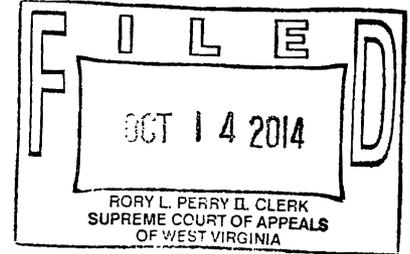


14-1031

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
STATE OF WEST VIRGINIA**

DOCKET NO.

**STATE OF WEST VIRGINIA EX REL.
GLEN POE**



Plaintiffs below, Petitioners,

V

Petition for Writ of Mandamus from Circuit
Court of Jefferson County, WV Civil Action
08-C-223

**THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and JAMES P. CAMPBELL, ESQ., and STEVEN FOSTER**

Defendants Below, Respondents

**PETITION FOR WRIT OF MANDAMUS FROM CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA CIVIL ACTION 08-C-223**

Counsel for Petitioner, Glen Poe

**Robert J. Schiavoni (WV Bar #4365)
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 2014, and the refusal of the lower court to address a petition for fees
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 Petitioner’s State Constitutional right to redress under Article 3,
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
STATE OF WEST VIRGINIA**

DOCKET NO.

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GLEN POE**

Plaintiffs below, Petitioners,

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08-C-223

**THE HONORABLE DAVID H. SANDERS,
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Defendants Below, Respondents

VERIFICATION

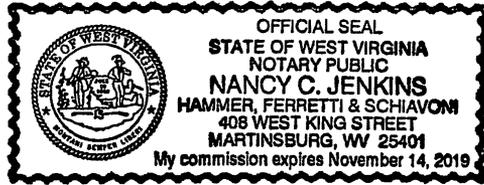
NOW COMES the Petitioners, State of West Virginia Ex Rel. and Glen Poe, by and through Counsel Robert J. Schiavoni, and the law firm of Hammer, Ferretti & Schiavoni, pursuant to West Virginia Code § 53-1-3 and herby verifies, under oath, that upon information and belief, the material facts as stated in the petition for Writ of Mandamus are true and accurate.



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Counsel of Record for Petitioners

Berkeley County, West Virginia

7th The foregoing verification was signed before me, a Notary Public, on this the
day of October, 2014.



Nancy C. Jenkins
Notary Public

My commission expires: Nov. 14, 2019

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
STATE OF WEST VIRGINIA

DOCKET NO.

STATE OF WEST VIRGINIA EX REL.
GLEN POE

Plaintiffs below, Petitioners,
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Petition for Writ of Mandamus from Circuit
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08-C-223

THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and JAMES P. CAMPBELL, ESQ., and STEVEN FOSTER

Defendants Below, Respondents

CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: United States Mail, postage pre-paid

Date of Service: October 7, 2014

Persons served and address: Charles Bailey
Bailey & Wyant, PLLC
500 Virginia Street East, Suite 600
PO Box 3710
Charleston, WV 25337

Item(s) Served: Petition for Writ of Mandamus


Robert J. Schiavoni, Esq. (WV Bar #4365)
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Counsel of Record for Petitioner

**PETITION FOR A WRIT OF MANDAMUS
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 08-C-223**

Now comes the Petitioner, Glen Poe, by and through Counsel Robert J. Schiavoni and the law firm of Hammer, Ferretti & Schiavoni, pursuant to Article III Section 17 of the West Virginia Constitution, and Rule 16 of the West Virginia Rules of Appellate Procedure and respectfully requests this Honorable Court grant this Petition for Writ of Mandamus for the reasons as set forth below.

I. QUESTION PRESENTED

Whether delay by the lower court in ruling upon or denying Respondents “Motion to Alter, Amend or Vacate the Judgment Order of January 17, 2014 Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure” when the motion has been fully briefed since March 4, 2014, and the refusal by the lower court to address a petition for fees and costs filed on November 25, 2013, materially violates Petitioner’s State Constitutional right to redress under Article 3, Section 17 to enforce a judgment order entered on November 9, 2011 and affirmed on June 17, 2013 by the West Virginia Supreme Court of Appeals against these Respondents for a case about a guarantee of a promissory note which has been pending for over six years.

II. STATEMENT OF THE CASE

Petitioner, Glen Poe, filed this suit on May 30, 2008 in the Circuit Court of Jefferson County. The long and difficult history of this case [Docket 12-0130 & 12-0165, App 00001-00015] was presented to the West Virginia Supreme Court of Appeals and was sufficiently covered in this Court’s Memorandum Opinion filed on June 7, 2013.

