Original Jurisdiction  
in Prohibition  
No. \_\_\_\_\_

THE HONORABLE SUSAN B. TUCKER,  
Judge of the Circuit Court of the Seventeenth Judicial Circuit,  
PATRICIA M. POWELL,  
as Executrix of the Estate of  
Robert L. Powell, and  
PATRICIA M. POWELL, individually,

Respondents.

\_\_\_\_\_  
*From the Circuit Court of Monongalia County, West Virginia  
Civil Action No. 12-C-511*

---

PETITION FOR WRIT OF PROHIBITION

---

Dr. Todd Tallman, M.D.  
By Counsel

A handwritten signature in cursive script, appearing to read "S. Brooks".

\_\_\_\_\_  
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## **I. QUESTION PRESENTED**

1. Whether a trial court abuses or exceeds its legitimate powers when it rules on a motion in limine that the opinions contained in a supplemental expert witness disclosure that were disclosed shortly after the deposition of the opposing party's expert witness and six (6) weeks prior to trial, yet after the discovery deadline, cannot be presented at trial?

The circuit court concluded at the motion in limine stage of the proceedings that the expert witness opinions contained in defendant's supplemental expert witness disclosure were excluded from trial because it was disclosed beyond the discovery and expert witness deadline.

## **II. STATEMENT OF THE CASE**

This medical professional liability civil action was initiated by the plaintiff, Patricia M. Powell, individually and on behalf the Estate of Robert L. Powell, against the defendant, Todd Tallman, M.D., by serving a notice of claim and screening certificate of merit on September 19, 2011. (Pl. First Notice of Claim. at *App.* 3; Pl. First Screening Cert. of Merit at *App.* 4.) By correspondence dated October 20, 2011, counsel for Dr. Tallman notified counsel for plaintiff that the screening certificate of merit prepared by Robert Casto, a nurse, did not comply with the West Virginia Medical Professional Liability Act, because he was not a physician engaged in a practice similar to that of the defendant, a surgeon. (Corr. From Attorney Brooks to Attorney Burdette, October 20, 2011, *App.* 5.) The plaintiff then served a second notice of claim and screening certificate of merit on April 16, 2012. (Pl. Second Notice of Claim. at *App.* 6; Pl. Second Screening Cert. of Merit at *App.* 7.)

The initial Complaint was filed on July 27, 2012, and the Amended Complaint was filed on August 8, 2012. (July 27, 2012, Complaint, at *App. 8*; August 28, 2012, Amended Complaint, *App. 9*.) A Scheduling Order was entered in this civil action on March 7, 2013. (Scheduling Order at *App. 10*.) Paragraph No. 9 of said Scheduling Order required the plaintiff to disclose trial experts on or before May 31, 2013, “in the manner proscribed [*sic*] by the West Virginia Rules of Civil Procedure Rule 26 (b)(4).” That deadline was not met by the plaintiff.

On July 3, 2013, the plaintiff filed her first disclosure of expert witnesses. (Pl. Disclosure of Expert Witnesses at *App. 11*.) The disclosure was not “in the manner” prescribed by Rule 26(b)(4) of the West Virginia Rules of Civil Procedure. Specifically, the disclosure was limited to a curriculum vitae for three (3) of eight (8) witnesses and was completely devoid of the subject matter, facts, or opinions about which the expert witnesses were expected to testify as required by Rule 26(b)(4)(A)(i) of the West Virginia Rules of Civil Procedure. Dialogue between the attorneys for the plaintiff and the attorneys for the defendant commenced, initially resulting in a letter from Attorney Honaker, who represented Dr. Tallman, to Attorney Whiteman, attorney for the plaintiff. (July 3, 2013, Corr. from Attorney Honaker to Attorney Whiteman at *App. 12*.)

By letter dated July 31, 2013, from the attorney for Dr. Tallman to the attorney for the plaintiff, the defendant noted the concerns with the deficiencies in the plaintiff’s first expert witness disclosure. (Corr. from Attorney Brooks to Attorney Burdette, *App. 13*.) It was suggested by the attorney for the defendant that the defendant “will not be required to provide his Rule 26(b)(4) until such time as the required information is received from

[plaintiff].” *Id.* There was no disagreement or objection to that understanding by the plaintiff.