2013 W.Va. Lexis 637, WL 2462169 [App 00016-00024]. In its Memorandum Opinion this Court affirmed the January 5, 2012 order of the Circuit Court denying these Respondents' various motions to alter or amend the order granting summary judgment in favor of the Petitioner. This Court thereafter on September 24, 2013 refused a Joint Petition for Rehearing and the Mandate issued on October 1, 2013.

After the Mandate and consistent with the Circuit Court's Orders entered on November 9, 2011 (Order Granting Judgment Against James P. Campbell, Esq. and Steven D. Foster Upon Promissory Note [App 00025-00029) and January 5, 2012 (Order Denying Campbell's and Foster's Motion to Alter or Amend the Court's Judgment Order) [App 00030-00034], Petitioner filed and served "Plaintiff's Motion to Record Fixed Amount of the Judgment" which in essence included the calculation for simple interest as found in the Promissory Note. After Respondents claimed not to have been served, the Circuit Court "out of an abundance of caution" entered a revised Scheduling Order on the Motion to Record Fixed Amount of the Judgment. In opposing the motion to reduce the judgment to a fixed amount for purposes of enforcing it, the Respondents argued in memorandum that the Circuit Court lacked jurisdiction to allow for the calculation of interest and presumably opposed a related petition for fees and expenses (both of which provisions were expressly agreed upon by these Respondents as stated in the Promissory Note itself) because, according to Respondents, the Circuit Court's jurisdiction somehow ended on January 4, 2013. The Circuit Court, by Order Granting Motion to record Fixed Amount of Judgment entered on January 17, 2014 [App 00035-00036], granted Petitioner's motion regarding the calculation of simple contractual

interest and entered an Order reducing the amount of judgment to include a calculation for simple interest at 12% in conformance with the Promissory Note.

On November 25, 2013, Petitioner also filed a Petition for Fees and Costs. [App 00037-000107]. Respondents have not filed a memorandum opposing this motion.

On January 29, 2014, Respondents filed a Motion to Alter, Amend or Vacate the Judgment Order [App 000108-000124] of January 17, 2014 Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. In essence, Respondents seek to entirely vacate the January 17, 2014 Order only on the basis that the lower court lacks jurisdiction.

Petitioner responded to the latest Rule 59 motion [App 000125-000150] which now has been fully briefed since March 4, 2014. Respondents' Rule 59 motion is nothing more than a complete rehash of the brief filed earlier opposing the entry of the Order fixing the amount of the judgment. Thereafter, Respondents retained counsel who filed a motion for oral argument claiming that they need a complete record given the "particular importance in this case because it is likely an appeal will follow given the jurisdictional issues." Thus, Respondents clearly indicate a choice having been made to seek appeal of any adverse order on the basis that the lower court lacks jurisdiction to enter judgment to include the calculation of contractual interest and to consider fees and costs as contractually mandated.

Petitioner has been litigating the enforcement of this Note since 2008. The lower court has entered an Order which otherwise would have allowed him to at least record his judgment and attempt to recover money from his former attorney and that attorney's 'business partner'. Respondents' latest motion under the pretext of Rule 59 has prejudiced Petitioner's right to seek redress through the enforcement of a judgment order

which includes a contractual computation for interest and a contractual obligation to pay attorney fees and costs. Petitioner, through counsel, has attempted to expedite a ruling on the latest motion having contacted the lower court but to no avail as Petitioner has now waited over nine months to seek to enforce the January 17, 2014 Order and seven months since having completed briefing of Respondents' motion to vacate, and ten months since filing a petition for fees and costs. It has been seven years (six of which have been in litigation) since Petitioner's former attorney guaranteed the payment of the Promissory Note

III. SUMMARY OF ARGUMENT

Whereas the Petitioner is asking the lower court to enter an order denying the Respondents' motion to vacate a judgment order, the Respondents claim, and would argue either in response hereto or in a writ of prohibition, that the lower court lacked jurisdiction to enter a judgment order which included the calculation of interest and the recovery of fees and costs both of which are expressly and contractually obligated under the terms of the Promissory Note that was at issue. Petitioner remains in limbo having no redress by which he can enforce a judgment order after over six years of litigation without substantial risk should the lower court unexpectedly vacate its prior judgment order. While Petitioner asks that a rule to show cause be issued against the lower court to act upon the outstanding motion to vacate, Petitioner respectfully asks that this Court expressly finds that the lower court has jurisdiction and accordingly deny Respondents' motion, and further direct the lower court to proceed with consideration of Petitioner's claim for the recovery of contractual fees and costs as mandated in the Promissory Note. The Petitioner is materially harmed by lengthy delays because it has been seven years

since his former attorney and the attorney's business partner obtained Petitioner's \$100,000.00 as Guarantors, and, as it should be expected given the lengthy history of this case and the conduct of the Respondents, the recovery of any judgment award is being made more challenging, and likely compromised, as delays will foster mischief in locating assets to satisfy any recovery on behalf of the Petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner does not request oral argument.