By letter dated November 12, 2013, a copy of which is attached hereto as *Appendix 14*, having not received any additional or more specific expert disclosure from the plaintiff, the attorney for the plaintiff was again reminded of the perceived deficiencies, with the request that the expert witness disclosure be supplemented, and indicating that additional action was being considered by the attorneys for the defendant. This letter was an attempt to resolve the ongoing discovery/disclosure dispute. (Corr. From Attorney Prince to Attorney Burdette, November 12, 2013, *App. 14.*)

Rather than wait for the plaintiff to provide a disclosure of expert witnesses that, in the judgment of the defendant, complied with the provisions of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure, the defendant proceeded to prepare, serve, and file the Expert Witness Disclosure of Dr. Todd Tallman, M.D. (Expert Witness Disclosure of Dr. Todd Tallman, M.D., November 15, 2013, *App. 15.*) In that disclosure, the defendant reserved the right to supplement and/or amend the opinions after further discovery had taken place and additional depositions had been taken. *Id.* This is a fairly standard reservation, and, indeed, it was included in the Plaintiff’s Disclosure of Expert Witnesses previously filed on July 3, 2013. (See, *App. 11.*)

Having not received any additional, supplemental, or more detailed disclosure from the plaintiff, motions were filed and a hearing was held before the court on April 9, 2014. (Def.’s Mot. to Strike Pl.’s Expert Witnesses and to Preclude Them From Testifying at the Trial of This Matter, or, in the Alternative, to Compel Complete Expert

Witness Disclosures, *App. 16.*) As an outgrowth of that hearing, an Agreed Order, a copy of which is attached as *Appendix 2*, was entered by Judge Tucker on May 27, 2014. Among other things, the court ordered that the plaintiff's expert witness disclosure of Dr. Leonard Milewski be supplemented. *Id.*

The supplemental disclosure with regard to Dr. Milewski was served on June 3, 2014. (Pls.' [Expert] Witness Disclosure, *App. 17.*) After having received the supplemented expert disclosure with regard to Dr. Milewski, his deposition was scheduled for June 19, 2014. Upon receipt of the transcript of that deposition, and after review of it by the defendant's anticipated expert witnesses, a Supplemental Expert Witness Disclosure was filed on July 29, 2014. (Def. Todd Tallman, M.D.'s Supplemental Expert Witness Disclosure, *App. 18.*)

On August 1, 2014, the plaintiff filed a motion in limine to exclude from trial the opinions contained in defendant's supplemental expert witness disclosure. (Pls.' Mot. in Limine to Exclude Defendant's Expert Opinion, *App. 19.*) On August 19, 2014, the defendant responded to said motion in limine. (Def. Resp. to Pl. Mot. in Limine to Exclude Defendant's Expert Opinion, *App. 20.*)

The parties convened for a final pre-trial conference on September 15, 2014, at which time the circuit court heard oral arguments on the pending motions in limine. On September 19, 2014, the circuit court entered the order at issue granting plaintiff's motion in limine to exclude from trial the opinions contained in defendant's supplemental expert witness disclosure. (Order Granting Plaintiff's Motion in Limine to Exclude Defendant's Expert Opinion, *App. 1.*)

Trial in this matter was, and is, scheduled to begin on September 23, 2014. (March 6, 2014, Amended Scheduling Order, *App.* 21.)

### **III. SUMMARY OF ARGUMENT**

The circuit court committed plain error and exceeded its legitimate powers by ruling that defendant's expert witnesses would not be permitted to testify as to any opinions contained in his supplemental expert witness disclosure. Upon receiving the plaintiff's expert witness disclosure and deposing the plaintiff's primary expert witness, Dr. Milewski, the defendant immediately forwarded the transcript to his experts for review. Naturally, the opinions of the defendant's expert witnesses were more detailed following the review of plaintiff's expert witness deposition testimony. In the spirit of Rule 26(e)(1)(B), and to avoid unfairly surprising the plaintiff at trial, the defendant filed a supplemental expert witness disclosure.

The defendant recognizes that Rule 26(e)(1)(B) applies to the supplementation of discovery responses, however, the plaintiff at no time served any written discovery requests upon the defendant. Nevertheless, the spirit and purpose of Rule 26(e)(1)(B) is to prevent unfair surprise at trial of an expert opinion. The effect of the circuit court's ruling penalizes the defendant for attempting to secure a fair trial by complying with the spirit and purpose of this procedural safeguard.

The effect of the order at issue forces the defendant to accept the plaintiff's expert witness's criticisms, divulged during his deposition, and foreclose any opportunity for the defendant's expert witnesses to specifically respond to those opinions. The result would prevent the defendant from putting forth a complete and appropriate defense to the allegations against him and undoubtedly deprive him of a fair trial.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The defendant is ready and willing to present oral argument on the matters contained herein. However, should the Court believe oral argument would not assist in the resolution of the issues, the defendant has no objection.