V. ARGUMENT

The standard of review for a writ of mandamus is stated in in *Syllabus Point 2 of State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969):

A writ of mandamus will not issue unless three elements coexist --(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Petitioner respectfully maintains, especially so in the context of over six years of litigation during which the Respondents actually admitted in oral argument before this Court that they had in fact guaranteed a Promissory Note, that any further delay acts to diminish recovery on a judgment order. Petitioner has a clear legal and State Constitutional right, under Article 3, Section 16, to justice without delay, with a corresponding obligation on the part of the lower court to do that which Petitioner seeks. Petitioner is without remedy because he is without a ruling on what should be considered a specious motion by these Respondents to vacate a judgment order.

Using WVa RCP, Rule 59 these Respondents have sought to vacate the Court's Order Granting Judgment Against James P. Campbell, Esq. and Steven D. Foster Upon

Promissory Note entered November 9, 2011, by arguing that this judgment order is now unenforceable because the lower court lacks jurisdiction to enforce the Order, despite the fact that said Order, and the Promissory Note, and the need to calculate the simple damages based on 12% interest were part and parcel of Respondent Campbell's appeal when he represented to the West Virginia Supreme Court of Appeals that the Order from which they appealed was a "final decision on the merits as to all issues and all parties."

[App 000133]

Rule 59 in its purpose and expression offers no predicate for what is now before the lower court and which appears to have caused that court to delay the denial of this motion. Rule 59 is a rule used for requesting to alter or amend jury verdicts, bench trial verdicts, or judgments for summary dismissal of cases, not for attempting to disregard simple calculations of damages. See Handbook on West Virginia Rules of Civil Procedure, § 59(e) at 1285 (4th Ed. 2012). Rule 59 is not to be used, and offers no support, for asking a court for ceaseless and meritless 'do-overs.'

By Order entered on November 9, 2011 granting Mr. Poe summary judgment, the lower court specifically and expressly incorporated by reference the entirety of the terms of the Note: "Defendants Campbell and Foster are personally obligated upon the Note and indebted **under the terms of said Note.**" The lower court's Order, by incorporating the Note, and the "terms of the Note", as a part of the Order, specifically and expressly retained jurisdiction over the enforcement of the "terms of the Note" to effectuate its Judgment Order. The lower court's Order further contemplates continued jurisdiction of the matter including the remaining claims pending any appeal of this Judgment. The Court further held:

The Court shall conduct such further proceedings as may be necessary under the terms of the Note to liquidate an amount due under the Note, including an award of attorney's fees and costs as provided for in the Note. The plaintiff shall have twenty days from the date of entry of this Order to submit such further issues to the Court and Rule 22 will issue upon the plaintiff's motion.

After entry of the Order granting Petitioner summary judgment, on November 8 and 10, 2011, Respondents once again filed motions to disqualify Judge Sanders which were denied by Administrative Order of the Supreme Court of Appeals entered on November 18, 2011. Then on November 23, 2011, Defendants filed separately motions to alter or amend the Court's November 8, 2011 Order placing any action on the November 8th Order in abeyance until the motions to amend or alter were addressed by the Court. By Order entered on January 5, 2012 and received by Plaintiff's counsel on January 10th, the Court denied Defendants' motions to amend or alter its November 8th Order. On January 23, 2012, Respondent Campbell filed his Notice of Appeal followed by similar Notice filed by Respondent Foster on January 27, 2012. On January 27, 2012, and only after an additional three months of litigating Respondents' Rule 59 motions which delayed enforcement of the Judgment, Petitioner provided the lower court with the calculations of interest and a petition for fees and costs consistent with the enforcement provisions of the Promissory Note as incorporated in the Circuit Court's November 8th Judgment Order. Thus, any further action by the lower court to effectuate its November 8, 2011 Order was held in abeyance by the conduct of, and delays caused by, these Respondents and their motions, including motions to disqualify the Judge, appeals, petitions for re-hearing of appeals, and yet again, more motions.

In affirming the Circuit Court, the West Virginia Supreme Court of Appeals observed that the lower court found "Campbell and Foster are personally obligated upon

the Note and indebted under the terms of said Note...”, and further in its *de novo* review, the West Virginia Supreme Court of Appeals observed that “the petitioners admitted during oral argument before this Court that they personally guaranteed a \$100,000.00 promissory note payable to the respondent at twelve percent interest.”[App 00022] Now, after having admitted this very fact to the Supreme Court of Appeals, Respondents argue otherwise, that there is no jurisdiction by the lower court to enforce an Order expressly affirmed by the Supreme Court of Appeals which would include a simple, mechanical computation of interest as an expressed term of the Promissory Note, an expressed term of the Judgment Order, and an expressed term as found in the Opinion of the Supreme Court of Appeals. That the lower court is “without jurisdiction” to enter a judgment order when that very interest was accruing during the pendency of the appeal (as were fees and costs) is absurdly bad, and bad faith, argument to impose on the lower court.