#### **V. ARGUMENT**

- 1. The circuit court's decision is clearly erroneous as a matter of law and the defendant will be damaged or prejudiced in a way that is not correctable on appeal.**

When considering whether to entertain and issue a writ of prohibition pursuant to W.Va. Code § 53-1-1, and Rule 16 of the West Virginia Rules of Appellate Procedure, where it is alleged that the lower tribunal exceeded its legitimate powers, this Court has held that it 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 tribunal's order is an oft repeated error of law 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.

Syll Pt. 2, *State ex rel. Caton v. Sanders*, 215 W.Va. 755, 601 S.E.2d 75 (2004).

##### **A. The circuit court's decision is clearly erroneous as a matter of law.**

The circuit court's decision to exclude the opinions in the defendant's supplemental expert witness disclosure is contrary to the long established precedent in West Virginia jurisprudence to promptly supplement discovery to eliminate unfair surprise at trial. In accordance with this requirement, the defendant expeditiously filed a supplemental disclosure containing his expected expert witness testimony six (6) weeks prior to trial. Indeed, had the defendant chosen not to supplement his expert witness

disclosures and proceeded to attempt to introduce testimony based upon opinions that had not been previously disclosed, the plaintiff would have properly contended to have been unfairly surprised at trial. This is precisely the sequence of events that gave rise to this Court's decision in *Graham v. Wallace*, 214 W.Va. 178, 588 S.E.2d 167 (2003).

In *Graham*, a former patient brought a medical malpractice action against his oral surgeon. At trial, the defendant called Dr. Phillip Hutt to testify as an expert in oral and maxillofacial surgery. Counsel for the defendant elicited testimony from Dr. Hutt about the proper way to perform a certain procedure even though his opinion on this issue had not been previously disclosed to the plaintiff. After the jury returned a verdict in favor of the defendant, the plaintiff sought a new trial on the basis that Dr. Hutt's testimony should have been excluded. Upon appeal, the Supreme Court determined that the plaintiff had been unfairly surprised by Dr. Hutt's testimony. *Jenkins v. CSX Transp., Inc.*, 220 W.Va. 721, 728, 649 S.E.2d 294, 301 (2007) (*citing, Graham*, 214 W.Va. at 185, 588 S.E.2d at 174.)

In *Jenkins*, the Supreme Court held that the circuit court did not err by prohibiting plaintiff's expert witness's testimony because the plaintiff failed to supplement his discovery as required by Rule 26(e) of the West Virginia Rules of Civil Procedure. *Jenkins*, 220 W.Va. at 728, 649 S.E.2d at 301. This is precisely the result the defendant in the matter *sub judice* sought to avoid by promptly supplementing his expert witness disclosures.

In *Graham*, the Supreme Court noted that "one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure." *Graham*, 214 W.Va. at 184, 588

S.E.2d at 173 (*quoting, McDougal v. McCammon*, 193 W.Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995)). Furthermore, the Supreme Court further explained in *Graham* that

[t]he discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

*Graham*, 214 W.Va. at 184-85, 588 S.E.2d at 173-74.

*Graham*, and the other cases cited herein, speak in terms of the discovery process and the desire to better assure a fair trial for all of the parties. The discovery process in the case *sub judice* was a one-way process. The plaintiff served no written discovery on the defendant, nor did the plaintiff take or seek to take any discovery depositions, not even of the defendant physician or the defendant's proposed expert witnesses. One must accept that this was a chosen strategy, but it has forced the defendant to be even more proactive in attempting to assure that his position was disclosed to the plaintiff.

In an effort to avoid the result in *Graham*, the defendant, by supplementing his expert witness disclosure as soon as possible – ultimately six (6) weeks prior to trial – sought to better assure a fair hearing and avoid any inference or suggestion by the plaintiff of causing a “[t]rial by ambush.” *Graham*, 214 W.Va. at 184, 588 S.E.2d at 173 (citations omitted). Paradoxically, as a direct result of the defendant's efforts to ensure that the plaintiff was fully aware of his expert witness' opinions, especially considering that the plaintiff chose not to submit written discovery or take the depositions of the

defendant's expert witnesses, the circuit court's order precludes the defendant from proffering the same at trial. Indeed, the plaintiff has not even taken the deposition of the defendant physician. Will the plaintiff's failure to do that result in her objecting to Dr. Tallman's testimony at trial? The circuit court's order is contrary to the purpose of discovery as outlined by the precedent of this Court, as it serves to dissuade and discourage the supplementation of expert witness disclosures prior to trial.