Respondents appealed the judgment order enforcing all terms of the Promissory Note, including the simple calculation of interest as expressed in the Promissory Note itself together with the provision allowing the recovery of fees and costs, also expressed in the Promissory Note. Now, in essence the Respondents apparently claim that they had only appealed an interlocutory order. The Supreme Court of Appeals in its Memorandum Decision clearly did not see it that way as it too was informed that the Defendants sought review of a “final decision on the merits as to all issues and all parties.”

In *C&O Motors, Inc., v. W.Va. Paving, Inc.*, 223 W.Va. 469 (2009), the Supreme Court of Appeals, *sua sponte*, found that the appeal was improvidently granted because the order of the lower court did not include an award of damages. However, the Court

noted that in cases where liability is found and the computation of damages is ministerial or mechanical, then an order may be final. In the instant case, the Supreme Court of Appeals was told by Campbell and Foster that they had appealed a final order which included the damages as expressed in the “terms of the Note.” The calculation of the interest, as expressly contained within the “terms of the Note,” is in any event ministerial to the enforcement of this Court’s Judgment Order and the Supreme Court’s Memorandum Decision. *See Hensley v. W.Va. Dept. of Health and Human Resources*, 203 W.Va. 456 (1998) (statutory interest is recoverable on special damages unless there is an expressed agreement as to the interest which should apply). The Supreme Court of Appeals in its Memorandum Decision paid particular attention to Campbell’s admission during oral argument: “the petitioners admitted during oral argument before this Court that they personally guaranteed a \$100,000.00 promissory note payable to the respondent **at twelve percent interest.**” [App 00022]. Mr. Campbell and Mr. Foster, understood at the time of the appeal that the calculation of interest is ministerial and was included as a part of the damage calculation upon appeal.

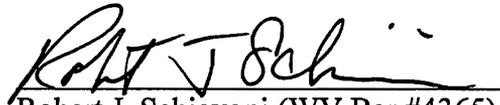
Finally, as to fees and costs, the Promissory Note, and in furtherance by operation of the Judgment Order, clearly state that “if any action is taken to collect this Note, Noteholder shall be entitled to collect, and Maker agree to and shall pay, all reasonable costs and expenses thereof, including but not limited to reasonable attorney fees.” Elsewhere the Promissory Note states that upon failure to pay the amounts due that accrued interest and “reasonable attorneys fees shall at once become due and payable at the option of the Noteholder without prior notice to maker” and further and importantly that “the remedies of Noteholder shall be cumulative and concurrent and may be pursued

singly, successively, or together, against Maker, at Noteholder's discretion and may be exercised as often as the occasion therefor shall arise." Respondents remain contractually obligated to pay fees now and into the future when Mr. Poe seeks to collect on the judgment and or when he must renew his claims for interest and fees expended in seeking to collect on his judgment. These Respondents contractually agreed to pay all reasonable fees connected with this action and in furtherance of collecting any judgment, thereby submitting themselves to the continuing jurisdiction of a Court to enforce the "terms of the Note." Indeed, the Supreme Court of Appeals has consistently recognized that in fee shifting cases, the right to recover attorney fees "extends beyond the initial trial below to encompass work performed in the pursuit of a necessary appeal. *Hollen v. Hathaway Elec., Inc.*, 213 W.Va. 667 (2003); *Bishop Coal Co., v. Salyers*, 181 W.Va. 71 (1989). Thus, as a general practice, in fee shifting cases, the lower court is charged with the task of assessing fees and costs which include those incurred in the appeal.

IV. Conclusion

Wherefore, Petitioner seeks the issuance of a rule to show cause why relief cannot otherwise be immediately granted which denies Respondents' Motion to Alter, Amend, or Vacate the Judgment Order of January 17, 2014 Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure for the simple reason that the lower court has jurisdiction to affirm its own Judgment Order, and; why, pursuant to the express terms of the Promissory Note and the Orders of the lower court and the Memorandum Opinion of this Court, the lower court has failed to either enter an order awarding fees and costs given that Respondents have not opposed the motion, or, alternatively, why the lower court has refused to conduct a hearing as to the award of those fees and costs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert J. Schiavoni". The signature is written in a cursive style with a horizontal line underneath it.

Robert J. Schiavoni (WV Bar #4365)

Counsel of Record

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