The decision of the Supreme Court in *West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.* 222 W.Va. 688, 671 S.E.2d 693 (2008) also supports the finding that the circuit court's decision is a clear error of law. In *Parkersburg Inn*, the Court advised that:

[t]he "factors to be considered in determining whether the failure to supplement discovery requests under applicable rule of procedure should require exclusion of evidence related to supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.

*Parkersburg Inn, Inc.*, 222 W.Va. at 698, 671 S.E.2d at 703 (citations omitted). Significantly, the circuit court order in the matter *sub judice* is devoid of any legal authority and does not specifically address any of these factors. The *Parkersburg Inn* case required a determination of when a failure to supplement should result in exclusion; however, the same analysis should be applied when determining whether supplemental disclosure should result in exclusion.

Assuming, *arguendo*, that the *Parkersburg Inn* analysis applies to the supplemental disclosure at issue, the circuit court's decision is clearly an error of law. The prejudice or surprise to the plaintiff is *de minimis*, and, if even any, is due in large

part to the plaintiff's decision not to engage in any discovery. Furthermore, the supplemental disclosure was filed six (6) weeks prior to trial thus affording the plaintiff ample time to either finally commence discovery based upon the supplemental disclosures or further supplement her own disclosures. The plaintiff had more than sufficient opportunity to cure any prejudice; however, she continued to adhere to her apparent trial strategy of avoiding participation in discovery.

Additionally, complete absence of bad faith or willfulness on the part of the defendant for supplementing his expert witness disclosures could not be more evident. As stated above, the defendant promptly forwarded the deposition transcript from plaintiff's expert witness to his expert witnesses and proceeded to supplement his expert witness disclosures after reviewing that testimony. The argument that the supplemental expert witness disclosure was served beyond the scheduling order deadlines is disingenuous. No authority from this jurisdiction was found that recognizes any limitations on supplementation of expert witness disclosures.

Finally, the practical importance of the evidence excluded by the circuit court's order cannot be overly emphasized. The typical medical professional negligence cause of action involves the application and understanding of medical terminology and standard of care analysis that may only be proffered through an expert witness. This case is no exception. Indeed, the implication of West Virginia Medical Professional Liability Act, W.Va. Code § 55-7B-7, is that testimony concerning the standard of care may *only* be proffered by an expert witness. Without question, the evidence excluded by the circuit court severely encumbers the defendant's ability to defend his care and

treatment of the plaintiff and will ultimately serve to deprive him of a fair trial on the merits.

**B. The exclusion from evidence of defendant's supplemental expert witness disclosure will cause the defendant to be damaged or prejudiced in a way that is not correctable on appeal.**

The defendant will be prejudiced if he is forced to proceed to trial without the benefit of his expert witness' supplemental opinions that were disclosed after the plaintiff's expert witness deposition testimony.

Specifically, the defendant will be forced to incur the expense of undergoing a complex medical negligence trial without the ability to respond to the criticisms levied by the plaintiff's expert witness disclosure or during the deposition of the plaintiff's expert witness. A positive result on appeal would cause the matter to be remanded to circuit court for re-trial with the inclusion of opinions contained in the defendant's supplemental expert witness disclosures. Stated alternatively, the defendant will incur significant expenses in the form of trial preparation if he is forced to undergo a trial with limited expert witness testimony only to later be forced to repeat the process following appellate review. In order to avoid duplicative expenses, time, and inconvenience, the defendant submits that it would be most prudent for this matter to be resolved prior to trial.

**2. The proceedings in the circuit court must be stayed pending the resolution of this Petition for Writ of Prohibition.**

The defendant will be severely prejudiced by the circuit court's decision to exclude the opinions contained in his supplemental expert witness disclosure. The trial in this matter is currently scheduled to begin on September 23, 2014. (See, *App.* 21.) In light of the prejudice to the defendant that will result from undergoing a complex medical

negligence trial with limited expert witness support coupled with the fact that the trial is scheduled to commence immediately, the defendant requests, pursuant to W.Va. Code § 53-1-9, that the underlying proceedings be stayed by this Supreme Court of Appeals pending the resolution of the issues raised by this Petition for Writ of Prohibition.

#### **IV. CONCLUSION**

The circuit court's order excluding the opinions in the defendant's supplemental expert witness disclosure from trial is an abuse of its legitimate powers and is a clearly erroneous ruling. As a result of the late deposition of plaintiff's expert witness and plaintiff's expert witness disclosure, the defendant was forced to choose between supplementing his expert witness disclosure after the deadline or proceeding to trial and introducing the evidence without supplementation. The defendant chose openness and fairness over deception and trial by ambush. The precedent of this Court encourages parties to continually supplement all discovery, especially expert witness disclosures, to avoid unfair surprise at trial. The circuit court's order exceeds its legitimate powers and penalizes the defendant for supplementing his expert witness disclosures and further serves to dissuade supplementation of discovery prior to trial in future cases.

Therefore, the Petitioner/Defendant Below prays that this Petition for Writ of Prohibition be docketed by the West Virginia Supreme Court of Appeals and that, after a full and complete analysis, the Order Granting Plaintiff's Motion in Limine to Exclude Defendant's Expert Opinion be found to be a clear error law and that the enforcement of it be prohibited by this Court.

Submitted this 22nd day of September, 2014.

TODD TALLMAN, M.D.  
By Counsel

A handwritten signature in black ink, reading "Travis A. Prince". The signature is written in a cursive style with a horizontal line underneath it.

Stephen R. Brooks (WV Bar No. 472)  
Travis A. Prince (WV Bar No. 11704)  
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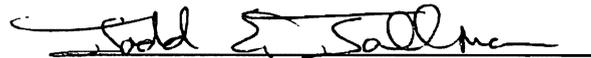
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*From the Circuit Court of Monongalia County, West Virginia  
Civil Action No. 12-C-511*

VERIFICATION

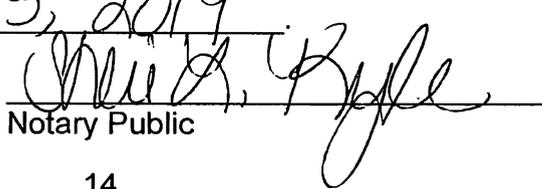
STATE OF WEST VIRGINIA  
COUNTY OF MONONGALIA, to-wit:

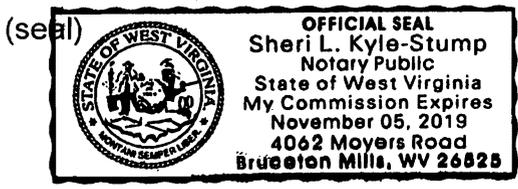
I, Todd Tallman, M.D., the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the Petition for Writ of Prohibition and that he has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he believes, based upon information made known to him, the same to be true.

  
\_\_\_\_\_  
Todd Tallman, M.D.

Taken, subscribed and sworn to before the undersigned Notary Public this 22<sup>nd</sup> day of September, 2014.

My commission expires Nov. 5, 2019

  
\_\_\_\_\_  
Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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State of West Virginia *ex rel.*  
DR. TODD TALLMAN, M.D.,

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Respondents.

\_\_\_\_\_

*From the Circuit Court of Monongalia County, West Virginia  
Civil Action No. 12-C-511*

**VERIFICATION**

STATE OF WEST VIRGINIA  
COUNTY OF MONONGALIA, to-wit:

I, Todd Tallman, M.D., the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the Petition for Writ of Prohibition and that he has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he believes, based upon information made known to him, the same to be true.

\_\_\_\_\_  
Todd Tallman, M.D.

Taken, subscribed and sworn to before the undersigned Notary Public this \_\_\_\_ day of September, 2014.

My commission expires \_\_\_\_\_.

(seal)

\_\_\_\_\_  
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. \_\_\_\_\_

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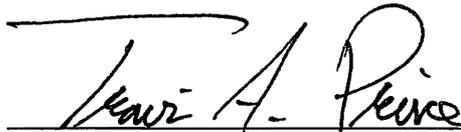
**CERTIFICATE OF SERVICE**

I, Travis A. Prince, counsel for Defendant Dr. Todd Tallman, M.D., do hereby certify that a true and exact copy of the foregoing "Petition for Writ of Prohibition" has been served upon counsel of record and the Court via regular United States mail and facsimile this 22nd day of September, 2014, and addressed to the following:

Kristine A. Burdette, Esquire  
Whiteman Burdette, PLLC  
229 Jefferson Street  
Fairmont, WV 26554

L. Wilson Burdette, Esquire  
PO Box 371  
Talcott, WV 24981

Judge Susan B. Tucker  
Monongalia County Circuit Court  
243 High Street  
Morgantown, WV 26505  
(Hand Delivered)

A handwritten signature in black ink that reads "Travis A. Prince". The signature is written in a cursive style with a large, sweeping initial "T" and a large "P".

---

Travis A. Prince  
(WV State Bar No. 11704)